

**PAIN, PLEASURE, AND CONSENTING WOMEN:
EXPLORING FEMINIST RESPONSES TO S/M AND
ITS LEGAL REGULATION IN CANADA
THROUGH JELINEK'S *THE
PIANO TEACHER***

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I. INTRODUCTION

Consent is a critical analytical tool in western liberal legal traditions. It is the basis, in its form of the social contract, for foundational theories of justice and underpins a hallmark of the core liberal precondition for human flourishing: autonomy.¹ Under liberal legalism, choosing to do something typically legitimates that activity as long as it does not harm others.² Conversely, being forced to do something is typically perceived as an infringement of personhood. For feminists, an example that comes easily to mind to demonstrate the significance of consent, and the principle of autonomy that underlies it, is the difference between sex and rape, a distinction that turns on consent. The absence of consent turns a socially approved and even celebrated act of love and expression into an act of violence. It is no wonder, then, that feminist writing on consent in this particular area has often been concerned with ensuring the presence of “real” consent, impugning the idea of constructive or implied consent to sex, and emphasizing instead that “no means no,” to expunge long-standing rape myths and norms about female sexuality that have made women’s bodies vulnerable to violation.³

Feminists have been worried that sexual assault laws will look erroneously to context to construe consent from conduct where none existed verbally. At the same time, feminists have also challenged liberal legalism’s

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¹ See MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 2–4 (2006); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts, and Possibilities*, 1 *YALE J.L. & FEMINISM* 7, 7 (1989).

² See Robin West, *Desperately Seeking A Moralist*, 29 *HARV. J.L. & GENDER* 1, 20 (2006).

³ See Kevin Bonnycastle, *Rape Uncodified: Reconsidering Bill C-49 Amendments to Canadian Sexual Assault Laws*, in *LAW AS A GENDERING PRACTICE* 60 (Dorothy E. Chunn & Dany Lacombe eds., 2000).

presuppositions and encouraged adverting to context to caution against presuming that even *explicit* consent has been given freely. The concern in both situations is the same: that the law will assume consent where none existed. But whereas in the former situation, the concern predicts that the law will look to context too much, in the latter situation the concern for many feminists is that the law will ignore the social, cultural, and economic context limiting women's options. Feminists have provided critical readings of women's apparent consent to practices (e.g., child care, domestic labor, modified career patterns, etc.) that conform to naturalized and traditional gender roles, taking care to explain the context surrounding women's choices. They question whether decisions made in non-ideal conditions can ever count as real exercises of choice⁴ and are concerned that the law will too easily presume or recognize women's consent for decisions that are adverse to their interests and/or otherwise leave existing power structures intact.⁵ Since consent is intimately tied with responsibility in this binary, such that one is generally held responsible for something if one consents to it while one is absolved if one is coerced, feminists worry that women will be held responsible for their decisions while the hegemonic social structures that shape those decisions remain intact. In short, feminists "have been quick to locate the structural determinants of consent."⁶

These concerns generate the intricate question of agency and how to best promote it for women. Does justice demand that the law should limit the types of permissible choices women may make precisely because such choices are shaped by hegemonic structures and are thereby "deformed" and a variation of false consciousness?⁷ Does the personhood of women (and men) require the legal non-recognition of certain types of behavior irrespective of the consent or autonomy that underlies it? Or does respect for personhood, especially of women, require the direct opposite: a respect for agency regardless of the self-harm and violence sought?

In this Article, I explore the general theoretical question of whether a feminist legal vision striving for women's personhood should recognize and respect women's *desired* consent to violence.⁸ I will discuss this question by

⁴ See JOAN WILLIAMS, UNBENDING GENDER 260–70 (2000); see also REBECCA JOHNSON, TAXING CHOICES: THE INTERSECTION OF CLASS, GENDER, PARENTHOOD, AND THE LAW 125–41 (2002).

⁵ For an excellent discussion of this problem, see generally JOHNSON, *supra* note 4.

⁶ KATHLEEN B. JONES, COMPASSIONATE AUTHORITY: DEMOCRACY AND THE REPRESENTATION OF WOMEN 59 (1993).

⁷ Anita Superson, *Deformed Desires and Informed Desire Tests*, 20 HYPATIA 109 (2005).

⁸ By "consensual violence," I am referring to situations where women actively desire and pursue activities and practices that inflict pain, injury, and harm as opposed to harmful activities or arrangements to which they may consent due to their current life circumstances and options that involve harm that women would rather do without. My example of "consensual violence" is the *desired* practice of S/M. An example of *unwanted* consensual violence is the example of consenting to sex because the financial and emotional overall well-being of oneself and one's children depend on it. See West, *supra* note 2, at

examining the particular concrete example of heterosexual S/M.⁹ The novel *The Piano Teacher*¹⁰ by Nobel Laureate Elfriede Jelinek illuminates the feminist tensions underlying this agency issue and assists in answering the question of whether consensual violence is properly part of a feminist project and how the law should therefore treat S/M.¹¹ The novel illustrates both sides of a feminist debate that revolves around the issue of whether S/M should be denied or affirmed as a feminist practice.¹² It also illustrates why a feminist legal vision should ultimately be cautious of recognizing consent to violence in this instance. Part II of this Article provides a plot summary of Jelinek's novel, which serves as a point of departure for what follows. Part III then sets out the contours of feminists' S/M analyses, focusing on the binary established between "dominance" and "sex radical" interpretations and how the subjectivity of the female masochist in *The Piano Teacher* supports each. This Part canvasses the multiple interpretations feminists have ascribed to the female desire for S/M and their disparate assessments of S/M as a subversive practice for women. Part IV then moves this inquiry regarding possible feminist readings of S/M into the legal arena by exploring feminist

19–20, 25–26. I realize that if we were to define "violence" as always already non-consensual the idea of desired or consensual violence is oxymoronic. I leave aside this discussion of the precise meaning of "violence" to allow for the idea of consenting to violence.

⁹ I have chosen to discuss heterosexual S/M in particular because of the unique symbolic meaning of heterosexual S/M for feminists seeking to resist male dominance and exploitation. This is not to say that power issues do not arise for feminists from lesbian S/M, just that the contours of the debate are altered when gender roles are perceived to be mimicked by two women rather than enacted by a dominant male on a submissive female. In focusing on heterosexual S/M, I do not wish to discount the importance or validity of lesbian S/M feminist discourse, but simply to hone in on an area that is an arguably riper breeding ground of exploitation for women. For a feminist analysis critical of lesbian S/M, see Reina Lewis & Karen Adler, *Come to Me Baby or What's Wrong with Lesbian SM*, 17 *WOMEN'S STUD. INT'L F.* 433 (1994). For reasons why lesbian S/M may be seen as a more serious affront to feminism than heterosexual S/M, see Patrick D. Hopkins, *Rethinking Sadomasochism: Feminism, Interpretation, and Simulation*, 9 *HYPATIA* 116 (1994). For a discussion of differences in heterosexual versus gay male practice of S/M, see Niklas Nordling et al., *Differences and Similarities Between Gay and Straight Individuals Involved in the Sadomasochistic Subculture*, 50 *J. HOMOSEXUALITY* 41 (2006).

¹⁰ *THE PIANO TEACHER* was originally written in German and entitled *DIE KLAVIERSPIELERIN*.

¹¹ ELFRIEDE JELINEK, *THE PIANO TEACHER* (Joachim Neugroschel trans., Serpent's Tail 1992); see also Matt Moore, *Austrian Wins Nobel Prize for Literature*, *THE GLOBE & MAIL*, Oct. 8, 2004, at A15.

¹² See *AGAINST SADOMASOCHISM: A RADICAL FEMINIST ANALYSIS* (Robin Ruth Linden et al. eds., 1982); Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER* 267 (Carole Vance ed., 1984); *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* (Ann Snitow, Christine Stansell & Sharon Thompson eds., 1983). The term "sadomasochism" at the center of these debates stems from the works of Marquis de Sade and Leopold Von Sacher-Masoch and the complex constellations of sex, pain, pleasure, and domination on which they wrote. See Gary W. Taylor & Jane M. Ussher, *Making Sense of S&M: A Discourse Analytic Account*, 4:3 *SEXUALITIES* 293 (2001). This is not to say, however, that sadism and masochism are complementary. See GILLES DELEUZE, *MASOCHISM: AN INTERPRETATION OF COLDNESS AND CRUELTY* 13, 33–41 (Jean McNeil trans., George Braziller, Inc. 1971).

legal analyses of how Canadian criminal law should treat S/M. This Part identifies an emerging shift in the S/M sex wars and explains the focus of current feminist theory and legal doctrine on the subject. Here, the issue of how the law defines S/M—as sex or violence—becomes critical due to the different opportunities for an S/M practitioner’s consent to be legally relevant depending on this characterization. Here, also, I demonstrate how *The Piano Teacher* illustrates the strengths of both sides of the debate, but ultimately favors a legal treatment of S/M as violence rather than sex. The conclusions reached on S/M in Part V are not meant to apply to all instances of consensual violence, but simply to offer one concrete example of how feminists can continue to explore urgent questions about women’s agency.

II. *THE PIANO TEACHER*

In *The Piano Teacher*, Jelinek tells the story of the late sexual blossoming of a female music professor by way of an intimate consensual relationship with her besotted young male student.¹³ But perhaps “blossoming” is too romantic a term since the sexual encounters the professor seeks are intensely sadistic. When she communicates her sexual desires to her student by describing how she would like their sexual encounters to unfold, his admiration of and attraction to her turn quickly to disgust. Her fantasy would require the student to inflict a severe amount of pain on the professor and to continue doing so despite anything she may say during the actual act imploring him to stop. The student leaves, repulsed, and the teacher unsuccessfully continues to pursue him. Toward the end of the narrative, the student more or less enacts the sexual encounter the professor had earlier described, including the violent entry into her apartment, the locking up of her mother with whom she lives, and the shoving, punching, and beating that she had detailed. Throughout, he asks her menacingly if this is not, in fact, what she wanted, what she had instructed him to do. She has no response to this. Instead, she cries and repeatedly begs him to stop. He then begins to have sex with/rape her. He proceeds without hitting at first, but then receiving no indicators of desire from her, the student resumes the beatings while she begs him to stop. Once the sex/rape is complete, he leaves her battered and bloodied. In the final few pages, the novel describes what happens the next day. The professor, dressed in her bandages, takes a knife from the kitchen and goes to meet her student at his school. She sees him from a distance in a group of his peers, flirting with a girl. Once the students enter the school, she takes out her knife and without emotion stabs herself in the shoulder and walks back home.

The professor is Erika Kohut, a mid-thirties concert pianist-hopeful turned music professor. The student is ladies’ man Walter Klemmer, a new

¹³ The following narrative summarizes JELINEK, *supra* note 11.

and promising piano student. Klemmer wants a conventional romantic heterosexual liaison with Erika with its attendant albeit culturally unacknowledged moments of aggression and violence.¹⁴ Despite the efforts of her mother to eliminate men from Erika's life and to tell her that men will bring her sheer misery, Erika eventually accepts Klemmer's advances. She wants a relationship, too, but one marked by S/M as well as, and perhaps as the route to, love. She has harbored S/M fantasies for a long time, which thus far have found only limited expression in a collection of bondage paraphernalia kept hidden in a box in her room. She has finally found a possible candidate to share that experience in Klemmer. Erika is unable to tell him what she desires, though, so she writes a letter, which Klemmer reads in front of her. He is initially disgusted and tries to cajole her into having a "normal" love affair, i.e., one marked by tenderness, amorous attentions,¹⁵ and conventional gender roles and performances, including the occasional display of male violence.¹⁶ She resists this traditional paradigm and he leaves upset. Erika and Klemmer later attempt reconciliation, but it is unsuccessful. Erika tries to perform fellatio on him, but ends up vomiting in the midst of the attempt instead. Humiliated, Klemmer tells the apologetic Erika that she stinks and that she repulses him. They part. A few days later, Klemmer terrorizes the nocturnal residents of a downtown park on his way to barging into Erika's apartment to assault her as described above, wanting to punish her for her perceived sexual transgressions of idealized femininity.

