

SEX IS NOT A SPORT: CONSENT AND VIOLENCE IN CRIMINAL LAW

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Abstract: Does consent excuse violence against another? Generally, it does not. Recently, however, criminal defendants charged with violence against their sexual partners have asked courts to treat violent sex or sadomasochism (S/M) as a sport, like prize fighting and hockey. While most courts have refused to do so, a recent New York case, *People v. Jovanovic*, let stand a ruling that effectively permits a defendant to argue consent as a defense. This Article argues that the liberal argument treating S/M as a matter of sexual autonomy fails to account adequately for the history and practical application of the doctrine of violent consent. It concludes that by recognizing consent in the S/M context, the law is evolving in a direction that could lead to the glorification of sexual violence, rather than the sexual liberation of consenting adults.

We are in bondage to the law so that we may remain free.

—Marcus Tullius Cicero

INTRODUCTION: IN BONDAGE TO THE LAW

In sadomasochism,¹ sex and violence intersect, becoming intertwined and indistinguishable. Americans are fascinated with S/M, in

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¹ The term sadomasochism (S/M) derives from the work of two novelists: Marquis de Sade and Leopold von Sacher-Masoch, both of whom explored in their writings the bonds of violent sexual relationships. Sadomasochism, which is sometimes referred to as bondage and domination, or bondage and discipline (B/D), is a sexual practice whereby a person experiences erotic pleasure though either inflicting pain (sadism) or receiving pain (masochism). THOMAS E. MURRAY & THOMAS R. MURRELL, *THE LANGUAGE OF SADOMASOCHISM* 20–21 (1989).

part, because we are a culture fascinated with bonds and boundaries of pain and pleasure and with the ambiguity of power and powerlessness in intimate relationships. S/M is at "once pain and the opposite of pain."² In S/M, bondage, role-playing, spanking, beatings, physical and verbal torture, and humiliation are the means to a cathartic end—the knowledge and acceptance that one person has total and complete control over the other.³ In the "eroticism of suffering," pleasure and pain are not mutually exclusive, but rather they are "intimately linked."⁴ S/M is, by definition, consensual activity,⁵ yet it pushes at the edge of legal consent.⁶

S/M involves not only the law of *sexual* consent,⁷ but also the law of *violent* consent. Sex and violence are separate and distinct paths within criminal law, however, and at their crossroads, the doctrine of consent becomes confused and confusing. Violence, like sex, is both terrorizing and titillating, depending on the context. Whether S/M is a context in which individual sexual autonomy should overpower the state's interest in restraining violence is the subject of this Article.

Consensual sexual violence⁸ runs the spectrum from playful pushing and wrestling to erotic asphyxiation. On one end of the spectrum, consensual activities that could result in nothing more than a "transient and trifling injury" are generally no concern of the crimi-

² Talal Asad, *On Torture, or Cruel, Inhuman, and Degrading Treatment*, 63 SOC. RES. 1081 (1996), available at 1996 WL 13224679 (1996).

³ See Marianne Apostolides, *The Pleasure of Pain: Why Some People Need S & M*, PSYCHOL. TODAY, Sept. 1, 1999, at 60.

⁴ Asad, *supra* note 2.

⁵ See, e.g., GLORIA G. BRAME ET AL., *DIFFERENT LOVING: THE WORLD OF SEXUAL DOMINANCE AND SUBMISSION* 5 (1993) ("The practices and attitudes of contemporary sexual dominants and submissives . . . largely abide by the credo of 'Safe, Sane, and Consensual.'").

⁶ William N. Eskridge, Jr., *The Many Faces of Sexual Consent*, 37 WM. & MARY L. REV. 47, 48 (1995).

⁷ *Id.*

⁸ There is some debate over the use of the word violence within the S/M context. For example, one author suggests, "Consensual sadomasochism has nothing to do with violence. Consensual sadomasochism is about safely enacting sexual fantasies with a consenting partner. Violence is the epitome of nonconsensuality, an act perpetrated by a predator on a victim." CAROL TRUSCOTT, *LEATHERFOLK* 15-16 (1992), as cited in WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 260 (1999).

In this piece, I use the word "violence" within its legal definition: "Force, physical force, force unlawfully exercised, the abuse of force, that force which is employed against common right, against the laws, and against public liberty." BLACK'S LAW DICTIONARY 1742 (4th ed. 1968). Hence, within its legal definition, violence may be consensual activity but still violate public policy and legal norms.

nal law.⁹ On the other end, the state has a compelling interest in protecting its citizens from death. Thus, the law generally refuses to recognize consent as an absolute defense to homicides that occur during sexual encounters, although consent can be a partial defense, mitigating murder to manslaughter.¹⁰ It is the gray area between sexual playfulness and death that plagues the law.

In an ongoing and highly controversial case, *People v. Jovanovic*,¹¹ New York's highest court recently let stand a lower appellate court decision holding, in effect, that consent can be a defense to violent assault and battery occurring within the context of a sadomasochistic encounter.¹² The case involves a male graduate student at Columbia who was sentenced to fifteen years in prison for kidnapping, assaulting, and sexually abusing a female Barnard College student. The two met online and frequently discussed on e-mail their mutual interest in S/M. The victim admitted on e-mail to being in a sadomasochistic relationship with another man, and described in intimate detail her S/M fantasies, which included being tortured.¹³

At trial, the victim testified that when the two met in person for the first time, she voluntarily went to Jovanovic's apartment and agreed to be tied to a futon as part of a sexual encounter. But she also testified that she never consented to being tortured for twenty hours. Jovanovic poured candle wax on her, bit her, shoved an object in her rectum, and refused to release her even after she invoked a "safe word" which meant "stop." Neighbors testified that they heard screams coming from the apartment and friends corroborated her injuries.¹⁴ The defendant did not take the stand, but his attorney Jack Litman, who also defended the "preppy murderer" Robert Chambers,¹⁵ claimed that this was all part of a consensual S/M encounter.

⁹ See *R. v. Brown*, 1 A.C. 212, 230 (Eng. H.L. 1994) (detailing the common law of violent consent and holding that "bodily harm. . . need not be permanent, but must, no doubt, be more than merely transient and trifling").

¹⁰ See generally George E. Buzash, Note, *The "Rough Sex" Defense*, 80 J. CRIM. L. & CRIMINOLOGY 557 (1989) (reviewing the case law on the "rough sex" defense and finding that it often serves to mitigate and in some cases exculpate defendants).

¹¹ See *People v. Jovanovic*, 95 N.Y.2d 846 (2000) (leave to appeal granted, decision without published opinion) [hereinafter *Jovanovic I*].

¹² *People v. Jovanovic*, 700 N.Y.S.2d 156 (App. Div. 1999) [hereinafter *Jovanovic II*].

¹³ See *id.* at 164.

¹⁴ See *id.* at 174.

¹⁵ Robert Chambers was charged with the murder of Jennifer Levin. Both were affluent youths in New York City. On August 26, 1986, the two met at a local pub, where they argued, and then left for a walk in Central Park. Two hours later, the police found Levin's body, bruised and strangled. At trial, Mr. Litman, Chambers's attorney, contended

The trial judge refused, under New York's Rape Shield Law, to admit portions of the e-mail correspondence that related to the victim's experience with S/M.¹⁶ The Supreme Court of New York, Appellate Division, reversed the conviction and ordered a new trial. It held that although the defendant had no constitutional right to engage in S/M, the e-mail statements would have highlighted the complainant's state of mind as to consent and the defendant's own state of mind regarding the reasonableness of consent.¹⁷ Thus, in the "interests of justice," the e-mails should have been admitted.¹⁸ However, the court failed to define what limits, if any, the law should place on private, sexually-motivated violence, thus raising far more questions than it answered.

The crucial issue in *Jovanovic* is not whether the jury believed the victim. Rather, even if the jury believed that the victim consented, or that Jovanovic was both reasonable and honest in believing that she consented, is what he did to her still a crime? The New York Court of Appeals implies that Jovanovic committed no crime if the victim consented. This is significant because *Jovanovic* is the first appellate decision in the United States to so hold. Prior to this decision, courts in the United States, England, and Canada have consistently maintained that one cannot consent to any activity which could cause serious bodily injury or death, i.e. violence, with a few exceptions,¹⁹ voluntary participation in organized sports being the most common.²⁰

Sex is not a sport, however, and prior to *Jovanovic* courts have refused to recognize consent as a defense in S/M cases. In doing so, they have relied on two arguments. First, moral outrage towards the

that Levin's death resulted from a mishap during rough sex. The prosecution eventually plea-bargained from murder to manslaughter. See Buzash, *supra* note 10, at 558. The "rough sex" defense was not invented by Jack Litman, but was made popular by this case. See LINDA A. FAIRSTEIN, *SEXUAL VIOLENCE* 125, 146 (1993).

¹⁶ See *People v. Jovanovic*, 676 N.Y.S.2d 392 (N.Y. Sup. Ct., Trial Division 1997).

¹⁷ *Jovanovic I*, 700 N.Y.S.2d at 156.

¹⁸ *Id.*

¹⁹ But see *R. v. Christopher*, BC9906145 (Supreme Court of Victoria—Criminal) (1999) (reaching contrary conclusion in case where the victim died of erotic asphyxia and bondage). This is the only case of common law tradition to explicitly suggest that S/M may fall within the sports exception to assault and battery. For a description of the case, see, *Five Years in Jail for Bondage Sex Death*, AAP NEWSFEED, Sept. 3, 1999.

