

## **BEYOND THE PLEASURE PRINCIPLE: THE CRIMINALIZATION OF CONSENSUAL SADOMASOCHISTIC SEX**

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*“Bind my ankles with your white cotton rope so I cannot walk. Bind my wrists so I cannot push you away. Place me on the bed and wrap your rope tighter around my skin so it grips my flesh. Now I know that struggle is useless, that I must lie here and submit to your mouth and tongue and teeth, your hands and words and whims. I exist only as your object. Exposed.”*<sup>1</sup>

## I. Introduction

Lord Devlin proclaimed “all sexual immorality involves the exploitation of human weakness . . . . An established morality is as necessary as good government to the welfare of society.”<sup>2</sup> Laws often attempt to police sexual behaviors considered aberrant or deviant. Although much has been written about the regulation of various sexual practices, regulations of sadomasochistic (“S/M”) sex have for the most part escaped legal analysis. However, S/M sex has not escaped the interest of criminal prosecutors, and S/M practitioners face threats of arrest and prosecution. Also, there have been numerous attempts to close sex clubs, and discrimination against S/M practitioners in child custody, employment and other arenas is common.<sup>3</sup>

This paper analyzes the legal treatment of S/M sex, specifically where S/M has been charged as criminal assault. My analysis is framed by the assumption that the promotion of procreative sex is no longer the predominant policy underlying sex laws following legalization of contraceptive information in *Griswold v. Connecticut*,<sup>4</sup> *Eisenstadt v. Baird*<sup>5</sup> and the legalization of abortion in *Roe v. Wade*.<sup>6</sup> This assumption raises many questions: As sex laws currently shift toward configuring sexuality in a post-procreative sex jurisprudence, how can laws regulate the pursuit of sexual pleasure without invoking hasty moralistic gag reflex responses? If the pure pursuit of pleasure is permissible, how can principled limits be placed on pleasure seekers? How does society go about designing a *laissez faire* rubric that allows individuals to follow their pursuit of happiness without interference, while preventing the exploitation of human weakness?

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1. Marianne Apostolides, *The Pleasure of Pain – Why Some People Need S&M*, PSYCHOL.TODAY, Sept.-Oct. 1999, at 60, 60.

2. Ian Freckelton, *Masochism, Self-mutilation and the Limits of Consent*, 2 J.L. & MED. 48, 48 (1994).

3. See *infra* Part II.

4. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

5. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that contraceptive information made available to married women must also be made available to non-married women).

6. *Roe v. Wade*, 410 U.S. 113 (1973).

S/M sex fails to fit neatly in such a *laissez faire* scheme because minor physical injuries are inflicted with the person's consent. Other potentially self-injurious behaviors include sports, cosmetic surgery, piercing and tattooing, but consent is a defense to a charge of assault for these behaviors. However, where S/M sex is charged as assault, no consent defense is available.<sup>7</sup> Is it the sexual nature of S/M that excepts the applicability of the traditional consent defense? . . . the perception that the intent to injure is a primary rather than secondary purpose? . . . a judicial repugnance for the activities involved and a presumed universal abhorrence?

I argue that the mere act of engaging in S/M activities should not lead to criminal prosecution absent the victim's complaint. Criminal prosecution for S/M sex should occur only where the victim claims he or she was sexually assaulted because there was no clear consent to the S/M encounter, consent was revoked, or the perpetrator exceeded the scope of consent. Criminal prosecution of S/M sex in any other circumstance is a misapplication of criminal assault law. This is because such prosecutions mistake S/M sex as only violence. Prosecutors confuse the presence of traditional symbols of violence (whips, chains, handcuffs), utilized in a theatrical and self-conscious simulation of power relationships, as the presence of real dominance and exploitation. I wish to dispel this confusion and advocate for a more culturally informed legal treatment of this behavior.

In Part II of this paper, I discuss how the current media proliferation of S/M symbols acknowledges the prevalence of S/M, while simultaneously demonizing the act as aberrant, violent and pathological. The media is replete with sensationalistic stories that treat sadistic sexual assaults as consensual S/M gone bad. Part III describes how these depictions of S/M have allowed for the rampant discrimination against S/M practitioners. Part IV attempts to dispel popular conception of S/M sex by describing S/M practices as understood by researchers and practitioners.

Part V, the primary focus of this paper, describes how current legal treatment of S/M sex ignores psychological and sociological research when it wrongly permits the prosecution of S/M sex as criminal assault. Because consent to assault is not a defense unless good reasons can be found for an exception, the "victim's" consent to S/M sex is no defense in the assault prosecution. This is true for both United States' cases and the British *Spanner* case.<sup>8</sup>

Part VI argues that the central error in both U.S. and British case law is its treatment of S/M sex as only violence. This section considers whether S/M sex is violence, whether S/M sex should be allowed a consent

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7. See *infra* Part V.A-B.

8. See *infra* Part V.C.

defense, and the possible social consequences attached to creating this exception.

Finally, Part VII considers whether the legalization of S/M sex is consistent with a feminist agenda.

## II. Growing Prevalence of Kink: S/M Imagery in Popular Media

A summary review of current newspaper and magazine articles indicate S/M's unexpected rupture from the closet. S/M iconography has established a distinct presence in the modern American cultural economy. "The imagery of kink has proliferated through the emergence of an astounding variety of niche markets."<sup>9</sup> Examples of this are numerous: from body piercing, body manipulations and tattoos, to the proliferation of sex toys and S/M tools,<sup>10</sup> to Madonna's 1992 *Sex* book including several photographs taken at the Vault – a Manhattan S/M club,<sup>11</sup> and to the establishment of several bed and breakfast inns in New York and New Jersey equipped with private dungeons, video equipment and fisting slings.<sup>12</sup> High fashion has made frank allusions to bondage, fetishism and S/M.<sup>13</sup> The State University of New York at Albany provides funding and a meeting room for "Power Exchange," an S/M student group.<sup>14</sup> An S/M French Restaurant named La Nouvelle Justine, decorated with a prison cell, "slave" busboys and "dominant" waitresses, birthday spankings and leather wrist cuffs, operates on Manhattan's 23rd Street and is so popular that dinner is by reservation only.<sup>15</sup>

As economic forces embrace the growing market for S/M signifiers, cultural imagery appears to elevate S/M photographs and films out of the sexual underground. Robert Mapplethorpe has gained both critical and political recognition.<sup>16</sup> A film by Kirby Dick entitled *Sick: the Life and Death of Bob Flanagan* documented the longest living victim of cystic

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9. Guy Trebay, *No Pain No Gain*, 42 THE VILLAGE VOICE, Nov. 11, 1997, at 34.

10. David Tuller, *Probing Limits of Pleasure and Pain*, S.F. CHRON., June 29, 1997, at 3/Z1.

11. *Id.*

12. Trebay, *No Pain, No Gain*, *supra* note 9, at 32, 34, 36.

13. Guy Trebay, *A Detour Into Naughty For Last Season's Nice Girls*, N.Y. TIMES, Oct. 31, 2000, at B12.

14. Joe Mahoney, *SUNY Club is Going By The Book – Of S&M*, DAILY NEWS, Feb. 7, 2001. This may not necessarily mean SUNY is liberal with respect to sex education. Indeed the article stated "Red-faced administrators stressed the S&M club receives no funds from taxpayers, though it can use school facilities for its meetings." *Id.*

15. Sara Silver, *For Spankers and Spankees Alike*, L.A. TIMES, Aug. 17, 1997, at 4.

16. See Amy Adler, *The Art of Censorship*, 103 W. VA. L. REV. 205, 206-07 (2000).

fibrosis, and his proclivity for extreme S/M love play.<sup>17</sup> “*Sick* won the Special Jury Prize at the 1997 Sundance Film Festival and accolades as Best Feature at the 1997 Los Angeles Independent Film Festival.”<sup>18</sup> The San Francisco International Lesbian & Gay Film Festival boldly made the closing act at its 19th annual showcase the world premier of “*Frisk*,” a dark S/M fantasy film,<sup>19</sup> and, in mainstream Hollywood, the movie “*Basic Instinct*” opened with a man being tied to a bed by a woman.<sup>20</sup>

Despite the ascendancy of these common almost hackneyed images, cultural curiosity with S/M stems not from social acceptability but rather, a desire to ogle what is perceived as aberrant sexual conduct. Indeed, the “shock value of S/M has been mercilessly exploited . . . .”<sup>21</sup> Pat Califia, a leading S/M advocate and practitioner, notes “the machines of pop culture steals from minorities. It comes to us for titillation and rips off our symbolism. At the MTV level, S/M looks more acceptable. The reality, for actual perverts, is it’s not.”<sup>22</sup> “Even as the mainstream beckons, serious players are bedeviled by grotesque urban legends. . . bad law, and a peek-a-boo press.”<sup>23</sup>

The media is replete with sensationalistic stories corroborating the faulty presumption that S/M is a violent sexual pathology. In the highly publicized “*Preppy Murder*” case, former altar boy Robert Chambers defended the murder charge by claiming he accidentally choked his victim during an episode of “rough sex.”<sup>24</sup> Recently, New York newspapers again lit up with the story of Oliver Jovanovic, a Columbia University graduate student convicted for kidnapping, assaulting and sexually abusing a then 20-year-old Barnard College student that he met on the Internet after exchanging e-mails about S/M.<sup>25</sup> On June 7, 2000, the *Houston Chronicle* reported that five bodies were found in barrels in a storage locker belong-

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17. Silver, *supra* note 15, at 4 (the poster for *Sick*, featuring a man collared, shackled, with a 10 pound chrome weight suspended from his testicles, was posted outside Manhattan theaters without raising a criminal justice eyebrow).

18. Susan Wright, *Report on the Suppression of Sexual Diversity in Art*, Arts Censorship Roundtable The Center for Lesbian and Gay Studies at The City University of New York, at <http://www.ncsfreedom.org/censorship/suppression.org> (Feb. 7, 1998).

19. Edward Guthmann, *A Daring Closing Act for Lesbian & Gay Film Festival*, S.F. CHRON., June 16, 1995, at C14.

20. *Id.*

21. Gayle Rubin, *The Leather Menace: Comments on Politics and S/M*, in *COMING TO POWER* 194, 199 (Katherine Davis ed., 1981).

22. Trebay, *No Pain, No Gain*, *supra* note 9, at 36.

23. *Id.* at 34.

24. *Preppy Murder Killer Denied Parole*, THE RECORD, Dec. 18, 1992, at A36 (The following cases are not reported because they were disposed of by guilty pleas.).

25. David Rohde, *Call for New Sex-Abuse Trial Is Said to Harm Rape Shield Law*, N. Y. TIMES, Dec. 23, 1999 at 3B.

ing to a man who met women over the Internet for S/M sex.<sup>26</sup> On August 16, 2000, The Boston Globe reported that “a sadomasochistic sex practice turned into a macabre death scene . . . when [a dominatrix] tied a client into bondage straps and returned to the room to find he was dead . . . after panicking, she and her boyfriend cut the man into pieces with a power saw in her bathtub and disposed of his body in a dumpster in Augusta, Maine. . . .”<sup>27</sup>

These sensationalistic stories not only distort S/M sex and their practitioners, oftentimes they are factually incorrect. For example, in the CBS documentary titled *Gay Power, Gay Politics*, San Francisco coroner Dr. Boyd Stephens estimated that ten percent of the homicides in San Francisco were gay related and some were S/M related.<sup>28</sup> Although this statistic includes the killing of homosexuals by heterosexuals, this statement has been widely misquoted (including *Time Magazine* and *San Francisco Chronicle*) as the source for the fabricated statistic that ten percent of San Francisco’s homicides are related to S/M.<sup>29</sup> Similarly, in July 1981, newspapers reported that a fire started at a “gay bathhouse” although it had been closed for years. “The *San Francisco Chronicle* ran a picture of a burned out S/M playroom next to the story about how there might be dead slaves lying in the ruins.”<sup>30</sup> A firefighter reported the odor of burning meat and the press ran stories of a slave who had been left chained to a bed had burned to death, although investigations revealed no such human remains.<sup>31</sup>

### III. Discrimination Against S/M Practitioners

Gayle Rubin notes how biased media depictions of S/M sex demonize the S/M community, criminalize their behaviors and subject them to “virtually unrestrained attack.”<sup>32</sup> There is rampant discrimination against the S/M community, and police raids of sex clubs are common. For example, on July 8, 2000, the police in Attleboro, Massachusetts, broke up a private bondage and S/M play party and two men were arrested.<sup>33</sup> The charges

26. *Suspect Held In Internet Death / Five Bodies Found in Missouri, Kansas*, HOUSTON CHRON., June 7, 2000, at 17.