With this truncated version of the novel in hand, I now turn to an analysis of how the main arguments of both sides of the historic and current sex wars on S/M find fortification in this narrative.

III. OPPRESSION VERSUS REPRESSION

A. *S/M as Part of the "Sex Wars" In Feminism*

While S/M has varied meanings to its practitioners and eludes precise definition,¹⁷ it is generally associated with the giving and receiving of pain to

¹⁴ For recent statistics about the prevalence of male violence against women in heterosexual "romantic" couplings in Canada and elsewhere, see STATISTICS CANADA, MEASURING VIOLENCE AGAINST WOMEN: STATISTICAL TRENDS 2006, Cat. No. 85-570-XIE (2006); Craig Brown & Melanie Randall, *Compensating the Harms of Sexual and Domestic Violence: Tort Law, Insurance, and the Role of the Estate*, 30 QUEEN'S L.J. 311, 312 (2004); and also see Rosemary Hunter, *Narratives of Domestic Violence*, 28 SYDNEY L. REV. 733, 736 (2006).

¹⁵ JELINEK, *supra* note 11, at 224.

¹⁶ *Id.*

¹⁷ Taylor & Ussher, *supra* note 12, at 297–302; Robert B. Ridinger, *Negotiating Limits: The Legal Status of SM in the United States*, 50 J. HOMOSEXUALITY 189 (2006) (discussing the origin of sadomasochism in the United States and the evolution of its treatment by the American legal system).

incite sexual pleasure in a role-play/relationship mediated by power.¹⁸ The feminist analysis of S/M maps onto larger debates surrounding sex-related issues in general. These debates have been dubbed the “sex wars” within feminist circles. Drawing upon the work of Kathryn Abrams,¹⁹ Lynn Chancer describes the “sex wars” as a situation within second-wave feminist theorizing where sex issues are the object of sharp divisions characterized by either/or paradigms.²⁰ Though neither side in these debates absolutely rejects the position of the other, each stresses its own understanding of the sex-related practice as the better, true, or right interpretation.²¹

On one side are the “pro-sex feminists” or “sex radicals” who champion sexual practices such as pornography, sex work/prostitution, and sado-masochism as empowering practices for women and correspondingly characterize attempts to regulate sex as repressive.²² Pro-sex feminists view sexual repression as a main impediment to flourishing in women’s lives and view attempts to stifle sex-related expression as perpetuating women’s subordination rather than subverting it. While pro-sex feminists do not share liberal legalism’s doubt regarding the ubiquity of women’s oppression, they are not prepared to accept the view of feminists who always regard women’s sexual agency as already a fiction given a culture of male sexual aggression and dominance.²³

On the other side are theorists who are known both in the legal literature and popular culture as “radical feminis[ts].”²⁴ They have argued that S/M, prostitution, and pornography, far from being liberating for women, are

¹⁸ Taylor & Ussher, *supra* note 12, at 294. The authors more fully state that “SM is best understood as comprising those behaviors which are characterized by a contrived, often symbolic, unequal distribution of power involving the giving and/or receiving of physical and/or psychological stimulation. It often involves acts which would generally be considered ‘painful’ and/or humiliating or subjugating, but which are consensual and for the purpose of sexual arousal, and are understood by the participant to be SM.” *Id.* at 301. Some scholars have contested traditional definitions emphasizing pain, highlighting instead the experience of the power differential as erotic as the primary reason people engage in S/M. See, e.g., Patricia A. Cross & Kim Matheson, *Understanding Sadomasochism: An Empirical Examination of Four Perspectives*, 50 J. HOMOSEXUALITY 133 (2006); Darren Langdrige & Trevor Butt, *The Erotic Construction of Power Exchange*, 18 J. CONSTRUCTIVIST PSYCHOL. 65, 68–69 (2005).

¹⁹ See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995).

²⁰ See Lynn Chancer, *From Pornography to Sadomasochism: Reconciling Feminist Differences*, 571 ANNALS AM. ACAD. POL. & SOC. SCI. 77, 79 (2000).

²¹ *Id.*

²² See Brenda Cossman, *Sexuality, Queer Theory, and “Feminism After”*: Reading and Rereading the Sexual Subject, 49 MCGILL L.J. 847, 850 (2004).

²³ *Id.* at 860–61 (“...sex radical feminism rejects the very premises of dominance feminism that sexuality constitutes the primary site of women’s subordination, insisting that sex and sexuality are a far more ambivalent site, producing multiplicities of pleasures and dangers”); see also Matthias Kuzina, *The Social Issue Courtroom Drama as an Expression of American Popular Culture*, 28 J.L. & Soc’y 79, 86, 89 (2001) (“[T]he very epitome of liberal legalism. . . . disregards [the] violence against women which finally leads to the ‘institutional oppression of the rape victim.’”).

²⁴ Cossman, *supra* note 22.

among the most acute instances of institutional sexism and modern day patriarchy (and, to a lesser extent, classism and racism). This feminist position has been branded “‘dominance’ feminism.”²⁵ It characterizes private sexual practices and transactions as primary spaces where sexist power dynamics operate such that feminists need to target them just as (if not more) vigilantly than they do more public displays and examples of structural sexual subordination.²⁶ Dominance feminism impugns the eroticization of relationships of dominance and submission and contends that women’s sexual agency and consent to sex is meaningless in a sexual regime fundamentally marked by male sexual coercion. To the extent that women “want” pain inflicted on their bodies or harm done to them, they have been duped by patriarchy’s unjust social conditions into forming these “deformed” desires.²⁷ Thus, while not necessarily “anti-sex,” dominance feminists are skeptical of the feminist status of sexualities that acquiesce to male sexual dominance (heterosexuality) or rely, mimic, and celebrate these and other related oppressive power dynamics (somasochism, pedophilia, master/slave relationships, etc.).²⁸

With this sense of why S/M is a divisive topic for feminists, the next section illustrates how *The Piano Teacher* confirms the complexity of any possible answer to the question “Is S/M feminist?”

B. Subversion of Gender Roles?

The fact that there must be limits on certain forms of S/M forms a point of agreement in the historic sex wars and the latest incarnation of the debate.²⁹ There is less agreement though, despite the retreat from dominance feminism, as to whether S/M simply reinforces oppressive gender codes or subverts them. *The Piano Teacher* elicits the tensions in feminist theorizing of S/M, but also illustrates the plausibility of multiple interpretations of the meanings of practices associated with S/M. It thus encourages feminists not to dismiss such practices out-of-hand or to celebrate them uncritically.

A commonly articulated argument against the legitimization of S/M as a feminist practice is that it perpetuates sexual subordination of women to

²⁵ Kathryn Abrams, *Songs of Innocence and Experience: Dominance Feminism in the University*, 102 YALE L.J. 1533, 1549 (1994).

²⁶ See Abrams, *supra* note 19.

²⁷ See generally Superson, *supra* note 7.

²⁸ Susan Ardill & Sue O’Sullivan, *Upsetting an Applecart: Difference, Desire and Lesbian Somasochism*, 80 FEMINIST REV. 98, 118–19 (2005); Hopkins, *supra* note 9.

²⁹ Witness Monica Pa’s 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.” Monica Pa, *Beyond the Pleasure Principle: The Criminalization of Consensual Somasochist Sex*, 11 TEX. J. WOMEN & L. 51, 81 (2001) (citing British Law Commission Report 134 at 656–57, § 10.52–55).

men.³⁰ And the fact that it is often women, like Erika Kohut, who choose this type of sexual play and wish to perform the submissive role, does not rescue the practice from being mired in patriarchal power relations.³¹ Rather, it serves as a confirmation that women learn detrimental gender roles exceedingly well.³² Because of their enculturation into a general overarching sadomasochistic patriarchal culture, women are unable to conceptualize their femininity, sexuality, and desirability to a man in a relationship of equals.³³ Instead, they rely on a relationship of dominance and subservience both to be aroused and make themselves desirable to men.³⁴ The contention is not that women who prefer the masochist role sublimate their sexual desires to those of their male partners, but rather that practices and discourses of gendering have socialized them to eroticize violence and have constrained their ability to formulate sexual desire outside of traditional patterns of male dominance.³⁵ As such, their desires are deformed.³⁶

We see this in *The Piano Teacher*. Erika is unable to actualize sexual fulfillment except through representations or enactments of male sexual domination over females. She visits peep shows where she witnesses images of traditional heterosexual pornography with men controlling, in rough and violent ways, sex acts (typically penetration) with women.³⁷ We learn that Erika views all sexual interaction as women screaming while men bang into them, and that this is the only way that women can communicate their sexual pleasure.³⁸ For Erika, “pain is a variety of pleasure,” making her only too willing to “cross the border to her own murder” because she has learned that female sexual pleasure is realized through submission to male control and the infliction of pain.³⁹

In her letter to Klemmer, Erika details the submission she would like to experience:

Her most haunting wish—the adored Herr Klemmer reads—is for you to punish me. She would like Klemmer as a punishment. And in such a way that he ties her up with the ropes I’ve collected, and also the leather straps and even the chains! Hogtie her, bind her up as thoroughly as he can—solidly, intensely, artfully, cruelly,

³⁰ See, e.g., Cossman, *supra* note 22, at 868.

³¹ See generally AGAINST SADOMASOCHISM, *supra* note 12.

³² Hopkins, *supra* note 9, at 119.

³³ Cossman, *supra* note 22, at 868.

³⁴ J. Nichols et al., *Is Sadomasochism Feminist?: A Critique of the Samoïs Position*, in Linden et al., *supra* note 12, at 139.

³⁵ *Id.* at 139–41.

³⁶ Erika prefers hardcore porn houses to soft core ones because she finds it more authentic, where the “shabby, frazzled amateur actors work a lot harder” and she feels that “a slum contains more hope for shaping pain, decorating pain.” JELINEK, *supra* note 11, at 107.

³⁷ *Id.* at 106–07.

³⁸ *Id.* at 107.

³⁹ *Id.*

tormentingly, cunningly. He should bore his knees into her abdomen, if you'll be so kind.⁴⁰

A little later in the letter, Erika tells Klemmer what she wants done if she disobeys him:

In case you witness a transgression on my part (she advises Walter Klemmer), please hit me, with the back of your hand too, slap my face when we're alone. Ask me why I don't complain to my mother or hit you back. In any case, tell me these things so I can feel my helplessness properly. Treat me just as I've told you to in writing. . . . Please sit down on my face with all your weight and crush my head between your thighs so solidly that I can't move. . . . Threaten to leave me in that position for hours and hours if I don't carry out your assignments properly. You can let me pine away for hours with my face under you You can easily guess the greater delights that I wish for. . . . Slap me hard, over and over. Ignore my protests. Ignore my cries. Ignore my begging.⁴¹

Klemmer is incredulous at first of what he is reading.

Does she really mean what it says here: that she's supposed to stick her tongue in his behind when he mounts her? Klemmer is skeptical about what he reads, he blames it on the poor lighting. A woman who plays Chopin so marvelously can't possibly mean that. Yet that is precisely what the woman desires, because she has never done anything but play Chopin and Brahms. Now she pleads for rape, which she pictures more as a steady announcement of rape. When I can't stir or budge, please talk to me about rape, nothing could save me from it.⁴²

That the height of Erika's sexual desire is to be gagged, bound, slapped, and raped is, the argument goes, emblematic of the mythical social expectation that women are always already available and desirous of objectification, submission, and male sexual aggression and actually enjoy being dominated and brutalized.⁴³ Thus, S/M becomes no more a mark of women's liberation than the latest domestic violence statistic. The fact that women are sometimes sadists as the aggressors in the relationship does not erase the fact that they are most frequently victimized by physical and psychological torture at the

⁴⁰ *Id.* at 215.

⁴¹ *Id.* at 224–25.

⁴² *Id.* at 226.

⁴³ Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, in *THE SIGNS READER: WOMEN, GENDER & SCHOLARSHIP* 227, 251–53 (Elizabeth Abel & Emily K. Abel eds., 1983); PAULA J. CAPLAN, *THE MYTH OF WOMEN'S MASCULINISM I* (Univ. of Toronto Press 1993).

hands of men.⁴⁴ Far from subverting systemic sexism, S/M leaves it neatly intact,⁴⁵ as Erika's adoption of eroticized violence attests.