²⁰ The other exceptions to the doctrine include surgery, body piercing, and tattooing, which are activities regulated by the states in exercise of its police power. John S. Herbrand, *Regulation of the Business of Tattooing*, 81 A.L.R. 3d 1212 (1977); see also Keith M. Harrison, *Law, Order & the Consent Defense*, 12 ST. LOUIS U. PUB. L. REV. 477, 480, 501 (1993). This Article does not explore the relationship between consensual violence and mercy killings or euthanasia.

practice of S/M has often justified its illegality.²¹ Second, and more frequently, courts have refused to extend the sports exception to S/M because the likelihood and degree of harm that could result is too high while the social utility of the activity itself is not compelling.²²

Although *Jovanovic* is the first case to break with this legal tradition, it is not likely to be the last. S/M is going mainstream.²³ The psychological community once considered those who practiced S/M mentally ill.²⁴ Today, however, S/M is no longer universally considered to be a fantasy or fetish confined to the "sexually deviant" and/or sexual sub-cultures. The Institute for Advanced Study of Human Sexuality estimates that at least one in ten adults has experimented with some form of S/M and that it is most popular among educated, middle and upper class men and women,²⁵ despite its association with gays, lesbians, and bisexuals.²⁶

S/M is so trendy, it is almost passe. Black leather is *the* look in bars and clubs among the urban chic and tragically hip. Stories about S/M appear in mainstream magazines like *Psychology Today*, *Jane*, and the *New Yorker*. Noted authors such as Anne Rice write sadomasochistic

²¹ See, e.g., *Barnes v. Glenn Theater*, 501 U.S. 560, 574–75 (1991) (Scalia, J., concurring) ("Our society prohibits . . . certain activities not because they harm others but because they are considered . . . immoral. In American society, such prohibitions have included, for example, sadomasochism . . . suicide, drug use, prostitution, and sodomy.).

For articles and books on whether moral outrage alone is a sufficient governmental interest to regulate private activity, see generally WILLIAM J. BENNETT, *THE DEATH OF OUTRAGE: BILL CLINTON AND THE ASSAULT ON AMERICAN IDEALS* (1998); ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* (1997); S.I. STRONG, *Romer v. Evans and the Permissibility of Morality Legislation*, 39 ARIZ. L. REV. 1259 (1997); Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139 (1998).

²² See *infra* notes 80–102 and accompanying text.

²³ Lauren Goodlad, *You Get Me Closer to God: Advertisers Are Taking S/M Mainstream, but What Exactly Are We Buying?* SEATTLE WEEKLY, Feb. 12, 1998, at 35.

²⁴ See Apostolides, *supra* note 3, at 60 (noting that in the 1980s, the American Psychiatric Association removed S/M as a category in its Diagnostic & Statistical Manual of Mental Disorders); see also JACK NOVICK & KERRY KELLY NOVICK, *FEARFUL SYMMETRY: THE DEVELOPMENT AND TREATMENT OF SADOMASOCHISM* (1996) (reviewing psychoanalysis literature on S/M); LYNN S. CHANCER, *SADOMASOCHISM IN EVERYDAY LIFE* 69–88 (1992) (describing psychoanalytic view of sadomasochism, particularly Freudian theory); S & M: *STUDIES IN DOMINANCE AND SUBMISSION* (Thomas S. Weinberg ed., 1995).

²⁵ See Apostolides, *supra* note 3, at 60 (quoting Charles Moser).

²⁶ See, e.g., Eskridge, *supra* note 6, at 60–61 (arguing that while there is no "stereotypical" gay lifestyle, "the lesbian, gay male, and bisexual community is more relentlessly 'liberal' about sexuality than is the straight community, including most straight women" and that the gay experience is more sympathetic to S/M).

erotica for the mass market.²⁷ Personal ads in newspapers and on websites provide a private forum to find a partner. Those in search of "how-to" manuals can bypass dirty bookstores for Barnes & Noble. Sex shops that sell whips and chains and Velcro restraints are moving from red light districts to upscale shopping areas. Websites advertising torture tools are a click away. Clubs and conferences for the curious and the committed are commonplace. Anyone can become a card-carrying member of the *Black Rose*²⁸ or the *Disciplinary Wives Club*.²⁹ Images of beautiful people experiencing pleasure through pain appear in ads for Skyy Vodka, Bass Ale, Candies Shoes, and high-priced fashion. It is the subject of popular songs, Hollywood movies, and prime-time TV.³⁰

Admittedly, researching and writing about S/M is, in itself, risky behavior.³¹ Thus, an author's preface seems in order. My interest in the law of S/M began while prosecuting domestic violence cases. Often, defendants would claim that the injuries inflicted upon their intimate partners were a result of "rough sex" and thus raised consent as a defense to charges of assault and battery. On more than one occasion, I argued to a court that consent was immaterial.³² Furthermore, I have argued that domestic violence victims should be mandated to participate in the prosecution of their abusers—that women cannot implicitly consent to violence by refusing to press charges or cooper-

²⁷ See, e.g., ANNE RICE, *EXIT TO EDEN* (1996).

²⁸ See Black Rose Club Homepage at <http://www.br.org> (visited Aug. 15, 2000) (homepage for the Black Rose, a nonprofit organization "which provides a forum for the many different expressions of power in love and play").

²⁹ See Disciplinary Wives Club Homepage at <http://jagworld.com/mist/DWC/DWC-main.htm> (visited July 10, 1999) (describing itself as "an organization whose purpose is to encourage the application of 'Good Old Fashioned' spanking and other traditional methods of discipline by wives and committed partners.").

³⁰ David Brooks, *The New Upper Class: How Conservatives Won the Cultural War and Lost the Peace*, WKLY. STANDARD, May 8, 2000, at 21.

³¹ For a description of the academic controversy surrounding S/M, see, e.g., Eddie Hargreaves, *Professors' Grant to Study S/M Stirs Controversy*, U. WIRE, May 14, 1998 (describing controversy stirred when two Pacific University Professors received a \$5000 grant to study sadomasochism); see also Candace de Russey, *Revolting Behavior: The Irresponsible Exercise of Academic Freedom*, CHRON. HIGHER EDUC., Mar. 6, 1998, at B9 (ridiculing an academic conference on S/M); Andrea Neal, *Promoting Sexual Deviancy on Campus*, INDIANAPOLIS STAR, June 18, 1998, at A16 (criticizing the American Association of University Professors for giving its academic freedom award to a college president for hosting a conference on sexuality that including the topic of sadomasochism).

³² For a description of such a case, see Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1555-57 (1998).

ate with the prosecution.³³ But I had never handled a case where the victim claimed that she had actually consented to violence as part of an erotic encounter, so I had not considered whether the "no consent to violence" doctrine as applied to S/M was practically, ethically, and legally sound. Given the increasing number of cases involving S/M, I thought it time to do so.

Thus, using the law as my lens, I became a voyeur into the world of S/M. I did what scholars do. I researched, I read, I conducted an occasional interview. Frankly, however, nothing in my previous work or personal life prepared me for what I would see, and how I would make sense of it. I have started and stopped this Article many times. Sometimes the material challenged me. At other times, it confused me. One day last summer, after going over sources on S/M that my research assistant downloaded from the World Wide Web, I put away my files and vowed never to return to this topic again.

I have returned to this issue because it raises questions for the theory and practice of criminal law, which, while often times painful, are necessary to explore. It is likely that more courts will be asked if sex is a sport or should be treated like one. Whether yes, no, or sometimes, the answer will have serious shortcomings, both practically and theoretically. The legal treatment of S/M exposes the ambiguity of power and powerlessness, of masculinity and femininity, of coercion and consent, and the limits and limitations of the law.

In Part I of this Article, I argue that if one looks at the historical evolution of the doctrine of consent as applied to S/M, one finds it is not primarily rooted in the state regulation of sex.³⁴ Rather, it is rooted in a more fundamental question as to when violent aggression is appropriate in a civilized state. Why the sports exception? I argue that the sports exception is illustrative of the male heterosexual acceptance of violence in the context of competition and fair play. Violence, competition, and the construction of manhood are intricately linked. So long as men are engaged in "above the belt" physically competitive games, then the law accepts that injury may occur, just as it accepts that fatalities will be a consequence of war. By allowing violence in sports but not sex, the law accepts and celebrates male competitiveness and violence and at the same time channels and confines it. Although the games and the rules may shift over time, one cannot

³³ See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996) [hereinafter Hanna, *No Right to Choose*].

³⁴ See *infra* notes 48-79.

separate the doctrine of consent from what it means to "be a man" and to be a "gentleman."

In Part II, I challenge the liberal argument that one has a "right" to engage in S/M by examining the practical application of the law of consent within this context.³⁵ Liberals who argue that S/M should be legal as a matter of private sexual autonomy, and that the current doctrine arguably serves to disguise sexual orientation discrimination, provide only a partial explanation of the doctrine's evolution, and a far from perfect normative conclusion.³⁶ For both gay men and women, in particular, it is unclear whether recognizing consent promotes sexual autonomy or gives further license to people—mostly men—to brutalize their sexual partners and then claim that she or he "asked for it." Throughout this Article, I discuss in detail the facts of these cases, not for shock value, although some may find the facts shocking. Rather, I include the facts because it is far too easy to make abstract arguments about the nature of consent when consent is always grounded in the particulars of the case.

True, the issue of consent and violence in the criminal law makes for some very strange bedfellows, albeit with different long-term expectations. I am well aware that arguing that as a legal matter not allowing consent as a defense when the defendant claims that the injury was part of an S/M encounter could be misconstrued as agreeing with popular moralists or religious leaders.³⁷ Yet, my argument is not that S/M is itself immoral, but that within the context of an actual serious physical injury, the law is best left undisturbed as to consent. Truth be told, I have struggled with what the legal doctrine in this context ought to be. Ultimately, I conclude that *Jovanovic* was wrongly decided and sets a dangerous precedent.³⁸

Initially, when I began this project, I anticipated arriving at the opposite conclusion, for to suggest that people cannot consent to private sexual matters seems unnecessarily paternalistic (or maternalistic, as the case may be). In theory, liberals make a compelling argument that people should be able to exercise sexual autonomy and,

³⁵ See *infra* notes 80–193.

³⁶ See WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 248–49 (1999).

³⁷ See, e.g., David Hinckley, *Laura v. Gays: The Airwar Heats Up*, N.Y. DAILY NEWS, Mar. 8, 2000, at 42 (discussing controversy over Dr. Laura Schlesinger); Stephen Breen, *Bishop Stirs Up A Storm Over Sex*, THE SCOTSMAN, July 10, 1999; John Boyle, *Sadomasochism Troubles Therapists, Spiritual Leaders*, ASHEVILLE CITIZEN-TIMES, Aug. 16, 1998, at C1.