27. Farah Stockman, *Disposal of Body Probed After Report to Police*, BOSTON GLOBE, Aug. 16, 2000, at B6.

28. Rubin, *supra* note 21, at 204.

29. *Id.* (Dr. Stephen, the coroner, is currently suing the San Francisco Chronicle for libel).

30. *Id.* at 209.

31. CHARLES MOSER, PH.D., M.D. & J.J. MADESON, BOUND TO BE FREE 115 (1996).

32. *Id.* at 197.

33. *History and Information on the Attleboro Police Raid, Paddleboro*, available at <http://www.paddleboro.org/information.htm>, (last visited May 10, 2001).

included keeping a house of prostitution (although no money for sex was exchanged) and possession of a dangerous weapon (a wooden spoon).<sup>34</sup> Also, local law enforcement has made several attempts to close down sex clubs in San Francisco, New York, and Los Angeles.<sup>35</sup> Harassment against individuals who engage in S/M range from embarrassment<sup>36</sup> to harassment and assault. The National Coalition for Sexual Freedom's ("NCSF") National Survey of Violence and Discrimination Against Sexual Minorities found rampant harassment against S/M practitioners. Of the first two hundred surveys, 72 reported incidents of discrimination, while 73 reported incidents of violence.<sup>37</sup> The survey participants described harassment in child custody suits ("My ex wife attempted to have visitation with our child stopped. She succeeded in having it curtailed.").<sup>38</sup> Several practitioners also feared losing their jobs. For example, when an ordained minister's interest in S/M was discovered by his superiors, he stated that he "was up on a years leave of absence and required to participate in therapy."<sup>39</sup> Female practitioners of S/M are subject to sexual abuse by individuals who discover their sexual preferences. Some anecdotes include "my boss started grabbing my breasts when he found out," and "I was beaten up due to the jerk thinking that since I was submissive, that also meant free game to beat up and rape."<sup>40</sup> Finally, S/M practitioners experiencing sexual harassment, prejudicial custody disputes or criminal prosecutions rarely find adequate legal representation.<sup>41</sup>

Police harassment of sexual minorities also occurs. Rubin describes an incident where her friend died of a heart attack while having sex in his "lovingly built playroom. When the police saw the S/M equipment, they threatened to charge his lover with manslaughter."<sup>42</sup> The press aired lurid stories of "ritual sadomasochistic death," although the death was ruled ac-

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34. *Id.*

35. See Rubin, *supra* note 21, at 202 (noting harassment of San Francisco leather bars by the vice squad and the Alcoholic Beverage Commission).

36. For example, one S/M practitioner noted "SM is forgetting to take off your steel cockring, and it sets off the alarm at the airport." MOSER, *supra* note 31, at 204.

37. *Violence and Discrimination Against You*, National Coalition for Sexual Freedom, at <http://www.ncsfreedom.org/discrimination/violence1998.htm>, (last visited May 10, 2001).

38. *Id.*; Rubin, *supra* note 21, at 206 (arguing that "Custody law is one of the places where sex dissenters of all sorts are viciously punished for being different").

39. *Id.*

40. *What is SM? Law Enforcement Outreach Program*, National Coalition for Sexual Freedom, at <http://www.ncsfreedom.org/whatissm/chapter11.htm>, (last visited May 10, 2001).

41. See *To Each His Own: Lawyers Listen to Fetish Fridge*, A.B.A.J. (February 2001), available at <http://www.ncsfreedom.org/media.htm>, (last visited May 8, 2001).

42. Rubin, *supra* note 21, at 205.

cidental.<sup>43</sup> This anecdote illustrates how S/M propaganda works to rationalize the abuse and harassment of S/M practitioners. Indeed, “[w]hen men have coronaries while fucking their wives, the papers do not print stories implying that intercourse leads to death. Nor are their widows threatened with criminal charges.”<sup>44</sup>

#### IV. How Researchers and Practitioners Describe S/M Sex

##### A. *What Is It?*

Media depictions of S/M as a violent sexual pathology at best represent dismal ignorance of sociological and psychological information, and at worst, portray hateful smear tactics against a legally vulnerable community. The legal discourses surrounding S/M often reflect stereotypes propagated in the media. Thus, I wish to carefully describe how S/M is understood by practitioners and researchers so the reader can better consider whether legal regulation of this behavior is advisable.

S/M sex includes a wide range of sexual activities “between two consenting adults that may include, but is not limited to, the use of physical and/or psychological stimulation to produce sexual arousal and satisfaction.”<sup>45</sup> S/M sex is difficult to define precisely because of the wide range of activities involved and the paucity of research on this subject.<sup>46</sup> There are four major categories of sadomasochistic behavior, although variations are numerous. They include: (1) infliction of physical pain, usually by means of whipping, spanking, slapping or the application of heat and cold; (2) verbal or psychological stimulation such as threats and insults; (3) dominance and submission, for example, where one individual orders the other to do his or her bidding; (4) bondage and discipline, involving restraints such as rope and chains and/or punishment for real or fabricated transgressions.<sup>47</sup> Other variations include fetishistic, exhibitionistic and voyeuristic components, intense and/or frustrated genital stimulation, age-play (infantilism, diapering), body mutilation (piercing, scarring, corsetting, tattoo-

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43. *Id.*

44. Rubin, *supra* note 21, at 205.

45. *What is SM*, *supra* note 40. When discussing sadomasochism, I refer only to external stimuli resulting in sexual arousal. Sadism and masochism is a larger topic which include a range of behaviors, considered “self injurious” by some members of the medical profession, that are not necessarily sexual stimulants. Examples of behaviors that may be considered “self-injurious” or “masochistic” but are not considered sadomasochistic by this paper include body piercing, anorexia, and alcoholism. *See generally* Freckelton, *supra* note 2.

46. Moser, *supra* note 31, at 21, 26.

47. JOHN MUNDER ROSS, PH.D., *THE SADOMASOCHISM IN EVERYDAY LIFE* 115 (1997).

ing), role reversal (cross-dressing) and defecation (urination, enemas, fecal play).<sup>48</sup>

Given this wide range, analysts have observed five features generally present in an S/M encounter:

1. Dominance and submission – the appearance of control of one partner over the other;
2. Role-playing – the participants assume roles that they recognize are not reality;
3. Consensuality – a voluntary agreement to enter into SM “play” and to honor certain “limits”;
4. Sexual context – the presumption that the activities have a sexual or erotic meaning;
5. Mutual definition – participants must agree on the parameters of what they are doing, whether they call it SM or not.<sup>49</sup>

#### B. *Who Does It?*

An amalgamation of the average S/M participant is represented by the case of “James.” James recognized masochistic tendencies as a child playing war games and desiring that he be caught.<sup>50</sup> Some theorists opine that S/M-like fantasies often originate from early childhood captivity games such as cowboys and Indians, cops and robbers.<sup>51</sup> Typically, a sadomasochist is “keenly interested in a particular fetish or activity in early childhood; to experiment with this vaguely, at least during masturbation in puberty or teen years; and then repress the desire once dating begins.”<sup>52</sup> For example, James’ first S/M encounter occurred at a party where a college professor singled him out. “She brought him home and tied him up, and told him how bad he was for having these desires, even as she fulfilled them. For the first time he felt what he had only imagined, what he had read about in every S&M book he could find.”<sup>53</sup>

Sexual arousal from sadomasochistic stimuli is not rare. Research indicates that approximately 5 -10% of the U.S. population have experimented with S/M sex.<sup>54</sup> The 1990 *Kinsey Institute New Report on Sex* estimates that the U.S. population “engages in S/M for sexual pleasure on

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48. MOSER, *supra* note 31, at 26.

49. *See id.* at 30.

50. *See* Apostolides, *supra* note 1, at 60-61.

51. GLORIA G. BRAME, WILLIAM D. BRAME, AND JON JACOBS, *DIFFERENT LOVING: AN EXPLORATION OF THE WORLD OF SEXUAL DOMINANCE AND SUBMISSION* 8 (1993).

52. *Id.*

53. Apostolides, *supra* note 1, at 60.

54. *See id.* (stating that one out of ten readers of Apostolides’ article have experienced S/M sex).

at least an occasional basis, with most incidents being either mild or stage activities involving no real pain or violence.”<sup>55</sup> A recent Playboy poll by Dr. Marty Klein observed: “18% of the men and 20% of the women have used a blindfold during sex. 30% of the men and 32% of the women have tied someone up or have been tied up during sex. 49% of the men and 38% of the women have spanked or have been spanked as part of sex.”<sup>56</sup>

People of “all races, creeds, religions, socioeconomic classes, and sexual orientation” practice sadomasochistic sex.<sup>57</sup> Ronald Moglia claims that this practice is most popular among educated, middle- and upper-middle-class men and women, although this may be due to research bias.<sup>58</sup> He claims the overwhelming majority of those engaged in consensual S/M sex are individuals who are normal, healthy, and contributing to society.<sup>59</sup> Sociologist Gini Scott, in her study on heterosexual S/M subculture, argues that “[u]nlike the psychiatrists and psychologists who deal primarily with psychologically troubled individuals who are also interested in D&S [dominance and submission], I did not find them to be psychologically troubled or socially inept . . . . At the core of the [S/M] community are mostly sensible, rational, respectable, otherwise quite ordinary people.”<sup>60</sup>

There is no evidence, anecdotal or otherwise, to support the presumption that men prefer being the “top” or dominant S/M partner, while women are more sexually responsive to submissive roles. Some theorists claim that “submissive men are the single largest component of the S/M communities, and widespread male interest in sexual submission is an observable phenomenon.”<sup>61</sup> Psychologist Nancy Friday contends that men are four times more likely to express masochistic desires than women.<sup>62</sup> Moreover, the role of dominant or submissive is not fixed, and partners often exchange active and passive roles.<sup>63</sup> Finally, as it is quite common that the submissive is the one who initiates and choreographs the sexual encounter; this active initiation “suggests an essential ambiguity in the

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55. JUNE M. REINISCH, PH.D. & RUTH BEASLEY, M.L.S., KINSEY INSTITUTE NEW REPORT ON SEX: WHAT YOU MUST KNOW TO BE SEXUALLY LITERATE (Debra Kent ed., 1990).

56. *What is SM?*, *supra* note 40.

57. MOSER, *supra* note 31, at 40.

58. *Id.* (stating better educated and more affluent individuals are more likely to participate in research studies).

59. BRAME, *supra* note 51, at 8 (interview with Dr. Ronald Moglia, Director of the Human Sexuality graduate program at New York University).

60. *What is SM?*, *supra* note 40.

61. BRAME, *supra* note 51, at 11.

62. *Id.*; see also *Sado-Masochism, Consent, and the Reform of the Criminal Law*, 39 MODERN L. R. 130, 132 (1976) (Dr. Helene Klein and Dr. Karen Horney attack the assumption that masochism is a peculiarly feminine trait).

63. British Law Commission Report (“BLCR”) 134 (comparable to a congressional report, often used when Parliament considers changing a law).

casting of the roles in these scenes.”<sup>64</sup> In fact, one “top” noted that “ultimately, the submissive controls the scene totally, unless she’s with a nut.”<sup>65</sup>

### C. *Safe, Sane and Consensual*

The commonplace media portrayal of a submissive S/M participant enslaved to a pathological “nut” confuses sadism with sadomasochism. S/M is highly negotiated and mutually satisfying.<sup>66</sup> The credo of S/M sex is “Safe, Sane and Consensual.”<sup>67</sup> “Safe” refers to physical safety and acknowledging the potential risk of inflicting harm or “extreme stimulus” on a participant.<sup>68</sup> This requirement includes the duty to be knowledgeable about techniques and not to inflict irreversible damage.<sup>69</sup> A “safe word” is often selected before the action begins. When the safe word is uttered, the dominant must cease all activity—the game is over.<sup>70</sup>

“Sane” is based on the principle that S/M sex is done for the pleasure of everyone involved. “Erotic play should not cause emotional anguish; it should not abuse the submissive’s vulnerability or subject a submissive to unreasonable risk.”<sup>71</sup> Thus, implicit in the exchange is awareness of limits, both physical and psychological. The dominant is required to know when and where the fantasy stops.

“Consent” is considered the “first law” of S/M sex – the moral dividing line between S/M and brutality.<sup>72</sup> Consent is required to be voluntary, knowing, explicit, and with full understanding of the previously agreed to parameters.<sup>73</sup> The ongoing consent of the participants is required, and constructive consent is never sufficient.