That Erika at times evinces a desire not to be hurt, and harbors hopes that despite her sexual fantasies and violent requests Klemmer will refuse to physically hurt her, does not negate the dominance feminist theory. In one passage, Jelinek writes: "Please don't hurt me; that's what's written illegibly between the lines . . . The letter is the fruit of Erika's years of silent reflection. She now hopes that love will prevent anything from occurring. She will insist on it, but an amorous reply will make up for his refusal. Love excuses and forgives, that's what Erika thinks."⁴⁶ Erika has adopted the gendered ideal of romantic love along with the sexual objectification of women, twin concepts in highly gendered patterns of sexual objectification.⁴⁷ That she selects a path of pain and humiliation to obtain what she really covets—love—is indicative, the argument proceeds, that a masochistic identity is not truly what she desires for herself, but is compelled to adopt according to dominant cultural narratives linking female desirability to submission and violence. The giving of herself in a submissive form to Klemmer is an attempt to recuperate the mark of desirability that society takes away from professionally successful women.⁴⁸

Proponents of S/M contest this reading of the practice. Instead, they offer interpretations of S/M that stress its empowering potential for women.⁴⁹ A primary objective is that the singular reading of *The Piano Teacher* eclipses the agency Erika is able to express. Consider that Erika largely lives a life devoted to music, but tightly confined by the desires of her mother. In many areas of the text, we are reminded of the mother's sense of

⁴⁴ See Cynthia Chewter, *Violence Against Women and Children: Some Legal Issues*, 20 CAN. J. FAM. L. 99, 99–102 (providing statistics about the prevalence of violence against women by their spouses in Canada, illustrating, for example, that women are eight times more likely to be victimized by a spouse than men).

⁴⁵ Hopkins, *supra* note 9, at 120.

⁴⁶ JELINEK, *supra* note 11, at 226.

⁴⁷ See Louise Vincent & Caryn McEwen, *Sleeping with Beauty: Romantic Love, Sex, Power and the Construction of Femininity in Heterosexual Young Adult Relationships*, 20 ASIAN WOMEN 1–26 (2005) (providing a discussion of Romantic Love as deeply informed by traditional gender roles oppressive to women).

⁴⁸ Indeed, Jelinek makes the same point about her own life in an interview she gave after she won the Nobel Prize for Literature. She states: "A woman who becomes famous through her work reduces her erotic value. A woman is permitted to chat or babble, but speaking in public with authority is still the greatest transgression." The interviewer then states, "You're suggesting that your achievements, like winning the Nobel Prize in Literature, detract from your overall appeal." Jelinek gives the following reply: "Certainly! A woman's artistic output makes her monstrous to men if she does not know to make herself small at the same time and present herself as a commodity. At best people are afraid of her." Deborah Solomon, *A Gloom of Her Own*, N.Y. TIMES, NOV. 21, 2004, § 6, at 31.

⁴⁹ Kelly McDowell, *Unleashing the Feminine Unconscious: Female Oedipal Desires and Lesbian Sadosochism in Mulholland Dr.*, 38:6 J. POPULAR CULTURE 1037, 1038–39 (2005) (reading the lesbian S/M in the film *Mulholland Dr.* as a new way to consider female psychosexual relations).

entitlement to Erika. For example, when the mother is first awakened to the sounds of Klemmer thrashing about her apartment and the realization that he is also perhaps thrashing around her daughter, her response is indignation: "If anyone is going to slap Erika, it'll be Mother."⁵⁰ After the second slap on Erika's cheek, Mother "is forced to realize that her daughter is being degraded into something like a piece of athletic gear. Mother indignantly points out that he is damaging someone else's property, namely hers!"⁵¹ Moments later as she listens to the beating behind the door, she thinks that "[s]he finally twisted the child into shape, and now someone else is twisting her again. Mother is raging."⁵² Indeed, Erika's mother is never given a name in the novel; she is simply referred to as Mother, a status symbol of the matriarchal position of authority she has over Erika.⁵³

Liberation from her mother's constant scrutiny, interrogation, expectation, and repression is thus no small feat for Erika. By curbing the relationship with her mother through her own lover, Erika finds a partial route out of the contained existence she has led thus far. Instead of sneaking off to peep shows in obscure parts of town,⁵⁴ or spying on copulating couples under the brush in public recreation areas at night as she did in the past,⁵⁵ the S/M relationship for Erika is a vehicle to express the sexuality that she has until now kept constrained to her growing yet unused box of bondage equipment, never knowing sexual pleasure.⁵⁶ That this box is also classifiable as a torture tool should not lead the reader to dismiss the possibility that Erika's relationship with Klemmer is empowering.⁵⁷ It cannot only be an idealized version of egalitarian sexual unions that meets feminist standards for sexual activity. As Jane Gallop has noted, "[t]he norm for feminist sexuality is an egalitarian relation of tenderness and caring where each partner is considered as a 'whole person' rather than as an object of sexual fantasy."⁵⁸ This norm, constructed as a response to oppressive heterosexual relationships, has its own oppressive moralizing force that "condemns pleasure that is not subordinate to it."⁵⁹ Erika's complicated existence indicates that it would be too dismissive to immediately regard consensual rough or painful sex as unfeminist. Through Erika, Jelinek's novel demonstrates that it is critical that the law redress its liberal moorings and be alert to the fraught conditions informing women's choices and consent and when such conditions amount to coercion, duress, or unconscionable exploitation. Beyond that, Erika's

⁵⁰ JELINEK, *supra* note 11, at 264.

⁵¹ *Id.*

⁵² *Id.* at 267.

⁵³ Similarly, in the film by Michael Haneke based upon Jelinek's novel, Mother has no other name. *LA PIANISTE* (Kino Int'l 2001).

⁵⁴ JELINEK, *supra* note 11, at 106–07.

⁵⁵ *Id.* at 141–49.

⁵⁶ *Id.* at 249–50.

⁵⁷ *Id.* at 222.

⁵⁸ JANE GALLOP, *THINKING THROUGH THE BODY* 107 (1988).

⁵⁹ *Id.* at 108.

story shows how it is also important to recognize women as agents bargaining with or otherwise navigating oppressive structures.⁶⁰

An analytical departure point that stigmatizes S/M is further troubling for some feminists because it reinforces the feminist concentration on the negative aspects of women's sexual lives instead of emphasizing the positive.⁶¹ Katherine Franke has argued that "legal feminists," more so than feminist thought in general, have ascribed negative, even dangerous, associations to sex.⁶² According to Franke, this is the cumulative effect of feminist legal reform that has focused largely on the dangers and criminalization of sexual violence against women without an attendant affirmation of the pleasures of sex and the desirability of sexual subcultures.⁶³ This imbalance is detrimental to the interests of women because it is paternalistic, reminiscent of Victorian anti-sex attitudes denying female sexuality, and reinforces social sexual surveillance.⁶⁴ Moreover, Franke argues, conceptualizing sex singularly as a site of peril that requires constant control fundamentally misses the intimate relation between danger and desire:

Desire is not subject to cleaning up, to being purged of its nasty, messy, perilous dimensions, full of contradictions and the complexities of simultaneous longing and denial. It is precisely the proximity to danger, the lure of prohibition, the seamy side of shame that creates the heat that draws us toward our desires, and that makes desire and pleasure, not a contradiction of or haven from danger, but rather a close relation. These aspects of desire have been marginalized, if not vanquished, from feminist legal theorizing about women's sexuality.⁶⁵

⁶⁰ Uma Narayan, *Minds of Their Own: Choices, Autonomy, Cultural Practices, and Other Women*, in *A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY* 418, 418–32 (Louise M. Antony & Charlotte E. Witt eds., 2002) (discussing how women retain active agency as they negotiate with patriarchal structures).

⁶¹ For a sex radical feminist reading of the film *The Secretary*, see Cossman, *supra* note 22, at 868–69.

⁶² Katherine Franke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101 *COLUM. L. REV.* 181, 200 (2001).

⁶³ Franke argues that feminist legal theorists have focused on harnessing law to "tame" sexuality and sex instead of using law to support the positive aspects of sex. She provides examples of how law could be used to support positive sexuality, including the establishment of a "right to sex." Franke also suggests that tort law could recognize the value of female sexual pleasure by allowing courts to view female sexual dysfunction resulting from another's tortious act as a real and tangible loss. *Id.* at 200–01, 206, 208. Franke is not alone in her concerns about the sexualized impact of legal feminism. Janet Halley extends the critique further to argue that critical theory, especially queer theory, should "take a break" from feminism "as it is practiced and performed in the United States today." Brenda Cossman et al., *Gender, Sexuality, and Power: Is Feminist Theory Enough?*, 12 *COLUM. J. GENDER & L.* 601, 604, 610 (2003).

⁶⁴ Franke, *supra* note 62, at 206.

⁶⁵ *Id.* at 207.

To dismiss Erika's fascination with the connections between domination, power, and sexual pleasure would be to deny her efforts at constituting herself as a sexual subject, however fraught her conditions of agency may be in terms of wanting to escape her mother. It would also, according to Franke, eclipse the very elements that give sexual energy its purchase.

The value Franke ascribes to female sexual desire associated with power and danger and not just reproduction or motherhood also points to a third redeeming feminist feature of S/M: S/M's potential to subvert traditional gender roles.⁶⁶ When women play the dominating sadists, in control of the sensations experienced by a male masochist, the cultural norm of the male as the sexual aggressor is contested. But S/M is able to retain a subversive dimension even where women are masochists.⁶⁷ This is so for two reasons. First, even where women are masochists, S/M dramatically opposes the ideal of romantic love and norm of white female heterosexual innocence and white heterosexuality grounding masculine and feminine identities alike.⁶⁸ Related to this point is the proclivity among masochists, such as Erika, to design and thus control S/M encounters through a written contract (here, her letter).⁶⁹ Second, S/M proponents argue that it is the masochists who are really in control of an S/M situation since they are able to delineate the precise acts they wish to experience, no more and no less.⁷⁰ Implicit in this interpretation is distinguishing between surrender and submission.⁷¹ If masochists were really so subordinated, the argument concludes, the dy-

⁶⁶ Judith Butler, *Gender as Performance: An Interview with Judith Butler*, 67 *RADICAL PHIL.* 32 (1994). Drawing from postmodernist and especially Foucauldian insights, Butler encourages us to pursue opportunities to reinvent our gender and disrupt the presumption or truth of its fixed essence. *Id.*

⁶⁷ See, e.g., JESSICA BENJAMIN, *THE BONDS OF LOVE: PSYCHOANALYSIS, FEMINISM, AND THE PROBLEM OF DOMINATION* 55–61 (1988) (analyzing Pauline Réage's *Story of O* to explore the concept that a woman may submit as a masochist not solely out of fear, but also because of her own desires).

⁶⁸ Terry Hoople, *Conflicting Visions: SM, Feminism, and the Law—A Problem of Representation*, 11 *CAN J.L. & SOC.* 177, 194 (1996); Selena Whang, *The White Heterosexual Couple: On Masculinity, Sadism and Racialized Lesbian Desire*, 24 *C. LITERATURE* 116, 117–18 (1997). Despite the historically tight associations of sex with race in economics of Empire that violently made racialized female bodies available to white men and anxiously and violently kept racialized male bodies away from “innocent” white female ones, analyses of racial economies of desire with respect to sadomasochism are infrequent. Cheryl Hanna, *Sex is Not a Sport: Consent and Violence in Criminal Law*, 42 *B.C. L. REV.* 239, 286 (2001). I do not wish to add to this erasure here or suggest that the power dynamics are stable or uniform across all possible heterosexual couplings or that these are merely simply reversed when sexual positions change. The inflections of race, as well as other force fields of difference, are important to understanding the full meanings of any S/M encounter. On the connections generally between sexuality and race in empire-building, see ANNE McCLINTOCK, *IMPERIAL LEATHER: RACE, GENDER, AND SEXUALITY IN THE COLONIAL CONTEST* (1996), and in contemporary dating logics, see B. HOOKS, *BLACK LOOKS: RACE AND REPRESENTATION* 21–27 (1992). On the construction of innocence with respect to white women, see E. SPELMAN, *INESSENTIAL WOMEN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1989).