³⁸ See *infra* notes 154–166.

thus, legalizing S/M arguably would reduce its social stigma and allow humans a full range of activities in which to express their intimate sexual desires.³⁹ To allow the moral police to round up people for what they do in private is to encroach on legitimate individual liberty. Furthermore, when practiced properly, S/M requires that one respect his partner's wants, desires, expectations, and limitations. Those who engage in safe and consensual S/M have much to teach the rest of us about what consent really means. Within the S/M context, consent is not merely the absence of "no," but a far more qualitative conversation that involves negotiation, the sharing of fantasies and the setting of limits. In theory, S/M distinguishes pain from violence. As a result, few of these "pure" cases ever come to the attention of law enforcement.

But some do. For example, in a recent case dubbed "Paddleboro," police in Attleboro, Massachusetts raided a BDSM (bondage, discipline, and sadomasochism) private party and arrested both the host and a guest who paddled another woman with a large wooden kitchen spoon, allegedly causing bruising and bleeding.⁴⁰ The case has sparked controversy over the limits of sexual freedom and caused fear among those in the S/M community that they will be targeted by law enforcement.⁴¹ The lawyers for the defendants argue that the state has no interest in prosecuting the accused for assault and battery, especially when the victim does not complain.⁴² The state is going forward with the prosecution.⁴³ The Paddleboro case is one of the hard cases where the legal restraints on violence may, in fact, undermine individual liberty and persecute a woman who was engaged in acceptable consensual violence with another woman. This sort of overreaching and sexual repression is precisely what both liberals and many feminists fear, especially given that the nature of the injury did not appear serious. Indeed, at least from the press reports, the prosecution seems motivated by politics, not protection.⁴⁴

³⁹ See ESKRIDGE, *supra* note 36, at 256-57; GLORIA G. BRAME ET AL., *supra* note 5, at 3-4.

⁴⁰ Paddleboro Information Website at <http://www.paddleboro.com> (visited Nov. 2, 2000); Cindy Rodriguez, *Group Creates Defense Fund to Support S&M Accused*, THE BOSTON GLOBE, July 27, 2000, at B6.

⁴¹ J.M. Lawrence, *Of Human Bondage: S&M Community Unites to Defend Paddleboro Martyrs; Championing Different Strokes for Different Folks*, BOSTON HERALD, Oct. 27, 2000, at 39.

⁴² Judith Kelleher, *S & M: Why Not?*, NAT'L L. J., Aug. 21, 2000, at M1.

⁴³ Meredith Goldsmith, *Prosecutor Defends Handling of Sadomasochism Party*, THE PROVIDENCE JOURNAL, Nov. 2, 2000, at B3.

⁴⁴ See *id.*

Nevertheless, in setting rules as to when one can consent to violence, the law will either be under-inclusive or over-inclusive. In deciding which horn of this dilemma is better (or less bad),⁴⁵ we have to look at experience as well as theory in making that determination. "Good" people can and should be able to freely consent to "bad" things so long as no third party is hurt, at least in theory.⁴⁶ But, in practice, the law should not allow consensual violence that results in *actual serious* physical injury outside of highly regulated contexts. Currently, by holding someone strictly liable for actual injuries inflicted outside of highly regulated contexts, the law checks (mostly male) violence, be it against women or men. While, in rare cases, the doctrine could be over-inclusive by holding culpable those defendants who played by the rules of S/M (and there are rules), in the vast majority of cases that make it into the criminal justice system, consent is questionable at best. Experience shows us that at this point in history, the doctrine of strict liability more often has been invoked to protect those most at risk of dehumanizing abuse than to persecute those who are humane in their sexual encounters.

Furthermore, the state's interest in controlling and confining violence is a compelling one, perhaps the most compelling of all. While there is a legitimate individual liberty interest in protecting private sexual conduct from unwarranted state interference, there is no liberty interest to inflict serious bodily injury on others for the pursuit of one's own pleasure. Although religion was once powerful enough to both set the rules for this life (and to establish the standards for getting to the next one) it does so no longer. The Ten Commandments have been replaced by criminal codes. The law now decides when we can indulge our passions—be they motivated by lust or wrath or pride—and what the consequences of doing so will be. Violence is not always sexy, but often causes long lasting harm. The social goals of promoting human dignity are better served by limiting, not extending, the doctrine of violent consent. To paraphrase H.L. Mencken, in our own private pursuits of pleasure, here in Zion, today, we are all in bondage to the law.⁴⁷

⁴⁵ See Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1702 (1990).

⁴⁶ See Richard Posner, *Ask, Tell*, THE NEW REPUBLIC, Oct. 11, 1999, at 52 (arguing for Millian liberalism in domain of sex and sadomasochism).

⁴⁷ In *ON BEING AMERICAN* (1922), H.L. Mencken wrote: "To be Happy one must be a) well-fed, unhounded by sordid cares, at ease in Zion, b) full of a comfortable feeling of

I. LET'S SETTLE THIS LIKE MEN

Historically, under the common law, violence, even if consensual, was illegal. Thus, consent was no defense when one engaged in an activity that could cause physical injury or death, even if the "victim" did not complain. Assaultive behavior is criminal behavior, as the wrongdoer infringes upon and threatens the state's monopoly on the legitimate use of force.⁴⁸ The victim is merely a witness for the prosecution. Yet, courts have carved out exceptions to this general rule on a case-by-case basis. In this section, I review the Anglo-American history of consensual violence in the sporting context, drawing primarily from English, Canadian and American jurisprudence. Although few American appellate courts have examined the doctrine of consensual violence, both the Canadian Supreme Court and the British House of Lords have taken up the issue in the last decade. Thus, American legal scholars can benefit from the experiences of our common law cousins in this area.

When discussing the issue of consensual violence, it is quite common for commentators to assume that courts use the "harm test" to decide the relevancy of consent—the more likely injury is to occur, the less likely a court will allow the activity. In 1895, for example, in the first American article to examine the issue of violence and consent within the criminal law, the *Harvard Law Review* summarized the doctrine of violent consent. "A game which involves physical struggle may [be] a commendable and manly sport, or it may be an illegal contest in which the participants are or may become criminals; this depends on whether it is a game which endangers life."⁴⁹ The premise was that the level of injury inherent to the activity is what is crucial to the law.

But courts have allowed all sorts of activities, including prize fighting and hockey, which carry a high probability of injury, and disallowed barroom brawling, which is arguably no more dangerous. In practice, the likelihood of harm is more or less legally irrelevant.⁵⁰

superiority to the masses of one's fellow men, and c) delicately and unceasingly amused according to one's tastes."

⁴⁸ Harrison, *supra* note 20, at 478–79.

⁴⁹ F.H. Beale, *Consent in the Criminal Law*, 8 HARV. L. REV. 317, 325 (1895).

⁵⁰ For example, one of the earliest statements regarding consensual violence is found in Hawkin's Pleas to the Crown:

[I]f death ensues from such [sports] as are innocent and allowable, the case will fall within the rule of excusable homicide; but if the sport be unlawful in itself, or productive of danger, riot or disorder, from the occasion, so far as to

What is legally relevant is the social utility of the activity itself. The law clearly distinguished between those contexts in which men competed to enhance their manliness and those contexts in which their aggression went unchecked, or inspired runaway passion by the parties or observers. Instrumental violence—that which serves a “manly” purpose—is legal, but expressive, emotional violence, which carries with it too high a risk of social unrest, is not.⁵¹ Thus, lawmakers have whittled down the playing field, so to speak, by legalizing only those sporting activities that promote what I call civilized masculinity.⁵²

How have courts gone about deciding when a sport is legal? A review of the case law suggests that judges draw heavily upon the social norms at the time. *Regina v. Bradshaw*, one of the earliest cases to address this issue, illustrates the importance of male culture when deciding what men and gentlemen can do.⁵³ During a “friendly game of football” the deceased, Herbert Dockerty, was dribbling the ball towards the goal when the defendant, William Bradshaw, a player on the opposing team, charged Dockerty, jumped in the air, and struck him in the stomach with his knee. Dockerty died the next day of a ruptured intestine. There was conflicting evidence as to whether Bradshaw had engaged in unfair play, but the game was played in accordance with the “Association Rules.”⁵⁴

In deciding whether Bradshaw was guilty of manslaughter, Justice Bramwell stated, “No rules or practice of any game whatever can make that lawful which is unlawful by the law of the land; and the law of the land says that you shall not do that which is likely to cause the death of another.”⁵⁵ Thus, Bramwell makes clear that the law decides whether the context in which the injury occurs is legal, while the decision reveals that it is a case-by-case, highly context-specific inquiry. To criminalize football in England would have been absurd and unimaginable. Not surprisingly, Bramwell ultimately found the defendant not guilty. “No doubt the game was, in any circumstance, a rough one; but [his Lordship] was unwilling to decry the manly sports of this country,

endanger the peace, and death ensue; the party killing is guilty of manslaughter.

1 HAWKIN'S PLEAS OF THE CROWN, ch. 15 (8th ed. 1824).

⁵¹ See Beale, *supra* note 49, at 325.

⁵² See generally James Q. Whitman, *Enforcing Civility & Respect: Three Societies*, 109 YALE L.J. 1279 (2000).

⁵³ 14 Cox C.C. 83, 84 (1878) (Eng.).

⁵⁴ See *id.*

⁵⁵ *Id.* at 84–85.

all of which were no doubt attended with more or less danger."⁵⁶ While the facts indicate that Bradshaw may have committed a foul when charging Dockerty, there was no evidence that he was motivated by personal animus or acted outrageously, and thus Bradshaw had done nothing wrong, at least legally.⁵⁷

Had Bradshaw been guilty of manslaughter, then the state arguably could prosecute any player who injured or attempted to injure another for assault and battery, or even homicide, even if he had broken no rules of the game. Bramwell's opinion shows how courts take into account the public acceptance and even love of the game in question as well as the motive (as opposed to the intent) of the defendant in causing the harm. So long as men play like gentlemen—fair and above the belt—any resulting injury is of no concern to the criminal law.

