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# The Role of Pornography in the "Rough Sex" Defence in Canada

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# The Role of Pornography in the "Rough Sex" Defence in Canada

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*Drawing upon the authors' earlier research studying the consent defence when it is used to suggest that the complainant agreed to "rough sex" involving violence, this paper develops an extended analysis of the complex role of pornography in these decisions. This paper focuses on a subset of "rough sex" cases, where pornography played a role in "scripting" the accused's behaviour. Thematically, these cases included: those where the accused had a substantial history of consumption of violent pornography; cases in which the accused forced the complainant to view pornography as part of the assault; cases where the accused recorded the attack, engaging in the making of pornography themselves; and finally those cases where the airing of the "rough sex" defence in the courtroom, including cross-examination based on the re-playing of the recordings made by the accused, creates a "theatre of pornography." The authors underline concerns about the growing role of pornography in sexual violence against women, and propose both legal and non-legal strategies in response.*

Keywords: rough sex, pornography, sexual assault

## Introduction

> [T]he videos depict, in graphic detail, three male individuals degrading the victim in a most sadistic fashion. In addition to the name calling, they yelled at her to do a better job on the oral sex and struck her repeatedly in such a vicious manner that not even an animal should be treated in such a way. The punching of the victim in her vagina with a closed fist as hard as possible, as they simultaneously ridiculed and laughed at her as she pleaded for it to stop, is not youthful impulsivity or bad decision making. This was a prolonged brutal and vicious assault … If this sentence is subject to review, I strongly recommend that the appellate justice personally review the videos, as they are the most appalling acts of human depravity I have had the displeasure to witness as a judge.[1]

High-quality cellphone cameras and the cultural phenomenon referred to as the "age of the selfie" mean that acts of sexual violence are increasingly being recorded, and that gruesome images and

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[1] *R v MM*, 2017 ABPC 268 at paras 58–59.

videos now form part of the evidence in many criminal trials involving sexual violence.[2] In a recent research project, we examined more than three decades of reported Canadian decisions where any level of assault, sexual assault, or homicide was charged and the accused either explicitly raised a "rough sex" defence or argued consent where additional violence had been inflicted on the complainant.[3] We use the term "rough sex" as it is understood in popular and now legal culture: to describe acts of violence committed during sexual activity that are represented as "consensual," no matter how degrading or risky to human life and health. While we did not set out to look at the interrelation between pornography, image-based sexual abuse, and the use of a "sex games gone wrong defence," this was a theme that leapt from the pages of the decisions we analyzed.

The facts of these cases were deeply disturbing. Like the sexual assault described by the sentencing judge above, most of the decisions we examined involved extremely violent sexual assaults. In some, the victims did not survive. In others, they were subjected to acts of sexual abuse that were not only marked by violence, but also by extreme forms of degradation and humiliation, sometimes enacted through the recording of images as a part of the assaults.

In this article, we examine more carefully the complex interconnections between pornography and the "rough sex" defence that we observed through our analysis of reported Canadian decisions between 1988 and 2021, extending our analysis of cases involving pornography through to June 30, 2023. We focus here most closely on a subset of these decisions in which the influence of pornography was noted by trial or sentencing judges, where pornography-viewing was a part of the assault, and those in which the perpetrator/s recorded the assault.

We also make observations about how the facts of the cases we examined reflect a pornographic aesthetic and how trials in "rough sex" defence cases become what Susan S.M. Edwards has described as "theatres of pornography."[4] Pornography offers a script for the dehumanizing and violent assaults that are at issue in these decisions. Through these assaults, the perpetrators perform and sometimes create pornography for their own use as an aid to masturbation or to sell or distribute to other men. Pornography both scripts and is scripted in these cases. When

[2] See Alexa Dodge, "The digital witness: The role of digital evidence in criminal justice responses to sexual violence" (2018) 19:3 Fem Theory 303 at 303; Anastasia Powell, Gregory Stratton & Robin Cameron, *Digital criminology: crime and justice in digital society* (London: Routledge, 2018) at 101; Sveinung Sandberg & Thomas Ugelvik, "Why do offenders tape their crimes? Crime and punishment in the age of the selfie" (2017) 57:5 Brit J Crim 1023 at 1024.
[3] See Elizabeth Sheehy, Isabel Grant, & Lise Gotell, "Resurrecting "She Asked for It": The Rough Sex Defence in Canada" (2023) 60:3 Alta Law 651.
[4] See Susan SM Edwards, "Consent and the 'rough sex' defence in rape, murder, manslaughter and gross negligence" (2020) 84:4 J Crim L 293 at 296.

the visual record of this sexual violence, committed against the body of a real woman, is displayed in the courtroom and used to cross-examine the complainant, she is forced not only to re-live, sometimes repeatedly, her own rape, but also to experience the consumption of her rape by the accused along with other men in the courtroom. This pornographic record becomes a stage on which victim-blaming assertions about women's desire and enjoyment of the violence are translated into the "rough sex" defence.[5]

In the first section of the article, we briefly discuss the findings of our larger study, as well as the methodology for our analysis of the role of pornography in "rough sex" defence cases. In the second section, we consider the pornographic sexual script, what the existing research has to say about the rising cultural sway of pornography, and how scholars are analyzing the convergence of image-based sexual abuse and sexual violence. In the third section, we turn to our database of Canadian "rough sex" defence cases to analyze decisions where judges specifically discussed the impact pornography had on the offender's behaviour. In section four, we examine those decisions where the accused forced or coerced the complainant to watch pornography during the sexual assault. Section five reviews cases where pornography is scripted and performed, when perpetrators, sometimes in groups, engage in recording their assaults. In section six, we consider the argument that the trial where a "rough sex" defence is raised itself becomes pornographic by examining how the dehumanization that is all too frequently enacted on complainants is circulated in courtrooms in ways that magnify women's trauma. While our purpose here is to use a close reading of the case law as a foundation for more theoretical insights about the role of pornography in trials where a "rough sex" defence is raised, we conclude with some thoughts about harnessing the expressive role of criminal law to condemn the recording of sexual violence.

## 1. Background and Findings from our Larger Project

Canadian courts are increasingly likely to encounter accused men who defend allegations of sexual assault, assault, and homicide by arguing that the acts were consensual "rough sex," or that they believed that the victim consented.[6] These claims, we contend, are becoming the new version of the "she asked for it" defence, reframing acts of sexual violence and resulting injuries as "sex

[5] *Ibid*. See also Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989) at 39–40.
[6] See Elaine Craig, "The Legal Regulation of Sadomasochism and the So-Called 'Rough Sex Defence'" (2021) 37:2 Windsor YB Access Just 402 at 403.

games," and reconstructing women as responsible for the harms they experience.[7] As Elaine Craig suggests, the rise of this defence in Canadian law may be an opportunistic defence strategy, reliant on the increased mainstreaming of rough sex.[8]

To determine how Canadian courts have approached this defence, we searched the main legal databases for decisions wherein accused men used some version of a consent to "rough sex" defence.[9] We identified 98 reported cases between 1988 and 2021. While reported cases are not fully representative of the use of the "rough sex" defence, we used this database to identify trends in these cases.

Although it is a general principle of Canadian law that people cannot consent to their own deaths or to non-trivial bodily injuries that are reasonably foreseeable, there is considerable slippage when women's bodily harm is at issue. In *R. v. Welch,* decided in 1995, the Court of Appeal for Ontario held that consent to sexual activity is invalidated when bodily harm is reasonably foreseeable, thus making proof of sexual assault consistent with other forms of violence that cause bodily harm.[10] However, in more recent decisions, this court overturned *Welch*: in *R. v. Quashie*[11] and *R. v. Zhao,*[12] the Court of Appeal held that consent is only negated if the accused both subjectively intended and actually caused bodily harm.

This finding, now adopted by the Court of Appeal of Alberta,[13] effectively creates a new, higher intent standard for proving sexual assault causing bodily harm. These courts have held that the complainant's consent can only be vitiated where the accused intentionally caused bodily harm even though this crime generally only requires that bodily harm be objectively foreseeable. These cases thus allow an accused to argue the "rough sex" defence, even where the woman's injuries were objectively foreseeable.

Consistent with research conducted by the UK advocacy group, We Can't Consent to This,[14] our analysis found that the "rough sex" defence is deeply gendered. All of the 98 accused

[7] See Sheehy et al, *supra* note 3.
[8] See Craig, *supra* note 6 at 403.
[9] We used CanLII, Westlaw and Lexis Advance.
[10] [1995] OJ No 2859, 25 OR (3d) 665.
[11] [2005] OJ No 2694, 198 CCC (3d) 337.
[12] 2013 ONCA 293.
[13] See *R v AE*, 2021 ABCA 172 [*AE*].
[14] For the campaign, see https://wecantconsenttothis.uk/aboutus; for the research results see 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.

in our database of cases were men, and 94 of 97 complainants were women.[15] Our cases also demonstrated that women were most likely to be harmed by men who claimed sexual access to them, as partners, boyfriends, and johns in the context of the sex trade.[16] Almost half of the allegations involved men who were current or former intimate partners of the complainant, and there was a documented history of domestic violence in about one-fifth of the decisions.[17]

We also found that in the large majority of sexual assault cases in our sample, it was the complainant who went to police to report sexual assault. These women clearly did not view their sexual encounter as promoting their sexual autonomy. The cases suggest that it is inaccurate to construct the "rough sex" defence as promoting women's sexual agency to engage in BDSM (bondage, domination, sadism, masochism) practices.[18] Where the complainants survived, they overwhelmingly claimed that they did not agree to "rough sex" or, more often, to any sexual contact.[19]

The allegations at issue in these cases involved acts of extreme violence that accused men attempted to recharacterize as consensual sexual activity. Cases in our sample involved burns, extensive bruising, scarring from wounding, and death. We believe that the level of violence evident in these cases is responsible for the relatively high conviction rate recorded,[20] but we also observed a pattern of undercharging.[21] What was particularly striking, once again echoing other findings,[22] was the incidence of strangulation, present in nearly half the cases. Strangulation is a dangerous act that impedes blood circulation and oxygen flow to the brain,[23] and has been described as the ultimate act of control.[24]

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[15] See Sheehy et al, *supra* note 3 at 665.
[16] *Ibid.*
[17] *Ibid*.
[18] *Ibid* at 666.
[19] See Karen Busby, "Every Breath You Take: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions" (2012) 24 CJWL 328 at 347.
[20] See Sheehy et al, *supra* note 3 at 668-669. Convictions were entered in 67% of the sexual assault cases and in 8/11 of the homicide cases.
[21] See Sheehy et al, *supra* note 3 at 674. Nearly all the 22 Level 1 sexual assault cases in our study could have been charged at a higher level because they involved either serious injuries or a form of strangulation that the *Criminal Code* treats as equivalent to bodily harm.
[22] See Yardley, *supra* note 14 at 1842.
[23] See Debby Herbenick et al, "Non-fatal strangulation/choking during sex and its associations with mental health: Findings from an undergraduate probability survey" (2022) 48:3 J Sex & Marital Therapy 238 at 239; 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 Med 311 at 313; Sheehy et al, *supra* note 3 at 678.
[24] See Edwards, *supra* note 4 at 296.