⁶⁹ David Kirby, *Mr. Post-Everything*, 66 *VA. Q. REV.* 759, 761 (1990).

⁷⁰ Pa, *supra* note 29; Hoople, *supra* note 68, at 208–15.

⁷¹ Caplan, *supra* note 43, at 159.

dynamic phenomenon of “switching” (a masochist becoming a sadist) or extensive consultation and contracting beforehand and respect of boundaries during the power play would not mark S/M exchanges.⁷² Rather, the masochist’s intentions may be understood as a complete and active surrender to the activity and the sensations and effects it produces for the surrendered (rather than submissive or pornographic) subject.⁷³ Gilles Deleuze extends this insight by querying whether a sadist and a masochist are truly complementary, highlighting the control the masochist wishes to exact over the sadist as case for conflict rather than harmony between two subjects each desiring control and domination.⁷⁴

These last two arguments regarding S/M’s empowerment potential to contradict typical heterosexual gendered scripts are also borne out in *The Piano Teacher*. The inability of Erika to perform the traditional demure and gently affectionate sexual role expected of women of her background is what puzzles and enrages Klemmer. As he begins beating Erika, he tells her that “[t]here’s nothing worse than a woman who wants to rewrite Creation.”⁷⁵ His disdain for Erika’s vision for their relationship leads to the realization that not only is she rewriting the romantic love narrative, but that she is also trying to usurp his position as the man, a position for Klemmer inherently tied to the role of the sexual aggressor.⁷⁶ Erika has denied him his manly prerogative, even when bound, gagged, and raped, because she has asked for it all (in her letter). Erika’s desire to set out the boundaries and details of their sexual encounters infuriates Klemmer because she is giving the orders.⁷⁷ This rewriting of gender roles is the justification Klemmer seizes to inflict the beating. Jelinek writes:

Walter Klemmer whimsically kicks her in the ribs as she lies on the floor. He doses the violence out so carefully that nothing breaks. He has always controlled his own body, at least. Walter Klemmer steps across Erika, a threshold, out into freedom. She brought this on by trying to control him and his desires. This is what she gets.⁷⁸

⁷² Langdrige & Butt, *supra* note 18, at 65.

⁷³ Caplan, *supra* note 43, at 159, 161; Kirby, *supra* note 69, at 760 (discussing Deleuze’s work in MASOCHISM, *supra* note 12, and noting that the “masochist’s activity is concealed” rather than passive and emphasizes the “distinction between pornography, which is descriptive (literally ‘graphic’), and pornology, or discourse that is logocentric rather than pictorial” like S/M and the written contracts which masochists craft).

⁷⁴ DELEUZE, *supra* note 12, at 36–37.

⁷⁵ JELINEK, *supra* note 11, at 263.

⁷⁶ Klemmer’s vision of love includes violence against women. We see this, for example, when he “quips that my hand might take a swipe at you now and then, I won’t dispute it, but too much never does much good.” *Id.* at 219.

⁷⁷ “Klemmer finds it all so funny that he slaps his thighs: She wants to give *him* orders!” *Id.* at 216–17.

⁷⁸ *Id.* at 269.

Klemmer's response complicates the meaning of power and autonomy in S/M, with respect to who wields it and who does not. As long as the trajectory of their courtship resembled all of his previous sexual conquests, Klemmer was pleased. At the reading of the letter, instead of seeing his masculinity fortified as the hyper-sexual aggressor, Klemmer perceives Erika's masochistic request as undermining his power to define the parameters of their sexual encounters. Indeed, in an interview on her novel, Jelinek states that "[t]he right to choose a man and also to dictate how he tortures her—that is, domination in submission—this she is not permitted. Indeed for a woman almost everything beyond the bearing and raising of children is a presumption."⁷⁹

For Klemmer, then, the letter represents an inexcusable encroachment on his idealized masculinity. Once aware that she has transgressed some unspeakable norm, Erika tries to placate Klemmer by demonstrating her ability to perform the femininity expected of her. After he has threatened his way in, Erika tries to retract the letter:

She swears she would rather forget all about my stupid letter, but what's done is done. She had a mishap, but she'll make up for it, dearest. Why do we need letters? After all, we know everything there is to know about each other. We reside in each other's most intimate thoughts! And our thoughts nourish us constantly with their honey.⁸⁰

When her words fail to keep Klemmer from beating her, she tries to cajole him again. But her efforts are too little too late.

But that's enough, darling! Let's start with something better! She would like to see pain eliminated from the repertoire of love gestures. Now she's feeling it personally, physically, and she begs to return to the normal version of love. Let us approach the other with understanding. Walter Klemmer overcomes the woman violently, even though she says she's changed her mind. Please don't hit me. My ideal is shared feelings again. Erika revises her opinions too late. She expresses the opinion that she, as a woman, needs lots of warmth and affection.⁸¹

I am not suggesting that Erika's attempts to "go against Creation" and actually "trouble" gender in Butlerian terms are actually benefiting her in this instance! But the subversive nature of the script Erika asked for, "on her own terms," is precisely what irks, confounds, and then enrages Klemmer who then beats Erika. Had Erika's desires followed the normalized hetero-

⁷⁹ Interview by Marie Rivière with Elfriede Jelinek (trans. Robert Gray), *The Piano Teacher Interviews*, http://www.kino.com/pianoteacher/piano_intfr.html (last visited April 26, 2007) [hereinafter Jelinek Interview].

⁸⁰ JELINEK, *supra* note 11, at 262.

⁸¹ *Id.* at 266.

sexual romantic script, with her offering tender emotions and embraces,⁸² instead of viewing Erika as a monstrous entity,⁸³ then Klemmer would have reciprocated the love Erika tried to express, albeit on his terms of heterosexual interactions and acceptable levels of male violence. Instead, her gender transgressions result in Erika's rape and eventually her death. As Jelinek herself comments in an interview about the novel and the film based on it, "we are dealing here with a phallic woman who appropriates the male right to watch, and who therefore pays for it with her life. . . ."⁸⁴ That the ability of S/M to subvert gender hierarchies through (gender) role-play, even with the female as the masochist,⁸⁵ resulted in such violence does not detract from its transgressive status but confirms it. The gender transgression produced by S/M has "empowered" Erika, but it is *the response* to the transgression rather than the transgression itself that has resulted in Erika's rape and death. That Erika's choice in leading her life, similar to many women who step outside of tightly policed gender roles, led to her death does not make expression of agency any less feminist.

In short, delving into the narrative of *The Piano Teacher* offers a ripe opportunity to concretize the ambivalence in feminist theorizing around S/M. Both oppressive and empowering dimensions to Erika's subjective experience are discernible. The next Part explores how the novel reveals the similar feminist tension in how to conceptualize S/M. Yet, here, as we shall see, the novel provides proof of the sagacity of treating S/M as violence rather than sex.

IV. SEX VERSUS VIOLENCE

Sexual debates have been characterized by anti-repression (i.e., pro-sex or "sex radical" feminist) arguments on the one hand and anti-oppression (anti-sex or "dominance" feminist) arguments on the other,⁸⁶ although we have begun to see less dichotomous and more complicated readings.⁸⁷ Nonetheless, as this Part reveals, a binary still inheres in the debate surrounding the proper conceptualization of sex and consent to legitimate S/M; a primary disagreement surrounding the essence of S/M remains. Is S/M sex or is it violence?⁸⁸

⁸² *Id.* at 224.

⁸³ *Id.*

⁸⁴ Jelinek Interview, *supra* note 79.

⁸⁵ See generally CARL HOLMBERG, *SEXUALITIES AND POPULAR CULTURE* (1998) (exploring how popular culture influences our perception and communication of sexuality in everyday life).

⁸⁶ See Abrams, *supra* note 19, at 308–14.

⁸⁷ See Hanna, *supra* note 68; Pa, *supra* note 29.

⁸⁸ See discussion *infra* Part IV.3.

A. *A Shift in the S/M Sex Wars?*

With respect to S/M, the manifestation of the sex wars in the United States reached a notorious moment at the Barnard Conference on Sexuality, held in 1982, when some dominance feminists opposed the panel participation of women from SAMOIS, a group in favor of S/M.⁸⁹ Since that event, feminist theorizing, including activism, on the meaning of S/M has largely followed a dichotomous approach to the issue and thus the typical trajectory of the sex wars that Chancer and Abrams describe.⁹⁰ Two recent law review articles on S/M are the latest example of this pattern, but what is interesting about this latest exchange in the legal literature is the linchpin of the dichotomy.⁹¹ In earlier S/M debates, labeling one side as “pro-sex” made sense since the other side—the “dominance” feminists—concentrated on the dangers of either heterosexual or lesbian sexual expression that appeared to model male power (such as sadomasochism).⁹² However, the accuracy of this polarized nomenclature may now be declining.⁹³

A recent academic feminist legal articulation as exemplified through the works of Cheryl Hanna and Monica Pa, suggests that the debate over S/M contains more points of agreement than disagreement. Hanna argues in favor of an active approach to the regulation of sadomasochism.⁹⁴ Yet, it would be unfair to classify her as an “anti-sex” or a “dominance” feminist. Indeed, Hanna explicitly affirms the pleasure of sexual experiences, including the pleasure derived from S/M by its practitioners, and she recognizes the moral agency of women even within a world heavily affected by gender traditions and other social forces. She is not, as sex radicals have argued of their opponents in the past, intolerant of “minority” sexual practices or unaware of the need to theorize possibilities for female pleasure instead of just

⁸⁹ Chancer, *supra* note 20, at 83. Rifts in feminist organizations, including even lesbian-only organizations, are not exclusive to the United States. For an account of the tensions around S/M and feminist organizing in England, see generally Ardill & O’Sullivan, *supra* note 28.

⁹⁰ Lewis & Adler, *supra* note 9; Hopkins, *supra* note 9; Hoople, *supra* note 68. With respect to activism, the National Organization for Women (“NOW”) passed a resolution in 1971 that denounced S/M as a feminist practice, which stayed in place until 1999. Susan Wright, *Discrimination of SM-Identified Individuals*, 50 J. HOMOSEXUALITY 217, 219, 220, 223 (2006).

⁹¹ Hanna, *supra* note 68; Pa, *supra* note 29.

⁹² Ardill & O’Sullivan, *supra* note 28, at 110.

⁹³ This is not to suggest that the polarized portrayal of feminism as dominance feminism and queer studies as sex radical was ever accurate. Brenda Cossman notes how the representation of the sex wars eclipsed the diversity within feminism and the multiple interpretations of sex and sexuality that feminists had generated. She also explains how this polar view of feminism eventually displaced the sex wars from occurring within feminism to occurring between feminism and queer theory. Feminism was cast as entirely in favor of sexual legal regulation while queer studies was privileged as the repository of liberatory theorizing on sexual pluralism and sexual pleasure. Cossman, *supra* note 22, at 851–52.

⁹⁴ Hanna, *supra* note 68, at 246.

focusing on the dangers of sex.⁹⁵ Similarly, unlike her sex radical predecessors from the 1980s, Pa does not prioritize the pursuit of sexual pleasure over all other considerations nor does she constrict her thesis to attestations of the complexities and contradictions of women's sexual subjectivities.⁹⁶ Pa recognizes the need for some legal limits on the pursuit of pleasure through pain, and she does not advocate for decriminalizing consensual S/M that results in grievous bodily injury or death.⁹⁷

A comparison of the works of Hanna and Pa suggests that the debate over S/M may now contain more agreement than disagreement. Notably, Hanna's pro-S/M regulation argument explicitly rejects denunciation of S/M sexual experiences on a moral ground.⁹⁸ Rather than disputing whether certain forms of sex are more about pleasure or danger in order to answer the dilemma of whether to participate in the contested practice, the primary disagreement in this legal exchange turns on defining "sex" and defining sexual sadomasochism.⁹⁹ It may be premature to view this recent exchange between Hanna and Pa as a movement toward agreement in the feminist legal debate given that legal literature in general on S/M is scant and a wider sample of feminist legal writing on this topic is not available.¹⁰⁰ Yet, the Hanna-Pa exchange is illustrative of a current moment of this debate and for the purposes of determining how the law should respond to S/M, the shift toward agreement is important to note.