### D. *Psychological Understanding of S/M*

S/M has received mixed treatment from the psychological community. Historically, S/M had been treated as a sexual psychological dysfunction.

64. ROSS, *supra* note 47, at 17.

65. BRAME, *supra* note 51, at 78.

66. Interview with Michael Fois, Board Member of National Coalition of Sexual Freedom, in N.Y.(Jan. 29, 2001).

67. BRAME, *supra* note 51, at 49-53.

68. MOSER, *supra* note 31, at 118.

69. *See id.*

70. *See id.* (The words chosen are often inappropriate to the sexual context so there can be no mistake of its meaning when uttered. Often, words “Red” (meaning stop); “Yellow” (slow down) and “Green” (keep going, this is hot) are used. Words like “stop” or “no” are not ideal as they may be uttered as part of the sex play).

71. BRAME, *supra* note 51, at 51.

72. *See id.* at 52.

73. *What is SM*, *supra* note 40.

Krafft-Ebing's extensive anthology on sexuality, *Sexualis Pathologies*, created the categories "sadism" and "masochism," introducing the two diagnoses as sexual pathologies. Both were defined as paraphilias – aberrant sexual activity, and this system of behavioral categorization ushered in the modern "medicalization of [sexual] deviance."<sup>74</sup> Dr. Moser argues that this genealogy reveals the socially constructedness of S/M sex because "prior to Krafft-Ebing, S/M was neither a sickness nor a sin."<sup>75</sup> Despite this classification, he claims "there is no scientific study that indicates S/M practitioners suffer from any specific psychological problems or that their choice of sexual behaviors in any way interferes with their day-to-day functioning."<sup>76</sup>

Modern psychology has been unable to arrive at a clear diagnosis because S/M behaviors are a "poorly understood phenomenon in both its behavioral and biochemical aspects. It occurs in a variety of clinical settings, and features of the behavior vary among those settings."<sup>77</sup> Furthermore, because there is such a wide range of activities falling within the rubric of "sodomasochistic activity," there is little consensus in psychological and psychiatric literature on aetiology or prognosis.<sup>78</sup>

Studies involving "extreme"<sup>79</sup> S/M sex have presented numerous explanations for S/M behaviors, ranging from psychoanalytical theories describing unresolved earlier conflicts, to endocrinological and brain abnormalities, to sociological and cultural factors that legitimize the linkage of sexuality and violence. Various aetiological features have been identified as possible attributes of masochistic or sadistic behaviors, including: genetics, childhood abuse, irrational guilt, poor self-esteem, fragile sense of identity, uncertain personal boundaries, and socio-historic cultural context.<sup>80</sup>

For example, one professional dominatrix provides an explanation of how early childhood experiences may form later sadomasochistic desires:

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74. MOSER, *supra* note 31, at 36 (In 1938, Sigmund Freud introduced the combined term *sadomasochism*, noting that the two states could be found in the same person).

75. BRAME, *supra* note 51, at 24.

76. *Id.*

77. *See* Freckelton, *supra* note 2, at 51-52.

78. *See id.* at 58.

79. I use the word "extreme" to indicate S/M that often resulted in severe or serious bodily injuries.

80. *See id.* at 54-55 (cultural and historical period may sanction various infliction of pain on the body, ranging from "Chinese foot binding, to prehistoric trepanation of the skull, to finger amputation in the Pacific and in Africa, to various types of genital rearrangement among Australian Aborigines and also in Africa."); *see also* Ross, *supra* note 47, 90-91

As a professional, I once had a man in dog training. He was dressed, but when I pushed his face into the dog food, he had an orgasm in his pants. The moment I pushed his face into the dog food, [he had] a revelation. His father was a veterinarian and gave more love to animals than to him. He realized how much he wished his father had paid attention to him and how he wished to be a dog because he wanted his father's attention. Everything just became clear to him, and he never came back.<sup>81</sup>

The wide range of explanations and anecdotes as to the causes of S/M tendencies reveal the impossibility of casting S/M as a distinct psychological pathology. The recent trend in the medical community is to depathologize S/M unless the practices or desires interfere with everyday life. *Psychology Today* declared, "[t]he view that S&M is pathological has been dismissed by the psychological community."<sup>82</sup> This article claimed that current psychological research indicates no significant psychological or biochemical variations among S/M practitioners. Finally, the American Psychiatric Association removed S/M as a mental disorder in its Diagnostic and Statistical Manual of Mental Disorders in 1980 ("DSM – IV").<sup>83</sup> Sexual masochism or sadism only becomes a diagnosable dysfunction if the "fantasies, sexual urges, or behaviors cause *clinically significant* distress or impairment in social, occupation or other important areas of functioning."<sup>84</sup>

Finally, Dr. Moglia argues that an accurate medical understanding of causation is not necessary in determining the legal status of S/M activities. He queries:

Do we need to understand S/M . . . , or do we need just to accept it? When you look at the history of fetishes, three or four fetishistic behaviors were discovered between 1870 and 1900 – they weren't [actually] discovered; they were just named by a medical source. All of a sudden we are compelled to understand and in-

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81. BRAME, *supra* note 51, at 154-55 (this is an example of depersonalization S&M. Depersonalization S&M involves fantasies of being an "less than human," or inhumanely treated. Often, the bottom desires to be treated as an object (such as an armchair, foot stool) or an animal. Although not in the common panoply of S&M activities, it is not uncommon. Allegedly, the late Alfred Bloomingdale, the clothing mogul, "hired women to perform as ponies and rode them, whipping their flanks." *Id.* at 155)

82. Apostolides, *supra* note 1, at 62.

83. *Id.* at 61. *Contra* DSM-III-R 286-88 (1987) (dual diagnostic criteria: (1) over a period of at least six months the subject must have suffered intense sexual urges and sexually arousing fantasies involving the act (real, not simulated) of being beaten or humiliated on the one hand or beating or humiliating on the other; and (2) the subject has acted on these urges, or is markedly distressed by them).

84. DSM – IV 529-530 (1994).

interpret them. Perhaps what social scientists should be doing is trying to understand the people who can't accept the behaviors.<sup>85</sup>

In sum, there is no conclusive evidence whether practitioners of S/M suffer from a mental disorder. Regardless of the cause, approximately ten percent of the American population is engaging in behaviors of a questionable legal status.<sup>86</sup> This paper now turns to whether these sexual behaviors can or should be the basis for continuing criminal prosecution.

## V. Case Law: S/M Assault Prosecutions

### A. *General Legal Principles on Assault and Consent*

The infliction of injury for purposes of sexual gratification "is highly problematic both from the point of view of determining legality and from the point of view of legal policy development."<sup>87</sup> Assault addresses two types of bodily invasions. Where no actual injury occurs, or only trifling injury occurs, the victim's consent bars an assault charge. Because this is a personal offense, and not a physical injury occasioning a breach of the peace, the victim's consent vitiates an assault charge because the State's interests have not been harmed. Whereas if actual bodily injury occurs, no consent defense is available because a breach of the peace occurred, and the State has a compelling interest in punishing this behavior.<sup>88</sup> The individual cannot consent to an injury inflicted against the community.

The consent defense is an exception to this general rule where public policy deems it worthy to protect a socially desirable activity. For example, a consent defense is available for a patient of cosmetic surgery or willing participants in a football game or a boxing fight. "On the other hand, assault involving aberrant behavior or conduct *with no apparent social utility* is often held to be criminal without regard to the consent of the victim if the force used has as its probable result bodily injury."<sup>89</sup>

Participants in S/M sex have been prosecuted for criminal assault on a number of occasions.<sup>90</sup> A consent defense has never been allowed in this context.<sup>91</sup> Presumably, this is because society has an interest in preventing

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85. BRAME, *supra* note 51, at 15-16.

86. *See supra* Part IV.B.

87. BRAME, *supra* note 51, at 59.

88. *See id.* (the injury must generally be so severe that the conduct is viewed as detrimental to the state's interest in the well-being of its able bodied soldiers); *see also* People v. Samuels, 58 Cal.Rptr. 439, 448 (1967).

89. Note, *Assault and Battery – Consent of Masochist to Beating By Sadist Is No Defense To Prosecution For Aggravated Assault*, 81 Harv. L. Rev. 1339, 1339 (1968) (emphasis added).

90. *See infra* Part V.B.-C.

91. *See infra* Part V.B.-C.

violence, and the common perception is that the purpose of S/M is only to inflict physical injury, whereas sports or tattooing have other social purposes, such as creating social bonds and self-expression. The moral judgments in such reasoning are plain. To treat S/M sex as “being about violence, and therefore as having no redeeming social value, but to accept that boxing or rough and undisciplined play do have social value, is to turn reality on its head.”<sup>92</sup>

### B. United States Case Law

The earliest case holding that the victim’s consent is no defense to S/M assault is *People v. Samuels*.<sup>93</sup> The California Supreme Court affirmed the conviction for aggravated assault and held that a consent defense was inapplicable. The court believed the S/M beating “was no less violative of a penal statute obviously designed to prohibit one human being from severely or mortally injuring another.”<sup>94</sup> In *Samuels*, Dr. Samuels produced films depicting S/M behaviors, specifically whipping a naked man who was gagged and suspended from the ceiling with a riding crop.<sup>95</sup> There was no breaking of the skin, and there was evidence that cosmetics were used to enhance this S/M depiction.<sup>96</sup> Dr. Samuels intended to donate these films to Dr. Gebhardt of the Kinsey Institute, who had expressed an interest in obtaining S/M films, and there was no discussion of making these films available to the general public.<sup>97</sup>

Subsequent cases have likewise rejected the consent defense to a charge of S/M assault. In *Commonwealth v. Appleby*, the Supreme Judicial Court of Massachusetts sentenced the defendant to ten years in jail for beating his homosexual partner with a riding crop.<sup>98</sup> The court reasoned that the State’s ability to proscribe violent behaviors includes brutality occurring in private, consensual sexual relationships.<sup>99</sup> The battery charge “would be the same, however, whether or not the battery was related to

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92. BLCR, *supra* note 63, at 145 §10.46; *see also Report of the European Commission of Human Rights on the Spanner Appeal*, available at <http://www.sexuality.org/l/bdsm/laskey.html> (last visited Marcy 19, 2001) (Loucaides, dissenting) (On 15 October 1985 two professional boxers died as a result of a boxing match. “It appears that the treatment of activities that may cause physical injury by the legal system of the respondent State is not consistent. Apart from the example of boxing one may refer also to cosmetic surgery and tattooing where consent is sufficient to preclude offences [sic] being brought.”).

93. 58 Cal. Rptr. 439, 448 (1967).

94. *Id.* at 447.

95. *Id.* at 444.

96. *Id.*

97. *Id.* at 441-42.

98. *Commonwealth v. Appleby*, 402 N.E.2d 1051, 1056 (1980).

99. *Id.* at 1060-61.

sexual activity.”<sup>100</sup> The court held that because assault is a general intent crime, the only intent required is an intent to do the act causing the injury; a showing of hostile purpose or motive is not required.<sup>101</sup> Moreover, given the vicious nature of this sexual act, “[a]ny right to sexual privacy that citizens enjoy would be outweighed in the constitutional balancing scheme by the States’ interest in preventing violence by the use of dangerous weapons upon its citizens under the claimed cloak of privacy in sexual relations.”<sup>102</sup>

The Iowa Court of Appeals relied on *Appleby* in rejecting a consent defense in *State v. Collier*.<sup>103</sup> The court ruled that sadomasochistic conduct did not fall within the statutory exception for assault: “where the person . . . voluntar[ily] particip[ates] in a sport, social or other activity, not in itself criminal.”<sup>104</sup> Further, the victim’s consent is no excuse because “[a]n individual cannot consent to a wrong that is committed against the public peace.” In *Collier*, the defendant, an operator of an out-call model business tied an employee/model “spread eagle,”<sup>105</sup> blindfolded her, whipped and slapped her.<sup>106</sup> He performed sexual acts with paraphernalia and then sodomized her.<sup>107</sup> At trial, the victim testified for the prosecution, described these acts and also testified that he threatened her life.<sup>108</sup> *Collier* testified that the victim desired this conduct, she read books concerning bondage and sadomasochism, and she instructed him on the manner she wished to be beaten.<sup>109</sup> The court reasoned that regardless of the enjoyment the defendant might receive from this private sexual activity, “when such activity results in the whipping or beating of another resulting in bodily injury, such rights are outweighed by the States interest in protecting its citizen’s health, safety and moral welfare.”<sup>110</sup>

A possible aberration to this line of case law may be the recent New York case, *People v. Jovanovic*. In December 1999, the New York Supreme Court remarkably reversed a defendant’s conviction for kidnapping, sexual abuse and assault during an S/M encounter.<sup>111</sup> In *People v. Jovanovic*, the complainant, a then 20-year-old Barnard student and Jovanovic,

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100. *Id.* at 1060.