Finally, a pornographic aesthetic is evident in the decisions we analyzed. The distressing factual patterns imitated widely available online pornography, and included references to the accused's pornography habits and to videos or photographs of the events at issue. A further content analysis identified decisions that referenced pornography and those in which the accused filmed their assaults. We were interested not only in how pornography consumption may have influenced the accused, but also in how he engaged in pornography-creation or image-based sexual abuse by recording the events.

For the purposes of this paper, we updated our database to include decisions up to June 30, 2023.[25] We then searched our larger database of cases for the terms "pornography," "pornographic," "film," "video," "cell phone," and "mobile phone." Sveinung Sandberg and Thomas Ugelvik used a similar method to identify Norwegian decisions in which images were an integral part of criminal activities, creating a database of cases in which offenders had taken a picture or video as they perpetrated their attacks.[26] While their study excluded decisions where security cameras caught crimes on video, we chose to include a case in which the brutal assault was filmed on surveillance cameras because it was apparent that the two accused had deliberately traded their voyeuristic recordings of this and other assaults. Altogether we found 12 cases in which pornography was explicitly recognized as implicated, and/or in which accused men engaged in image-based sexual abuse by recording the violent sexual assault, without consent and sometimes without even the knowledge of the complainant. We engaged in a close reading of these cases in order to trace the links between the pornography and sexual violence, and to attempt to understand the implications of creating visual recordings of violent sexual assaults.

## 2. The Pornographic Sexual Script

Debates about pornography remain deeply polarized, with some scholars arguing that it constitutes, in Andrea Dworkin's classic formulation, "a bible of sexual abuse" and the "law on

[25] Our updated research added 22 cases, involving 19 matters, to our database: *Directeur des poursuites criminelles et pénales c Denis*, 2023 QCCQ 3821; *R v AE*, 2022 SCC 4; *R v AL*, [2022] OJ No 5416 (SCJ), [2022] CCS No 8089; *R v Cordeiro*, 2022 ONSC 6256; *R v GDL*, 2022 BCSC 940; *R v Gubbels*, 2022 ONSC 18; *R v Hamid*, 2022 ONSC 2074; *R v JJ and JM*, 2023 ONSC 2360; *R v LAM*, 2023 ONSC 1313; *R c Maier*, 2022 QCCQ 7295; *R v Martiuk*, 2022 ONSC 5577, 2023 ONSC 414; *R v Moore*, 2022 ABQB 196; *R v Moore*, 2022 ABQB 329, 2022 ABKB 816; *R v Munir*, 2023 QCCQ 3623; *R v RB*, 2022 ONSC 1782; *R v TCF*, 2022 ABKB 643; *R v Tsang*, 2022 BCCA 345 leave granted, 2023 CanLII 6098 (SCC); *R v Valiquette*, 2022 ONSC 4530; *R v VZ*, 2022 ONCJ 283, *R v VZ*, 2022 ONCJ 543. The patterns we discerned in our earlier research are maintained by these additional cases.

[26] Sandberg & Ugelvik, *supra* note 2.

what you do to a woman."[27] Other scholars celebrate pornography's role in fostering sexual education and experimentation.[28] Whatever their position, researchers agree that pornography use is now ubiquitous: a recent American study based on a national probability sample of adults between 18-60 found that 94% of men and 87% of women report using pornography.[29] Pornography is pervasive, highly accessible, and interactive. Aleksandra Antevska and Nicola Gavey's qualitative research with male consumers has shown that it is now considered normal for young men to use pornography. As they write, "[young men's] talk suggested a discursive milieu in which pornography and its consumption was so normalized and naturalized that they were not under normal circumstances required to stop and think about it or explain it."[30]

Pornography communicates male-dominant models of gendered relationships and sexual behaviour,[31] represents sex in misogynist and racist ways, thus reinforcing racist and sexist stereotypes, and fetishizes disability.[32] Much of the material depicts acts of degradation and violence against women.[33] Fiona Vera-Gray and her colleagues undertook a recent content analysis of the titles appearing on the landing pages of the three most popular pornographic websites in the UK, assembling a corpus of 150,000 titles. Their research demonstrates how sexual violence against women has become commonplace in online pornography, comprising one in eight titles;

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[27] Andrea Dworkin, *Heartbreak: The Political Memoir of a Feminist Militant* (New York: Basic Books, 2007) at 143. See also G Dines, *Pornland: How Porn Has Hijacked Our Sexuality* (Boston, MA: Beacon Press, 2010); Walter DeKeseredy & Marilyn Corsianos, *Violence against women in pornography* (London: Routledge, 2015); Karen Boyle, "Producing Abuse: Selling the Harms of Pornography" (2011) 34:6 Women's Stud Int'l Forum 593.

[28] See K Albury, "Reading Porn Reparatively" (2009) 12:5 Sexualities 647; Linda Williams, "Pornography, porno, porn: thoughts on a weedy field" (2014) 1:1-2 Porn Stud 24; Steve Garlick, "A New Sexual Revolution? Critical Theory, Pornography, and the Internet" (2011) 48:3 Can Rev Socio Review Soc 221.

[29] See 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 Med 623 at 627. See also MS Lim et al, "Young Australians' use of pornography and associations with sexual risk behaviours" (2017) 41:4 Aust & NZ J Pub Health 438.

[30] Aleksandra Antevska & Nicola Gavey, "'Out of Sight and Out of Mind': detachment and men's consumption of male sexual dominance and female submission in pornography" (2015) 18:5 Men and Masculinities 605 at 610.

[31] See Elise R Carrotte, Angela C Davis, & Megan SC Lim, "Sexual behaviors and violence in pornography: Systematic review and narrative synthesis of video content analyses" (2020) 22:5 J Med Internet Research e16702.

[32] See Akeia AF Benard, "Colonizing Black female bodies within patriarchal capitalism: Feminist and human rights perspectives" (2016) 2:4 Sexualization, Media, & Society 1; R Amy Elman, "Disability Pornography: The Fetishization of Women's Vulnerabilities" (1997) 3:3 Violence Against Women 257.

[33] See DeKeseredy & Corsianos, *supra* note 27; Niki Fritz et al, "A descriptive analysis of the types, targets, and relative frequency of aggression in mainstream pornography" (2020) 49:8 Archives of Sexual Behavior 3041; S Keene, "Just Fantasy? Online Pornography's Contribution to Experiences of Harm" in J Bailey, A Flynn, & N Henry, eds, *The Emerald International Handbook of Technology-Facilitated Violence and Abuse (Emerald Studies In Digital Crime, Technology and Social Harms)* (Bingley: Emerald Publishing Limited, 2021) 289; Karen Boyle, ed, *Everyday Pornography* (London: Routledge, 2010) [Boyle, *Everyday Pornography*]; S Maddison, "'Choke on It, Bitch!': Porn Studies, Extreme Gonzo and the Main-streaming of Hardcore" in F Attwood, ed, *Mainstreaming Sex: The Sexualization of Western Culture* (London: IB Taurus, 2009) 37.

coercion, deception, and men over-riding non-consent are represented as if they are permissible practices.[34] Some forms of sexual violence—including child rape-- are represented as "kink" to render them "permissible" choices. As Rowland Atkinson and Thomas Rodgers put it, "insertions of objects, gagging and vomiting resulting from forceful oral sex, simulated rape, strangulation, anal sex and spitting have become merely choices from drop-down menus on many popular porn websites."[35] Troubling sub-categories of pornography, including rape fantasy and so-called humiliation porn, are on the rise.[36] Even scholars who do not take an explicit "anti-pornography" perspective contend that pornography is overwhelmingly characterized by acts of male sexual control and female submission.[37]

Researchers have moved away from a "cause and effect" model regarding pornography's impact on violent sexual behaviour, to explore more subtle influences. For example, the degradation and dehumanization of women in pornography, practices that are on display in the cases we analyzed in which perpetrators film their assaults, requires that men abandon empathy.[38] This is evident in Antevska and Gavey's qualitative research with young male consumers, where they found that participants use a variety of strategies to prevent themselves from even thinking about how pornography depicts male dominated sex that objectifies women.[39] One participant stated, he just doesn't worry about it: "Not at all, not a single smidge, don't give a shit."[40] Another, who admitted to watching violent, gang rape porn, used the imagined consent of the female performers as a means of avoiding any consideration of the harm to the individual women.[41] As Antevska and Gavey argue, young men's consumption of pornography is shielded from social critique by the atomizing neoliberal logics of choice and freedom.

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[34] Fiona Vera-Gray et al, "Sexual violence as a sexual script in mainstream online pornography" (2021) 61:5 Brit J Crim 1243 at 1244, 1256.
[35] Rowland Atkinson & Thomas Rodgers, "Pleasure zones and murder boxes: Online pornography and violent video games as cultural zones of exception" (2016) 56:6 Brit J Crim 1291 at 1298. See also Walter S DeKeseredy & Amanda Hall-Sanchez, "Adult pornography and violence against women in the heartland: Results from a rural southeast Ohio study" (2017) 23:7 Violence Against Women 830 at 831.
[36] See Boyle, *Everyday Pornography*, *supra* note 33; Sandberg & Ugelvik, *supra* note 2 at 1025.
[37] See Garlick, *supra* note 28; Susanna Paasonen, "Labors of love: netporn, Web 2.0 and the meanings of amateurism" (2010) 12:8 New Media & Society 1297.
[38] See R Jensen, "Pornography Is What the End of the World Looks Like" in Boyle, *Everyday Pornography*, *supra* note 33.
[39] See Antevska & Gavey, *supra* note 30.
[40] *Ibid* at 610.
[41] *Ibid* at 613–614.

Pornography has thus become a form of cultural authority on sexuality,[42] as evidenced by young men's ready admission that this material plays a pedagogic role.[43] Karen Boyle suggests that violent pornography can be viewed as part of a broader continuum of sexual violence, reinforcing a "culture of male sexual entitlement, dominance and coercive control."[44] Sveinung Sandberg and Thomas Ugelvik demonstrate pornography's role in the online culture of the humiliation of women.[45] This culture includes gonzo pornography, which depicts "hard core, body punishing sex," using an amateur aesthetic to put the camera into the action, with one or more participants both filming and performing sexual acts.[46] Importantly, pornography functions as a form of gendered speech among men about masculinity, in which narratives about the sexual degradation of women can bolster masculine status.[47]

Another field of inquiry focuses on pornography as a source of sexual scripts that influence sexual behaviours. Chyng Sun et al. explain that pornography,

> …as a core component of sexual socialization, provides a (gendered) heuristic "sexual script" which "tells us how to behave sexually." Once acquired and activated, consumers use pornographic sexual scripts to navigate real-world sexual experiences and guide sexual expectations.[48]

As Vera Gray et al. emphasize, while we need to allow space for agency in how the messages of pornography are taken up, "media representations of violence …. [can] augment, attune, and/or alter our understandings and experience of the social world."[49] Individuals internalize discourses that structure their values and, in turn, their behaviours.