Comparing this current exchange with the second wave "sex wars" described by Abrams and Chancer suggests that the focus of the feminist legal S/M debate has shifted.¹⁰¹ Currently, both sides affirm the pleasures of sexual experiences, the nuances of sexuality, and the problematic totalizing tendencies of dominance feminism as well as the naïveté in celebrating all forms of S/M as resistance or empowerment. However, deep-seated disagreement remains. The fundamental point of incongruence arises from the conceptualization of sexual S/M: Pa conceptualizes S/M as sex while Hanna maintains that it is violence.¹⁰²

The characterization is significant because Canadian law treats sexual (and other) assaults differently when there is no additional violence, i.e., bodily harm, involved. When the *actus reus* at issue is, for example, the

⁹⁵ *Id.* at 246, 281.

⁹⁶ Pa, *supra* note 29.

⁹⁷ *Id.* at 81.

⁹⁸ See Hanna, *supra* note 68, at 246–47, 281, 287.

⁹⁹ Hanna, *supra* note 68; Pa, *supra* note 29.

¹⁰⁰ I would also be careful to qualify the scope of this potential shift toward agreement—to value S/M as a source of pleasure but nonetheless treat it legally as violence—since it is still not representative of the entirety of the feminist literature (legal and non-legal) on S/M where S/M is not universally affirmed. For a recent article that makes a compelling argument for why S/M is not a desirable feminist practice, irrespective of how the law may treat it, see Susan Hawthorne, *Ancient Hatred and Its Contemporary Manifestation: The Torture of Lesbians*, 4 J. HATE STUD. 33 (2005–06).

¹⁰¹ Abrams, *supra* note 19, at 307–14; Chancer, *supra* note 20, at 78–79.

¹⁰² Pa, *supra* note 29, at 77–79; Hanna, *supra* note 68, at 240, 290.

sexual penetration by a man of a woman, assuming the requisite *mens rea*, it is the lack of consent from the woman that converts a non-criminal act into a criminal legal action.¹⁰³ The same goes for non-sexual touching: consent operates as a defense to what would otherwise be an assault.¹⁰⁴ Where the person acted upon consents to these acts, no illegality occurs. The situation changes once the level of harm escalates and the law's categorization shifts from sex to violence. Where the same acts involve bodily harm, defined as "a hurt or injury" to the person acted upon "that interferes with her health or comfort and is more than transient or trifling in nature,"¹⁰⁵ the consent of that person is immaterial. This is so even though section 265 of the Canadian Criminal Code, which establishes and defines the offense of assault, including sexual assaults and assaults causing bodily harm and aggravated sexual assault, states that "[a] person commits an assault when (a) *without the consent* of another person, he applies force intentionally to that other person, directly or indirectly."¹⁰⁶ The Supreme Court of Canada affirmed this arguably counterintuitive reading of the provision with respect to the relevance of consent to an assault causing bodily harm in the leading decision of *R. v. Jobidon*.¹⁰⁷ In deciding whether to vitiate the consent of the victim who agrees to a fist fight, the Court held that intending and causing bodily harm is illegal and the victim's consent to the bodily harm is irrelevant.¹⁰⁸ Therefore, once intended bodily harm occurs, any factual consent that exists is immaterial at law.¹⁰⁹

¹⁰³ Technically, consent is part of the *actus reus* of the offense, but jurists commonly refer to it as a defense. For example, as Gonthier J., writing for the majority of the Supreme Court of Canada in *R. v. Jobidon*, [1991] 2 S.C.R. 714 notes:

Whether consent is formally categorized as part of the *actus reus* of the offence, or as a defence, its essential function remains unaltered—if consent is proved, or if absence of consent is not proved, an individual accused of assault will *generally* be able to rely on the consent of the complainant to bar a conviction. He will be able to lean on the consent as a defence to liability. This basic reality has been widely recognized. English and Canadian courts widely refer to *consent as being in the nature of a defence*. Leading treatises on criminal law conceive it this way.

Id. at 743 (emphasis added). This suggests that judges, academics, lawyers, and lay people tend to conceptualize consent as particularly relevant to the defenses rather than the technical aspects of the *actus reus* in cases dealing with both sexual or non-sexual assault. However, whether we turn our minds to the issue of consent while considering the *actus reus* of the offense or any potential applicable defenses is analytically immaterial to this discussion. The focal point in my analysis of S/M turns on the question of whether we can (or should) view consent as material to a conviction when bodily harm has been suffered (or enjoyed).

¹⁰⁴ *Id.*

¹⁰⁵ Canada Criminal Code, R.S.C., ch. C 46 § 267(2) (1985).

¹⁰⁶ Canada Criminal Code, R.S.C., ch. C 46 § 265(1)(a) (1985) (emphasis added). Subsection 265(2) specifies that section 265 "applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault." *Id.* at s. 265(2).

¹⁰⁷ *R. v. Jobidon*, [1991] 2 S.C.R. 714.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* While not central to this discussion, it is useful to note that both elements—intent and actual bodily harm—must exist for consent to be vitiated. This is different

In the United States, courts have come to similar conclusions. The first reported instance dealing with S/M and the defense of consent arose in *People v. Samuels*.¹¹⁰ In this case, a California Court of Appeal rejected the defendant's claim that consent vitiated the offense of aggravated assault. In coming to this conclusion, the court held that "[i]t is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force likely to produce great bodily injury."¹¹¹ The Supreme Judicial Court of Massachusetts reiterated the *Samuels* rationale more recently, holding that consensual S/M does not provide a defense to the crime of assault with a weapon.¹¹² In clarifying the relationship between sex, violence, and consent in the S/M context, the court stated:

The fact that violence may be related to sexual activity . . . does not prevent the State from protecting its citizens against physical harm. The invalidity of the victim's consent to a battery by means of a dangerous weapon would be the same, however, whether or not the battery was related to sexual activity.¹¹³

However, not all courts have followed this reasoning on consent.¹¹⁴

Exceptions to this principle of invalidating victim's consent to battery may arise where the harmful activity serves some socially useful purpose. English and Canadian common law have recognized sporting activities, body piercings, the administration of tattoos, surgical interventions, and the performance of stunts as socially useful activities.¹¹⁵ Fistfights or brawls serve as an example of a socially useless activity in Canada.¹¹⁶ But even where the law permits individuals to consent to bodily harm because of its positive appraisal of the activity engaged in, the law will construe the scope of the consent as encompassing only that bodily injury which it regards as normally incidental to the overall socially useful activity. This explains, to take one recent example, why Vancouver Canuck player Todd Bertuzzi could not "sucker-punch" Steve Moore as he did in early March 2004 with

than the situation where bodily harm is intended, but none actually results. The Court recently clarified the application of *Jobidon*'s holding to this latter situation in *R. v. Paice*, [2005] 1 S.C.R. 339. The majority in *Paice* held that consent would be vitiated only where bodily harm was intended and actually resulted, but would stand to bar a conviction where no actual harm resulted although it was intended. *Id.* For a fuller discussion, see GERRY FERGUSON & STEVE COUGHLAN, ANNUAL REVIEW OF CRIMINAL LAW 2005 25–27 (2006). I am grateful to my colleague Gerry Ferguson for drawing my attention to this case and for discussions on attendant doctrinal issues relating to consent.

¹¹⁰ *People v. Samuels*, 58 Cal. Rptr. 439 (Cal. Ct. App. 1967). For a case comment, see *Assault and Battery*, 81 HARV. L. REV. 1339, 1339–42 (1968).

¹¹¹ *Samuels*, 58 Cal. Rptr. at 513–14.

¹¹² *Commonwealth v. Appleby*, 402 N.E.2d 1051 (Mass. 1980).

¹¹³ *Id.* at 1060.

¹¹⁴ See, for example, the discussion of *People v. Jovanovic*, 700 N.Y.S.2d 156, 168–69 (N.Y. App. Div. 1999), *infra* note 139 and accompanying text.

¹¹⁵ *R. v. Welch*, [1995] 101 C.C.C. (3d) 216, 235, 238.

¹¹⁶ *Id.* at 227.

impunity.¹¹⁷ Even though hockey is recognized as a socially useful activity, and so an exceptional realm where the law will recognize an individual's consent to bodily harm as relevant to the offense, the law does not sanction harm inflicted beyond the bounds of what is reasonable to expect in participating in the activity. Being punched in the face against the boards is a common type of bodily harm that all consenting National Hockey League players should expect as part of the game. Being blindsided or gouged in the eye with a hockey stick are not.

The Canadian Court has declined to include S/M in its list of socially useful activities where consent to bodily harm will be recognized.¹¹⁸ *R v. Welch* is the most authoritative decision with respect to S/M.¹¹⁹ In *Welch*, the Ontario Court of Appeal considered whether the accused could be exonerated from the charge of sexual assault causing bodily harm because the victim, a woman, had consented to it.¹²⁰ *Welch* was accused of tying up the victim on a bed, beating her breasts with a belt, beating her buttocks with a spatula, penetrating her with his penis, and pressing a pillow to muffle her screams.¹²¹ The court found that the complainant suffered "bruising to the right breast, abdomen, left calf, right bicep and buttocks," vaginal and rectal bleeding, and welts.¹²² The court held that the injuries met the definition of bodily harm in section 272 of the Criminal Code and that there was no evidence to show that the victim did in fact consent to acts against her; in fact, she denied consent.¹²³ The court proceeded to deal with the facts even assuming consent to bodily harm existed to answer the accused's submission that the law should tolerate some harm over and above a non-trifling nature, as long as serious harm did not result.¹²⁴

¹¹⁷ Bertuzzi assaulted Moore through a blindsiding punch from behind on March 8, 2004 and was suspended from playing until August 8, 2005. Moore suffered broken vertebrae in his neck, a concussion, and other injuries. See *A Star Player Goes Offside*, CBC SPORTS ONLINE, Feb. 15, 2005, <http://www.cbc.ca/sports/indepth/bertuzzi>. The combined effects of these injuries drove Moore's lawyer to state that the future of Moore's hockey career was uncertain and, as of December 2005, Moore still could not play hockey. See Hugh Adami, *Maligned Bertuzzi Has 'Paid the Price': Bruising Forward Will Get His Shot at Redemption*, NAT'L POST, Dec. 23, 2005, at B9.

¹¹⁸ *R. v. Jobidon*, [1991] 2 S.C.R. 714. Similarly, American courts have chosen not to categorize S/M activities as socially desirable or "ordinary" behaviors. In *People v. Samuels*, the court stated: "consent of the victim is not generally a defense to assault or battery, except in a situation involving ordinary physical contact or blows incident to sports such as football, boxing or wrestling." *People v. Samuels*, 53 Cal. Rptr. 439, 447 (Cal. Ct. App. 1967).

¹¹⁹ *Welch*, [1995] 101 C.C.C. (3d) at 216.

¹²⁰ *Id.*

¹²¹ *Id.* at 218–19.

¹²² *Id.* at 220.

¹²³ *Id.* at 228.