101. *Id.*

102. *Id.*

103. 372 N.W.2d 303, 307 (Iowa Ct. App. 1985).

104. *Id.* at 305.

105. *Id.* at 304.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 304-05.

110. *Id.* at 307.

111. *People v. Jovanovic*, 263 A.D.2d 182, 183 (Dec. 21 1999).

a Columbia graduate student, had exchanged a series of electronic mail messages where they discussed S/M.<sup>112</sup> The complainant's e-mail message described her consensual S/M activities with a third party.<sup>113</sup> After their date, Jovanovic brought the complainant back to his apartment, bound and blindfolded her, poured hot candle wax over her body, bit her nipples and collarbone, and then sodomized her with either a baton or his penis.<sup>114</sup> During this, the complainant claimed she asked him to stop and he refused.<sup>115</sup> At trial, the prosecutor included some of the e-mail messages, but excluded messages where the complainant discussed her S/M relationship with a third party and other S/M experiences pursuant to New York Rape Shield laws.<sup>116</sup> The court of appeals held that the trial court erred by excluding these e-mail messages because this prevented Jovanovic from fully presenting his defense to the charge of sexual assault and kidnapping – that the victim had consented or that he was under a reasonable belief that she had consented.<sup>117</sup>

Although the court stated in dicta that “consent is no defense to assault,” it stated that these messages were highly probative as to Jovanovic's belief that consent to these activities existed.<sup>118</sup> “Because the jury could have inferred from the redacted e-mail messages that the complainant had shown an interest in participating in sadomasochism with Jovanovic, this evidence is clearly central to the question of whether she consented to the charged kidnapping and sexual abuse.”<sup>119</sup> However, if consent is no defense to assault, then it is unclear why the court also reversed Jovanovic's assault conviction.<sup>120</sup> The dissent pointed out this incongruity, and recog-

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112. *Id.* at 183-84.

113. *Id.* at 183.

114. *Id.* at 188.

115. *Id.*

116. *Id.* at 191-92.

117. *Id.* at 200-01.

118. *Id.* at 198 n.5 (“[T]here is no available defense of consent on a charge of assault . . . . Indeed, while a meaningful distinction can be made between an ordinary violent beating and violence in which both parties voluntarily participate for their own sexual gratification . . . we need not address here whether consent to such conduct may constitute a defense, since the jury clearly found here that the complainant was physically injured.” The court finds that consent is a defense where no physical injury occurs).

119. *Id.* at 197.

120. Professor Cheryl Hanna reads the *Jovanovic* case as effectively establishing a consent defense to the charge of criminal assault. Cheryl Hanna, *Sex is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. Rev. 239, 278 (2001) (“By not separating out the sexual abuse and kidnapping charges from the assault charge, and thus reversing the entire conviction, the Appellate Division implicitly suggests that the jury could have found that she consented to the violence that was part of a sexual encounter.”).

nized that reversal of his assault charges implicitly held that failure to allow evidence of consent to S/M assault might result in reversible error.<sup>121</sup>

On March 30, 2001, the Washington State Court of Appeals in *Washington v. Guinn* considered a case where the defendant, on five occasions, solicited sex from prostitutes, forced them into a deserted shack at gun point, bound them, and then proceeded to assault, rape and sodomize the women.<sup>122</sup> He occasionally shaved their pubic hairs, dripped hot candle wax on various parts of their bodies, slapped their breasts, and stuck safety pins through their nipples and vaginal area.<sup>123</sup> He was charged with five counts of first-degree rape, five counts of second-degree assault, four counts of first-degree kidnapping and three counts of robbery.<sup>124</sup>

The court held that the trial court did not abuse its discretion in excluding expert testimony on deviant sexual behavior showing that S/M activities can be consensual.<sup>125</sup> The court reasoned that the testimony would have been of little assistance to the jury, stating:

that some people may consent to sadomasochistic acts has little bearing on whether *these* victims did. Moreover, the issue of consent turns not so much upon sadomasochist practices as upon the entire course of events, including taking the victims to deserted places, controlling them with a gun, tying and taping them, and threatening to kill them. *Jurors did not need expert testimony to decide whether, under these circumstances, these victims consented.*<sup>126</sup>

What is most troublesome about this holding is that the court assumed that an expert witness would not shed any light on whether consent existed for these acts because using a gun, threats, and binding the victims indicated that the victims did not consent. The court assumed this as a matter of law. The court held that, given this factual situation, evidence of consent is cumulative and irrelevant because no reasonable jury could consider consent to have been given under these circumstances.

However, an S/M expert would probably have stated that these antics might occur in an S/M incident. The use of threats and binding the submissive is commonplace in S/M encounters. The key is whether both parties knew that these antics were fantasies and that no threat of actual harm existed. Although the facts, as characterized by the court, indicated the

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121. Jovanovic, 263 A.D.2d at 206-07.

122. *State of Washington v. Guinn*, 2001 Wash. App. LEXIS 502, at \*1-\*6 (March 30, 2001) (unpublished opinion).

123. *Id.*

124. *Id.* at \*1.

125. *Id.* at \*11-\*12.

126. *Id.* (emphasis added).

victims did not consent, the court should not have precluded a defense based on its own moral views of reasonable and healthy sex.

The court's ignorance about deviant sexual practices is evidence in its second holding that the crimes of assault and rape did not merge nor were they the "same criminal conduct."<sup>127</sup> For both holdings, the court reasoned that although each set of crimes occurred at the same time and involved the same victim, assault and rape were distinguishable in this case because the two crimes required different purposes. "Guinn assaulted the victims not merely to facilitate the rapes; rather, he assaulted the women for his own pleasure. Guinn testified that dripping hot candle wax is 'part of' sadomasochism. . . Guinn's assault did not further the rapes; his purpose was distinct – sadomasochistic pleasure."<sup>128</sup> The crux of this circular reasoning may be that the purpose for assault was sadistic pleasure while the purpose for rape was sexual pleasure.

### C. *British Spanner Case*

The seminal case on the legality of S/M sex is the 1993 British House of Lords case, *Regina v. Brown*.<sup>129</sup> At present, *Regina v. Brown* contains the most thorough analysis of consensual S/M sex.<sup>130</sup> The Court, divided three to two, held that consent was irrelevant to a charge of S/M assault occasioning actual bodily injury.<sup>131</sup> Despite the fact that the victims consented to the acts, appellants could be convicted because "[s]ociety is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing."<sup>132</sup>

In *Brown*, the appellants were a group of homosexual males engaged in allegedly consensual body "mutilating" activities in the private homes of three of the appellants. Considered one of the most extensive police operations to date,<sup>133</sup> fifteen gay and bisexual men were charged with unlawful wounding, assault occasioning actual bodily harm, and aiding and abetting the same under §§ 20 and 47 of the Offenses Against the Persons Act 1861 (UK).<sup>134</sup> No permanent injuries were sustained, and, in each case, the sub-

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127. *Id.* at \*36-\*43.

128. *Id.* at \*39-\*42.

129. *R. v. Brown*, 1 A.C. 212 (Eng. H.L. 1994)(Scotland Yard's code name for the operation was "Operation Spanner," and the case is commonly referred to as the "Spanner case"). The opinion was upheld by the European Court of Human Rights. *Laskey, Jaggard and Brown v. United Kingdom* (Eur. Ct. H.R. 1995).

130. *Brown*, 1 A.C. at 212.

131. *Id.*

132. *Id.* at 236

133. *Say No to the Sex Police*, Countdown to Spanner, at <http://www.barnsdle.demon.co.uk/span/xpol.html> (last visited March 19, 2001).

134. *See Brown*, 1 A.C. at 235.

missive partner gave his consent. The activities had been videotaped and copies were distributed among the group. There were no allegations that the videotapes were made for public distribution or for economic gain. The videotapes, rather than dissatisfaction among members of the group, formed the basis of the prosecution when they accidentally came into police possession. The charges, as stated by the court, were described by the following:

victim had his body hair shaved. He was hit with stinging nettles. He had 36 cuts to his back and buttocks causing blood to flow. . . Jaggard aided and abetted by taking a video film whilst a co-accused pushed a safety pin through the head of L's penis . . . Atkinson had his penis nailed to a bench. He was caned, hit and rubbed with a spiked strap, then cut with a scalpel by Lucas. . . Laskey rubbed thistles into the testicles of M, causing blood to flow and then clamped M's testicles and hit them with nettles, drawing blood.<sup>135</sup>

The majority in *Brown* started with the proposition that causing actual bodily injury was unlawful unless "good reason" existed for allowing an exception. Using policy as the basis for its decision, the Court held that satisfaction of sadomasochistic desires did not constitute good reason, and thus an exception to the general rule was unavailing. The Court found that lawful activities like sports have a consent defense because "injury is merely incidental to the purpose of the main activity,"<sup>136</sup> whereas with S/M sex, "indulgence of cruelty" is the only purpose.<sup>137</sup>

The majority assembled a polemic of policy reasons for refusing to find a consent defense. First, the court believed the S/M participants could not foretell the degree of bodily harm that could result.<sup>138</sup> Consequently, actual injuries inflicted may be more severe than intended.<sup>139</sup> Second, the violent nature of the act was "dangerous and degrading to the body and mind" such that its level of violence distinguished it from corporal punishment, surgery or sports.<sup>140</sup> Third, the Court noted an interest in preventing

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135. Sangeetha Chandra-Shekeran, *Theorizing the Limits of the 'Sadomasochistic Homosexual' Identity in R v. Brown*, 21 MELB. U. L. REV. 584, 586 (1997). (When the court read these charges out loud in court, a Foucaultian may view this recitation as effectively casting the public trial as a confession. The irony in this is that the court stages a public spectacle, proliferating and acknowledging the very conduct the juridical domain seeks to isolate and punish.)

136. *Brown*, 1 A.C. at 241.

137. *Id.* at 236.

138. *Id.* at 235

139. *Id.*

140. *Id.*

the spread of H.I.V. and other sexually transmitted diseases.<sup>141</sup> Fourth, S/M homosexual activity cannot be regarded as beneficial to “the enhancement or enjoyment of family life or conducive to the welfare of society.”<sup>142</sup> Fifth, the House must “consider the possibility that these activities are practiced by others . . . who are not so controlled or responsible as the appellants claimed to be.”<sup>143</sup> Finally, the Court found a social interest in deterring such practices. They were concerned that if S/M behavior is “not overtly criminalized, it may proliferate.”<sup>144</sup>

#### D. Critiques of U.S. and British Case Law

Courts’ treatment of S/M sex indicate the judiciary’s ignorance of S/M practices and intolerance for sexual difference. This condemnation is supported by several observations.

##### Enhanced Sentencing

First, in several cases, the sentences imposed were unusually severe. For example, in *Appleby*, Judge Hennessey’s concurrence noted that a ten-year sentence was excessive where the only injury inflicted “was a ‘glancing blow,’ with no evidence of visible injury or after effects.”<sup>145</sup> He believed this sentence was influenced by the fact that the described incidents “are abhorrent to most persons[.]”<sup>146</sup> Similarly, in *Guinn*, the defendant was sentenced to 2,852 months (237 years).<sup>147</sup> This was allowed under the “exceptional sentence” exclusion.<sup>148</sup> The Washington court upheld consecutive sentences for rape and sadomasochistic assault without providing a clear explanation of why the two charges did not constitute the same criminal conduct.<sup>149</sup> Finally, the defendants in the British *Brown* case received up to four and a half-year sentences for engaging in consensual S/M

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141. *Id.* at 246

142. *Id.* at 255.

143. *Id.* at 246.

144. See Freckleton, *supra* note 2, at 68.

145. Commonwealth v. Appleby, 402 N.E.2d at 1061.

146. *Id.*

147. *Id.*

148. Washington v. Guinn, 2001 Wash. App. LEXIS 502, at \*44 (March 30, 2001) (Under Washington state law, an exception sentence may be imposed if the “(1) record supports its reasons, (2) the reasons justify an exceptional sentence as a matter of law, and (3) the sentence is not clearly excessive.”).