This scripting role appears to be borne out by several studies conducted on "rough sex" behaviours. These studies demonstrate the growing prevalence and persistent gendered nature of "rough sex" practices. Based upon a representative probability survey of American adults in 2020, Debby Herbenick et al. found that significantly more men than women have engaged in at least

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[42] See Laura Tarzia & Meagan Tyler, "Recognizing connections between intimate partner sexual violence and pornography" (2021) 27:14 Violence Against Women 2687 at 2694.
[43] See Antevska & Gavey, *supra* note 30; Rae Langton, "Is Pornography Like the Law?" in Mari Mikkola, ed, *Beyond Speech: Pornography and Analytic Feminist Philosophy* (Oxford: Oxford University Press, 2017) 23 at 30–32.
[44] Karen Boyle, "What's in a name? Theorising the inter-relationships of gender and violence" (2019) 20:1 Fem Theory 19 at 29.
[45] See Sandberg & Ugelvik, *supra* note 2 at 1030–1031.
[46] See Dines, *supra* note 27 at xi.
[47] Antevska & Gavey, *supra* note 30 at 625.
[48] Chyng Sun et al, "Pornography and the male sexual script: An analysis of consumption and sexual relations" (2016) 45:4 Archives of sexual behaviour 983 at 985.
[49] Vera-Gray et al, *supra* note 34 at 1245.

one sexually aggressive behaviour (such as choking, name-calling, spanking and pressuring someone sexually).[50] High numbers of women report experiencing aggressive behaviours from male sexual partners, with 21.4% reporting choking/strangulation, 32.3% reporting having their face ejaculated on and 34% reporting aggressive fellatio.[51]

Similarly, in 2019, BBC Radio 5 asked 2002 UK women if they had experienced "rough sex" during sexual activity: 59% had experienced slapping, 38% strangulation, 34% gagging, 20% spitting and 59% biting.[52] More than half of the women reported that these acts were "unwanted,"[53] essentially describing sexual assault. In 2020, BBC Disclosure and BBC5Live commissioned a parallel survey of men. It is striking how the results of this survey mirror women's experiences of "rough sex": 55% of men have slapped, 35% have engaged in strangulation, 34% have gagged, 58% have hair-pulled, 53% have engaged in biting, and 24% have spat on a partner.[54]

Turning to pornography's scripting role, 57% of 2,049 UK male respondents in BBC Disclosure and BBC5Live surveys who had "slapped, choked, gagged and spat on partners" reported that pornography had influenced their desire to do so.[55] After adjusting for age, age at first porn exposure, and current relationship status, a 2020 study of American adults by Herbenick et al. also found statistically significant associations between men's pornography use and aggressive behaviours.[56]

We are not suggesting that pornography plays a straightforward, causal role in the kinds of violent sexual assaults and homicides described in the decisions within our database. However, even in "rough sex" decisions where pornography consumption is not specifically mentioned, and even when the violence is not filmed, the facts of these cases suggest that a pornographic aesthetic is at play. The events at issue include hair pulling, slapping, spanking, facial ejaculation, aggressive penetration, double penetration, gang rape, penile gagging, verbal abuse, and various forms of

[50] Herbenick et al, *supra* note 29.
[51] *Ibid.*
[52] See Alys Harte, "A Man Tried to Choke Me During Sex Without Warning", *BBC Radio 5 Live Investigations Unit* (29 November 2019), online: <bbc.com/news/uk-50546184>.
[53] *Ibid*.
[54] See 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-5LiveMens-Poll-Tables-140220-2c0d4h9.pdf>.
[55] *Ibid*. See also Samantha Keene, "Defining Rough Sex Via Mainstream Pornography" in Hannah Bows & Jonathan Herring, eds, *'Rough Sex' and the Criminal Law: Global Perspectives* (Bingley: Emerald Publishing Limited, 2022) 52 at 55.
[56] Herbenick et al, *supra* note 29.

strangulation, thus conforming to a pornographic sexual script that reflects the construction of gender as a category of inequality, positioning men as dominant sexual aggressors and women as targets.[57]

Thinking about pornography as a form of gendered speech that constructs masculinity is particularly useful for analyzing cases that include filming or image-based sexual abuse. Sandberg and Ugelvik's analysis of legal decisions in which perpetrators filmed sexual assaults found that these men were actively participating in a pornographic narrative: "[a]s life imitates 'art', the aesthetic of pornography has found its way into sexual practice."[58] They highlight how the sexual assault videos are created with an audience in mind (even if the recording stays a private trophy), and argue that this imagined audience changes the character of the sexual violence enacted.[59] This analytic lens provides an important way of understanding our decisions. The scenes performed in these assaults are being staged for a camera, and are at their core about the dehumanization of women for the enjoyment of the accused and potentially other men.

In the sections that follow, these themes regarding pornography's role in the "rough sex" defence are illustrated and elaborated upon using cases from our database.

### 3. Pornography Sets the Stage for "Rough Sex"

The accused's pornography use was identified as a factor setting the stage for sexual violence in a handful our decisions. For example, Cindy Gladue, a 36-year-old Indigenous Cree and Metis woman and mother of three daughters, bled to death from an 11-centimetre wound running the entire length of her vaginal wall. Bradley Barton, a trucker passing through Edmonton, admitted to causing this wound during a sex for payment encounter, and leaving her to bleed to death in a hotel bathtub. As Sherene Razack has argued, such acts of extreme sexual violence inflicted on the bodies of Indigenous women function as a visual symbol of systemic, gendered, colonial violence.[60] Gladue's death needs to be set within a history of the sexual brutalization and "attempted annihilation" of Canadian Indigenous women.[61]

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[57] See Carrotte et al, *supra* note 31; Megan SC Lim et al, "The Impact of Pornography on Gender-based Violence, Sexual Health and Well-being: What Do We Know?" (2016) 70:1 J Epidemiology & Community Health 3.
[58] Sandberg & Ugelvik, *supra* note 2 at 1028.
[59] *Ibid* at 1028.
[60] Sherene H Razack, "Gendering disposability" (2016) 28:2 CJWL 285.
[61] *Ibid* at 290. See also, National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*

Barton testified that he inflicted the wound that caused Ms. Gladue's death through what was euphemized as "fisting" during consensual sex. The claim that this wound was caused by "rough sex" hides what is otherwise known as blunt force trauma, and what was arguably an intentional wounding. Only nine days before engaging in this horrific act of violence, Barton searched the internet for pornography featuring ripped and torn vaginas, using terms such as "moms.cunt.get.toren.rip" and "girl.get.ram.huge.objects.rip.opencunt.pict[62] Under cross-examination during his trial for manslaughter, Barton denied his interest in ripped or torn vaginas, despite repeatedly searching these terms on pornographic websites; he claimed that these words were easier than typing "stretched."[63]

The Crown did not seek to admit evidence of Barton's internet search history at his initial trial.[64] At the end of this trial, the jury found the accused not guilty of murder and not guilty of manslaughter, presumably accepting his defence that Ms. Gladue's death had occurred accidentally during consensual rough sex. His acquittal was overturned by the Court of Appeal and by the Supreme Court of Canada, which ordered a new trial but only on a charge of manslaughter. At the retrial, Barton's computer searches for violent extreme pornography were admitted and he was convicted and sentenced to 12 ½ years for manslaughter.

In sentencing, Justice Hillier emphasized the significance of Barton's pornography use as accentuating his moral blameworthiness: "the offender held a consciousness of significant risk of serious injury, if not purpose, as reflected in the terms used in his computer searches."[65] While not specifically making a causal link between pornography and has brutalization of Ms. Gladue, the sentencing decision nevertheless suggests clear connections between men's pornography consumption and sexually violent practices, through foresight of the risk of serious bodily harm.[66]

*R. v. Strong*[67] is another highly disturbing case in which the accused killed his victims. Strong was found guilty of first-degree murder in the death of Rory Hache, and of manslaughter in the death of Kandis Fitzpatrick. Both victims were vulnerable young women who struggled with

(Ottawa: Crown-Indigenous Relations and Northern Affairs Canada, 2019) online (pdf): <mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf>.

[62] See *R v Barton*, 2017 ABCA 216 (factum of the Respondent [Crown] at para 20).

[63] *Ibid* at para 37.

[64] See Ryan Cormier, "Jury Not Told of 'Disturbing' Pornography Evidence in Edmonton Hotel Room Murder Trial", *National Post* (26 March 2015) <news.nationalpost.com/news/canada/jury-not-told-of-disturbing-pornography-evidence-inedmonton-hotel-room-murder-trial>.

[65] *R v Barton*, 2021 ABQB 603 (sentencing decision for manslaughter conviction) at para 81 [*Barton* ABQB].

[66] *Ibid* at para 26.

[67] 2021 ONSC 1906.

drug addiction and who engaged in the sex trade. Ms. Hache was on unhoused at the time of her murder,[68] while Ms. Fitzpatrick was described as "[living in] various accommodations and sometimes [disappearing] for long periods of time."[69]

Ms. Hache's death was first discovered in 2017 when her disemboweled torso was found in Lake Ontario.[70] It was subsequently connected with Strong when a plumber found strips of her flesh in the drains of his apartment, and the police later found body parts in his freezer.[71] While Strong admitted to the police to having had sex with Ms. Hache and to dismembering her body, he denied killing her. Forensic evidence found at the scene led the trial judge to conclude that she had died from blows to her head while in a restraint device during or just after, sexual activity.[72] The trial judge found that while the sexual encounter may have begun consensually, any consent was vitiated by the accused's "murderous intent."[73] Strong was convicted of first degree murder because the killing took place during a sexual assault and forcible confinement.

Ms. Fitzpatrick went missing nearly a decade earlier, and her DNA was found in blood spatters in Strong's freezer, as well as on the hunting knife he used to dismember the body of Ms. Hache.[74] While her body was never found, forensic evidence, Strong's police statements, and the similarities between the two victims, led the trial judge find him responsible for Ms. Fitzpatrick's death albeit only for the lesser offence of manslaughter because there was insufficient evidence to conclude that he had the intent for murder.[75]

As in *Barton*, Strong's obsession with extremely violent pornography was deeply intertwined with the sexual violence he enacted. The trial judge described a "sex box" containing "sex toys and related items found in the apartment, including many pornographic videos and a rubber vagina."[76] The Crown had sought to introduce other evidence of the perpetrator's fascination with sexually violent and "gore" pornography. In a decision on pretrial motions, the judge described evidence from proposed witnesses about how Strong had shown them disturbing images such as "a bound woman on a spit that travelled through her mouth and out her rectum,"[77]

[68] *Ibid* at para 22.
[69] *Ibid* at para 34.
[70] *Ibid* at para 1.
[71] *Ibid* at paras 3-5.
[72] *Ibid* at paras 186, 189.
[73] *Ibid* at paras 189, 191.
[74] *Ibid* at para 71.
[75] *Ibid* at para 197.
[76] *Ibid* at para 71.
[77] See *R v Strong*, 2020 ONSC 7580 at para 35.

"S&M videos from websites including a video of a "savagely sexed" woman who was bleeding,"[78] as well as videos of his own sexual activity with women who were bound and blindfolded.[79] Strong's cellphones provided evidence of an "interest in gore and violence, including sexual violence against women."[80] This evidence was ultimately excluded from the trial because of its potential for prejudice to the accused.