Sports such as soccer or rugby or hockey,⁵⁸ where violence is incidental, albeit expected, to the game itself, have enjoyed enormous legal protection. In civil cases where one injured player sues another, courts are very reluctant to punish those who foul but do not act so outrageously as to have crossed the line between bad sportsmanship and culpably bad sportsmanship.⁵⁹ In contrast, many activities that involve the intentional infliction of bodily harm as the goal of the game have been outlawed or severely restricted. For example, duelling was once legal and tolerated unless one of the participants was maimed—a bodily harm whereby a man was deprived of the use of any body parts that he needed to fight.⁶⁰ The act of maiming was unlawful because it deprived the King of the services of his subjects for defense of the realm. Duelling is no longer legal in England and America, despite some early public resistance, because courts decided

⁵⁶ *Id.*

⁵⁷ *See id.*

⁵⁸ Ice hockey has presented a host of problems for Canadian courts in particular. *See, e.g., Regina v. Ciccarelli*, 54 C.C.C. (3d) 121 (Can. 1989). Like football and soccer, professional ice hockey is a contact sport where, while physical contact is what makes the game the game, injury is incidental to the game itself. To intentionally inflict harm is not the purpose, but an anticipated consequence of the activity itself.

⁵⁹ *See, e.g., Nabozny v. Barnhill*, 334 N.E.2d 258, n.10 (Ill. 1975) ("This court believes that the law should not place unreasonable burdens on the free and vigorous participation in sports by our youth. However, we also believe that organized, athletic competition does not exist in a vacuum. Rather, some of the restraints of civilization must accompany every athlete on to the playing field."); *Jaworski v. Kiernan*, 696 A.2d 332, 337 (Conn. 1997); *Dilger v. Moyles*, 54 Cal. App. 4th Supp. 1452 (1997). *See also* Jack Anderson, *Citius, Altius, Fortius? A Study of Criminal Violence in Sport*, 11 MARQ. SPORTS L. REV. 87 (2000).

⁶⁰ *See* HAWKIN'S, *supra* note 50, at ch. 15.

that the activity was too dangerous and served no legitimate public interest. Fencing, however, remains a varsity sport, although fencers must wear protective gear, thereby reducing any risk of injury.⁶¹ In contrast, wrestling and prize fighting are legal, even though the purpose of the sport is to injure, but it is only professional boxers who can spar without protective headgear.⁶² Nevertheless, even in prize fighting, there are some very clear rules, such as no hitting below the belt. One referee for two participants arguably ensures that the rules will be followed and the safety of the players protected.

Few cases are ever criminally prosecuted when one player injures another,⁶³ at least in America,⁶⁴ although this trend may be changing.⁶⁵ Prosecutors are increasingly imposing a standard of civilized masculinity on both high school⁶⁶ and professional players. Take, for example, Marty McSorley, the Boston Bruins hockey player who hit Donald Brashear of the Vancouver Canucks in the head with a stick during a National Hockey League game, knocking him unconscious.⁶⁷ Hockey is a dangerous sport and thus players implicitly consent to a certain level of violence, but McSorley crossed that line. A Canadian criminal court found McSorley guilty of assault with a deadly weapon

⁶¹ See generally THE HISTORY OF FENCING: FOUNDATIONS OF MODERN EUROPEAN SWORDPLAY (William M. Gaugler & Lance C. Lobs eds., 1998).

⁶² For an excellent history of the law of prize fighting, see *R. v. Brown*, 1 A.C. 212, 262-65 (Mustill, L., dissenting) (Eng.H.L. 1993).

⁶³ But see *People v. Freer*, 381 N.Y.2d 976 (1976) (sustaining third degree assault charge in altercation between football players that took place after the players got up from a pile-up).

⁶⁴ Jody Goldstein, *Acts of Violence in the Sporting Arena Increasingly are Finding Their Way Into the Courtroom*, HOUS. CHRON., May 5, 2000, at 1 (noting that Canada has long prosecuted athletes for injuries inflicted on the playing field, especially hockey games); Bonnie DeSimone, *Violence Between the Sidelines Seldom Leads to Court*, CHI. TRIB., Dec. 20, 2000, at 1 (citing Matt Mitten, Director of Marquette University's National Institute on Sports Law as saying, "It is generally accepted that there is a level of contact and violence that is part of the game, even though it would be considered unacceptable off the field. Courts don't want to chill vigorous competition.").

⁶⁵ See DeSimone, *supra* note 64, at 1 (noting that there have been at least five arrests in 2000 of players who inflicted injury on another during a sporting event). For a discussion of Canada's response to sports and violence, see generally, Diane V. White, *Sports Violence as Criminal Assault: Development of the Doctrine by Canadian Courts*, 1986 DUKE L.J. 1030 (1986).

⁶⁶ See, e.g., Chip Scoggins, *High School Hockey: Checks & Balances*, STAR TRIB. (Minneapolis-St. Paul), Jan. 19, 2000, at 1C (discussing case in which a fifteen-year-old boy from suburban Chicago faced criminal charges after he cross-checked from behind an opponent and left him paralyzed).

⁶⁷ See Dave Luecking, *Following McSorley's Guilty Verdict, Many Players are Concerned that More Cases will End Up in Court*, ST. LOUIS POST-DISPATCH, Oct. 8, 2000, at D8.

(his hockey stick) and sentenced him to eighteen months probation.⁶⁸ Although McSorley is one of only eleven NHL players to be prosecuted in the league's history,⁶⁹ the conviction has sparked concerns that even more sports cases will end up in court as prosecutors intervene in serious cases that would otherwise be left for the league to handle.⁷⁰ The McSorley case may indeed signal a growing state interest in confining violence in sport which is outside the rules of the game, or motivated by unrestrained passion or personal animus.

The law, then, sets limits on what it means to "settle things like a man" and has not extended the right to fight beyond organized sports played within the rules of the game. For example, in *Regina v. Jobidon*, the Canadian Supreme Court was asked to revisit the consensual violence doctrine in a typical bar room brawl situation.⁷¹ The case illustrates the underlying assumptions about how men should be able to express their aggression at any given point in history, and how deeply rooted those assumptions are within the common law tradition. It is also a case which suggests that there are limits on personal autonomy outside of the sexual sphere.

The defendant, Jules Jobidon, a "young, fit and powerful man," according to the court, was in a hotel bar one night with friends when Rodney Haggart approached him. Haggart was at the hotel celebrating his upcoming marriage and drinking heavily. Haggart was larger than Jobidon and had trained as a boxer. It is not clear what triggered the brawl, but Haggart was "prevailing" when the hotel manager separated the men and told Jobidon to leave the bar. He and Haggart exchanged words in the lobby that indicated that the two intended to finish the fight. After Haggart left the bar, he found Jobidon and his friends waiting in the parking lot. A crowd had now gathered. Jobidon threw the first punch, then another, and another, and within a few seconds, Haggart was knocked backward onto a hood of a car. Unconscious and bleeding, he was taken to the hospital in a coma where he died of severe contusions to the head. The trial judge found Jobidon not guilty of manslaughter, given the consent to a fair fist fight. The Crown appealed and the Ontario Appellate Court set aside the acquittal and substituted a guilty verdict. The issue raised before the Canadian Supreme Court was whether the absence of consent is a material

⁶⁸ See Luecking, *supra* note 67, at D8.

⁶⁹ See Steve Ziplay, *Questionable Decision; McSorley Ruling Renews Debate on How to Handle Violence in Sports*, NEWSDAY, Oct. 8, 2000, at C10.

⁷⁰ See Luecking, *supra* note 67, at D8 (discussing the reaction to McSorley verdict).

⁷¹ [1991] S.C.R. 714 (Can. 1991).

element which must be proved by the Crown in all cases of criminal assault or whether there are common law limitations which restrict or negate the legal effectiveness of consent in certain types of cases.⁷²

The Canadian Supreme Court discussed at length the origins of the consent doctrine as applied to violence and made clear that consent's status as a defense is ultimately a matter of policy.⁷³ The court was not apologetic for its case-by-case approach in the area, commenting that courts were well-suited to balance individual autonomy (the freedom to choose to have force intentionally applied) and some larger social interest. In upholding the conviction, the court explicitly rejected the argument that pugilism was sheltered by chivalry. It stated:

Duelling was an activity not only condoned, but required by honour. Those days are fortunately long past. Our social norms no longer correlate strength of character with prowess at fisticuffs. . . . Erasing long-standing limits on consent would be a regressive step, one which would retard the advance of civilized norms of conduct.⁷⁴

Both the holding and the reasoning of this case are consistent with American law concerning the social acceptability of street fighting. The fear is that passions in situations such as street fighting can go unchecked, and therefore the state has an overriding interest in ensuring some level of peace among its citizenry.

The Canadian Supreme Court declined to extend its holding to other contexts, including S/M, but the court's analysis suggests that it would not allow consent to any activity where the risk of unrestrained aggression was too great.⁷⁵ The law has not evolved to condone male violence. Rather, it has evolved to control it, enforcing a code of physical competition and fair play—civilized masculinity. This is, overall, a good thing. First, competition and physical aggression are part and parcel of human nature, and to disallow it entirely would run counter to human experience.⁷⁶ Yet, by limiting legal violence to

⁷² See *id.* at 725.

⁷³ See *id.* at 762.

⁷⁴ *Id.*

⁷⁵ See *id.* at 733–34.

⁷⁶ See generally MICHAEL GHIGLERI, *THE DARK SIDE OF MAN* (2000) (tracing the origins of male violence); FRANS DE WAAL, *GOOD NATURED* (1996); FRANS DE WAAL, *CHIMPANZEE POLITICS* (1990); Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C. L. REV. 1117 (1997) (reviewing a biological model of human behavior and its applications to the law); Robert Wright, *The Biology of Violence*, *THE NEW*

highly regulated contexts, the law implicitly imposes parity between the players, thus minimizing the possibility of excessive injury and exploitation, as well as maintaining social control of its citizenry.