¹²⁴ *Id.* The appellant also advanced two other submissions, which the court dealt with more summarily. The appellant contended "that consent should be a defense to any degree of violence in a sexual context that is performed in private" and that "the extent of the violence should not be an issue but rather the trier of facts should be required to determine whether the degree of violence inflicted upon the recipient exceeded that to which consent had been given." *Id.* at 225. The court dispensed with both of these

The *Welch* court then turned to deciding whether, for public policy reasons, sexual S/M should qualify as the type of activity in which the complainant's consent matters if any bodily harm occurs.¹²⁵ Canvassing the principles from *Jobidon*, as well as English and American authorities, the court concluded that it should not.¹²⁶ The *Welch* court followed *Jobidon* to the extent that it focused on the social utility of the activity (there, fisticuffs) to determine whether S/M properly qualifies as an exception to the general negation of consent in the presence of bodily harm.¹²⁷ The court upheld the distinction between socially useful violent activities, such as a boxing match, and S/M, by first noting that "acts of sexual violence . . . were conspicuously not included among (the) exceptions" noted in *Jobidon*.¹²⁸ Thus, the *Welch* court construed the majority in *Jobidon* as creating an exhaustive rather than open list, even though the majority in *Jobidon* specifically stated that its decision was relegated to the issue of fisticuffs and that no "sweeping conclusion" resulted with respect to "all situations or activities in which people willingly expose themselves to intentionally applied force."¹²⁹

The court's rationale in *Welch*, however, moved beyond statutory interpretation. Drawing from the majority decision in *R v. Brown*,¹³⁰ an English case concerning gay male S/M, the court accepted the distinction between violent activities that have a larger cultural purpose and violent activities that are pursued solely for the gratification of cruel and sadistic desires, whether sexual or not.¹³¹ The court did not reach this decision lightly, indicating its respect for the alternative conclusions reached by both the Canadian and English Law Reform Commissions stating that consent should be relevant to a conviction even in S/M assaults where serious and long-term injuries re-

submissions quickly. With respect to the first submission, the court held that "[p]ublic policy should not sanction as a defense the consent to any degree of violence even though committed in private, where such violence is likely to result in serious and permanent bodily harm." *Id.* In response to the second submission, the court classified it as reflective of the minority position articulated by Sopinka J. in *Jobidon*, and thus "obviously not the law in Canada." *Id.*

¹²⁵ *Id.* at 238–39.

¹²⁶ *Id.*

¹²⁷ *Id.* at 237.

¹²⁸ The full passage of Griffiths, J.A. states:

In my view . . . the message delivered by the majority in *Jobidon* is that the victim cannot consent to the infliction of bodily harm upon himself or herself, as defined by s. 267(2) of the Code, unless the accused is acting in the course of a generally approved social purpose when inflicting the harm. Specifically, the majority in *Jobidon* recognized that consent may be material to certain activities such as rough sporting activities, medical treatment, social interventions, and "daredevil activities" performed by stuntmen, "in the creation of a socially liable cultural product." Acts of sexual violence, however, were conspicuously not included among these exceptions.

Id. at 238.

¹²⁹ *R. v. Jobidon*, [1991] 2 S.C.R. 714, 766.

¹³⁰ *R. v. Brown*, [1994] A.C. 212, *aff'd* [1992] Q.B. 491 (Eng.).

¹³¹ *Welch*, 101 C.C.C. (3d) at 238, 239.

sult.¹³² Nevertheless, Griffiths, J.A. in *Welch* was unable to endorse the Law Reform recommendations:

While the circumstances of this case are not as distasteful as the facts in the House of Lords decision of *Brown*, they are nevertheless disturbing. The sadistic sexual activity here involved bondage (the tying of the victim's hands and feet) and the intentional infliction of injury to the body and rectum of the complainant. The consent of the complainant, assuming it was given, cannot detract from the inherently degrading and dehumanizing nature of the conduct. Although the law must recognize individual freedom and autonomy, when the activity in question involves pursuing sexual gratification by deliberately inflicting pain upon another that gives rise to bodily harm, then the personal interest of the individuals involved must yield to the more compelling societal interests that are challenged by such behaviour.¹³³

The court found S/M to be "inherently degrading and dehumanizing" because violence is the main pursuit rather than incidental in the performance of S/M.¹³⁴ This is the contrast the court draws with the socially useful identified activities in *Jobidon* (sporting activities and games).¹³⁵

Carl Stychin has criticized this traditional common law distinction between violent activities (legal sports, tattooing, etc.), where the law will recognize consent when determining whether the *actus reus* is made out, and violent activities for which it will not (S/M) because the law is reliant on hegemonic norms of masculinity.¹³⁶ He argues that the law supports and enables activities (sports) regarded as proper "manly diversions" for the expression of aggression, while impugning those activities associated with homosexuality and regarded as threats to "normal" heterosexuality (S/M, and in particular, gay S/M).¹³⁷ To its credit, the court in *Welch* explicitly stated that the exclusion of S/M from the protected group is not because S/M is the pursuit of sexual desire whereas the other activities involve the satisfaction of other human preferences.¹³⁸ Instead, in worrying about the dehumanizing

¹³² *Id.* at 216, 238. The court noted that the UK Law Commission conducted a review of *Brown* after extensive consultation to recommend "that the law be changed to allow consent to be given to the intentional infliction and to the risk of injury, where the injury sustained is not serious." *Id.* at 235. This would only apply if the consenting person is over the age of eighteen. For a detailed discussion of *Brown*, see Chris White, *The Spanner Trials and the Changing Law on Sodomasochism in the UK*, 50 J. HOMOSEXUALITY 167 (2006).

¹³³ *Welch*, 101 C.C.C. (3d) at 231.

¹³⁴ *Id.* at 231.

¹³⁵ *R. v. Jobidon*, [1991] 2 S.C.R. 714, 768.

¹³⁶ Carl F. Stychin, *Un(manly) Diversions: The Construction of the Homosexual Body (Politic) in English Law*, 32 OSGOODE HALL L.J. 503, 510, 515-16 (1994).

¹³⁷ *Id.*

¹³⁸ After quoting from Williams Wilson, *Is Hurting People Wrong?*, 5 J. SOC. WELFARE & FAM. L. 388 (1992), Griffiths, J.A. summarizes its gist: "Quite simply, it is sug-

message that a particular activity conveys, the decision invoked the final reason mentioned in *Jobidon*—the sanctity of human life—as to why fisticuffs was not an appropriate sphere into which to extend the legal importance of consent, and applied that to S/M.

B. Why S/M is “Violence”

It is clear that the court in *Welch* viewed S/M as violence first and foremost. It is thus in agreement with Hanna’s position as to how to legally categorize S/M. Both the court and Hanna would not introduce the relevance of consent to S/M, defined as assaults involving bodily harm.¹³⁹ Hanna is even more sensitive to critiques of *Brown* than the *Welch* court.¹⁴⁰ She is responsive to Stychin’s concern of how the “social utility” category has reproduced a normalizing discourse with respect to masculinity, but is nevertheless wary of treating S/M sex like a sport.¹⁴¹ Hanna does not base her objection to treating S/M like we treat hockey or football on a rigidly defined morality or conservative ideas about sexual normalcy. She is not interested in discouraging the overall pursuit of sexual pleasure through pain. Rather, Hanna’s concern regarding the legal characterization of S/M—as violence or sex—surfaces from a desire to protect the female individuals who endure the physical pain, the masochists, from exploitation.¹⁴²

This is a concern that the court in *Welch* shares, but Hanna elucidates the point at greater length and with greater force. In her view, the irrelevance of consent to S/M protects the masochists by preventing legal actors, as well as possibly coercive sadists, from dismissing assaults against stigmatized individuals (practitioners of S/M) as something that “they asked for.”¹⁴³ What is the likelihood, Hanna queries, that abused masochists will report abusive treatment if they know that their partners can claim they consented to the activity and drag their sexual history through a judgmental and

gested that hurting people is wrong and this is so whether the victim consents or not, or whether the purpose is to fulfill a sexual need or to satisfy some other desire.” *Welch*, 101 C.C.C. (3d) at 239.

¹³⁹ Hanna, *supra* note 68, at 241–44, writes from the American context and focuses on the recent American case of *People v. Jovanovic*, 700 N.Y.S.2d 156 (N.Y. App. Div. 1999). The case involved a male Columbia University student and a female Barnard College student. The case went against precedents that treated S/M as an assault causing bodily harm rather than a sexual assault and therefore would have barred the accused from invoking the victim’s consent as a response to the charge. The case instead treated this type of consensual violence like a sport where consent is typically accepted as a reply to an injury sustained through the normal parameters of the statute.

¹⁴⁰ Hanna, *supra* note 68, at 241.

¹⁴¹ *Id.* at 249–56.

¹⁴² *Id.* at 280, 285.

¹⁴³ *Id.* Hanna draws a parallel to rape, highlighting the long-standing response of law enforcement officials, judges, and the public at large to women who “cried” rape, saying these women were getting what they deserved for their aberrant social behavior. This aberrant behavior is typically understood as anything in violation of prevailing gender, racial, and class norms (wearing revealing clothing, having extramarital relationships, being of the wrong race, etc.). *Id.*

disapproving court system and media?¹⁴⁴ Hanna recognizes the cogent feminist type of arguments that can be made in favor of S/M.¹⁴⁵ Yet she is unwilling to assign importance to consent in a case such as *Welch* for fear that, because S/M is still a relatively marginalized and stigmatized practice, juries and judges will treat victims, who are protesting the extent of treatment they may have received, even worse than they do women in most rape cases.¹⁴⁶ Similar to the situation faced by women who for one reason or another appear to violate the norm of ideal femininity, her concern is that the evidence and testimony of victims of non-consensual S/M will be filtered through unfair and demeaning stereotypes such that they will be seen to have received what they deserved for their perverse behavior.¹⁴⁷ Hanna sees the issue of the legal characterization of S/M as a contest between protecting the male sadist or the female masochist and opts for the latter—the woman who actually experiences the physical pain. Thus, she advocates for the traditional legal doctrine concerning “rough sex,” which treats such sex as violence for which consent is legally immaterial.¹⁴⁸ Hanna is aware of the dangers of her position. It exposes responsible sadists to possible vindictiveness of their masochistic partners if a relationship sours. Hanna, however, sees this problem of over-inclusiveness as inevitable, and she prefers to err on the side of caution rather than give untrustworthy sadists *carte blanche* over unwitting and too-trusting masochists.¹⁴⁹

C. Why S/M is “Sex”

It is Monica Pa who argues the “other side” in her recent law review article, *Beyond the Pleasure Principle*.¹⁵⁰ She fundamentally disagrees with Hanna’s characterization of S/M as violence rather than sex.¹⁵¹ She argues that the physical pain (beatings, burnings, cuttings, etc.) involved in S/M misleads people to see it as violence, and she queries why we choose to view S/M as violence when, in her view, a central component of violence is the absence of consent.¹⁵²

For Pa, S/M is just another form of sex. The painful aspects are not “violent” but pleasurable as sex is widely perceived to be.¹⁵³ As such, S/M is entitled to attach the same legal importance to consent in establishing the *actus reus* of the offense. Pa recognizes Hanna’s concerns regarding authorities dismissing or diminishing the complaints of masochists against their

¹⁴⁴ *Id.* at 285–86.

¹⁴⁵ *Id.* at 281–83.

¹⁴⁶ *Id.* at 261–62, 270.

¹⁴⁷ *Id.* at 279.

¹⁴⁸ *Id.* at 263–64.

¹⁴⁹ *Id.* at 270–71.

¹⁵⁰ Pa, *supra* note 29.

¹⁵¹ *Id.* at 77.

¹⁵² *Id.* at 77–80.

¹⁵³ *Id.* at 76.

partners. Still, she believes that Hanna misses the cultural meaning of S/M as just another sexual activity when she sees the violence, rather than the sex, as more constitutive of the practice. In Pa's view, the violence is sexual and inextricable from the sexualization of the encounter.¹⁵⁴ Pa, then, would treat S/M as sex and thus analyze an S/M encounter *gone beyond the trifling* (but short of "grievous" or "permanent" and "serious" bodily harm) as a possible offense of sexual assault involving no bodily harm rather than consensual violence involving bodily harm.¹⁵⁵

D. *The Relevance of Consent*

The central issue in the current feminist theorizing regarding the ideal legal doctrine of S/M is the relevance of the masochist's consent. Before discussing how *The Piano Teacher* illustrates the nuances of the significance of consent, it is important to recognize that considerable agreement exists among feminists regarding the level of harm that may be inflicted, regardless of whether consent should later negate the existence of a potential offense. This section briefly lays out this overlap in the sex wars before moving on to discuss the disagreement that materializes over the relevance of consent.

1. *Consensus on the Degree of Harm*

In her article, Hanna emphasizes the likelihood that S/M, unchecked, could easily lead to serious bodily injury or even death.¹⁵⁶ Pa agrees with the assessment, which leads her to qualify her support for the type of S/M she asks feminists to place on their agenda.¹⁵⁷ The reason for the confluence of views regarding the level of harm that should be lawful in an S/M relationship is plain: most societies constrain the freedom of individuals to do certain things to their bodies where those activities would imperil the individuals' lives or cause them grave and irreparable injury. Most notably, it is illegal to contract for slavery.¹⁵⁸ Most jurisdictions continue to criminalize the choice to have someone else help us in killing ourselves (whether assisted suicide or euthanasia),¹⁵⁹ or even to contract our wombs to the high-

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 81.