149. If the convictions involve the same criminal conduct, then the sentences should run concurrently, not consecutively. As previously noted, the court distinguished the motive underlying assault with the motive underlying rape.

conduct.<sup>150</sup> Notably, these sentences generally exceeded those meted out for violent, nonconsensual rape or battery, or for assaults against gays or lesbians.<sup>151</sup>

Second, in some cases, the sentences were increased by charging the defendants with causing serious bodily injury when only slight injuries were inflicted. In *Collier*, Judge Schlegel vigorously dissented from upholding the assault charge because “[w]hipping a person with a belt, the actual activity involved in this case, is not ‘itself illegal.’ Nor does a swollen lip, large welts, and severe bruises constitute a serious injury within the meaning of [the statutory code].”<sup>152</sup> Similarly, the charged conduct in *Appleby*, whipping the victim with a riding crop, “was a ‘glancing blow[.]’”<sup>153</sup> In *Guinn*, the defendant was charged with inflicting “serious physical injury” based on the fact that the candle wax “was hot and it stung” and the nipple clamps were “tight and cutting.”<sup>154</sup> The court reasoned that infliction of serious bodily injury included the causing of “serious physical pain.”<sup>155</sup>

Third, sentences may have been unjustifiably enhanced by wrongfully contending that the defendant used a dangerous weapon. For example, the court in *Appleby* treated a riding crop as a dangerous weapon as applied because it “is capable of being used to inflict serious bodily harm, and possibly even to cause death.”<sup>156</sup> Yet, no authority supported this assessment, nor was there any explanation as to how someone could be killed with a riding crop. Similarly, in *Jovanovic*, candle wax qualified as a dangerous weapon under New York law.<sup>157</sup> The police raid of sex party in Attleboro charged defendants with possessing a dangerous weapon – a wooden spoon.<sup>158</sup>

Torturing the statutory language in service of meting out severe sentences only results in morphing the terms “dangerous weapon” and “serious bodily injury” into arbitrary and meaningless categories. One of the alarming consequences of abhorrence toward deviant sexual practices is how effectively it weakens criminal law protections for all members of

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150. The Spanner Trust, *The History of the Spanner Case*, available at <http://www.spannertrust.org/documents/spannerhistory.asp> (required to use website cite because the *R v. Brown* opinion failed to state what sentence the defendants received).

151. *Id.*

152. *State v. Collier*, 372 N.W.2d at 309 (J. Schlegel dissenting).

153. *Commonwealth v. Appleby*, 402 N.E.2d at 1062.

154. *Washington v. Guinn*, 2001 Wash. App. LEXIS 502, at \*34.

155. *Id.* at \*34.

156. *Commonwealth v. Appleby*, 402 N.E.2d at 1057.

157. *Jovanovic*, 263 A.D.2d at 206 (Mazzarelli, J.P., concurring in part and dissenting in part).

158. *Paddleboro*, *supra* note 33.

society. Despite their good intentions and moral sensibilities, sentencing judges cannot permit their immediate emotive responses to S/M to sanction hyperbolic interpretations of the facts as they transpired.

#### Poor Statutory Interpretation

Fourth, in many cases, S/M sex was not clearly proscribed by the assault statute. The primary weakness of *Brown* was the Lords' attempt to fit the appellants' conduct into the 1861 assault statute titled "Offenses Against the Persons Act."<sup>159</sup> Lord Jauncey relied on the "abhorrent" nature of the acts involved to support the assumption that the behaviors were naturally unlawful.<sup>160</sup> As such, there was little statutory analysis on whether the assault statute actually proscribed the appellants' conduct.<sup>161</sup>

Similarly, Lord Templeman announced he was not ready to "invent a defence [sic] of consent for sado-masochistic encounters which breed and glorify cruelty . . . ."<sup>162</sup> However, the Court's holding effectively created a new crime.<sup>163</sup> The 1861 Act was being applied "to a new factual situation not already clearly covered."<sup>164</sup> Lord Mustill in dissent queried "whether the Act of 1861 (a statute which . . . clearly intended to penalise [sic] conduct of a quite different nature) should in this new situation be *interpreted* so as to make [the behavior] criminal."<sup>165</sup>

In *Collier*, the assault statute permitted consent to be a defense if the activity was a "sport, social or other activity."<sup>166</sup> The court held the defense inapplicable because the legislature did not intend S/M to fall under this exception.<sup>167</sup> The court determined this by relying on cases from other jurisdictions that addressed dramatically different statutes, namely *Appleby* and *Samuels*.<sup>168</sup> In dissent, Judge Schlegel argued that the majority's statutory analysis failed to acknowledge the words of the statute itself.<sup>169</sup> He argues that by using the nonspecific word, "other," the legislature intended

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159. *Brown*, 1 A.C. at 212.

160. *Id.* at 245.

161. *Id.* 246 (stating "If it is to be decided that such activities as the nailing by A of B's foreskin or scrotum to a board or insertion of hot wax into C's urethra followed by the burning of his penis with a candle or the incising of D's scrotum with a scalpel to the effusion of blood are injurious neither to B, C and D nor to the public interest then it is for Parliament . . . to declare them to be lawful.").

162. *Id.* at 236.

163. *Id.* at 274.

164. *Id.* at 222.

165. *Brown*, 1 A.C. at 274 (emphasis added).

166. *State v. Collier*, 372 N.W.2d at 305 (citing Iowa Code section 708.1).

167. *Id.* at 307.

168. *Id.*

169. *Id.* at 309 (J. Schlegel dissenting).

this exception to apply to a broad range of activities.<sup>170</sup> Because these words evince a legislative intent to create a “flexible framework,” Judge Schlegel would hold that S/M is “other activity” within the meaning of the statute.<sup>171</sup>

### Homophobia

Fifth, many of the cases dealing with homosexual S/M appear to be influenced by homophobia. For example, in *United States v. Marsh*, the defendant and the alleged victim had a 25-year homosexual relationship that began when the victim paid the defendant for sex.<sup>172</sup> Following this, a sexual relationship ensued and the defendant often asked the victim for money.<sup>173</sup> The defendant would threaten the victim if the victim withdrew financial support, and these threats became the basis of an economic extortion charge.<sup>174</sup> However, these threats were odd. The defendant threatened to ruin the victim’s business even though the victim no longer owned a business and to kill the victim’s mother even though his mother had been dead for several years.<sup>175</sup>

Judge John Noonan argued in dissent that this was not economic extortion but a dyadic dependency relationship. The defendant had no intent to actually threaten and the victim was not actually frightened by these baseless threats.<sup>176</sup> Noonan reasoned: “Say the relationship was unwholesome if one wishes to enter upon a moral judgment. The relationship was not criminal.”<sup>177</sup> The sexual and psychological aspect of this relationship that underlied the majority’s careless holding. “If Marsh had been a woman asking her lover for financial aid of a kind he had given her for twenty-four years; it is difficult to imagine that she would have been indicted, let alone have been convicted and sentenced to five years of imprisonment.”<sup>178</sup>

The British *Brown* decision also appears to be motivated by homophobia. All three Lords in the majority recognized the comfort they received from knowing that one of the younger participants, K., “has now

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170. *Id.*

171. *Id.*

172. 26 F.3d 1496, 1498 (9th Cir. 1994).

173. *Id.*

174. *Id.* at 1499.

175. *Id.* at 1504. Also, the pattern of giving to Marsh was peculiar. Doe sent small amounts by Western Union. He sent money to Marsh approximately every day or every other day, incurring substantial transaction expenses. *Id.* at 1506.

176. *See id.* at 1508.

177. *Id.* at 1507.

178. *Id.* at 1508.

settled into a normal heterosexual relationship.”<sup>179</sup> Also, the majority appeared preoccupied with the appearance of blood – a homophobic discursive tactic. The “presence of blood is then used . . . to signify the absolute threat of the spread of HIV . . . The judicial hysteria surrounding HIV is quite obviously linked to a pathologising [sic] of the homosexuality, positing homosexuality within a discourse of disease and contagion.”<sup>180</sup> Furthermore, the Lords failed to acknowledge that S/M sex is often “safer” than intercourse because most S/M sexual activity does not result in penetrative sex.<sup>181</sup>

Moreover, *Regina v. Wilson* indicated that the *Brown* court may have been more lenient if the appellants were heterosexual.<sup>182</sup> In *Wilson*, the appellant branded his initials on his wife’s buttocks with a hot knife and claimed the wife consented to this act. In light of *Brown*, the court of appeals held that the wife’s consent to this “tattooing” distinguished this conduct from an S/M assault. In so holding, the court declared that “sexual activity between husband and wife in the privacy of the home is not a matter for criminal investigation . . . .”<sup>183</sup> Chandra-Shekeran critiques the incongruity of these decisions, arguing that “despite the conception of S/M sex as violence, acts involving similar ‘violence’ within an authorized heterosexual relationship are not subject to the same level of public interference.”<sup>184</sup>

### Pop Psychology Diagnosis

Sixth, the case law reified the pathological deviancy of S/M sex when it doubted the actual existence of knowing consent. For example, the Lords questioned the presence of consent because the appellants were middle-aged men while the “victims” were youths.<sup>185</sup> Also, “drink and drugs” were employed to obtain consent and increase enthusiasm.<sup>186</sup> Similarly, *Samuels* assumed that practitioners of S/M were mentally depraved: “a normal person in full possession of his mental faculties does not freely consent

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179. *Brown*, 1 A.C. at 212, 235, 245 (paralleling the treatment of homosexuality acts and identity in *Bowers v. Hardwick*, a similar collusion of act and identity occurs in *Brown* with the construction of an S/M homosexual identity, treating the appellants acts as constitutive of an S/M identity. See generally Chandra-Shekeran, *supra* note 136.).

180. Chandra-Shekeran, *supra* note 136, at 594-95.

181. See BLCR, *supra* note 63, at 646, §10.27.

182. *R. v. Wilson*, QB 47 (1997).

183. *Id.*

184. Chandra-Shekeran, *supra* note 136, at 597.

185. *Brown*, 1 A.C. at 235.

186. *Id.* (the problem with this inquiry is that the Court then ignores the nature of appellate review because they are retrying the fact of freely given consent).

to the use, upon himself, of force likely to produce great bodily injury.”<sup>187</sup> The court then recited the rule for consent by a person without legal capacity, such as children and insane persons, although the issue of mental incompetence was never raised.<sup>188</sup> *Appleby* also expressed doubt that the victim consented to the S/M conduct.<sup>189</sup>

This presumed mental depravity of the “victim” by courts infantilizes, ostracizes, and derides the intelligence and agency of S/M participants. It is a rhetorical strategy, rather than a genuine attempt at psychological prognosis. This rhetoric regards S/M participants presumptively irrational, and thus, not capable of a legally-cognizable response. As a result, “since few judges or jurors can imagine why anyone would do S/M, it is easy to obtain convictions and brutal sentences.”<sup>190</sup> Moreover, categorizing S/M sex as simply “crazy” abnegates the duty to consider these issues in a judicious and complex manner.

## VI. Central Error: Aligning S/M Sex as Violence

The central error in all of these cases is the initial charging of S/M sex as assault, rather than recognizing this activity as a form of sexual expression, when S/M sex clearly espouses a sexual component.<sup>191</sup> Attorney Michael Fois argues that S/M “assaults” are more akin to “ripping off your blouse than stepping on your toe.”<sup>192</sup> However, case law and recent academic writings on S/M sex have consistently confused S/M sex as only violence.

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187. *People v. Samuels*, 58 Cal. Rptr. 439, 447 (1967).

188. *Id.* at 447.

189. *Commonwealth v. Appleby*, 402 N.E.2d at 1060 (discussing *Appleby*’s assertion that the victim consented to the relationship in general, and the beating with the riding crop, the court stated “[g]iving *Appleby* the benefit of this rather strained construction”).

190. *Rubin*, *supra* note 21, at 199.