Although historically the law of violence was really just the law of men and gentlemen, cultural and legal norms have evolved such that women too may now compete in the same ways that men do. One need only look to the history and spirit behind Title IX⁷⁷ and women's equity in athletics⁷⁸ to see that women, like men, not only enjoy competition, but that physical competition within an organized arena can promote personal growth. The benefits of physical competition for both boys and girls have been well documented.⁷⁹ Women are now even partaking in the most violent of sports, including boxing. *Girlfighting*, a documentary of women boxers, for example, illustrates that female physical competition is no longer considered socially unacceptable, but, in many cases, celebrated as a mark of female liberation. It is not physical aggression *per se* that is problematic, but the context in which it occurs.

By limiting consensual violence to activities that take place within a regulated environment, the law not only serves the practical purpose of reducing injury, but it also theoretically shifts cultural norms

YORKER, Mar. 13, 1995, at 68 (examining male competition and violence, especially among male gang members).

⁷⁷ 20 U.S.C. § 1681(a) (1994). For a history of Title IX, see Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 SETON HALL J. SPORT L. 391 (1997).

⁷⁸ See generally *WHATEVER IT TAKES: WOMEN ON WOMEN'S SPORTS* (Joli Sandoz & Joby Winans eds., 1999); SUSAN K. CAHIN, *COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH CENTURY WOMEN'S SPORTS* (1994); MARIAH BURTON NELSON, *EMBRACING VICTORY: LIFE LESSONS IN COMPETITION AND COMPASSION—NEW CHOICES FOR WOMEN* (1998); MARY TURCO, *CRASHING THE NET: THE U.S. WOMEN'S OLYMPIC ICE HOCKEY TEAM AND THE ROAD TO GOLD* (1999); JEAN ZIMMERMAN AND GIL REAVILL, *RAISING OUR ATHLETIC DAUGHTERS* 165 (1998); Cheryl Hanna, *Good Girls and Bad Sports: Violent Female Juvenile Delinquents, Title IX, and the Promise of Girl Power*, 27 HASTINGS CONST. L.Q. (forthcoming 2000); Mariah Burton Nelson, *Learning What Team Really Means*, NEWSWEEK, July 19, 1999, at 55.

⁷⁹ See *Force v. Pierce City R-IV School District*, 570 F. Supp. 1020, 1031 (W.D. Mo. 1983). In ruling that the plaintiff should be allowed to try out for the football team, the court held, "Nicole Force obviously has no legal entitlement to a starting position on the Pierce City Junior High School eighth grade football team . . . But she seeks no such entitlement here. Instead, she seeks simply a chance, like her male counterparts, to display those abilities. She asks, in short, the right to try. But the idea that one should be allowed to try—to succeed or fail as one's own abilities and fortunes may dictate, but in the process at least to profit by those things which are learned by trying—is a concept deeply engrained in our way of thinking; and it should indeed require a 'substantial' justification to deny that privilege to someone simply because she is a female rather than a male." *Id.*; see also *Cohen v. Brown Univ.*, 101 F.3d 155, 188 (1st Cir. 1996).

of masculinity. There are no referees in a bar room brawl, no code of conduct, and no crowd control. Men can no longer use weapons, unless they wear protective gear. And women can now get in the game. We find far less social value in violent physical competition than we did when duelling was legal, and it is no longer a manly duty to kill or be killed outside of the context of war. Although many argue that we are mired in a cult of violence, the law has at least served as a symbolic and practical check on natural human aggression in general, and violent male competition, in particular.

II. LEGAL RESTRAINTS

Should the law treat sex as it does sport and allow the parties to consent to physical injury? Some commentators have argued that the state has no interest in regulating private, consensual sexual conduct, and that the doctrine of violent consent is, too often, used to persecute people considered to be sexual deviants, as well as to deny women sexual agency.⁸⁰ If people can consent to play hockey, why can't they consent to private sexual activity which is arguably no more dangerous? Yet, to allow defendants who inflict serious physical injury on others during sexual encounters to avoid culpability under a theory of consent would be to reverse the trend to confine the use of physical force to highly regulated contexts. The argument that sex is a sport has the unintended consequence of allowing people, mostly men, to use violence to satiate their sexual desires, redefining civilized masculinity within a sexual context.

In this section, I review the most prominent cases where defendants have asked a court to treat sex as similar to sport and thus allow the consent defense. It is clear from a review of these cases that refusing to change the doctrine of consent as applied to sexual encounters is an effective shield, more often protecting, albeit at times punishing, those who have not yet been granted full sexual autonomy under the law. It is an imperfect solution to one of the law's most difficult problems.

⁸⁰ See ESKRIDGE, *supra* note 36, at 259-63; Sangeetha Chandra-Shekran, *Critique & Comment: Theorizing the Limits of Sodomasochistic Homosexual Identity in R. v. Brown*, 21 MELBOURNE U. L. REV. 584 (1997).

A. *Be A Man: The Gaylaw Critique*

There are cases in which homosexual men have been singled out for state prosecution, and, in many of those cases, the court imposes a notion of civilized masculinity that is repressive. True, the cases discussed in this section are difficult, and the social utility of the prosecutions questionable. Nevertheless, we must be careful before suggesting that the law of violent consent is always used as a tool of discrimination. Rather, the doctrine often serves to protect gay men from physical violence by their intimate partners. In all three cases discussed below, the courts could have allowed consent to be a defense, analogizing S/M to sport or holding that S/M fell within the realm of private sexual conduct exempt from state regulation. This would have created a "you asked for it, you got it" doctrine and denied legal protections to gay men as well as reinforced stereotypes about sexual deviancy.

1. *People v. Samuels*

People v. Samuels was the first American case in which a court refused to extend the doctrine of violent consent to an assault and battery within an S/M context.⁸¹ American courts often cite this case positively for its holding.⁸² Yet, although the jurisprudence in this area has developed in large part from *Samuels*, a detailed discussion of it is surprisingly absent in the literature.⁸³ It is a complicated case and one in which a more nuanced discussion of both the facts and the holding sheds some light as to why the court did both the right thing and the wrong thing in upholding Samuels' conviction.

A California court convicted Marvin Samuels, an ophthalmologist, of aggravated assault, as well as conspiracy and sodomy, after a photo processing company turned over to the police a film that Samuels had developed. The film showed "a gagged and naked man strung up in an unfinished room, receiving a beating with whips and lashes administered by . . . [the defendant]."⁸⁴ There were marks on the victim's buttocks, his back, and up his body, although there was

⁸¹ See 58 Cal. Rptr. 439 (1967).

⁸² See, e.g., *Jovanovic I*, 700 N.Y.S.2d 156, 167 (N.Y. App. Div. 1999); *State v. Collier*, 372 N.W.2d 303, 306 (Iowa 1985).

⁸³ For a brief discussion of the case and the law of consent, see Note, *Assault and Battery—Consent of Masochist to Beating by Sadist is No Defense to Prosecution for Aggravated Assault*, 81 HARV. L. REV. 1339 (1968).

⁸⁴ *Samuels*, 58 Cal. Rptr. at 442-43.

considerable debate over whether the injuries were real or staged. The victim was never affirmatively identified, nor did he appear at trial. Samuels admitted that he was a sadist, and that he made the film in order to control and release his sadomasochistic urges in ways that were harmless.⁸⁵ He further testified that the man in the film had heard of him through the San Francisco "underground" and that he had fully consented to being beaten on the film. While he did string up the man and strike him lightly with a riding crop, the injuries were cosmetically applied and the victim was merely acting. The court noted that an aggravated assault could occur without the infliction of any physical injury, and therefore found it irrelevant as to whether the victim was actually physically injured.⁸⁶ The state also presented unimpeached expert testimony that the films were not altered or faked, suggesting that the injuries were, in fact, real.

On appeal, Samuels argued that the jury should have been instructed that the consent of the victim is an absolute defense to the charge of aggravated assault.⁸⁷ The California Court of Appeal rejected his argument, holding that consent of the victim is generally not a defense to assault and battery, except in a situation involving ordinary physical contact or blows incident to sports such as football, boxing, or wrestling.⁸⁸ The court not only suggested that both the defendant and his alleged victim may have been suffering some mental illness,⁸⁹ but it also explicitly refused to analogize S/M to sports.⁹⁰ Thus, like Justice Bramwell in *Bradshaw*, the court drew a distinction between "manly activity" and criminal activity, even though there is arguably no difference between the level of injury that the victim can sustain during an S/M encounter and a football match. Furthermore, unlike in *Bradshaw*, where the victim actually died, here the victim was not even aware that the case was being prosecuted.

This case is troubling for many reasons, not the least of which is that it appears that the prosecution may have been motivated by factors other than public safety or bodily integrity. Rather, as in *Bowers v. Hardwick*,⁹¹ the United States Supreme Court case that upheld Geor-

⁸⁵ See *id.* at 441.

⁸⁶ See *id.* at 447.

⁸⁷ See *id.* at 513.

⁸⁸ See *id.*

⁸⁹ *Samuels*, 58 Cal. Rptr. at 513-14 ("It is a matter of common knowledge that a 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.").

⁹⁰ *Id.* at 513.

⁹¹ 478 U.S. 186, 195 (1986).

gia's sodomy statute, at least as applied to homosexual sodomy, law enforcement appeared to be more concerned with persecuting a gay man. The California court was clearly morally outraged that a "good doctor" would engage in such "bad" acts, judging Samuels both legally and morally.⁹²

But *Samuels* is distinguishable from *Bowers* in one very important respect. In the case of homosexual sodomy, arguments as to the "social harm" are merely rhetorical. There is no empirical data that homosexual sodomy causes any measurable social harm. In contrast, there was evidence in *Samuels* that the "victim" sustained actual physical injury. Furthermore, it is troubling that the "victim" was not identified. There was no way to know if the filmmaking was consensual. The case can certainly, and rightfully, be criticized in that the state may have targeted Samuels because of his sexual orientation. And it is questionable whether the state could even have met its burden of proof absent the defendant's testimony; even with it, the sufficiency of the evidence seems lacking.⁹³

Yet, if the jury believed that the man on the film had been beaten, then it arguably had a moral and legal duty to hold Samuels criminally culpable, at least if one accepts the premise that the law should limit consensual violence to highly regulated activities. Furthermore, without any witnesses there was no way to prove that the acts were consensual. Even assuming that the doctor was truthful in his statements that the injuries were staged, it should indeed give us pause for concern as to what actually happened to the "victim." Had the person on the film been a woman, would we not be concerned that she was beaten? Would we not wonder why the doctor did not know her name or her whereabouts?