In *R. v. Bohorquez*, two men were convicted for their participation in a hours-long gang sexual assault of a young York University student that included surreptitious video-recording of their sexually violent acts mimicking gonzo pornography, such as whipping her with a belt, double penetration, slapping, spitting on her face, and penile gagging.[81] Their defence was that the complainant, who had only recently met the two, had "openly discussed with [one of the accused] a predilection for violent sexual debauchery and enthusiastically endorsed participating in an evening of sexual abandon with [them], in this brief car ride…". The judge at sentencing described this claim as "beggar[ing] the imagination."[82]

The assault unfolded like a pornographic encounter, including the perpetrators' projection of consent onto a complainant who described feeling "trapped,"[83] and "sick and frantic."[84] Like the women in gonzo pornography, she was imagined to be a willing participant, not only consenting, but who, in Catharine MacKinnon's words, was "turned on by being put down and

[78] *Ibid* at para 31.
[79] *Ibid* at para 35.
[80] *Ibid* at para 41.
[81] 2019 ONSC 1643 at paras 32–37 [*Bohorquez*].
[82] *Ibid* at para 16. We note, however, that judges who dismiss such claims as improbable risk appeal on the basis of speculating about women's desire, which of course turns the whole notion of negative stereotyping of women against women themselves. See, for example, *Tsang*, *supra* note 25, where the Court of Appeal concluded that it was purely speculative for the trial judge to find that the complainant would not have asked to be spanked in anticipation of an evening of "rough sex" with the accused, whom she had just met in a bar. The Court of Appeal overturned the conviction, holding "[t]he conclusion that it was unbelievable that she asked to be spanked can only have been founded upon an assumption about what activity she might have willingly engaged in after she willingly engaged in some sexual foreplay — the assumption that she consented to some sexual activity but not to that described by the appellant. In my view, the trial judge's assessment of the evidence in this regard is affected by implicit, unsupported assumptions about "normal behaviour." (at para 53). The appellate court reached a similar conclusion about the trial judge's assessment that "the appellant's testimony rang hollow" and "seemed lifted from a pornographic script completely at odds with the encounter to that point." (at para 55). A Crown appeal has been heard by the Supreme Court of Canada (5 May 2023) and the decision is on reserve. The case was heard along with *R. v. Kruk*, 2022 BCCA 18, leave granted, 2022 CanLII 67618 (SCC), where the Court of Appeal overturned a conviction based on a speculative assumption by the trial judge that it was unlikely that a complainant would be mistaken about the feeling of a penis inside her vagina. These cases suggest a disturbing trend towards using the concept of improper stereotyping or "speculating" against complainants such that an inference that a woman did not invite violence is itself considered inappropriate speculation.
[83] *Ibid* at para 30.
[84] *Ibid* at para 33.

[made to] feel pain as pleasure."[85] At sentencing, the judge singled out pornography as a precipitating factor for the attack and noted that one of the perpetrators, who "enjoys engaging in rough sex, and dominating his partner," "was interested in pornography depicting rough sex," "watch[ing] it daily."[86]

An obsession with "rough sex" pornography, and the perpetrator's reconstruction of extreme sexual violence as just consensual "rough sex," is also apparent in *R. v. Skoyen*.[87] This accused's prolonged assault caused the complainant to feel "just broken" and to experience flashbacks from "the simple sound of mosquitos buzzing in her ear."[88] Having met up with the perpetrator for the first time to discuss a potential photo shoot, she described crying out in pain and repeatedly saying no as he forced her to perform fellatio, subjected her to aggressive anal and vaginal penetration, pinned her down, strangled her, and called her "demeaning and vulgar names."[89] The complainant was left with numerous physical injuries, including a bloody nose, scratches and bruises, and "pain [in] her neck, ribs, back, spine, genital and anal areas."[90] Despite this violence, at sentencing the perpetrator still maintained that what had occurred was consensual "rough sex."[91]

Complainants are also depicted as responsible for the harm they have suffered through the accused's claims that they consented. These men use discursive strategies that shift focus to the complainant's behaviour and position her as responsible for what was done to her.[92] Mr. Skoyen described his "rough sex" practices, including slapping and "choking to the point of passing out"[93] as consensual: "If both people are willing, it's not forcing. It's like a dance and someone has to take the lead – she is submitting."[94] The sentencing judge drew on a psychological report that emphasized the perpetrator's self-description as a "sex addict" who watched "an excessive amount of rough sex pornography, sometimes all day."[95] The facts of cases such as this demonstrate how

[85] Catharine A MacKinnon, *Feminism unmodified: Discourses on life and law* (Cambridge, MA: Harvard University Press, 1987) at 159.
[86] See *Bohorquez*, *supra* note 81 at para 61.
[87] 2020 BCSC 362 [*Skoyen*].
[88] *Ibid* at para 10.
[89] *Ibid* at para 7.
[90] *Ibid* at para 9.
[91] *Ibid* at para 21.
[92] Hannah Bows & Jonathan Herring, "Getting Away With Murder? A Review of the 'Rough Sex Defence'" (2020) 84:6 J Crim L 525 at 531.
[93] *Skoyen*, *supra* note 87 at para 24.
[94] *Ibid* at para 22.
[95] *Ibid* at para 21.

"rough sex" pornography might help men persuade themselves that they are "innocent" by normalizing "rough sex" behaviours and perpetuating the lie that women enjoy being hurt and degraded.

Another example is *R. v. Stratton*,[96] where the accused pled guilty to numerous sexual offences against nine young women and children, and to the possession and production of child pornography. However, he disputed charges involving sexual assault against one complainant, a vulnerable young woman who exchanged sex for drugs to support her addiction. She agreed to be filmed and indicated he could "slap her around" so long as he didn't beat her.[97] The accused argued that he had paid her for numerous consensual violent encounters "short of bodily harm…while [he] acted out [child] rape scenarios."[98] For some of the acts, LV was caught on camera "cracked out" and unconscious while the accused subjected her to degrading sexual violence that included penetration of her body with a beer bottle, as well as repeatedly slapping her face with his penis.[99] At sentencing, the trial judge noted that the accused engaged in "significant viewing of pornography over the Internet," although he "denied any pornography that was directed towards violence or sexual sadism."[100]

These cases strongly suggest associations between male perpetrators' pornography use and forms of rape myth acceptance.[101] They provide a unique window into the scripting role of pornography in men's sexually violent assaults and femicides, including the cognitive distortions involved in believing that someone could be consenting to extremely violent acts, such as the painful and horrific death that Cindy Gladue experienced. As Barton testified in his trial for manslaughter, "[s]he was moaning and groaning and having a good time,"[102] purportedly grounding his incredible claim that he believed she was consenting.[103]

Although only a handful of decisions explicitly referenced the accused's use of pornography, we suspect that virtually every accused in our "rough sex" defence database used

[96] 2009 ONCJ 459 [*Stratton*].
[97] *Ibid* at para 21.
[98] *R v MS*, 2010 ONCJ 600 at para 13.
[99] *Ibid* at paras 13, 17.
[100] *Ibid* at para 47.
[101] See RC Seabrook, LM Ward, & S Giaccardi, "Less than human? Media use, objectification of women, and men's acceptance of sexual aggression" (2019) 9:5 Psychol of Violence 536.
[102] Dan Grummett, "'A Dead Girl in my Bathtub': Barton Takes Stand at Own Manslaughter Trial," *CTV News online* February 1, 2021 <https://edmonton.ctvnews.ca/a-dead-girl-in-my-bathtub-barton-takes-stand-at-own-manslaughter-trial-1.5290341>
[103] *R v Barton*, 2023 ABCA (factum of the Respondent [Crown] at para 41).

pornography given what we know about rates of consumption. As we will discuss below, we found significant interactions in the cases we studied between being obsessed with "rough sex" pornography and either forcing women to consume pornography or engaging in pornography creation during violent assaults.

### 4. Coerced Pornography Viewing

Another way in which pornography is implicated in these cases is through compelled pornography-viewing. Laura Tarzia and Meagan Tyler's qualitative research on young Australian women's experiences of intimate partner sexual violence unexpectedly found that pornography shaped the kinds of abuse they experienced. Several of the women described being forced to watch pornography and emphasized that this was a form of grooming in the sexual violence they endured.[104]

Coerced pornography-viewing was integral to the assault in *R. v. Cross*.[105] In this case, the accused, who was convicted of sexual assault and choking to assist, insisted on viewing rough-sex pornography with the complainant over the course of an evening during which he "became heavily intoxicated and then much more aggressive in playing out his rough sex fantasies."[106] The complainant had met the accused through a dating app and they decided to get together in her apartment where her young daughter was asleep in another room. According to the complainant, the accused's sexually aggressive behaviour escalated as they watched pornography on his laptop.[107] Cross engaged in what the judge euphemistically described as "throat grabbing," locking his arm around her neck to the point that she could not breathe, as well as slapping her face, digital penetration, and engaging in aggressive intercourse.[108] As the trial judge noted, "[t]he conduct described above was mixed up with periods of watching videos on the computer," during which he insisted that she watch with him.[109]

The complainant testified that she had complied with the pornography viewing "reluctantly" and that she had been afraid that if she did not submit to this and to the accused's violence, there could be a "bad situation" that may involve her young daughter sleeping nearby.[110]

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[104] See Tarzia & Tyler, *supra* note 42 at 2701.
[105] 2015 ONSC 4251 [*Cross*].
[106] *Ibid* at para 47.
[107] *Ibid* at para 13.
[108] *Ibid* at paras 13–19.
[109] *Ibid* at para 15.
[110] *Ibid* at paras 13–14.

The violence of the assault she experienced over the evening resulted in several physical injuries, including bruising on her inner thigh and her neck.[111]

Pornography viewing was also integral to the sexual violence enacted by the perpetrator in *R. v. L.E.G.*,[112] one of only a few cases involving a male victim. While this case fell outside of our focus on the "rough sex" defence because the accused ultimately pled guilty and thus did not raise a defence, it provides an illustration of coerced pornography viewing in the context of a violent sexual assault. In this case, the two men met on a dating app and engaged in consensual sex that included "some roughness" but that turned increasingly violent and non-consensual.[113] L.E.G. pinned B.C.H. on the bed, slapped him hard on the face, strangled him to almost to the point of unconsciousness, and punched him in the face.[114] L.E.G. forced the complainant to watch pornography, and engaged in performative humiliation that included spitting on B.C.H. and telling him he "wasn't doing it right."[115]

Cases like *Cross* and *L.E.G.* demonstrate the direct way in which pornography is implicated in violent and humiliating sexual assaults. And in *Cross*, the complainant's submission to viewing pornography was deployed by the defence as an indication of her complicity in the sexual violence.[116]

### 5. "Rough Sex" on Display: Recording Sexual Violence

> The sex of pornography is always, by definition, performative: even when there are only one or two people on screen, they are always addressing a viewer.[117]

With the exception of cases that resulted in women's deaths, the most disturbing among this set of decisions are those in which the links between "rough sex" and pornography take the form of pornography-creation, with the perpetrator(s) recording and thus memorializing and perhaps monetizing the sexual violence. As Alexandra Powell, Gregory Stratton, and Robin Cameron observe, emerging research suggests that amateur images taken at the time of an offence are

[111] *Ibid* at para 21.
[112] 2020 BCPC 303.
[113] *Ibid* at paras 3-4.
[114] *Ibid* at para 5.
[115] *Ibid* at para 6.
[116] See *Cross*, *supra* note 105 at para 16.
[117] Karen Boyle, "Epilogue: How Was it for You?" in Boyle, *Everyday Pornography*, *supra* note 33, 203 at 206.

increasingly featured in the perpetration of "everyday" sexual violence.[118] In such cases, the pornography and the sexual violence are intimately intertwined.