¹⁵⁶ Hanna, *supra* note 68, at 256, 274–75, 286–87.

¹⁵⁷ Pa, *supra* note 29, at 81.

¹⁵⁸ This is not to say that people have not tried to do so in the context of sadomasochism. Hanna speculates on the unenforceability of a "sex slave" contract between sadist and masochist, citing the case of John Edward Robinson, a sadist who used the internet, logging on as "Slavemaster," to find masochist women, one of whom paid him \$17,000 to be his "sex slave." See Hanna, *supra* note 68, at 286–87.

¹⁵⁹ Black's Law Dictionary defines assisted suicide as "the intentional act of providing a person with the medical means or the medical knowledge to commit suicide." BLACK'S LAW DICTIONARY 1475 (8th ed. 2004). Euthanasia is defined as "the act or practice of killing or bringing about the death of a person who suffers from an incurable disease or conditions, especially a painful one, for reasons of mercy." *Id.* at 594.

est bidder.¹⁶⁰ The rationale of these prohibitions relates to the concept of personhood. Enabling a person to partly or completely commodify her body and labor, or acceding to her request to be killed, are seen as impugning personhood rather than facilitating it.¹⁶¹ Critics who support these positions against slavery, commercial surrogacy, and assisted suicide or euthanasia underscore the propertied status, and thus antithesis of personhood, that would result from the recognition of a contract for indentured servitude and the potential for abuses of vulnerable individuals from a permissive death regime.¹⁶²

The argument for a qualified acceptance of S/M is analogous to these arguments for personhood protection. S/M conduct that deliberately pursues death, brain damage, paralysis, or amputation, for example, finds little feminist support regardless of one's position on the sex wars spectrum.¹⁶³ This is because of the severe nature of harm involved. Hence, S/M advocates such as Pa support limitations on the level of harm that a person may legally inflict. It is simple to appreciate the sensibility of limiting the harm a person may inflict when we consider the life-threatening and life-ending injuries Erika would sustain if her instructions were followed literally to the letter in *The Piano Teacher*.¹⁶⁴ Erika asks Klemmer to gag her up to keep her from whimpering, to let her "writhe like a worm in . . . cruel bonds," to leave her in that position for hours, and then to place her "in all sorts of different positions, hitting or kicking [her], even whipping [her]," and then finally to leave her in a locked room hogtied, with nylons stuffed down her throat, for hours.¹⁶⁵ Klemmer responds that such treatment would kill her, noting that, "No one could endure the things she desires, without dying sooner or later."¹⁶⁶ This level of injury is too much for most feminists, regardless of the justifications for S/M. We can surmise that the adage of "everything in moderation," including sexually satisfying sadomasochism guides the convergent theorizations here.

¹⁶⁰ Assisted Human Reproduction Act, S.C. ch. 2 (2004) (Can.). Note though that surrogacy is permitted when altruistic. For an exploration of the commodification of human bodies debate from feminist perspectives, see generally RETHINKING COMMODIFICATION: CASES AND READING IN LAW AND CULTURE (MARTHA ERTMANN & JOAN WILLIAMS eds., 2005).

¹⁶¹ See generally MARGARET JANE RADIN, CONTESTED COMMODITIES 154–63 (1996); Margaret Jane Radin & Madhavi Sunder, *Introduction: The Subject and Object of Commodification*, in RETHINKING COMMODIFICATION, *supra* note 160, at 8–24.

¹⁶² For feminist discussions against the commodification of the human body, see generally Jennifer Nedelsky, *Property in Potential Life? A Relational Approach to Choosing Legal Categories*, 6 CAN. J.L. & JURISPRUDENCE 343 (1993); see also Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849 (1987). For a feminist discussion against assisted suicide, see generally Jocelyn Downie & Susan Sherwin, *A Feminist Analysis of Issues Around Assisted Death*, 15 ST. LOUIS U. PUB. L. REV. 303 (1996).

¹⁶³ Hanna, *supra* note 68, at 284.

¹⁶⁴ See JELINEK, *supra* note 11, at 215, 224–25.

¹⁶⁵ *Id.* at 215–16, 223–24.

¹⁶⁶ *Id.* at 217.

2. *Dissension on the Meaning of S/M*

The feminist consensus on the undesirability of “extreme S/M” only addresses a sliver of the S/M conduct that people are increasingly practicing.¹⁶⁷ Views continue to diverge, sometimes sharply, as to the legality of S/M in the grayer, moderate S/M zone.¹⁶⁸ In the same way that *The Piano Teacher* complicates the question of whether S/M is a friend or foe of feminism, it also illustrates the tensions regarding the latest focus in the debate: whether consent should be relevant to S/M acts/assaults when things go awry. Recall that Pa advances a characterization of S/M as sex and not violence,¹⁶⁹ a characterization that Hanna does not address. This move seems legitimate given the sexual meaning that Erika ascribes to her S/M fantasies. Violence and pain are inextricably entwined with her understanding of female sexuality. She is interested in pain for reasons of sexual arousal and romantic love. Since she desires this pain from a particular lover, it is difficult to characterize it as violence against her, because she seeks it out through her letter, expecting pleasure from it, even bliss.

Yet, the dangers that Hanna predicts were the law to treat S/M as sex rather than violence trouble Pa’s conceptualization. Consider again the scene where Klemmer assaults and rapes Erika in her apartment.¹⁷⁰ Without regulation, the potential for abuse of trust between two S/M practitioners arises. Proponents of a laissez-faire approach to S/M have argued that S/M is not dangerous when it is practiced in a responsible way.¹⁷¹ A critical ingredient of responsible S/M is said to be the selection of a “safe” word, which, when spoken during S/M activity, tells the sadist to stop whatever he or she is doing to the masochist despite prior consent to the activity.¹⁷² As with any “safe sex” or other guideline, it is just that: a guideline rather than a binding, enforceable regulation. As Hanna argues, some S/M participants do not practice safe S/M sex.¹⁷³ Litigation arises from S/M participants when masochists claim that the activity went beyond what they consented to.¹⁷⁴

As Hanna notes, although it may be readily conceded that many other types of activities (examples such as hockey, bungee-jumping, electrolysis, and plastic surgery come to mind) are all potentially dangerous and even fatal, they are also typically regulated activities.¹⁷⁵ As a society we usually

¹⁶⁷ See Pa, *supra* note 29, at 59–60; see also Wright, *supra* note 90, at 222 (abusive individuals can be found in all groups, but S/M itself is not inherently abusive).

¹⁶⁸ Hoople, *supra* note 68, at 190–98 and 208–19.

¹⁶⁹ Pa, *supra* note 29, at 77–80.

¹⁷⁰ JELINEK, *supra* note 11, at 266–69.

¹⁷¹ See, e.g., Pa, *supra* note 29, at 61.

¹⁷² *Id.*

¹⁷³ Hanna, *supra* note 68, at 288.

¹⁷⁴ *Id.* at 275–80 (discussing *People v. Jovanovic*, 700 N.Y.S.2d 156 (N.Y. App. Div. 1999)).

¹⁷⁵ Hanna, *supra* note 68, at 290.

do not permit persons, even the privileged “paradigmatic” person (i.e., a mentally and physically capable human adult male),¹⁷⁶ to engage in activities involving a high degree of risk to his person without some aspect of regulation. As a private, behind closed doors practice, S/M is not an activity that the state regulates through a commission, board, agency, or other administrative decision maker. S/M’s non-regulated status is a critical point that Hanna adduces in justifying the current legal doctrine dismissing consent where serious physical injury is involved.¹⁷⁷ In this unregulated realm, Hanna argues, the potential for accidents, mistakes about the scope of consent, or deliberate abuse is high and pressing enough to warrant state-imposed limits on sadomasochistic conduct.¹⁷⁸

Hanna’s argument is convincing when we recall what unfolds in *The Piano Teacher*.¹⁷⁹ Both Erika and Klemmer are neophytes as S/M practitioners. Erika knows her fantasies and tells Klemmer of them through the letter, but appears unaware that what she asks, even if carried out halfway, could kill her. In trying to convey his sense of frustration and incredulity at what she wants, Klemmer asks her what she knows of his strength, assuring her that she underestimates its limits when she asks him to tie things as tightly as he can, to sit on her, to whip her, etc.¹⁸⁰ In this way, *The Piano Teacher* illustrates the reasonableness of Hanna’s concern regarding the significance of consent as the narrative imparts the sense that Erika is heavily uneducated in safe S/M sex. One anticipates that an encounter with another uneducated partner would result in misunderstandings as to what is to consensually transpire and mistakes in the application of force.

Moreover, the letter has not discussed a “safe word,” a staple in communication during S/M conduct.¹⁸¹ To the contrary, Erika asks Klemmer to come up with punishments as he sees fit if she disobeys him or asks him to stop.¹⁸² It is arguable, however, whether a safe word would even have been sufficient to guard against ambiguities regarding whether Erika had given consent to a particular act. Recall that in a state of frenzy, and after terrorizing animals and a young couple having sex in a nearby park at midnight, Klemmer comes to Erika’s home and orders her to let him inside. She does, fearful that he will wake up the neighbors and her mother, but also hopeful that he has come to apologize for his cruel words in their last meeting and

¹⁷⁶ Christopher Stone, *Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 S. CAL. L. REV. 1, 9–10 (1985). Stone’s actual term for these humans is “Contemporary Normal Proximate Persons.” *Id.*

¹⁷⁷ Hanna, *supra* note 68, at 268.

¹⁷⁸ *Id.* at 248.

¹⁷⁹ JELINEK, *supra* note 11.

¹⁸⁰ *Id.* at 222.

¹⁸¹ Pa, *supra* note 29, at 61 (citing CHARLES MOSER & J.J. MADESON, BOUND TO BE FREE 118 (1996)).

¹⁸² JELINEK, *supra* note 11, at 224. Erika writes to Klemmer: “In case you witness a transgression on my part . . . please hit me, with the back of your hand too, slap my face when we’re alone. Ask me why I don’t complain to my mother or hit you back. In any case, tell me these things so I can feel my helplessness properly.” *Id.* at 224.

declare his love for her once again.¹⁸³ When Erika opens up her apartment door in response to his banging, he forces his way inside and starts slapping her about amidst her protestations. When Erika's mother, awakened by the disturbance, hears her daughter's cries, she orders Klemmer to leave. Klemmer then slaps Erika and pushes her mother back inside the bedroom, locking her in and forcing her to listen to what happens next.¹⁸⁴ Jelinek writes:

Walter Klemmer smashes his right fist, not too hard and not too soft, into Erika's belly. She tumbles back again after standing upright. Erika huddles over, pressing her hands into her abdomen . . . He jeers at her: Where are her cords and ropes? And where are her chains? I'm only executing your orders, madame. Now gags and straps can't help you, mocks Klemmer, who produces the effects of gags and straps without using such aids.¹⁸⁵

A few moments later: "Erika, bleeding slightly, curls up like an embryo, and the work of destruction progresses. In Erika, the man sees many other women he wanted to get rid of."¹⁸⁶

After Klemmer leaves, Erika refuses to contact the police, despite her mother's urging.¹⁸⁷ Instead, she tries to meet Klemmer the following day, packing a kitchen knife in her purse. It is unclear what Erika's intentions are as she sets out, hoping to meet Klemmer; she does not know whether she will use the knife to harm him or herself. It is possible that she still wishes to revert to a romantic dynamic between Klemmer and herself, one which he will covet, as he used to covet her.¹⁸⁸ Instead, she feels rejected. She goes to his engineering school to try to meet him. Klemmer does not see Erika, but she sees him, flirting on the steps of the conservatory with a female classmate and surrounded by his admiring collection of friends before they go inside the building. As Klemmer disappears, seeming to fade from Erika's life, Erika takes the knife and stabs it efficiently into her shoulder.¹⁸⁹

Erika's situation provides an illustration of why Hanna argues against viewing S/M as sex rather than violence.¹⁹⁰ She expressed words conveying her opposition to the physical beating and rape that transpired in her home once Klemmer arrived. Yet, we have to ask whether the consent, written in the letter that Erika gave to Klemmer, to perpetrate very similar acts against her, matters. Had Erika called the police, and the novel continued into a

¹⁸³ *Id.* at 261–62.