Granted, this is a hard case to discuss within a contemporary context. In the late 1960's, the public was far more hostile to homosexuality than it is now, and the medical community still looked upon both homosexuality and sadomasochism as mental abnormalities.⁹⁴ Thus,

⁹² See *Samuels*, 58 Cal. Rptr. at 447.

⁹³ But see *People v. Doggett*, 83 Cal. App.2d 405 (1948) (holding that photographs or films are admissible as probative evidence where there is unimpeached expert testimony that they were not faked).

⁹⁴ See, generally, William N. Eskridge, Jr. *No Promo Homo The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N. Y. U. L. REV. 1327 (2000); Odena R. Neil, *The Limits of Legal Discourse: Learning From the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N. Y. L. SCH. L. REV. 679 (1996); Elvia R. Arriola, *Faeries, Marimachas, Queens & Lezzies: The Construction of Homosexuality Before the 1969 Stonewall Riots*, 5 COLUM. J. GENDER & LAW 33 (1995).

we can be sympathetic to the fact that Samuels had to conduct his sexual life underground, and may have in fact been protecting the man on the film by not releasing his name. Nevertheless, had the case somehow arisen today, we would no doubt feel a sense of ambivalence. On one hand, we want to protect Samuels and his civil right not to be singled out by bigoted law enforcement; on the other hand, we must be concerned for the safety and dignity of the unknown man on the film. Thus, in order to understand the cases that follow *Samuels*, it is imperative to appreciate the complexity and ambiguity of the origins of the S/M case law. In many of the cases that follow, the court both protects and prosecutes gay men, raising questions as to the relationship between violence, manliness, and sexual expression.

2. *Commonwealth v. Appleby*

The next reported case involving S/M is the 1980 case of *Commonwealth v. Appleby*.⁹⁵ The facts of *Appleby* illustrate that the doctrine of consensual violence can protect gay men from sexual abuse just as it can persecute them based on their sexual status. Indeed, *Appleby* is far more analogous to cases involving battered women than it is to cases in which courts are morally outraged by homosexuality, and illustrates the difficulty in arguing that the legal treatment of S/M serves only to disguise sexual orientation discrimination.

The defendant, Kenneth Appleby, and the victim, Steven Cromer, lived together for two years in what the court characterized as a "homosexual, sadomasochistic" relationship. During that time, Cromer allegedly lived as Appleby's "servant," which meant that not only did he perform household duties, but also was subjected to beatings when Appleby was dissatisfied. The court noted that the residence looked like a military camp; Appleby owned a number of weapons and had designed a torture chamber.⁹⁶

Over the course of the relationship, Appleby badly beat Cromer numerous times with a whip: fracturing his kneecap, once sending him to the hospital, and even beating him so severely that Cromer ran from the house in his underwear to a monastery. Cromer claimed at trial that Appleby was indeed a sadist, but denied being a homosexual himself or that he consented to the beatings. Indeed, Cromer's testimony was not dissimilar to the testimony that many abused women give as to why they stay with abusive partners. Cromer said that he suf-

⁹⁵ 402 N.E.2d 1051 (Mass. 1980).

⁹⁶ See *id.* at 1053.

ferred low self-esteem, was afraid of Appleby, and acted under duress, fearing that Appleby would harm him or his family if he did not continue the relationship.⁹⁷

The Massachusetts Supreme Judicial Court reiterated that consent is no defense to sadomasochistic activities, even when engaged in for the explicit purpose of sexual gratification.⁹⁸ The court was careful to note that Appleby was in no way charged with a crime for committing homosexual acts. Rather, he was tried and convicted under a statute that implied, as a matter of public policy, that one could not consent to be the victim of an assault and battery within a sexual context.⁹⁹

The outcome of this case is not nearly as troubling as *Samuels*. In contrast to *Samuels*, in *Appleby* there was a complaining witness, as well as a great deal of evidence that Cromer was injured. In upholding Appleby's conviction, the court was protecting Cromer, despite his sexual orientation, as much as holding Appleby accountable for his violence, regardless of his sexual orientation. Furthermore, the court in *Appleby* goes out of its way to suggest that this is not a case directed against homosexuals, but rather focuses on the nature of the violence itself, suggesting that one cannot invoke the S/M defense in a case of assault with a deadly weapon, regardless of the victim's identity.

Had the court come to the opposite result, defendants in every case of intimate abuse, be it in same-sex or heterosexual relationships, could argue that they too had an explicit contract with their partner that included physical punishment. The progress that has been made in prosecuting domestic violence cases and holding batterers criminally liable would have been almost impossible under such circumstances. There is a common stereotype that women who stay in abusive relationships not only deserve it, but like it.¹⁰⁰ Sadism would thus become a natural state for men, while masochism would become a natural state for women—arguably a relationship with which the law should not interfere.

Similarly, in cases involving homosexual men, the fear is that juries will nullify the law, finding the victims "sick" or "sexually deviant." Like battered women, abused men not only like being beat, but get

⁹⁷ See *id.* at 1054.

⁹⁸ See *id.* at 1059–60.

⁹⁹ See *id.*

¹⁰⁰ See, e.g., Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L. REV. 263 (1987); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991).

what they deserve as well, albeit for different reasons. By refusing to extend acceptance of consensual violence when a defendant claims consensual S/M, the law ensures that neither gay men nor abused women are stereotyped as pathological.¹⁰¹

Suggesting that consensual violence is a normal part of a gay lifestyle could arguably be the cause of more, not less, sexual orientation discrimination. The public perception of what is "normal" behavior in a homosexual relationship is often based on crude stereotypes of the sexual deviant. This perception is illustrated by the reaction of police officers in the case of Konerak Sinthasomphone, Jeffrey Dahmer's fourteen-year-old victim.¹⁰² Before Dahmer's killing spree was finally ended, the police had the opportunity to stop him and thereby save the lives of five young men. However, because the officers involved believed that violence was the norm in a male homosexual relationship, they failed to intervene, and Dahmer was free to kill again and again.

The chance to prevent Dahmer from committing further atrocities came on May 27, 1991, when two teenage cousins saw a young boy, whom they described as "butt naked," bleeding, and having difficulty speaking. The young women immediately called 911, and attempted to explain the situation to the police when they arrived. However, by this time Dahmer had arrived on the scene and the officers simply took him at his word that the fourteen-year-old Konerak was his nineteen-year-old lover.

Speaking only to Dahmer and ignoring the attempts by Konerak to speak in Laotian, the police believed Dahmer when he said that Konerak had too much to drink and wandered naked into the street while Dahmer was out getting more beer. The cousins tried to explain to the police that Dahmer was lying and that he was using physical force against Konerak before the officers' arrival, but they were ignored. According to the police, Dahmer's behavior suggested embarrassment. He told them that "everybody has to be into something." One officer later testified that Dahmer "appeared to be a normal in-

¹⁰¹ See also *People v. Murphy*, 899 P.2d 294 (Colo. Ct. App. 1994) (holding as reversible error a lower court's refusal to allow the defendant to cross examine the complaining witness about his sexual orientation or to introduce expert testimony about the possible behavior of homosexual men with sexual identity conflicts in order to go to the issue of consent.), *rev'd*, 919 P.2d 191 (Colo. 1996) (holding that questions about a victim's sexual orientation are barred under Colorado's Rape Shield statute and that this case did not fall into a statutory exception.).

¹⁰² Peter Kwan, *Intersections of Race, Ethnicity, Class, Gender & Sexual Orientation: Jeffrey Dahmer and the Cosynthesis of Categories*, 48 *HASTINGS L.J.* 1257, 1258 (1997).

dividual" and that they were "convinced that all was well." Therefore, without running Dahmer's name for warrants or arrests, the officers helped to return Konerak to Dahmer's apartment. Shortly after the police left, Dahmer proceeded to finish what he had started and murdered Konerak.¹⁰³

Thus, we must be careful before suggesting that all law enforcement officers are out to criminalize male sexual deviants. As the Dahmer case shows, in many cases law enforcement expects, possibly even tacitly condones, homosexual male violence. Were the law enforcement officers enforcing the law, they would not have simply presumed that what was happening to Dahmer's victim was consensual, nor would they have presumed it to be acceptable. This case, in many respects, is similar to police responses when they arrived at a domestic violence scene. A little battering was often considered "necessary," and women often left without any protection.¹⁰⁴ The holding in *Appleby* signals the law's willingness to provide protection to those often considered unworthy of it, again illustrating the positive effects of the doctrine.

3. *Regina v. Brown*

Just as hard cases make bad law, bad cases show us why the law is hard. *Regina v. Brown* is the most famous case involving gay men and sadomasochism that did not result in death.¹⁰⁵ Admittedly, it highlights both the practical use and potential misuse of state power in this context. In 1993, the British House of Lords decided this case, otherwise known as the "Spanner case"—Scotland Yard's code name for the investigation.¹⁰⁶ The case was highly controversial and received a great deal of press coverage and academic commentary, and is considered to be the biggest "bust" of a gay male sex club in history. Scotland Yard investigated a "ring" of sadomasochistic men who practiced at an S/M sex club, and eventually confiscated some videotapes. On the videotapes, the appellants, three middle-aged white men, along with several other men, are shown engaged in a number of sadomaso-

¹⁰³ See *id.*

¹⁰⁴ See Hanna, *No Right to Choose*, *supra* note 33, at 1857-65 (describing police responses to domestic violence).

¹⁰⁵ 1 A.C. 212 (Eng. H.L. 1993). For cases in which S/M activities arguably resulted in death, see, e.g., *Minnesota v. Pero*, 590 N.W.2d 319 (Minn. 1999); *Leitner v. State*, 631 So.2d 273 (Ala. 1993); *Gilpin v. State*, 1991 WL 84067 (Tex. Crim. App. 1991).