Perpetrator-created videos and images are frequently relied upon by the prosecution as a record of the sexual violence in these cases. This evidence can play a central role in corroborating the evidence of complainants and in securing convictions. In *R. v. Gairdner*,[119] for example, the videos created by the accused were pivotal in the judge's finding that the defence of honest but mistaken belief was unavailable. While Gairdner had testified that he and the complainant, a woman engaging in sex for payment, had had a consensual BDSM encounter, the videos showed her screaming out for him to stop: ""please stop"; "please help"; "I can't do it"; "are you going to kill me?"; and "why are you doing this to me?""[120] On camera, he hit her so hard that she required reconstructive surgery. The Court of Appeal for British Columbia also cited this video evidence when it upheld the conviction, arguing that his testimony that "no means yes" provided no defence, since the appellant's belief was based on a mistake about the legal meaning of consent.[121]

Recordings assume an especially important role as "digital witnesses"[122] when the complainant has been incapacitated by drugs and/or alcohol and has no memory of the sexual violence. Even though such video evidence often plays a significant role in securing convictions,[123] it is nevertheless a double-edged sword from the perspective of complainants because video evidence can also be used to cast doubt on the complainant's claim that she did not consent. In *R. v. Percy*,[124] for example, the Crown appealed the acquittal, in part on the basis that the trial judge conducted an improper approach to consent and misapprehended the video evidence. The complainant, a young student, had reported to police after learning that the accused, a groundskeeper at the university, had been arrested for sexual assault and voyeurism against another student in very similar circumstances.[125] The complainant's report led to charges of sexual assault, "choking," and voyeurism. She had encountered the accused, who was known to her, in a bar. At the end of the night, he offered to share a cab with her, and they went to his place. There were gaps in her memory because of her intoxication. She testified that while there may have been consensual

[118] See Powell et al, *supra* note 2 at 93. See also Dodge, *supra* note 2; Sandberg & Ugelvik, *supra* note 2.
[119] 2017 BCCA 425.
[120] *Ibid* at para 22.
[121] *Ibid* at para 25.
[122] See Dodge, *supra* note 2 at 304.
[123] *R v MacMillan*, 2019 ONSC 5480 at para 9.
[124] 2020 NSCA 11.
[125] *Ibid* at para 30.

kissing, the accused performed oral sex on her, which she found painful, and held her head and made her perform fellatio. When she told him "no sex tonight," he strangled her and forced her to have intercourse.[126] She was left with a bruised neck and her pain in her genitals.

Searching the accused's phone in another investigation, the police found video recordings of the complainant and the accused that she testified she had neither known about nor consented to.[127] These videos captured parts of the sexual activity, and the Crown suggested in cross-examination that the accused had only filmed parts that looked consensual in case he was ever caught.[128] In particular, the video showed the complainant apparently consenting to the fellatio, something that the trial judge saw as undermining her credibility and raising doubts about her consent.[129] When she was confronted with this video under cross-examination and asked by the defence if it had been consensual, the complainant conceded that she "let it continue."[130]

The Crown argued on appeal that the trial judge had misapprehended this evidence, applied a lay-person's definition of consent, and used stereotypical reasoning about how real sexual assault complainants behave. The video showed her apparently laughing, something that the trial judge found inconsistent with her claim that she was held down and participated out of fear.[131] Ultimately, the Nova Scotia Court of Appeal upheld the accused's acquittal, holding that even though consent is subjective, the complainant's claims must be assessed in light of the totality of the evidence.[132] Here we arguably see an accused's strategic filming of sexual activity being used to bolster his claims of consent.

There is another important way in which recording sexual violence can be a double-edged sword. Even though video evidence can often corroborate a complainant's allegations, recording sexual violence obviously intensifies the degradation that women experience. "Technosocial practices" increasingly associated with sexual assault both amplify the harms to victims and reproduce rape culture.[133] The creation of a visual record of sexual abuse is a form of involuntary

[126] *Ibid* at para 17.
[127] *Ibid* at para 62.
[128] *Ibid* at para 96.
[129] *Ibid* at para 101.
[130] *Ibid* at para 93.
[131] *Ibid* at para 103.
[132] *Ibid* at para 105.
[133] See Anastasia Powell & Nicola Henry, *Sexual Violence in a Digital Age* (Berlin: Springer, 2017).

pornography that transforms the assault by making it performative and by intensifying the humiliation and degradation that the woman experiences.[134]

Some complainants were unaware that the sexual activity was being filmed and most will never know whether, or how widely, the images were circulated. In *R. v. Kotio*, for example, the complainant testified that she and another student engaged in consensual intercourse that became increasingly violent when the accused began to penetrate her anally without her permission, causing her to bleed and feel like "her insides were being ripped out."[135] The perpetrator, invoking stereotypes about sexual assault complainants, claimed they had had consensual "rough sex" and that the complainant concocted a rape complaint in retaliation for: "(i) not letting her stay the night, and (ii) not responding favourably to her query of their relationship status."[136]

Early on, the accused began to film the sexual encounter with his cellphone without the complainant's knowledge. When she became aware of this, she objected and he stopped. She claimed that the video "captured genital areas."[137] Before she left, she asked the accused to delete the video and he refused, claiming his cellphone had died.[138] Under cross-examination, Kotio stated that he recorded it to defend himself against an allegation of sexual assault, a claim that the trial judge found problematic because the video was focussed on the genitals.[139] The accused initially denied placing the video on Snapchat, but on cross-examination admitted to saving it on Snapchat.[140] The accused's effort to preserve this video functions as a threat hanging over the complainant. As Alexandra Powell has argued, non-consensual filming represents an extension of the tactics that perpetrators of sexual violence have long used to humiliate and intimidate their victims, arguably prolonging an experience of power and entitlement.[141]

At trial, the accused was convicted. The trial judge drew an adverse inference against the accused based on his refusal to produce the video to the police, if, as he claimed, he had made it to prove that the sexual activity was consensual.[142] On appeal, however, a new trial was ordered.

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[134] See Clare McGlynn & Erika Rackley, "Image-based sexual abuse" (2017) 37:3 Oxford J Legal Stud 534 at 545–549.
[135] 2021 NSCA 76 at para 12 [*Kotio*].
[136] *Ibid* at para 30.
[137] *Ibid* at para 10.
[138] *Ibid* at para 48.
[139] *Ibid* at para 31.
[140] *Ibid.*
[141] See Alexandra Powell, "Seeking rape justice: Formal and informal responses to sexual violence through technosocial counter-publics" (2015) 19:4 Theor Crim 571 at 575.
[142] See *Kotio*, *supra* note 135 at para 36.

The absent video, lurking in the cloud, featured prominently in the appellate reasons. The Nova Scotia Court of Appeal found that the trial judge had effectively shifted the burden of proof to the accused who was under no obligation to produce the video.[143] Recognition of the complainant's significant privacy interest in this non-consensual pornographic video, and the ongoing emotional impact on the complainant of never knowing whether and who might have viewed the accused's sexual attack on her, is glaringly absent from this decision.

Recordings of sexual violence generate profound and unending harm to women. Like the Norwegian decisions analyzed by Sandberg and Ugelvik, the cases we examined did not track whether the recordings had been posted to the internet. Even without dissemination, the recording of sexual violence intensifies women's experience of the harm because the fear of widespread distribution is ever-present.

Furthermore, when perpetrators engage in filming their sexual violence, their actions are enacted with the camera in mind and their violence is exaggerated. As Sandberg and Ugelvik contend, pornographic videos are created to further humiliate and degrade the victim.[144] The sexual violence is shaped by deployment of a camera and by the perpetrator's participation within a pornographic narrative.

All too frequently, the kinds of sexual violence videos created by accused men and entered into evidence depict the scenes that characterize gonzo pornography – an amateur aesthetic depicting hard core sex in which men film themselves sexually degrading and violating women and celebrating the victim's debasement and humiliation.[145] The perpetrators appear to be mimicking these conventions or, as Sandberg and Ugevik put it, these offences are "instigated in order to create a certain visual product."[146]

Consider *R. v. P.O*, a case in which the complainant made a police report alleging horrific sexual violence, some of which were videoed by the accused, who was her pimp. She later recanted and testified that she had engaged in consensual "rough sex" with the accused, although there were text messages between the two showing that she had been pressured to recant. The accused was

[143] *Ibid* at para 81.
[144] Sandberg & Ugelvik, *supra* note 2 at 1030-1031.
[145] See Dines, *supra* note 27 at xi. The celebration of women's debasement is also reflected in *Gairdner*, *supra* note 130, although there is not enough information about the facts to demonstrate its gonzo-like qualities. The videos created by the appellant showed the complainant, who was exchanging sex for money, "imploring him to stop," though he asserted that this was "all part of BDSM, role-playing, where "no means yes and yes means no" (para 2). On camera, he hit her hard enough to cause an injury that required reconstructive surgery.
[146] Sandberg & Ugelvik, *supra* note 2 at 1028.

ultimately convicted of numerous offences, including trafficking, procuring, aggravated assault, and sexual assault with a weapon.[147] The gonzo-like videos made counteracted the victim's recanting testimony, providing clear evidence that he was, as the trial judge put it, "terrifying AB" at the time of the assaults.[148] The videos showed P.O. forcing the complainant to perform fellatio and analinguis on him while he hit her on the side of her head with a gun and verbally abused her,[149] and ordering her to "[s]hut up, suck my balls, dumb bitch."[150]

*Stratton*, described above, also involved an attack on a young woman who exchanged sex for drugs and agreed to be filmed.[151] In child rape scenes, she acted out the role of young children, with the accused assuming the role of a father forcing sex.[152] On one occasion, he threatened her with a knife, while repeatedly slapping her face with his penis.[153] She was filmed unconscious on the couch, wearing a Raggedy Ann doll costume, while he digitally penetrated her and masturbated.[154]

While such videos might be created as mementos of the sexual abuse, it is also important to pay attention to how both the act of videoing and the resulting pornographic films function to humiliate these complainants. Like the scenes described by Sandberg and Ugelvik, videos such as the ones created in *P.O.* and *Stratton* seem to be inspired by rape fantasy and humiliation porn.[155] A man hitting his victim with a gun, forcing her to enact child rape scenes (also known as "Daddy porn"), or slapping her with his penis, are highly degrading actions intended to demonstrate power and control. Digitally capturing such acts puts the perpetrator's power to direct and dominate the victim on display, transforming her into an object of conquest that reinforces his status as a masculine subject.[156] As Ben McJunkin writes, "Contemporary masculinity now posits value in men being chosen for sex, objectifies women as the source of such value, and eroticizes the transgression of women's resistance as sexual conquest."[157] Enacting extreme forms of sexual

[147] 2021 ABQB 318 at para 641.
[148] *Ibid* at para 319.
[149] *Ibid.*
[150] *Ibid* at para 361.
[151] *Supra* note 96.
[152] *Ibid.*
[153] *Ibid.*
[154] *Ibid* at para 45.
[155] See Sandberg & Ugelvik, *supra* note 2 at 1028.
[156] *Ibid* at 1031.
[157] Ben A McJunkin, "Deconstructing Rape by Fraud" (2014) 28:1 Colum J Gender & L 1 at 5.

violence and creating a spectacle of this abuse through recording that violence can be seen as tactics within this contest of masculinity.