191. Note that where S/M activities are charged as prostitution, courts are more inclined to find S/M as a sex act and thereby covered by the applicable prostitution statute. *Compare* *Commonwealth v. Morrell*, 41 Pa. D. & C. 3d 476, 478-9 (1986) (holding that Pennsylvania prostitution statute 18 Pa.C.S. § 5902(a)(1) term “sexual activity” includes “sado-masochistic sexual stimulation.” Notably, the statute defines “‘sexual activity’ . . . as homosexual and other deviate sexual relations.”); *with* *People v. Georgia A.*, 621 N.Y.S.2d 779 (1994) (New York Supreme Court held that “[s]ado-masochistic acts described by Ms. A.: foot licking, spanking, domination and submission does not appear to fit within the category of sexual conduct referred to in the statute.”). *See also* Telephone interview with Mark Weiner (May 10, 2000). Weiner is from Chicago, Illinois, and has worked on a few prostitution cases. It is very easy to obtain convictions for dominatrix who receives money for performing BDSM on clients because the Chicago prostitution statutes proscribe any contact with the genital region with any object. *Id.*

192. Interview with Michael Fois, *supra* note 66.

Professor Cheryl Hanna's recent article on consent and S/M sex maintains that S/M sex should be conceptualized as only violence, and divorced conceptually from its sexual components.<sup>193</sup> Thus, the legal inquiry surrounding S/M sex is only "how much violence is too much violence."<sup>194</sup> She desexualizes S/M by identifying the activity as unregulated violence, as distinguished from sports where aggression is organized, mediated, and thus, legitimate.<sup>195</sup>

However, I contend that Hanna's fundamental view of S/M is incorrect. For Hanna, S/M sex is consensual violence with sexual aspects, whereas I argue that S/M sex is consensual sex with potentially violent aspects. This is not a disagreement over semantics. Indeed, the classification of the activity as sex or violence is central in determining how policy concerns should be balanced. Pleasure gained from sex is a social good, while pleasure gained from violence is socially reprobated. When S/M sex is classed as consensual violence, there are few sufficiently compelling policy arguments that could redeem this conduct. On the other hand, if S/M sex is viewed as a sexual activity, then convincing social policies must exist to justify its continuing prohibition.<sup>196</sup>

Consequently, to resolve the legal dispute over S/M, we must first determine whether it should be classified as sex or violence, with the understanding that if it is seen as sex, a consent defense will be available. Second, we must ask whether there are countervailing social policy considerations that call for the continuing prohibition of S/M regardless of its sexual nature.

#### A. *S/M is Sex*

An S/M exchange should not be classified as violence because the presence of negotiation and consent in S/M remove core features of violence.<sup>197</sup> In a sexual assault, the victim is not asked to consent, and the victim cannot negotiate its duration, design, or performance. However, in S/M, the motivation is not hostility but mutual excitement. The submissive partner very much controls the situation, tells the dominant what is desired, and voluntarily places him or herself in the carefully delimited exchange. Although some S/M sex is not organized or carefully negotiated, if a person is bound and whipped during intercourse absent their clear and une-

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193. See generally Hanna, *supra* note 120 ("To suggest that anyone should have the right to control, beat, or brutalize another and escape culpability under a theory of sexual consent violates our deepest notions of freedom, human rights, and civility."). *Id.* at 289.

194. *Id.* at 288.

195. See generally *id.*

196. BLCR, *supra* note 63, at 144 § 10.42, 10.43.

197. *What is SM*, *supra* note 40.

quivocal consent, a sexual assault has occurred regardless of the assailant's intent.<sup>198</sup> Mutual definition, a central tenet of "Safe, Sane and Consensual," requires both parties to recognize that they are engaging in mutual S/M.

Most importantly, S/M is not so much a "replay" of violent interactions as it is a self-consciously transmogrified parody. Theorist Patrick Hopkins argues the distinction between S/M and true violence is that S/M desires a *simulation* of domination, not its replication.<sup>199</sup>

SM scenes gut the behaviors they simulate of their violent, patriarchal, defining features. What makes events like rape, kidnapping, slavery, and bondage evil in the first place is the fact that they cause harm, limit freedom, terrify, scar, destroy, and coerce. But in SM there is attraction, negotiation, the power to halt the activity, the power to switch roles, and attention to safety. Like a Shakespearean duel on stage, with blunted blades and actors' training, violence is simulated, but is not replicated.<sup>200</sup>

The simulation of brutality is not a legal substitute for actual violence. Pleasure lies in the fantasy. What is sought is "simulation qua simulation."<sup>201</sup> Hopkins illustrates this theory with a roller coaster analogy. The participant voluntarily places himself or herself in a situation of intense stimulation (fear, thrill, or adrenaline rush) and is given the sense of plummeting to her death or smashing into metal railings. She does not actually want to plummet to her death, the roller coaster is not a weak imitation of what is actually desired. The experience desired by the roller coaster rider is "precisely the simulation of that lethal experience and not because simulation is all she can get, but because the simulation *itself* is thrilling and satisfying."<sup>202</sup>

Finally, "equating sadomasochism with violence loses sight of the activity's social meaning for those who participate in it."<sup>203</sup> Most S/M practitioners see S/M sex as a consensual agreement to induce particular

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198. *Supra* section 3.A.

199. Patrick D. Hopkins, *Rethinking Sadomasochism: Feminism, Interpretation, and Simulation*, 9 HYPATHIA 116 (Winter 1994); *see generally* JEAN BAUDRILLARD, *SIMULATIONS* (Paul Foss, Paul Patton, and Philip Beitchman trans., 1983) (Hopkins takes from Baudrillard's treatment of the "orders of simulation," where the simulation is not a fake, a inferior copy of the real, rather, the copy has power and meaning precisely because it is a simulation).

200. Hopkins, *supra* note 200, at 116.

201. *Id.*

202. *Id.*

203. BLCR, *supra* note 63, at 655, §10.48.

sensations, with one of those sensations being pain.<sup>204</sup> Yet, the consensual agreement of the parties' is overridden by judicial and academic readings of S/M sex as uncivilized or undignified violence.<sup>205</sup> This reading undermines the ability of practitioners to define their own pleasure. The belief that these individuals are unable to truly know what is violent behavior, and thus unable to genuinely consent, contains condescending and false psychological stereotypes. In addition, it infantilizes the participants, and thereby justifies singular and adverse treatment of S/M practitioners in other social arenas.

*B. Because S/M Is Sex, A Consent Defense Should be Available*

As previously established, if an activity is conceived as only violence, then no consent defense is available because the violent activity is a harm against society, not the individual. If the activity is classed as sex, then the act is only a crime if the individual did not consent to the personal invasion.

This principle is illustrated in several S/M cases, including *Appleby* and *Brown*. In these cases, the defendants claimed their activity was sexual, and thus should have been charged under the appropriate sexual assault statute, thereby allowing a consent defense. However, because the courts treated their conduct as only violence, consent was no defense. In *Appleby*, under Massachusetts law, consent is a defense to sexual acts considered "unnatural and lascivious."<sup>206</sup> The court held this statute inapplicable because the S/M conduct was more than simply lascivious sex; it was an act of violence.<sup>207</sup> The defendant was prosecuted not for committing homosexual acts but for assault. The court reasoned: "[t]he fact that violence may be related to sexual activity . . . does not prevent the State from protecting its citizens against physical harm."<sup>208</sup>

Similarly, in *Brown*, it appeared that the appellants could have been charged under the Sexual Offenses Act, rather than the Offenses Against

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204. *Id.* at 644, §10.21. ("pain" may also be a poor description for the sensations arising from an S/M encounter. Sex research indicates a person's pain threshold may rise with sexual excitement and that physiological responses to pain are similar to that of orgasm. What may appear painful may not be so experienced if done in a sexual context.); *see also* Moser, *supra* note 31, at 147. (giving of a hickey may be experienced as painful if unexpected but not so if done in a sexual context)

205. Chandra-Shekeran, *supra* note 136, at 587; Hanna, *supra* note 121, at 289 (suggesting that condoning S/M activities would affront social notions of "civilized humanity.").

206. *Commonwealth v. Appleby*, 402 N.E.2d at 1060 (citing *Commonwealth v. Balthazar*, 318 N.E.2d 478 (1974) (This exception is mainly reserved for sodomy charges.)).

207. *Id.* at 1060.

208. *Id.*

the Persons assault statute.<sup>209</sup> Lord Templeman found that an assault charge was more appropriate because “the violence of sadists and the degradation of their victims have sexual motivations but sex is no excuse for violence.”<sup>210</sup>

In *Guinn*, the court engaged in linguistic gymnastics to justify charging the defendant with both rape and assault. Under Washington law, two crimes “merge” if the purpose or effect of one crime facilitated another crime.<sup>211</sup> The court’s only reason why rape and assault did not merge was that the purpose for the assault was the satisfaction of sadomasochistic pleasure.<sup>212</sup> The court did not explain how the purpose of satisfying sadistic pleasure is particular to assault but not to rape.<sup>213</sup> Rather, it operated under a fiction that the law could discern when the defendant was motivated only by sex and when he was motivated only by violence.

In holding that the two sentences should not run concurrently because they were not the same criminal conduct, the court again failed to clarify how the two acts are distinguishable. The court reasoned that the two crimes espoused different intent requirements but then said “[e]ven if the required intent was the same . . . Guinn’s assaults did not further the rapes; his purpose was distinct – sadomasochistic pleasure.”<sup>214</sup> Thus, even if Guinn’s intent was the same (receiving sadistic pleasure), the two crimes did not merge because the S/M act was an act of violence, wholly distinguishable from rape, which the court problematically presumed was only an act of sex.

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209. *R. v. Brown*, 1 A.C. at 247. There is some argument that prosecutors failed to charge sexual abuse within the allowed statutory time. Also, the assault charge carried a greater sentence.

210. *Id.* at 237.

211. *Washington v. Guinn*, 2001 Wash. App. LEXIS 502, \*36 (March 30, 2001) (Merger is where “a particular degree of crime is committed only when the defendant commits another criminal act . . . But when offenses have independent purposes or effects, each offense may be punished separately.”).

212. *Id.* (“Guinn assaulted the victims for sadomasochistic pleasure. Thus, Guinn’s assault convictions do not merge with his rape conviction. .) I suspect the court means to say “sadistic.” The term sadomasochistic is inapropos because it requires both participants to willingly engage in the sexual activity. The court’s analysis would be much clearer if they used the term “sadistic” which means receiving sexual gratification by inflicting pain on another person.)

213. *Id.* The court ignores the fact that rape is not motivated by achieving sexual pleasure but by the desire to dominate and violate another person. Indeed, studies indicate the rape perpetrator rarely achieves orgasm during the sexual assault.

214. *Id.* at \*42-\*43 (emphasis added).

### C. *Legislative Proposal*

I propose the legislature legalize private, consensual S/M sex that does not cause grievous bodily injury or death. I suggest adoption of the British Law Commission Report, which holds that it is not a criminal offense to injure a person who: (1) is a capable adult; (2) has given full and informed consent; and (3) suffers no permanent or serious bodily injury.<sup>215</sup> I would also require that the victim testify at trial to the existence and extent of his or her consent. The victim's consent should be a defense to a charge of assault, and the defendant's liability should be judged on the facts as she or he believed them to be.<sup>216</sup> This proposal strikes a balance between respecting personal sexual autonomy and preventing non-consensual injuries.

Courts have no business inventing the crime of S/M sex based on policy determinations that S/M sex should not be legal. In *Brown*, Lord Mustill argues that "whether the public interest requires a recognition of private sexual activities as being in a specially exempt category" is a value decision which should be made by Parliament "after a thorough review of all the medical, social, moral and political issues, such as was performed by the Wolfenden Committee."<sup>217</sup>

S/M sex does not fall neatly into the preexisting crime of assault because consensual, sexual acts are not merely exertions of physical force in a sexualized context. Without clear statutes stating the legal status of S/M, the judiciary has had free reign to engage in covert policy assumptions and moral condemnation under the guise of statutory interpretation – interpreting assault statutes which have no mention of bondage sex in their legislative history.

A liberalist Millian debate frames the issue of whether individuals "should be permitted to behave as curiously and unpleasantly as they wish provided that they do not unacceptably interfere with the rights of others."<sup>218</sup> S/M advocates claim that personal sexual conduct is a fundamental right and that they should be free to choose their own forms of sexual expression.<sup>219</sup> However, not all choices are equally commendable and there are always limits to pleasure seekers. This idea is congruous with Lord Devlin's belief that "criminal law [should be] a means of coercing

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215. BLCR, *supra* note 63, at 656-57, §10.52-55.

216. *Id.* at 599.

217. *Id.* at 273-74 (In 1957, the Wolfenden Committee, after extensive study, released a report to the British Parliament recommending the decriminalization of private homosexual acts between consenting adults.).

218. Freckelton, *supra* note 2, at 69.

219. BRAME, *supra* note 51, at 35.

morality or facilitating paternalistic regulation of morality.”<sup>220</sup> Ultimately, the degree of paternalistic intervention by the State should be made by the representative political body. Granted, the majoritarian branch often fails to protect the rights of sexual minorities. However, it appears that public sentiment and psychological research regarding S/M sex may be shifting.<sup>221</sup> The legislature is better equipped at weighing competing social, medical and moral concerns.