¹⁰⁶ For a description of the case, see BILL THOMPSON, *SADOMASOCHISM: PAINFUL PERVERSION OR PLEASURABLE PLAY?* (1994).

chistic acts. The "victims" were younger men, one not yet twenty-one, which was the legal age of consent for homosexual activity. There was much discussion in the case as to whether the "victims" were recruited or corrupted by the defendants. The extent to which the "victims" willingly submitted to the encounters remained unclear. The state had no evidence suggesting that they were coerced or forced against their will, although drinks and drugs were involved.¹⁰⁷

The defendants engaged in a range of behaviors including maltreatment of genitalia (with, for example, hot wax, sandpaper, fish hooks, and needles) and ritualistic beatings either with the assailants' bare hands or a variety of implements, including stinging nettles, spiked belts and a cat-o'-nine-tails. There were instances of branding and infliction of injuries which caused bleeding and left scarring.¹⁰⁸ The infliction of pain was subject to certain rules including "code words" that would communicate to the sadist to stop as the pain become unbearable.¹⁰⁹ The activities took place in a highly controlled and private setting, instruments were sterilized, and none of the participants sought medical attention.¹¹⁰

While homosexual activities conducted in private are legal in England,¹¹¹ the defendants were charged under the Offences Against Person Act of 1861.¹¹² The defendants pled guilty and were sentenced to a period of incarceration ranging from three to eighteen months.¹¹³ They appealed, arguing that the prosecution must prove lack of consent as an element of the crime.

Three of the five Lords upheld the conviction in an opinion that outlines in elaborate detail the doctrine of violent consent. Their decision is representative of the different strands of argument against S/M. Writing for the majority, Lord Templeton noted:

¹⁰⁷ *Brown*, 1994 1 A.C. at 236.

¹⁰⁸ See *Laskey v. United Kingdom*, 24 Eur. Ct. H.R. 39, 41 (1997).

¹⁰⁹ See THOMAS E. MURRAY & THOMAS R. MURRELL, *THE LANGUAGE OF SADOMASOCHISM: A GLOSSARY AND LINGUISTIC ANALYSIS* 118 (1989) (defining a safe word as "a word which, when uttered by the masochist during a sadomasochistic scenario lets the sadist know that the masochist has reached his or her limits of pain or believes that things are generally getting out of hand and wants to stop").

¹¹⁰ *Brown*, 1 A.C. at 236.

¹¹¹ Sexual Offences Act of 1967, c. 60, § 1 (Eng.) ("a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of 21.").

¹¹² Section 20 reads "Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily injury on another person, either with or without any weapon or instrument, . . . shall be liable . . . to imprisonment . . . for not more than five years."

¹¹³ See 24 Eur. Ct. H.R. at 42-43.

In principle there is a difference between violence which is incidental and violence which is inflicted for the indulgence of cruelty. The violence of sadomasochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the participants and unpredictably dangerous. I am not prepared to invent a defense of consent for sadomasochistic encounters which breed and glorify cruelty Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilized.¹¹⁴

Lord Templeton clearly invoked the moral outrage argument, which could lead one to interpret the case as being anti-homosexual, if not sexually repressive.¹¹⁵

The other Lords were more pragmatic in their reasoning, however. For example, Lord Jauncey's opinion drew heavily on the social utility of the activity itself, avoiding the moral outrage argument and focusing on the real risk of serious injury. He stated:

This House must therefore consider the possibility that these activities are practiced by others and by others who are not so controlled or responsible as the appellants are claimed to be. Without going into details of all the rather curious activities in which the appellants engaged it would appear to be good luck rather than good judgment which has prevented serious injury from occurring. Wounds can easily become septic if not properly treated, the free flow of blood from a person who is H.I.V. positive or who has AIDS can infect another and an inflicter who is carried away by sexual excitement or by drink or drugs could easily inflict pain beyond the level to which the receiver has consented When considering the public interest, potential for harm is just as relevant as actual harm.¹¹⁶

Although there was no empirical evidence introduced that S/M activities do in fact result in these harms, Lord Jauncey found the state's

¹¹⁴ *Brown*, 1 A.C. at 236-37 (opinion of Lord Templeton).

¹¹⁵ See *id.*; *ESKRIDGE*, *supra* note 36, at 236.

¹¹⁶ *Brown*, 1 A.C. at 245-62 (opinion of Lord Jauncey).

argument persuasive that criminalizing S/M regardless of consent was necessary to ensure the health and safety of the citizenry.¹¹⁷

There have been few systematic studies of the effect of S/M on its practitioners.¹¹⁸ However, as William Eskridge notes, nobody who participated in the S/M club in the *Spanner* case claimed to be abused, and there was no evidence that any member of the club was a sociopath or had ever been violent outside of the controlled club setting.¹¹⁹ Although in the absence of proof, arguments about social harm are merely rhetorical, both the tone and substance of Lord Jauncey's opinion suggests that the court is concerned with social outcomes that transcend the particular facts of the case. The court was worried about the slippery slope of allowing consensual violence outside of a highly regulated sphere.

Both dissenting Lords argued that the case should be decided not within the law of criminal violence, but within the law of private sexual relations. Unconvinced by speculation about the potential health risks of S/M or the remote possibility that youth could be corrupted by such activity, the dissent found the majority's holding both paternalistic and exceeding judicial power. Rather, Lord Mustill's dissent argued that consent should be a presumptive defense to assault, and that the state had not produced enough evidence to overcome that presumption.¹²⁰

The case took on international dimensions when the defendants appealed to the European Court of Human Rights ("ECHR").¹²¹ The defendants argued that their conviction constituted an "interference by a public authority" with the right to respect for their private life, and asked the court to overturn their conviction under the European Convention for the Protection of Human Rights and Fundamental Freedoms. The ECHR unanimously upheld the conviction. First, it

¹¹⁷ See *id.* (opinion of Lord Jauncey).

¹¹⁸ See Kenneth N. Sandnabha et al., *Sexual Behavior and Social Adaption Among Sado-masochistically-Oriented Males*, 36 J. OF SEX RES. 273 (1999) (finding that in a sample of 164 men who were members of two sado-masochistically-oriented clubs, the participants were socially well-adjusted).

¹¹⁹ See ESKRIDGE, *supra* note 36, at 261.

¹²⁰ See *Brown*, 1 A.C. at 256-75 (opinion of Lord Mustill).

¹²¹ Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides: "Everyone shall have the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except in accordance with the law and as necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others."

suggested that while the videotapes were not sold for commercial use, they were used to recruit new members, and questioned whether this involved a case of privacy at all.¹²² Yet, even assuming that the acts were private, the court likened the activities of the defendants to acts of torture,¹²³ and found that the state was entitled to regulate activities involving the infliction of physical harm, whether they occurred in the course of sexual conduct or otherwise.¹²⁴ These were not trifling or transient injuries, the court maintained.¹²⁵ Rather, it found that the state had prosecuted not based on the defendant's sexual orientation or proclivities, but on the extreme nature of the practices themselves. The court was clear to point out that it did not need to reach the issue as to whether the state could regulate the activity based on moral grounds; it found sufficient social utility reasons to let the decision stand.¹²⁶

Admittedly, the *Spanner* case is sensational and rare. Good people can and do disagree with both the House of Lords and the ECHR, at least as applied to the particular facts of the case.¹²⁷ The defendants did spend time in jail, and Eskridge has made a cogent argument that the court was bound to invoke the rule of lenity rather than send people to jail for private behavior that is not expressly prohibited by statute.¹²⁸ Further, he argues that the prosecution was a misapplication of scarce prosecutorial resources.¹²⁹

Eskridge is correct that the facts of the case call into question the motives behind the prosecution. Furthermore, S/M sex clubs can be safe and highly regulated establishments.¹³⁰ A strong argument can be made that S/M confined to a club setting, according to clearly

¹²² See *Laskey*, 24 Eur. Ct. H.R. at 56–57 (noting that a considerable number of people were involved in the activities, including the recruitment of new members and the shooting of videotapes, thus leaving open the question as to whether the sexual activities fell entirely within the notion of a private life).

¹²³ *Id.* at 57–58 (“[S]ome of these acts could well be compared to acts of ‘genital torture’ and a Contracting State could not be said to have an obligation to tolerate acts of torture because they are committed in the context of a consenting sexual relationship.”). For a broader discussion on human rights, see HUMAN RIGHTS, CULTURE & CONTEXT: ANTHROPOLOGICAL PERSPECTIVE (Richard A. Wilson ed., 1997).

¹²⁴ *Laskey*, 24 Eur. Ct. H.R. at 58.

¹²⁵ *Id.* at 59.

¹²⁶ *Id.* at 60.

¹²⁷ See, e.g., John Wadham, *Consent to Assault*, 146 New L.J., 1812, 1812 (1996) (pointing out that while some argue that consent to assault would most endanger women, the case is an affront to civil liberties).

¹²⁸ See ESKRIDGE, *supra* note 36, at 262.

¹²⁹ See *id.*

¹³⁰ See *id.*

defined rules and regulations, is analogous to prize fighting. Indeed, Lord Mustill argued in the dissent that Parliament ought to decide when an activity is dangerous, not the courts.¹³¹ Thus, legislators could license S/M clubs, like the one in the *Spanner* case. This would not at all be inconsistent with the sports exception.

The *Spanner* holding was legally sound, however. First, the Anglo-American law as to consensual violence is quite clear that consent is the exception and not the rule when one engages in activity that could cause serious bodily injury or death. The exceptions to that rule have been clearly defined, and S/M has never fallen within those exceptions. Second, the government does indeed have a legitimate interest in confining violence. True, the Lords were puritanical in their fear of people engaging in the unconstrained pursuit of their sexual pleasure. But they were also concerned as to what would happen if people were allowed to engage in unconstrained violent aggression. What is troubling about this case is the age of the alleged victims, and what appears to be a power imbalance between the parties, calling into question whether there was consent at all.

The outcome of the case may have served no social utility, in the end, but the long-term effects of allowing people to inflict serious injury on others—at least outside of a highly regulated club environment—to be a defense to sexual assault may have been even worse. Thus, the question is not what are the dangers of the law as it currently stands, but what would happen if the doctrine were reversed and consent to assault and battery was allowed as a defense in cases involving sexual as well as physical relationships. An analysis of these cases suggests that there may be more, not less, backlash and discrimination against people based on sexual orientation were the doctrine of consent extended to S/M.