This contest is especially on display in "gang rape" cases where there is more than one perpetrator. In *Bohorquez*, a case described above, the sentencing judge emphasized the centrality of this pornographic conquest, describing the young men as sexual predators looking for vulnerable young women and recording their conquest for their own future sexual pleasure.[158] In text messages, the two "clearly exhibited their preoccupation with finding women to have sex with."[159] They took turns performing violent and humiliating acts, including enacting a scene that the decision singled out as highly objectifying: "She was being held down, and one of the men held her throat and spit in her mouth while the other man's penis was inside her."[160]

*R. v. MacMillan*[161] is similar to *Bohorquez*. At first glance, *MacMillan* does not appear to be a case in which the two perpetrators, a bar owner and manager, intentionally created recordings of the assault. The videos were captured by security cameras in the bar where the hours-long horrific assault occurred, and this evidence played a pivotal role in the convictions for gang sexual assault and administering a stupefying drug to assist their crime.[162] At sentencing, the judge referred to similarities between this case and *Bohorquez*, specifically noting "the video recording of the crime by the offenders."[163] The extensive media coverage of this high-profile case, as well as other decisions convicting Mr. Carrasco,[164] the bar manager co-accused in *MacMillan*, of sexual assault, revealed that these perpetrators had deliberately used the security cameras to capture their sexual assaults of young women who were bar employees and patrons.

In sentencing Carrasco in one case for the sexual assault of a bar hostess, the trial judge described a pattern of misogynist predation --"a scheme for sport"[165] -- with each man watching video footage of the other with different women.[166] In text messages entered into evidence in Carrasco's trial, the men urged each other to send footage of sexual assaults captured by the security cameras and demonstrate the utter objectification of the women involved:

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[158] *Bohorquez, supra* note 81 at para 1.
[159] *Ibid* at para 4.
[160] *Ibid* at para 35.
[161] 2020 ONSC 3299 [*MacMillan*].
[162] *Ibid* at para 62.
[163] *Ibid* at para 62 (emphasis added).
[164] See *R v De Jesus-Carrasco*, 2021 ONSC 689; *R v De Jesus-Carrasco*, 2021 ONSC 4956.
[165] See *R v DeJesus Carrasco*, 2020 ONSC 5308 at para 33.
[166] *Ibid* at para 37.

> …Mr. DeJesus texted Mr. MacMillan and said: "You better fucking make it happen", to which Mr. MacMillan replied at 5:30:32 am: "Just tits. On camera. Bleeding bitch." At 5:53:52 am Mr. DeJesus asked "what time and camera should I check?" Mr. MacMillan responded: "4:30 AM, camera three".[167]
>
> …
> Mr. MacMillan texted several pictures of a woman to Mr. DeJesus. Mr. DeJesus responded at 10:24:15 pm: "Whos that one?" Mr. MacMillan then responded in two separate texts: "Lucy" followed by "Lucy Victim". At 10:25:45 pm Mr. DeJesus texted: "For today?" Mr. MacMillan responded with a smiley face symbol.[168]

These exchanges demonstrate how the visual recordings function as trophies, and also how the filming of sexual abuse becomes competitive between men. Antevska and Gavey contend that pornography can be viewed as a form of gendered speech that is ultimately about securing masculine status through the abuse and objectification of women. As they write, pornographic narratives of sexual violence "function in some contexts as "a currency among men as they jockey for position in the eyes of other men."[169]

In *MacMillan,* the gang sexual violence was on display through the surveillance footage that covered a period of nearly six hours. This disturbing video evidence was played repeatedly for the jurors, as well as for the media, who were permitted to watch the evidence on monitors not visible to the public gallery.[170] Judging from the extensive media coverage, the brutalization of the survivor shocked the conscience of the city of Toronto. Given the visual evidence of sexual violence and the level of the complainant's incapacitation, the "rough sex" defence offered by the two perpetrators was incredible. As the trial judge explained, this was clearly not BDSM role playing.

> The complainant was unconscious at times, and when she was not, her efforts at resistance were genuine, and her executive functioning was significantly impaired by the alcohol, cocaine, and other central nervous system depressants in her body.[171]

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[167] *Ibid* at para 38.
[168] *Ibid* at para 41.
[169] Antevska & Gavey, *supra* note 30 at 625, (citations omitted).
[170] See Rosie DiManno, "Judge doesn't declare mistrial in College Street Bar sexual assault trial but don't think that's the end of it", *Toronto Star* (20 January 2020), online: <thestar.com/opinion/star-columnists/judge-doesn-t-declare-mistrial-in-college-street-bar-sexual-assault-trial-but-don-t/article_046c5165-22f5-5918-8ddb-fbd2a4bc4631.html#tncms-source=login> [DiManno, "Mistrial"].
[171] See *MacMillan*, supra note 161 at para 23.

The complainant was a young woman who attended the bar because she had a friend who was taking a bartending course. Over the evening, the complainant became significantly impaired to the point she was unable to recall much of what happened. Carrasco texted his cocaine dealer to obtain drugs to "energize" the complainant and, in the trial judge's words, to "make her available to them for sex."[172] Carrasco subsequently texted MacMillan saying "Shes dead dead dead, im dealing with it."[173] He administered cocaine to the complainant through a straw.

The men perpetrated and "almost continuous sequence of sexual violence."[174] The complainant was so incapacitated that her muscles were flaccid,[175] she appeared unconscious at several points,[176] and the two perpetrators had to manipulate her body and keep giving cocaine to her. She was slapped, penis-slapped, and held up by Carrasco to force her to provide oral sex to MacMillan. She was subjected to gratuitous forms of humiliation that included double-penetration and "forced fellatio involving violent pulling of the victim's hair and head, coordinated digital penetration on a dog blanket, wiping of a hand on the victim's face after removing it from her vagina."[177] At one point they placed a "goofy helmet with a bell" on her head and repeatedly smacked the bell as they abused her.[178] As she testified: "I remember the floor. It was horrible…It was bumpy cement. It was hurting my knees…I was being forced to stay on my knees."[179]

Acts of extreme sexual humiliation, such as keeping a woman kneeling before her perpetrators, sexually assaulting her on a dog blanket, and attaching a bell to her, are inherently dehumanizing and performative. They are clearly being enacted with the camera in mind in order to produce a visual record that demonstrates the men's sexual power and control. The victim in *MacMillan* was sexually violated and ridiculed. She suffered extensive injuries, including bruising all over her body, genital injuries, ongoing physical pain, as well as debilitating fear and anxiety.

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[172] *Ibid* at para 16.
[173] *Ibid.*
[174] See *MacMillan, supra* note 161 at para 19.
[175] *Ibid* at para 26.
[176] *Ibid* at para 34.
[177] *Ibid* at para 57.
[178] See Rosie DiManno, "'She was taking the lead': Bar owner accused in gang sexual assault says it was entirely consensual", *Toronto Star* (31 October 2019), online: <thestar.com/opinion/star-columnists/2019/10/31/she-was-taking-the-lead-bar-owner-accused-in-gang-sexual-assault-says-it-was-entirely-consensual.html>.
[179] See Jamie Mauracher, 'It was horrifying': Woman recounts alleged gang sexual assault at Toronto's College Street Bar in court", *Global News* (24 October 2019), online: <globalnews.ca/news/6077431/toronto-college-street-bar-sex-assault-trial/>.

The videos amplified these extensive physical and psychological harms,[180] memorializing and creating a spectacle of the sexual violence she suffered.

In *R. v. A.E.*,[181] cellphone videos of the brutal gang sexual assault taken initially without the complainant's knowledge were central to the Crown appeal, as well as to the accuseds' subsequent appeal to the Supreme Court of Canada. The pattern of behaviour in this case closely resembled *Bohorquez* and *MacMillan*, with the three young men engaging in the violent sexual humiliation of the victim. The amateur videos showed the three young men punching and slapping the complainant, calling her a "slut" and a "bitch," and telling her to "shut the f--k up," all while taking turns assaulting her sexually.[182] Disturbingly, the perpetrators also laughed and egged each other on, yelling "Punch that pussy!," "F*cking fist that bitch Bro!"[183]

Like the other gang sexual assault pornography-creation cases we examined, the actions of these men show that what is happening is fundamentally homosocial. Their violent abuse of this young woman is a performance of a toxic hypermasculinity wedded to sexual violence and objectification. The complainant can be heard on the video crying out in pain and yelling for them to stop.[184] The video culminates with one of the accused, a young offender, penetrating her with an electric toothbrush and yelling, "I'm going to wreck her. Watch here," at the same time as A.E. was penetrating her orally and yelling, "Suck my fucking dick."[185] As in *MacMillan*, they are clearly directing each other in how to abuse this young woman, while at the same time performing for each other.

In *A.E.*, the trial judge found inconsistencies in the complainant's testimony.[186] Her initial agreement to some "rough sex" with the three perpetrators caused the trial judge to acquit two of the co-accused of sexual assault, even in the face of the video evidence showing her crying out in pain, clearly saying no, and telling them to stop. *A.E.* himself was convicted of sexual assault with a weapon (the electric toothbrush), because the trial judge defined this act as outside of the complainant's agreement to "rough sex," but the co-accused T.C.F., who was at the same time demanding that the complainant fellate him, was acquitted.[187]

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[180] See *MacMillan*, *supra* note 161 at paras 39–40.
[181] *Supra* note 13.
[182] *Ibid* at para 6 and 110.
[183] *Ibid* at para 6.
[184] *Ibid* at para 36.
[185] *Ibid* at para 37.
[186] *Ibid* at para 14.
[187] *Ibid* at para 21.