¹⁸⁴ *Id.* at 264–65.

¹⁸⁵ *Id.* at 266–67.

¹⁸⁶ *Id.* at 268.

¹⁸⁷ *Id.* at 275.

¹⁸⁸ *Id.* at 278.

¹⁸⁹ Though a reader may question the state of Erika's mental health, wondering what type of sane person would do this to herself, this query misses the point of the feminist dilemma of how to regard S/M since we may presume that most S/M practitioners are mentally capable individuals.

¹⁹⁰ Hanna, *supra* note 68.

legal trial where Klemmer was prosecuted for assault causing bodily harm and rape, should the defense be able to introduce that letter as evidence of consent for the acts about which Erika now complains? Hanna fears that women with life experiences and characteristics like Erika—namely, an unfamiliarity with safe S/M practice and/or poor judgment in requesting S/M encounters that would kill if carried out faithfully—will sanction Klemmer's brutality and immunize him from legal punishment. Hanna would rather protect someone in Erika's (heterosexual) position, typically the female, than someone in Klemmer's position, typically the male.¹⁹¹ According to Hanna, the risk has to fall somewhere.¹⁹² Applying Hanna's logic, were Erika to bring suit against Klemmer, it is Klemmer, as the one who chose to inflict the injuries, who should bear the risk because Erika did not consent to the injuries inflicted upon her. To Hanna, it would be immaterial that Klemmer thought he was adopting a role in Erika's S/M fantasy.

Hanna's assessment of who should bear the risk is difficult to determine given Klemmer's behavior. Jelinek writes:

Erika lies on the floor, the hallway runner sliding out beneath her. She says please don't. Her letter doesn't deserve such punishment. Klemmer is unleashed, but Erika is not leashed. The man casually hits her and mordantly asks: Well, where's your letter now? This is all you get. He boasts that he doesn't have to tie her up, as she can see for herself. He asks her whether the letter can help her now. While hitting her lightly, Klemmer tells the woman that this is exactly what she wanted. Erika tearfully protests that this isn't what she wanted, she wanted something different. *Well then you'll have to express yourself more carefully next time, the man replies.*¹⁹³

In this scene, even the optimistic reader is finally convinced of the disharmony between the two characters. Whereas it is possible to interpret Klemmer's actions up to this point as possibly staging the scene that Erika describes in her letter, Klemmer's mocking reference to the letter strongly suggests that he does not act out of a desire to fulfill her sexual fantasies, but to hurt and humiliate her and avenge himself for his own humiliation and emasculation, for which he blames her. If this interpretation is correct, it is disquieting to realize that if Erika attempted to lay charges, Klemmer could use the letter and profess, through standard honest belief in consent doc-

¹⁹¹ See *id.* at 269–70; see also Pa, *supra* note 29, at 90 (citing SUSAN WRIGHT, WHAT IS SM? LAW ENFORCEMENT OUTREACH PROGRAM, available at <http://www.ncsfreedom.org/eop/files/WhatIsSM.pdf> (last visited May 28, 2007)) But see Pa, *supra* note 29, at 90 (stating “no studies have conclusively indicated that women are more sexually responsive to playing the [masochist] or sexual submissions. Indeed several studies indicate that men are more drawn to playing submissive roles.”).

¹⁹² Hanna, *supra* note 68, at 248.

¹⁹³ JELINEK, *supra* note 11, at 270 (emphasis added).

trine,¹⁹⁴ to have genuinely interpreted the letter as authorizing the acts that he commits against Erika.

The last line is chilling in this regard. *Well then you'll have to express yourself more carefully next time.* Erika is not a lawyer; her letter is not a contract.¹⁹⁵ Indeed, most S/M practitioners will not express themselves with the precision required to eliminate *all* ambiguities regarding the hitting, burning, slapping, etc. the masochist may desire. The possibility for conflict and muddled expectations persisting long after a contract is drawn seems especially high in light of Deleuze's point that both subjects covet control and thus are working at cross-purposes.¹⁹⁶ This concern over the instability and intersubjectivity of the meaning of words, including contractual terms, becomes especially acute if we accept that "[t]he masochist seeks a compromise so subtle that it must be constantly reexamined by both parties. . . ."¹⁹⁷ While a safe word might be useful to stop a permitted activity from going too far, it would be useless to undo an originally *unpermitted* activity that resulted from the masochist's different interpretation of what exactly had been authorized. It is the latter situation that cautions against relying on consent in S/M, and that is dramatized in *The Piano Teacher*. Klemmer challenges Erika's version of events, claiming that what he has done is exactly what was requested. Whether he is genuine in this belief is beside Hanna's point.¹⁹⁸ The opportunity for a sadist to get away with such grievous injuries when the masochist claims that they were never authorized is unpalatable to her, and although Erika has her class and race to protect her from immediate skepticism of her claims to assault,¹⁹⁹ Hanna's point is compelling: police officials, jurors, and judges will have a difficult time believing that Erika was really harmed given her penchant for pain, as evidenced in her letter.²⁰⁰

Pa has a response to this concern. She argues that the belief that criminalization will protect masochists is ill-informed, and she agrees with Hanna that education about how to practice safe S/M is vital to the well-

¹⁹⁴ Canada Criminal Code, R.S.C. ch. 46 s. 265(3) (1985).

¹⁹⁵ The question of whether or not Erika made an offer in the contractual sense remains an open one: Would a reasonable person think that her letter evinces a clear intention to be bound? Similarly, would Klemmer's behavior qualify as acceptance measured by an objective test? Beyond offer and acceptance, the contractual concept of consideration is troubling in Erika's context: Who has conferred a benefit and who has suffered a detriment in the encounter?

¹⁹⁶ See generally DELEUZE, *supra* note 12.

¹⁹⁷ Kirby, *supra* note 69, at 768.

¹⁹⁸ JELINEK, *supra* note 11, at 270.

¹⁹⁹ Studies have shown that law enforcement officials are more likely to question the veracity of assault complaints made by women of color as opposed to their white, middle class counterparts. See, e.g., Kimberle Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women*, 43 STAN. L. REV. 1241, 1269-71 (1991) (arguing that Black women marginalized by their racial status must confront different challenges to realize respect for their bodies against male violence because they face subordination based on both race and gender).

²⁰⁰ Hanna, *supra* note 68, at 215, 224-25.

being of its practitioners.²⁰¹ Yet she questions the willingness of masochists to attend public education sessions if they believe their partners are at risk of harassment or prosecution for assault causing bodily harm.²⁰² Moreover, she worries that masochists may be less willing to seek out medical assistance if the medical staff that treat them are under professional obligations to report injuries to the authorities.²⁰³ This is an important point, but does not resolve the problem of over-inclusivity: either innocent sadists are still prosecuted or innocent masochists are still vilified. *The Piano Teacher*, for the reasons canvassed above, graphically illustrates the reasonableness of Hanna's selection in favor of protecting masochists.

V. CONCLUSION

Feminist readings have exposed the fraught and contested nature of discourses of consent and choice. The manner in which choice and consent enter into legal and political debates either to gloss over or to legitimate women's inequality has become a focal point in feminist inquiry. Amidst this interrogation lies the question of whether society should criminalize or otherwise denounce certain practices even when women actively pursue them. Should the primacy of individual autonomy and choice triumph over concerns regarding the underlying causes driving such decisions—causes which may trouble the preconditions for meaningful choice? In the S/M context, the question becomes: should women's preferences for sexual encounters typically marked by dominance and submission as well as bodily pain be respected, even celebrated, as exercises in human flourishing? Or should we instead approach such decisions with skepticism, aware of the coercive hegemonic gender and cultural codes which surround women from birth and make dubious their consent to violence at the hands of men? For the most part, answers to this labyrinthine question have come from two poles within feminist theory, adding fuel to the sex wars that have animated feminists for decades. The work of Hanna and Pa has recently brought opposing camps closer together among legal feminists with respect to the affirmation of S/M as sex, yet full conciliation remains impaired by definitional disputes as to what S/M means and its connection to choice and consent.

Jelinek illustrates these tensions with eloquence and depth in *The Piano Teacher*. Filtering the law through the literary lens of *The Piano Teacher* illuminates the contested question of the legality of S/M interactions and how such interactions should be treated in light of the consent principle. The literary iteration of this question also portrays the complexity of feminist concerns and analyses regarding S/M. Although Erika's story can be used, on the one hand, to affirm the argument that S/M supports feminist projects,

²⁰¹ Pa, *supra* note 29, at 83–84.

²⁰² *Id.*

²⁰³ *Id.* at 83.

it also confirms the need for law to protect those who willingly subject themselves to pain in the name of pleasure. *The Piano Teacher* illustrates the ways in which S/M may potentially assist some women to have greater personal agency, while cautioning against a situation that would have the law remove itself entirely from the intimate exchanges between partners in S/M encounters/relationships. As a particular cultural narrative on sex, gender, and power, it prompts a possible feminist legal vision and intervention in this area of sharply divergent interpretations.

In doing so, *The Piano Teacher* responds to Lynn Chancer's suggestions that a dualistic paradigm does little to advance the common goal of women's empowerment shared by all feminists while doing much to weaken the workings of feminist movements on these issues.²⁰⁴ For Chancer, the disputes among feminists about the emancipating potential of certain sexual practices are unfruitful. She argues that feminists need a way to move beyond the impasse of viewing a practice like sadomasochism as only about male dominance or as only about female sexual liberation.²⁰⁵ Similarly, we need to bypass the debate about what S/M *is* (consensual sex or consensual violence) and concentrate on, as Chancer suggests, eliminating sexist (and, I would add, other discriminatory) practices that are imposed, as well as hegemonic gender roles and identities. She writes:

[W]hat individuals like or do not like sexually about pornography, for instance, need not deflect attention from targeting sexism in the pornography industry overall. Collective demands can be made, challenging institutionally based power and raising questions of political economy Analogously, individuals' attitudes and actions regarding cosmetic surgery need not obscure another collective concern: transforming a media industry that still overvalues young, thin, and often white women's bodies. Nor do disagreements about an individual woman's engagement with sex work need to deflect feminist attentions away from the larger social context in which that woman often does not experience genuine economic choice. Finally, a two-pronged feminist strategy toward a third wave might be able to protest the sadomasochistic character of a given culture, at the same time recognizing that sadomasochistic desires are likely to characterize many individuals' experiences of desire.²⁰⁶

Chancer's perspective reflects the sensible conclusion that it is unlikely that a universal answer or solution to the sex wars will ever materialize. Indeed, it is unlikely that feminists will ever agree on a single answer to this or any controversial issue. But where does this leave feminist theoretical inquiry

²⁰⁴ Chancer, *supra* note 20, at 86.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 86–87.

and feminist praxis? To heed Chancer's call that "valid differences between women are left to stand"²⁰⁷ or to say that we can never agree does not mean that we can never favor a particular position or even campaign for a particular legal reform. It is not a call for relativism or apolitical pluralism. Given the richness and heterogeneity of feminist analyses, feminism has never been about promoting policies which all women support. The sheer impossibility indicates the absurdity of such an ambition. Yet, the unavailability of consensus should not extinguish attempts to articulate what types of practices feminists might want to support and which practices they might wish to discard in an ideal social order.

The Piano Teacher assists all feminists, regardless of which position they take, in this project to gain a more tangible appreciation for the arguments on both sides of the S/M debate. By illuminating the merits of competing interpretations in the debate, both in their traditional and more recent articulations, *The Piano Teacher* helps portray that, despite the forceful concerns of feminists worried about the eroticisation of violence against women, we should be respectful of women's agency and choices to engage in consensual violence like S/M, even as masochists. It also serves as a reminder not to simply or immediately reject the possibility that S/M has feminist potential. This appreciation may then help navigate future feminist conversations about precisely how the law should influence heterosexual S/M relationships and encounters and, more generally, approach instances of consensual violence.

²⁰⁷ *Id.* at 86.