#### D. *The Social Consequences of Creating an S/M Consent Defense*

There are five important reasons supporting the creation of an S/M consent defense. First, assault charges should not be brought if the victim clearly and unequivocally claims the activities were voluntary. By doing otherwise, the State’s interest in policing deviant sexual practices overrides concerns for the well being of the participants under the guise of maintaining moral and “civilized humanity.”<sup>222</sup>

Second, approximately ten percent of Americans are engaging in S/M behavior. The prohibition of S/M sexual activities would probably not deter S/M because, like sodomy, the conduct would continue in private bedrooms, sex clubs, and secret dungeons. Moreover, legal prohibitions may work to enhance S/M taboo status, making people feel very “naughty” indeed.<sup>223</sup>

Third, *Brown*, *Samuels* and progeny cases have increased prejudice against S/M and its practitioners, threatening the legal rights of S/M par-

220. Freckelton, *supra* note 2, at 69.

221. See *infra* Part III.A.

222. Hanna, *supra* note 121, at 290 (arguing that consent should not be a defense in S/M cases). Rubin illustrate the dangers of disembodiment of criminal prosecution to abstract moral principles in the following passage:

Since assault is a felony, the State can press charges without a complaint from or even over the objections of the “victim.” Once a sexual activity is construed as assault, the involvement of the partner is irrelevant . . . The bottom could protest that they were only making love as her or his lover is hauled off to jail. If the couple is gay or otherwise unmarried, the submissive could even be subpoenaed and forced to testify against her or his partner in court. While the protests of the bottom might not save the top from prison, they might be used as evidence to declare the bottom mentally incompetent. *Again, only the distortions of anti-SM bigotry could locate the abuse of power in this scenario within the S/M relationship rather than with outsiders who interfere with it.*

Rubin, *supra* note 21, at 200 (emphasis added).

223. See SIGMUND FREUD, *TOTEM AND TABOO* 35 (James Strachey trans., 1950) (“taboo is a . . . prohibition imposed (by some authority) from outside, and directed against the most powerful longings to which human beings are subject. The desire to violate it persists in their unconscious; those who obey the taboo have an ambivalent attitude to what the taboo prohibits. The magical power that is attributed to taboo is based on the capacity for arousing temptation[.]”).

ticipants. One S/M organization argued that *Brown* “gives an open ticket for harassing our community. This includes cheap journalists and some members of the police.”<sup>224</sup> Lack of case law on S/M does not reflect a lack of arrests or police harassment, and given the highly private and potentially embarrassing nature of the charge, there is added incentive to plead guilty rather than risk public disclosure or a hostile jury. Attorney Michael Fois argues that due to the “social stigma attached to S/M, and the stigma of arrest . . . [there is] the strong likelihood that arrested defendants – male and female – will, for obvious reasons, seldom go to trial, seldom test the law.”<sup>225</sup>

Fourth, prohibitions of S/M sex would only work to drive this activity underground. This would be socially detrimental for several reasons. Given the fact that S/M sex will undoubtedly continue, the current law endangers people by clamping down on safe sex and safe practice literature. Especially due to the recent proliferation of sex toys geared towards S/M sex, many people are experimenting with materials that can be dangerous.<sup>226</sup> In response to this, several S/M organizations hold workshops on S/M safety, such as how to avoid H.I.V. transmission, safe bondage and negotiation techniques.<sup>227</sup> For example, on the topic of slapping, one group advised that “a Top needs to know that he or she should have one hand under the submissive’s jaw to support and steady the head, thus preventing neck or jaw injury . . . .”<sup>228</sup> There is considerable concern among S/M groups that they may be prosecuted for aiding and abetting assault if they discuss safe methods of causing pain in consensual sex play.<sup>229</sup>

It has been reported that at least one death has occurred as a direct result of the *Brown* decision, involving a man who practiced “breath restriction.”<sup>230</sup> This man feared involving his partner because he did not want his partner to face liability under *Brown*, and he died while engaging in “breath restriction” alone.<sup>231</sup> One S/M practitioner has claimed several deaths have occurred due to lack of freely available safety information.<sup>232</sup> Another S/M group reported that, as a result of *Brown*, people are discour-

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224. BLCR, *supra* note 63, at 652.

225. Michael Fois, Memorandum of Law of Amicus Curiae, National Coalition for Sexual Freedom, *People v. Jovanovic*, (No. 1093/96) (internal citations omitted).

226. See Trebay, *No Pain, No Gain*, *supra* note 9.

227. *Id.*

228. MOSER, *supra* note 31, at 118.

229. BLCR, *supra* note 63, at 651.

230. *Id.* at 651-53.

231. *Id.* at 653.

232. *Id.* at 653.

aged from coming to S/M “clubs and social spaces – a network of safety advice.”<sup>233</sup>

Fifth, the illegal status of S/M discourages victims of S/M abuse from reporting to the police or going to the hospital after an accident. Many practitioners are hesitant to report S/M crimes to the police for fear it may lead to their own prosecution, police harassment and mockery, or blackmail.<sup>234</sup> Given the prejudice surrounding their sexual behavior, according to an NCSF survey, 96% of those who reported being harassed or attacked because of their sexual practices never reported the crime.<sup>235</sup> “Some of the reasons given were: ‘Didn’t think authorities would believe me.’ . . . ‘Wouldn’t have been taken seriously.’ ‘Who would believe me.’”<sup>236</sup> Attorney Paul Trump described a client who had gone to the police after she was assaulted and raped by her boyfriend.<sup>237</sup> The two were in an S/M relationship. During one exchange, she used a safety word, but he refused to stop. The police conducted a summary investigation of the incident, determined the conduct to be consensual, and then dropped the charges. She eventually filed a civil suit, and the case quickly settled.

The British Law Commission Report (“BLCR”)<sup>238</sup> also cites an anecdote that illustrates practitioners’ reluctance to report abuses. During an investigation of a serial killer of gay S/M men, the police faced huge difficulties in having S/M practitioners speak with them despite this threat to their community.

Similarly, in New York, the case of the “Dangerous Top” was cracked with the assistance of S/M organizations. Payte was a serial sexual assailant preying on the gay male S/M community for ten years. He would invite a man up to his Park Avenue apartment under the pretext of consensual S/M sex, but upon restraining the victim, Payte proceeded to abuse the men brutally. Payte was not detected by police authorities for several years because victims were reluctant to report the abuse they suffered.

Although prosecuting attorneys and police argue that prosecutions are rare and investigation of sex clubs and S/M relationships are a low priority, this does not assuage the fear of prosecution and harassment that exists in

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233. *Id.* at 652.

234. *Id.*

235. *What is SM*, *supra* note 40.

236. *Id.*

237. E-mail correspondence with Paul Trump, Attorney (May 7, 2001) (on file with author).

238. BLCR, *supra* note 63.

the S/M community.<sup>239</sup> Indeed, 26 S/M participants in the *Spanner* case were “cautioned” for aiding and abetting offenses against themselves.<sup>240</sup> This may be warranted given the lax definitions of “dangerous weapon” and “serious bodily injury.” Reluctance to go to the police following an incident is also based on fear that the S/M practitioner will become an easy suspect due to their sexual proclivities.

*E. An S/M Consent Defense’s Effect on Sexual Assault<sup>241</sup> and Domestic Violence Prosecutions*

Cheryl Hanna is incredibly persuasive in highlighting the potential social consequences for carving out an S/M exception.<sup>242</sup> Primarily, she worries that an S/M consent defense would undermine rape and domestic violence law because a defendant could easily perjure testimony that the victim asked for or sought out violent S/M sex. She states:

If consent were allowed as a defense in the S/M context, defense attorneys would have carte blanche to raise it in every sexual assault case where the victim is injured. This would essentially gut rape law jurisprudence as it now stands. So too could defense attorneys raise the S/M defense in many cases of domestic violence, undermining the slow and steady strides the law has made in sanctioning male violence.<sup>243</sup>

The concern is well grounded given the private nature of sexual relationships – especially when the victim is murdered,<sup>244</sup> unavailable, or unwill-

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239. Hanna suggests, “truly safe and consensual S/M cases are not likely to ever be pursued. It seems highly unlikely that many prosecutors will waste their time on cases with little evidence, and where the harm is questionable at best.” Hanna, *supra* note 121, at 289. However, similar to sodomy regulations, although it may not be actively prosecuted, it can easily become the basis for discrimination, harassment, and the illegality of this behavior creates a disincentive for reporting harms related to this behavior.

240. BCLR, *supra* note 63, at 518 §1.20 (this indicates that the Lords’ were primary motivated by disgust at the sex acts rather than out of concern for the victim’s well-being).

241. I have included the discussion of sexual assault because I believe people are concerned with what effect legal acknowledgment of S/M sexuality may have on rape prosecution. However, my general proposition is that S/M is not violence and thus, should not be prosecuted under assault charges. S/M sex being charged as rape is not a strong concern because first, this is a recognition that S/M activities are sexual expressions for which there can be consent. Second, if the victim alleges that a rape occurred, it probably was not S/M. See Interview with Michael Fois, *supra* note 66.

242. Hanna, *supra* note 121, at 272.

243. *Id.* at 285

244. See Richard Lacayo, *The Rough-Sex Defense*, TIME, May 23, 1988, at 55. The defense that the victim enjoyed rough sex has also been used in cases where the victim has been murdered. In these cases, the defendant claims that a homicide occurred inadvertently during an episode of rough S/M sex, thereby mitigating the requisite mens rea for murder, intent to kill, so that manslaughter or negligent homicide is the most the defendant can be

ing to testify either because she is a domestic violence survivor and fears retaliation by her partner, or she is an avid S/M enthusiast and will have nothing to do with her partner's prosecution.

Moreover, Hanna believes that the high risk of perjured testimony in rape or domestic violence cases far outweigh the potential benefits in permitting S/M sex. She claims "there are far more people who have been victimized by sexual violence than those who have been held criminally culpable for engaging in safe, consensual S/M."<sup>245</sup>

The case of *People v. Crispo*, a case involving the S/M rape between two gay men, illustrates the viability of this concern. In *Crispo*, the defendant successfully argued that "since sadomasochists customarily evince some resistance as part of their sexual activity, the defendant was justified in believing the victim's resistance was a mere sham."<sup>246</sup> The jury acquitted because they could not find, beyond a reasonable doubt, that the defendant did not reasonably believe the victim consented.

Although I acknowledge that there is a grave potential for abusing an S/M sex defense, such is the case whenever a consent defense is allowed. Several defenses have proof problems, including a consent defense in rape cases or mental insanity pleas. These difficult cases still trust the judicial adversarial fact-finding system. Through cross-examination, evidentiary rules, expert testimony, and thorough investigations, the law assembles a narrative of what events transpired. Moreover, defense attorneys are ethically required not to put forth perjured testimony. Additionally, because my proposal requires that the victim testify at trial, this would corroborate the defendant's testimony or conversely, the victim's failure to testify at trial would render the defendant's testimony suspect.

Most importantly, in assault cases involving intimate relationships, defendants are still bringing forth some version of S/M or "rough sex" defenses. Particularly in domestic violence cases, the social perception of the victim as masochistic is prevalent and capitalized upon by defend-

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convicted. Joseph Porto used this defense in his murder trial. It is alleged that Porto confessed "on videotape that he had strangled his girlfriend [Holland, 17] till 'my hands got tired,' then used his high school graduation tassel to finish the job." Although he at first stated he exploded in a jealous anger when she told him she wanted to see other boys, on the witness stand, Porto claimed he invented that story because he was ashamed of the truth: his girlfriend "begged him to wrap a rope around her neck to produce a state of near suffocation, called sexual asphyxia . . . In his excitement, he pulled too hard." The jury found Porto guilty of criminal negligence and sentenced him to four years in prison. Robert Chambers, also known as the "Preppie Murderer," gave a similar alibi for his strangulation of Jennifer Levin in Manhattan's Central Park. *Id.*

245. Hanna, *supra* note 121, at 288-89.

246. *People v. Crispo*, No. 3105-85 (N.Y. Sup. Ct. Oct. 16, 1998).

ants.<sup>247</sup> By confronting this tendency head on, the prosecution or defense may call an expert to explain what S/M consent truly means.<sup>248</sup> The S/M expert would educate the jury that S/M involves carefully defined negotiations, mutual definition, and above all else, consent that can be revoked at any point. With this information, defense counsel will not be able to exploit faulty S/M stereotypes depicting masochists as self-destructive and S/M sex as brutality.