On appeal, the Court of Appeal of Alberta unanimously reversed the acquittals and substituted guilty verdicts on sexual assault for both accused. In this decision, the video compilation, which was reviewed by the appellate court, figured prominently. Justice Pentelchuk emphasized the "objectivity of the video evidence,"[188] referring to it as a "silent witness."[189] She reasoned that the trial judge's decision "teeter[ed] dangerously close to engaging in the myth- and stereotype-based thinking that continues to linger in the legal landscape like a fungus."[190]

Justices Martin and Pentelchek relied on the digital evidence to find that the complainant had clearly withdrawn any consent she had given.[191] Justice Martin reasoned that the trial judge erred by relying on a concept of broad advance consent: "Merely agreeing to participate in rough sex, without more, cannot usually be taken as consent to engage in whatever acts of violence the other party wishes, especially in circumstances such as these, where the parties were sexual strangers."[192] Justice O'Ferrall, by contrast, used *Welch* and *Zhao* to find that the "subjective intent of the respondents to cause bodily harm to the complainant was clear from the video,"[193] and therefore any consent was vitiated, characterizing the attack as a violent group attack designed to inflict pain on a vulnerable human being in a context where bodily harm was caused.[194]

Justice Martin also found that act of the surreptitious video-creation constituted fraud that vitiates consent on the basis that it causes serious harm as a significant violation of privacy and for inducing "paralyzing fears" of dissemination for the complainant.[195] Significantly, on the facts of this case, he found that the videos constituted child pornography because the complainant was only 17 years old.[196]

In a brief oral reasons from the bench, the Supreme Court of Canada upheld the convictions for sexual assault on the basis that there was no air of reality to support an honest but mistaken belief in consent when the complainant had so clearly withdrawn her agreement.[197] The Court declined to consider the important questions raised by the convergence of pornography-creation

[188] *Ibid* at para 148.
[189] *Ibid* at para 147.
[190] See *AE*, *supra* note 13 at para 153.
[191] *Ibid* at paras 38, 143.
[192] *Ibid* at paras 34,152. The Supreme Court of Canada subsequently agreed with this conclusion: see *R v AE*, 2022 SCC 4 [*AE* SCC].
[193] *Ibid* at para 115.
[194] *Ibid* at para 130.
[195] *Ibid* at para 74.
[196] *Ibid* at para 76.
[197] See *AE* SCC, *supra* note 192.

and a "rough sex" defence– whether surreptitious recording constitutes vitiates consent and whether consent to sexual activity can be given in situations involving the infliction of bodily harm. But the argument that the videos constituted child pornography was obviously persuasive: even though this was not mentioned in the brief reasons, any discussion of the contents of the videos was redacted from the facta posted on the Supreme Court website.

The grim facts of these pornography-creation cases demonstrate how men create a spectacle of misogynist dominance when they film their acts of sexual violence.[198] The sexual activity put on display when these complainants are videoed being hurt and humiliated mimics and simultaneously creates pornography: pornography is both scripting and scripted. Gonzo pornography is a gendered speech act that engages the perpetrators as actors and directors, inviting masculine participation and bonding and creating an interactive experience that can later be enjoyed in perpetuity and distributed to other men.

### 6. Trials Involving the "Rough Sex" Defence as Pornography

There is yet another important way in which pornography is embedded in the "rough sex" defence. Criminal trials themselves become pornographic where a "rough sex" defence is raised.[199] This defence echoes victim-blaming cultural representations of women's desire for sexual violence that circulate within pornography. As Carol Smart has also argued, a rape trial constructs a pornographic vignette.[200] Through the embodied and detailed recounting of her violation, the woman complainant becomes sexualized — she is forced to both enact and deny her part in a pornographic scenario. The courtroom becomes the stage for this pornographic scene in which women's pain is transformed into entertainment.

One of the clearest examples of the "rough sex" trial as a theatre of pornography can be found in the first trial of Bradley Barton. Ms. Gladue's severed vagina was brought into the courtroom in an effort by the prosecution to show the jury that her injuries confirmed the theory that she had been wounded by a knife.[201] This display of her flesh was a profound act of

[198] Nicola Gavey makes a similar argument: "…these kinds of acts that show men's *commitment to* sexual violence against women (and others). They are forms of violence arguably designed to produce and prove dominance, fueled by the more fragile and more dangerous layer of the myth of masculinity." See Nicola Gavey, *Just sex?: The cultural scaffolding of rape* (London: Routledge, 2018) at 343.
[199] See Edwards, *supra* note 4 at 296.
[200] See Smart, *supra* note 5 at 39–40.
[201] See Razack, *supra* note 60 at 286.

dehumanization, creating a legal spectacle that reproduced the objectifying gaze of pornography. Ms. Gladue was reduced to her genitalia. Her desecrated flesh was repeatedly referred to in this trial as "the specimen." As Razack has argued, the targeting of Indigenous women for misogynist violence has a symbolic, visual component. Razack names this the scopic regime of gendered colonial violence.[202] Through this scopic regime, white settler dominance becomes visual, spectacular, sexualized and eroticized.

If in *Barton* the courtroom itself became a literal "theatre of pornography," we must also consider what happens when, as is increasingly occurring, digital recordings are played during rape trials with a "rough sex" defence. When videos of the sexual violence are used as a form of digital proof, it becomes inevitable that the complainant will be cross-examined on what was occurring, what she was thinking and feeling during the filming. The humiliation of the sexual violence, amplified first by the perpetrator's filming, resonates again in the courtroom. In *Bohorquez*, the grueling and degrading nature of this cross-examination was remarked upon by the trial judge. He described the cross-examination as "particularly humiliating" because of the way the pornographic video evidence was used:

> S. had to endure being present in a courtroom while a video was played depicting her being sexually assaulted by two men. Worse, she had to relive this experience while the men who assaulted her and a courtroom full of people watched the video. Worse still, she was forced to answer questions about what was taking place at specific moments as segments of the video were played repeatedly, sometimes freeze-framed. Worst of all, she was asked several times if she was having an orgasm at certain points in time in the video, all in support of Mr. Siddiqi's claim to having an honest belief in consent.[203]

The complainant in *MacMillan* was repeatedly shown video footage of herself on her knees in front of one of her perpetrators, while the defence suggested she was smiling and talking to him. When she replied that she did not remember and could not tell if they were having a conversation, a zoomed in version of this particularly humiliating scene was played, purportedly to aid her recall.[204] In *A.E.*, the defence suggested that the young complainant had only reported the sexual assault because of her embarrassment about having been filmed during "group sex." The video

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[202] *Ibid* at 219.
[203] See *Bohorquez*, *supra* note 81 at para 41.
[204] See Alyshah Hasham, "Complainant in sexual assault case was 'having a good time,' defence says", *Toronto Star* (29 October 2019), online: <thestar.com/news/gta/2019/10/29/complainant-in-sex-assault-case-was-having-a-good-time-defence-says.html>.

evidence was freeze-framed during cross-examination while she was asked whether she was making "sounds of pleasure" and smiling.[205] In *Percy*, the complainant was forced to watch the videos in open court three times, while the accused stared directly at her.[206]

We must consider how these pornographic videos are being used by the defence to intentionally unravel a complainant. As Sandberg and Ugelvik contend, when sexual violence is filmed, "the cold penetrating gaze of the camera" becomes "a double rape."[207] When this evidence is used in a criminal trial in a manner that intensifies the normal brutality of cross-examination, it amplifies triply the trauma that the complainant must endure.

Furthermore, this trauma circulates among all trial participants. What happens when judges, jurors, and other courtroom actors are required to watch the hours-long pornographic evidence in a case like *MacMillan*? A recent qualitative analysis of the impact of graphic video evidence on legal professionals emphasizes how viewing such material, often in a repeated and protracted matter, creates "a new emotional proximity to the violence."[208] Video evidence has an immediacy, providing much more "live" visual and auditory information. It brings courtroom participants into the scene of the horrific sexual violence at issue in the cases we have considered.

We can see indications of this trauma in the cases we examined. In *MacMillan*, for example, the jury spent an entire day viewing security footage depicting the brutal and humiliating sexual violence performed for the security cameras in the bar.[209] The Crown in this case stated at sentencing that the video evidence was "seared into my brain" and the judge concurred: "I can assure you I will never watch it again."[210] The opening quote in this article is from *R. v. M.M.*, a sentencing decision for the young offender who pled guilty to sexual assault in the companion case to *A.E.* The judge described the video footage as depicting "the most appalling acts of human depravity I have had the displeasure to witness as a judge."[211] Justice Pentelchuk also remarked on

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[205] See Kevin Martin, "Teary witness denies agreeing to rough sex with three males", *Calgary Sun* (23 November 2018), online: <calgarysun.com/news/crime/teary-witness-denies-agreeing-to-rough-sex-with-three-males>.
[206] "Questions raised after woman had to watch video of alleged sex assault 3 times at trial", *CBC News* (22 June 2018), online: <cbc.ca/news/canada/nova-scotia/law-prof-questions-why-complainant-had-to-watch-video-of-alleged-sexual-assault-1.4717685>.
[207] Sandberg & Ugelvik, *supra* note 2 at 1030.
[208] Arija Birze, Kaitlyn Regehr, & Cheryl Regehr, "Workplace trauma in a digital age: The impact of video evidence of violent crime on criminal justice professionals" (2023) 38:1-2 J Interpersonal 1654 at 1671.
[209] See Alyshah Hasham, "Jury views 'difficult to watch' surveillance videos in gang sex assault case", *Toronto Star* (9 October 2019), online: <thestar.com/news/gta/2019/10/09/jury-views-difficult-to-watch-surveillance-videos-in-gang-sex-assault-case.html>.
[210] DiManno, "Mistrial", *supra* note 170.
[211] *R v MM*, 2017 ABPC 268 at para 111.

this depravity in her concurring opinion in *A.E.* on appeal: "the video evidence is exceedingly difficult to watch. But I did watch it—multiple times…".[212]

These judges, as well as the Crown in *MacMillan*, are relaying experiences of vicarious trauma that was no doubt shared by the lawyers, clerks and juries in these "rough sex" defence trials. As Arija Birze, Kaitlyn Regehr, and Cheryl Regehr observed, "[courtroom] [v]iewers are increasingly and repeatedly presented with deeply emotional information that was once imperceptible or unknowable and thus held at a greater distance."[213] If third parties are traumatized, one can only imagine the harm done to the complainant from video replay accompanied by cross-examination that suggests she "asked for it" or enjoyed the violence. Along with the cases previously discussed, these decisions from our database suggest worrisome trends regarding the role of violent pornography in generating, shoring up, and extending the harms of the "rough sex" defence.

**Conclusion**

The multi-faceted role of pornography in scripting the rape of women, in the deployment of the "rough sex" defence, and in the further sexual abuse of complainants during the trial make it difficult to imagine ways forward in responding to these forms of attacks on women. Arguably, the criminal law has responded appropriately to these individual cases, as all but one of these men were convicted of some form of sexual violence or homicide. Yet the mainstreaming of misogynist, racist, and extremely violent pornography may suggest that these cases are only the tip of the iceberg, especially because the vast majority of women do not report sexual assault. When pornographic scripts are invoked or when the attacks are recorded, women may be further intimidated from reporting, especially in cases where they may have initially agreed to some sexual activity but not violence. The additional harm of being cross-examined while being forced to watch the recording of one's rape, in a public gallery with the accused present, is unaddressed by these convictions.