The expert would testify that there are several features distinguishing a consensual S/M relationship from domestic violence. First, domestic violence is a pattern of intentional intimidation of one party to coerce and isolate the other partner. Being abused is involuntary and nonconsensual. Signs of domestic abuse include attempts to isolate the partner, a cycle of justifications and apologies for the abuse and then gradual build up of tensions. The victim does not desire the abuse, rather, she is ashamed and attempts to justify and hide her injuries. However, "S/M partners ask for and enjoy the behavior; they are often disappointed if the behavior does not happen. There is no apology for the behavior after it is over, rather both partners are happy and satisfied that it occurred."<sup>249</sup>

Without question, there are cases where individuals have been so psychologically damaged by their abused spouses that they claim consent to offset the shame surrounding the relationship. Domestic violence cases where the woman feels she was in an S/M relationship present a difficult situation to judge, requiring a case-by-case analysis. Because the issue of whether consent had been freely given is immensely difficult to determine, giving more information about the nature of S/M and clearly explicating the distinction between S/M and domestic abuse is better than refusing to acknowledge the issue altogether.

With respect to sexual assault prosecutions, the expert would likely testify that an episode of S/M sex would require clear, informed, and verbalized consent and that constructive consent is no substitute for actual consent. Even if actual consent existed, the conditions under which consent was given should be scrutinized to determine whether it was informed and voluntary. Even if a person has a rape fantasy, and engages in simulations of rape or bondage with a trusted partner, this never means he or she is interested in being raped in real life. An S/M encounter is heavily negotiated and the "bottom" has substantial control in negotiating the scene.

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247. Hanna, *supra* note 121, at 244.

248. If an S/M defense is invoked, the NCSF and similar S/M organizations are interested in assisting prosecutors in recognizing signs of domestic violence versus consensual S/M. They are very much opposed to faulty S/M sex defenses which perpetuate S/M stereotypes and stigmatize the S/M community.

249. *What is SM?*, *supra* note 40.

Evidence of negotiation should be presented and tested by traditional adversarial processes.

Finally, it should be clear to both parties that they are engaging in a fantasy role-play. Neither parties should experience a real threat to his or her safety. If the victim files a complaint or alleges experiencing the threat as real, then this was probably not a consensual S/M exchange.

## VII. Is S/M on the Feminist Agenda?

The school of "Radical Feminism" closely mimics legal doctrine in its attack against S/M. Although engaging in a more sophisticated analysis, Radical Feminists likewise challenge the substance of consent to a S/M encounter. Their primary criticism is that S/M unwittingly adopts the naïve paradigm of "consent" permeating through U.S. legal doctrine. Liberal formulations of "consent" ignore how patriarchal institutions create inequalities of power that make voluntary consent impossible.<sup>250</sup> Radical Feminists would object to any legal recognition of S/M for two primary reasons. On a meta-social level, S/M sex should be discouraged because it leads to the eroticisation of sexual violence.<sup>251</sup> On a personal level, a woman's consent to S/M sex should be overridden because consent cannot be voluntary given the pervasive gender inequalities in society.

First, Radical Feminists would argue that S/M is only violence and should not be socially or legally tolerated. Andrea Dworkin argues that S/M sex reinforces the prevalent belief that "a woman's erotic femininity is measured by the degree to which she needs to be hurt, needs to be possessed, needs to be abused, needs to submit, needs to be beaten, needs to be humiliated, needs to be degraded."<sup>252</sup> The proliferation of S/M depictions eroticizing violence increases sexual brutality against women, and S/M sex as fantasy or as a negotiated experience permits the enactment of sexual violence. Moreover, because S/M is repetition of a behavior, especially an eroticized behavior, it is likely to cause habituation or addiction.<sup>253</sup>

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250. See EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 94-95 (1997). Judith Butler's later works acknowledge the "insistence that consent precedes sexuality in all instances signals a return to a pre-Freudian notion of liberal individualism in which 'consent' is constitutive of personhood." *Id.* at 95.

251. See generally Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L. J. 149 (2000).

252. John Stoltenberg, *Sadomasochism: Eroticized Violence, Eroticized Powerlessness*, in AGAINST SADOMASOCHISM: A RADICAL FEMINIST AGENDA 126 (Robin Ruth Linden, Darlene R. Pagano, Diana E. H. Russell & Susan Leigh Star, eds. 1982).

253. Jesse Meredith, *Response to Samois*, in AGAINST SADOMASOCHISM: A RADICAL FEMINIST AGENDA 97 (Robin Ruth Linden, Darlene R. Pagano, Diana E. H. Russell & Susan Leigh Star, eds. 1982).

Similarly, Hanna argues that the law has a normative function in conditioning “civilized masculinity,” a masculinity that engages in “non-violent and non-dominating” sexual practices.<sup>254</sup> Likewise, the law should protect women from their masochistic tendencies.<sup>255</sup> Thus, legal recognition of S/M as a viable expression of sexuality only reinforces the legitimacy of masculine sadism.

Second, Radical anti-S/M Feminists question whether a woman can give meaningful consent to an S/M encounter. Because patriarchal institutions make women economically, psychologically and socially dependent upon men, individual women are incapable of providing voluntary and knowing consent.<sup>256</sup> Moreover, they argue that the existence of consent does not undercut S/M as sexual violence; rather, it illustrates how gender domination has permeated human relationships and erotic desires. “Women are certainly going to have sexual fantasies that involve dominance and submission because this is how we have learned to experience our sexuality.”<sup>257</sup> The question is not whether consent existed, but rather, the hows and whys of consent.

Judith Butler notes how S/M advocates espouse a “fundamental faith in the rightness of desire” without recognizing that desires have a particular historical and social biography.<sup>258</sup> Desires are not straightforward; they are “complexes of things, fears, hopes, memories, anticipations. They arise from our concrete situation and are colored by the ambiguity of our experience.”<sup>259</sup> S/M proponents espouse a non-reflexive attitude that ignores how desire, choice, and consent are informed by social realities. “[T]o conceive of desire as a law unto itself, “impeccably honest,” and the key to destroying repressive sexual orders, is to exaggerate the autonomy and intelligence of desire. Our desires can only be as sure and free as we are.”<sup>260</sup>

Radical Feminists’ anti-S/M arguments are theoretically persuasive but problematic for several reasons. First, the BLCR, considering similar

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254. *Id.* at 270.

255. *Id.*

256. Sally Roesch Wagner, *Pornography and the Sexual Revolution: The Backlash of Sadomasochism*, in *AGAINST SADOMASOCHISM: A RADICAL FEMINIST AGENDA* 35 (Robin Ruth Linden, Darlene R. Pagano, Diana E. H. Russell & Susan Leigh Star eds., 1982). Although this then begs the question of whether women can ever consent to any sexual encounters or whether all heterosexual encounters are rape. See Hanna, *supra* note 121, at 270 (claiming that the masochist is “generally the woman in the paradigmatic heterosexual ritual.”).

257. *Id.* at 39.

258. Judith Butler, *Lesbian S & M: The Politics of Dis-illusion*, in *AGAINST SADOMASOCHISM: A RADICAL FEMINIST AGENDA* 171 (Robin Ruth Linden, Darlene R. Pagano, Diana E. H. Russell & Susan Leigh Star, eds., 1982).

259. *Id.* at 172-73.

260. *Id.* at 173.

feminist arguments in their analysis of S/M, noted that questions about the substance of consent given social inequality are imponderables, and as such, are not amenable to legal rules.<sup>261</sup> Regardless of debates surrounding false consciousness and inability to consent, U.S. legal doctrine presumes that, after a certain age, an individual is capable of making his or her own decisions. The bright line rule demarcates permissible paternalistic State interference and buffers hasty moralizing judgments. Because there is no evidence indicating S/M creates a sufficiently concrete threat of sexual violence against women, paternalistic State intervention is not warranted.

Second, much of the Radical Feminist argument against S/M relies on highly sensationalized media depictions of S/M encounters. The previous sections dealing with sociological understandings of S/M undermine many of the Radical Feminists' generalizations. Although their argument is theoretically convincing, it is flawed practically because it rests on little sociological research. For example, no studies have conclusively indicated that women are more sexually responsive to playing the "bottom" or sexual submission. Indeed, several studies indicate that men are more drawn to playing submissive roles.<sup>262</sup>

Third, Radical Feminists cite no information indicating that S/M fails in enacting self-conscious, theatrical parodies of power roles and sexual power. S/M borrows common experiences as scenes, and then exposes their hidden sexual and social power.<sup>263</sup> For example, the constructed enactment of a spanking by a teacher and pupil performs social power *as scripted* and hence, permanently subject to change. The voluntary undertaking of the pupil role transmutes the social meaning of pupil as compulsory and powerless. Also in this enactment, the older participant may be the student. In this manner, S/M refuses to allow "natural" orders of authority to govern this interaction. This is similarly true for gender roles in an S/M encounter. The roles of submissive or dominant are not determined by fate; gender roles are self-consciously performed as character and construct, not as biology.

Fourth, S/M's highly negotiated assumption of particular roles carefully acknowledges power in sexual relationship. This is untrue for many traditional heterosexual relationships that are often blind to how structural power dynamics inform their personal exchanges. In this manner, S/M is particularly suitable for a feminist agenda because it provokes the *self-aware assumption* of roles, such as master and servant, dominant and submissive, teacher and pupil. As self-conscious, neither nature nor biology

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261. BLCR, *supra* note 63, at 592.

262. *What is SM?*, *supra* note 48.

263. *See supra* Part II.A.-C.

cast the characters; rather, either gender can assume either role. This performance of roles reveals how social identities are not fixed but highly commutable and open to invention and transformation.

Fifth, it is very much in feminism's interest to map out the contours of sexuality in a post-procreative sex jurisprudence. This paradigm must reject genital determinism and locate eroticism in choice and stimulation, recognizing both psychological (fantasy and simulation) and physiological responses. S/M is highly suitable for this project because it expands the erotic body by locating sexual pleasure in non-reproductive sites (anuses, feet, ears, leather, feces, dog food) and acknowledges that numerous corporeal and psychological experiences may elicit sexual responses. In so doing, genitals and genital differences are no longer treated as the lynchpin of sexuality.

#### VIII. Conclusion

In the last two years, a notable shift in S/M prosecutions has been in charging S/M sex as *both* assault and rape. It is unclear whether *Jovanovic* and *Guinn* mark a shift towards acknowledging the sexual component of an S/M exchange or are only attempts at enhancing sentences for sexual deviants. In older cases such as *Samuels*, *Appleby*, *Collier*, and even the 1994 British *Brown* case, the defendant was only charged with committing assaults, thereby derogating the sexual components of their conduct.

What is made bleakly clear by *Guinn* is the difficulty of fitting S/M into pre-existing rape or assault statutes and the difficulty of distinguishing the two when the charge is S/M sex. *Guinn* highlights the pressing need of clarifying legal regulations surrounding S/M before another person is sentenced to 257 years in prison. There needs to be a more culturally informed legislative inquiry into the dynamics of S/M relationships. This inquiry should acknowledge the shifting conceptions and experiences of desire given the developments in feminism, psychology, and culture.

Regulating sex is incredibly complicated because sex is complicated. This is particularly true given how our society overburdens the significance of sex, casting "rational" sexual practices as foundational for a good social order and regulating desire in the service of promoting community health. In some ways, this may explain why sentencing judges permit their immediate emotive responses to sanction hyperbolic interpretations of facts – deviant sexual practices are viewed as unique in their ability to destabilize social orders on a very intimate level. However, sex laws should be shaped by social realities based on an honest assessment of what is actually occurring in private society, rather than romanticized conceptions of coquettish

procreative love which fictionalizes carnal pleasures as fitting within some logical order.

Legal constructions of sexuality often abnegate the ineffable and pluralistic nature of pleasure. By dismissing the aberrant as violence, the law strips the experience of its humanity and social worth. In understanding S/M sex, we must first hold back this reductive strategy and acknowledge how and why S/M sex may invoke certain emotive responses. S/M undermines desire's presumed autonomy, shows the constructed nature of sexuality, and disputes the romantic myth of sex as natural and spontaneous. What may be unnerving about S/M is its unabashed cynicism. S/M makes clear—it is indeed central to its praxis—that power and social presumptions govern intimate relationships. The designation of S/M sex as only violence speaks to a discomfort with this bluntness. The criminalization of S/M pleasure may underscore the threat of this honesty.