We recognize that the role of criminal law is limited in solving this serious problem because of the ubiquity and easy access to violent pornography. Criminal law only intervenes after women have been sexually assaulted or killed by violent men. We also recognize that criminal law

[212] *AE*, *supra* note 13 at para 149.
[213] Birze, Regehr & Regehr, *supra* note 208 at 1680.

disproportionately impacts racialized and Indigenous men, although we could not identify the racial identity of either perpetrators or complainants in a majority of our cases.

The criminal trial process may be particularly traumatizing for women where pornography has been produced; evidentiary rules need to be developed to ensure that the violence perpetrated against them is not repeated in the court room. However, we also believe that criminal law plays an important expressive role in signaling which behaviours are tolerated by a society and which must be condemned through threat of criminal sanction.[214] As such, there is a role for criminal law to denounce the use and production of violent pornography in the perpetration of sexual violence. While fashioning civil remedies is beyond the scope of this article, we do make recommendations with respect to criminal law responses.

In our larger study of the use of the "rough sex" defence we argued that Canadian criminal law should bar a consent defence where the accused has caused bodily harm to the complainant that was a foreseeable outcome of his acts. We also argued for a bar on a consent defence where the accused has used strangulation, because it is a use of force where bodily harm (or death) is always foreseeable, and because the *Criminal Code* has equated strangulation with bodily harm.[215]

We acknowledge that some scholars and advocates claim women should have the ability to engage in acts that risk bodily harm or death as a measure of their autonomy and sexual freedom, but we do not agree. No society that upholds women's constitutional right to equality can endorse one rule for men who engage in fighting, barring consent to acts that cause bodily harm or death, and another for women who experience bodily harm through sexual activity, whether consensual or not. Women who believe that participation in strangulation or other violence is part of their sexual autonomy do not have to report the violence against them. In our cases, women reported their experiences of violent rapes in which pornography played a part. Were such a criminal law rule to be adopted by judges or Parliament, the Crown would need to prove that the accused caused foreseeable bodily harm or strangled the complainant before a consent defence would be barred.

It should always be considered an aggravating factor in sentencing where the accused has used pornography to guide his acts (e.g., *Barton*), where he has forced his victim to watch pornography (e.g., *Cross*), where he has enlisted other men in a pornographic script (e.g.,

[214] See Danielle K Citron, "Law's Expressive Value in Combatting Cyber Gender Harassment" (2009) 108 Mich L Rev 378.
[215] See Sheehy et al, *supra* note 3 at 686.

*Bohoroquez*), or where he has filmed his crimes (e.g., *MacMillan*).[216] This could be accomplished legislatively through a statutory aggravating factor in sentencing or through common law development.[217]

We believe that filming a sexual attack on a woman and creating a pornographic record is particularly deserving of separate and specific criminal condemnation. The *Code* does include an offence of making obscene materials,[218] which would surely include a recording of a sexual assault. Yet even this offence is so rarely charged since 1990 that prosecution appears remote.[219]

The crime of voyeurism[220] has been used to prosecute the filming of men's rapes.[221] However, voyeurism is made out only if the accused made "a visual recording of a person who is *in circumstances that give rise to a reasonable expectation of privacy*." The concept of "reasonable expectation of privacy" may apply for those far less common "rough sex" interactions where the complainant has consented initially to some form of sexual contact,[222] but this requirement is incongruous when the complainant did not consent to anything, and voyeurism in such circumstances may be impossible to prove. Furthermore, the concept of voyeurism is inadequate to the task of capturing both the accused's active role in generating the sexual violence that is filmed but also the additional anguish imposed on the complainant of having her prolonged violation filmed for another's entertainment, with the consequent anxiety that it may also be shared with others.

The new criminal offence of non-consensual distribution of intimate sexual images[223] does not extend to the initial creation of such imagery. However, this criminal prohibition could be extended to include those who create recordings of sexual violence. Or, alternatively, an entirely

[216] *Barton*, *supra* note 65; *Cross*, *supra* note 105; *Bohoroquez*, *supra* note 81; *MacMillan*, *supra* note 161.
[217] Canada's *Criminal Code*, s 718.2(a) provides for mandatory aggravating factors of general application. But the *Code* also has examples of specific mandatory aggravating factors that relate to individual offences. See e.g. *Criminal Code*, RSC 1985, c C-46, s 348.1 [*Code*].
[218] *Code* s 163(1).
[219] Janine Benedet, "The Paper Tigress: Obscenity Law 20 Years After R v Butler" (2015) 93:1 Can Bar Rev 1.
[220] *Code* s 162(1).
[221] *Ibid*. Subsection (c) makes the filming voyeurism if done for a "sexual purpose." See, for example, *R v Peters*, 2023 MBCA 96 where a conviction for voyeurism was upheld for a man who recorded a sexual assault. The appeal dealt with sexual history evidence and thus did not address voyeurism.
[222] In our larger study we found that in 16 of 83 cases where the victim survived the violence, she indicated that she consented to some sexual activity but that the accused exceeded the scope of her consent. Sheehy et al, *supra* note 3 at 667.
[223] *Code* s 162.1.

new offence of "extreme pornography" creation through filming of sexual assault might be legislated, as discussed below.

Fourth, we suggest that a systemic response is needed for the virtually untrammeled availability of violent, misogynistic, and racist pornography. Although some researchers contest a causal link between nonviolent pornography consumption and men's sexual aggression,[224] there seems to be ample evidence that violent pornography shapes men's attitudes towards violence against women and can affect behaviours.[225] With the exception of child pornography, Canada seems to have abandoned the prosecution of pornography under the *Criminal Code* prohibition of the distribution of "obscene" materials,[226] and this law appears to be a "dead letter" in today's digital world.[227]

One response might be to target for criminalization those forms of pornography that involve explicit or simulated violence, including simulations of rape and multiple men penetrating women. The UK created an offence for extreme pornography in 2008, and its scope was extended to rape pornography in 2015 in response to criticism by feminist scholars.[228] Canada could learn from the UK experience,[229] and consider replacing the obscenity prohibition with an extreme pornography offence that would apply to both the making and distribution of such recordings.

In addition, public education about the lies pornography tells about women's desires and men's sexual prowess is sorely needed. Anti-porn education should be targeted at young people whose sexual desires and expectations are being shaped by the explicit and implicit messages of violent pornography, but also at adults. Adult women are affected by, for example, pornography's normalization of strangulation as a practice that men expect and women allegedly enjoy. Clarity about the public health risks demands that anti-porn education also lays bare the dangers and risks of "rough sex," and particularly of the potentially fatal practice of strangulation.

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[224] See Chris J Ferguson & Richard D Hartley, "Pornography and Sexual Aggression: Can Meta-Analysis find a Link?" (2020) 23:1 Trauma, Violence, & Abuse 278.
[225] See Walter S DeKeseredy & Anna Deane Carlson, "Understanding the Harms of Pornography: The Contributions of Social Scientific Knowledge," *Culture Reframed* (1 March 2020) online (pdf): < violenceresearch.wvu.edu/files/d/06c75dda-91d5-40d4-bee0-c9eeafc8fb8b/harms_of_pornographypdf.pdf>
[226] *Code*, s 163.
[227] Benedet, *supra* note 219.
[228] See Clare McGlynn & Erika Rackley, "Criminalising Extreme Pornography: A Lost Opportunity" (2009) Crim L Rev 245.
[229] See Clare McGlynn & Hannah Bowes, "Possessing Extreme Pornography: Policing, Prosecutions and the Need for Reform" (2019) 83:6 J Crim L 473.

Courts are beginning to recognize that surreptitious videotaping of sexual activity may vitiate consent to sexual activity. In *R. v. Rockburn*,[230] the trial judge held that videotaping sexual activity without the consent of the complainant vitiated consent such that what was otherwise consensual became sexual assault through the doctrine of fraud. Explicit legislative clarification of this point would be helpful and would send a clear signal about the seriousness of this behaviour.

Finally, we remain deeply disturbed about what is happening to women in courtrooms when they are forced to watch, sometimes frame-by-frame and for hours on end, videos of their own rapes while being cross-examined about whether they enjoyed the violence. We also worry about the impact on everyone else in courtroom who watches this form of what could be described as torture. Legislative reform is needed to clarify the limits on such evidence although, in the absence of such legislation, judges should use their authority to control their own processes to impose limits on the use of such evidence. If the Crown or defence wishes to rely on such a recording, it should be subjected to an initial judicial screening to determine potential relevance, where necessary followed by an *in camera* hearing to determine whether the probative value outweighs the prejudice to a complainant's privacy, dignity, and equality rights just as we do for sexual history evidence.

Given the nature of these videos, if such evidence is admitted, this part of the trial should also be held *in camera*. Limits must be placed on how often it can be played and where possible the sound should be muted. The complainant should be given the choice to watch the video in private, rather than in the courtroom, before being examined on it. The *Criminal Code* should include a mandatory publication ban on such evidence, including any description of its contents in reasons for judgment, sentence, and on appeal.[231] In the absence of a legislative regime, judges should at least go *in camera* when such evidence is heard and extend the scope of existing publication bans to cover the evidence. Judges should use their power to put limits on cross-examination to avoid women being subjected to unnecessary torment around these videos.

We acknowledge that the abusive cross-examination of women using these videos is part of a much larger problem of aggressive and rape-myth-promoting cross-examination, as

[230] [2023] OJ No 786 (CJ). See also the opinion of Justice Martin discussed above in *AE*, *supra* note 13.

[231] In the trial of Paul Bernardo, the judge made a decision to allow the audio of the murder of two teenage girls to be played in court, while the video was only shown to the jury, despite the families' efforts to block the public playing of the audio. In our view, the audio should not have been played in open court despite the intense public interest in the case. See "Victims' families lose Bernardo tape fight", *CBC News* (2 January 2000) online: < cbc.ca/news/canada/victims-families-lose-bernardo-tape-fight-1.167455>.

documented extensively by Elaine Craig.[232] Judges do have the inherent authority to limit abusive and repetitive cross-examination, but appellate courts have, at times, ordered new trials, finding that the trial judge's interventions limited the accused's right to explore their defence or created an appearance of bias.[233] Craig argues for a women's equality-based limitation on cross-examination of sexual assault complainants, and for professional ethical standards to be used to elevate the behaviours of both defence lawyers and prosecutors in protecting women against sex discriminatory cross-examination. We think that attention to the spectacle of the rape trial as pornography must surely factor into judicial curtailment of cross-examination that relies on videos of men raping women, but also into the understanding of professional ethics for lawyers on either side of a sexual assault trial where the "rough sex" defence is raised.

Pornography has epistemic authority — it gets into people's heads. In fact, as philosopher Ray Langton has written, "pornography is a more salient source of norms than the law itself, in the sexual lives of a great many people…."[234] Here, in these "rough sex" defence cases, we see pornography both scripting and being scripted, as perpetrators enact and perform violent pornography. As we have argued, this sets the stage for extremely degrading sexual assaults. It is vital that Parliament acts to curtail such performances of sexual violence, and to prevent the re-traumatization of survivors during trials.

[232] Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Kingston, ON: McGill-Queen's University Press, 2018).
[233] See e.g. *R v Schmaltz*, 2015 ABCA 4; *R v Quintero-Gelvez*, 2019 ABCA 17.
[234] Langton, *supra* note 43 at 27.