B. *Tie Me Up, Tie Me Down: The Feminist Response*

The law's inability to perfectly promote sexual autonomy, on one hand, and criminalize violence, on the other, masks a greater ambivalence about sex and sexuality and presents particular dilemmas for women. Just as in the sporting context, legal doctrines regulating sex no longer allow for unrestrained physical male aggression. Rather, physical force is becoming doctrinally distinct from consensual sex. In both the case of rape and of domestic violence, the law, in some re-

¹³¹ See *Brown*, 1 A.C. at 274 (Opinion of Lord Mustill).

spects, imposes standards of civilized masculinity for intimate encounters. For example, historically rape was defined as including the element of force or threat of force—the use of physical compulsion or violence beyond the act of intercourse itself.¹³² In many jurisdictions, this included the requirement that the victim physically resist to the utmost, thus condoning the use of some violence by males in obtaining sexual gratification.¹³³ As the law evolved to account for the inherent power differential between men and women, reasonable resistance became sufficient in most states, and, among the most progressive, no resistance is required at all.¹³⁴ Rather, the lack of consent, coupled with some physical sexual act, is sufficient in some jurisdictions to satisfy the elements of rape.¹³⁵ By recognizing that a little force is not always necessary, the law ensures that consent is not coerced, ensuring sexual autonomy by punishing physical violence.

A similar relationship between violence and sexual autonomy is found in the criminal law's treatment of domestic violence. As Donna Coker has noted, men who beat their wives or lovers frequently allege that the woman's infidelity or her desire to be unfaithful provoked the beating.¹³⁶ In the case of domestic homicide, partners who perceive that a loved one may stray are more likely to kill under the theory of "if I can't have you, no one can."¹³⁷ When the law failed to sanction men for acts of domestic violence, this, implicitly, at least, limited female sexual autonomy.¹³⁸ The trend toward criminalizing domestic violence promotes women's sexual agency and equality by distinguishing physical violence from consensual intimacy. Imposing standards of civilized masculinity hence promotes women's sexual autonomy.

Would allowing consent in the S/M context undermine sexual equality? The law is intended to prevent the powerful from hurting the powerless; by criminalizing S/M that results in injury, the law arguably protects masochistic women from sadistic men who injure

¹³² See SUSAN ESTRICH, *REAL RAPE* 60–65, 69 (1987) (discussing the legal standard of force in rape).

¹³³ See STEPHEN J. SCHULHOFER, *UNWANTED SEX* 3 (1998).

¹³⁴ See *id.*

¹³⁵ See, e.g., *In re M.T.S.*, 609 A.2d 1266 (N.J. 1992).

¹³⁶ Donna K. Coker, *Heat of Passion Killing: Men Who Batter, Men Who Kill*, 25. CAL. REV. L. & WOMEN'S STUD. 71 (1992).

¹³⁷ DAVID M. BUSS, *THE DANGEROUS PASSION* 101–30 (2000) (discussing the link between sexual jealousy and intimate violence).

¹³⁸ See Cheryl Hanna, *Can a Biological Inquiry Help Reduce Male Violence Against Females*, 22 VT. L. REV. 333, 348–49 (1997); Barbara Smuts, *Male Aggression Against Women: An Evolutionary Perspective*, in *SEX, POWER, CONFLICT: EVOLUTIONARY & FEMINIST PERSPECTIVES* 231 (David M. Buss and Neil M. Malamuth eds., 1996).

them in the course of non-consensual sexual relations, effectively eliminating the "she likes it rough" defense. Thus, the law imposes normative standards of sexual conduct on men that are non-violent and non-dominating, again, civilized masculinity. At the same time, the law limits women's pursuit of pleasure through pain, thus prescribing normative behaviors that can be paternalistic and repressive. The current doctrine of consent assumes that no reasonable woman would or should consent to sexual activity that involves violent domination, just as it once assumed women had no right to play sports.

The current doctrine of consent also fails to recognize that "rough sex" is not always victimizing to the masochist (generally the woman in the paradigmatic heterosexual ritual). Some have even argued that sadomasochism can create avenues of empowerment for the masochist as she becomes paradoxically stronger and the sadist weaker.¹³⁹ Thus, the inability of the law to distinguish between situations which are consensual and empowering and those that are humiliating and victimizing presents an unresolved and unresolvable dilemma.

The law must decide which horn of this dilemma is better (or less bad), and to do so, must examine experience as well as theory. The vast majority of S/M cases take place not in homosexual sex clubs, but in private, between heterosexuals.¹⁴⁰ A review of these cases suggests that S/M is more often a guise invoked by defendants to explain away their sexual battery and abuse,¹⁴¹ not a guise invoked by the state to

¹³⁹ See, e.g., CHANCER, *supra* note 24.

¹⁴⁰ See Apostolides, *supra* note 3, at 60 (citing Charles Moser of the Institute for Advanced Study of Human Sexuality that S/M is most popular among educated, middle and upper class men and women).

¹⁴¹ See, e.g., *Ohio v. Hardy*, 1997 Ohio App. LEXIS 4588 (1997). In that case, a husband, disguised as a burglar, attacked his wife, blindfolded her, tied her to a chair, struck her, and forced her to engage in oral and anal intercourse, claiming that it was part of "fantasy role playing." On another occasion, he raped her at gunpoint, bound her legs, handcuffed her, and attempted to put her in a bathtub with water that had an electrical radio perched on edge, and then tried to suffocate her. He testified at trial that their marital sexual activity was "a little bit different than what most people would consider normal." See *id.* In *Ohio v. Roquemore*, 85 Ohio App.3d 448 (1993), the defendant admitted to hitting the headboard of the bed with a baseball bat and started wrestling with the victim until she started scratching him and then he laid on top of her, and had intercourse. The victim became unconscious and died of cardiac stoppage, as well as suffering rectal and vaginal trauma. The defendant claimed that this was all part of rough sex that the two had had previously as well. See also *People v. Hooker*, 244 Cal. Rptr. 337 (1988) (Defendant, "an advocate of bondage and discipline" kidnapped, with his wife, a twenty-year-old girl and held her in a specially constructed "headbox", tortured her, whipped her, and held her prisoner as his sexual slave for more than seven years.); *Horowitz v. State*, 1996 WL 112223

persecute gay men. Even in those few cases where the victim refuses to participate in the prosecution, more often than not, the facts of those cases give rise to legitimate questions as to whether the victim consented at all. The danger in allowing consent to negate an assault and battery when the defendant claims S/M is that rape and domestic violence prosecutions could be greatly undermined.

1. *State v. Collier*

Take, for example, the 1985 case of *State v. Collier* in which the Iowa Court of Appeals was asked to decide whether sadomasochism was a "social activity" pursuant to the Iowa Code and thus exempt from an assault prosecution.¹⁴² In this case, the defendant, Edward "Tree" Collier, ran an outcall model business (i.e., he was a pimp). The victim, Leann Steele, worked for him as a model (i.e., she was a prostitute). According to Steele, when she returned one day without any money after an all-day encounter with a customer with whom she "did drugs," Collier got angry, locked the doors, and promised her a birthday that she would never forget. Collier forced Steele to remove her clothing and tied her spread-eagle face-up on the bed. He then blindfolded her and proceeded to whip her with a belt. Steele testified that she was struck on the thighs, legs and chest. When she began crying and asked him to stop, he slapped her across the face and gagged her. Defendant then performed sexual acts using various types of paraphernalia. He eventually untied her, beat her on the

(Tex. Crim. App.) (Victim who arguably blacked out after consuming alcohol was allegedly violated by the defendant, an attorney, who caused severe trauma too her vagina, cervix, anus and rectum, but argued that the injuries were sustained during consensual "rough" sex.); *Ewing v. Texas*, 1997 WL 488614 (Tex. Crim. App.) (At gunpoint, defendant grabbed the victim's arm, pulled her to the floor and told her he "was going to teach her a lesson wanting to be a slut and work in a bondage and discipline bar," and then engaged in a series of violent acts which included cutting her with a knife, beating her and inserting objects in her rectum and vagina. Defendant claimed that she asked him to perform these sadomasochistic acts on her.); *Mendyk v. Florida*, 545 So.2d 846 (Fla. 1989) (defendant grabbed a female convenience store clerk, took her to a secluded area, tied her up and sexually tortured her, and eventually killed her. At the penalty phase of the trial, the state introduced magazines seized by the police from the defendant's residence which covered themes including sadomasochism, slavery and bondage.); *R. v. Welch*, 101 C.C.C. (3d) 216 (1995) (defendant tied up his partner with scarves and his tie, poured baby oil on her, beat her with a belt, inserted his finger in her vagina and an object in her rectum. Defendant claimed that the victim agreed tot his kind of sadomasochistic sex and asked for it).

¹⁴² See 372 N.W.2d 303 (Iowa Ct. App. 1985) (citing Iowa CODE § 708.1 which provides "[t]hat the person doing any of the above acts [defining assault], and such other person, are voluntary participants in a sport, social or other activity, not in itself criminal . . . the act shall not be an assault").

backside and proceeded to have anal intercourse with her. As a result of the beating and the sexual acts, Steele suffered a swollen lip, large welts on her ankles, wrists, hips, and buttocks, and severe bruising on her thighs.¹⁴³

In contrast, Collier testified that Steele asked him to tie her up and beat her in order to celebrate her birthday, as it was one of her sexual fantasies. He further testified that she had read books concerning bondage and instructed him on what to do. The court cited both *Samuels* and *Appleby* in holding that the legislature never intended sadomasochism to be a "sport, social, or other activity." However, it did not define the precise definition of this term, opting for a case-by-case approach.¹⁴⁴ What is striking about *Collier* is that, again, the victim in this case was someone whom a jury could have found deserving of a beating, or at least not worthy of the protection of the law. She was a prostitute and a drug addict, and arguably sexually deviant by the nature of her profession. If the issue of consent was allowed to go to the jury, it may have found that she did so, given her status. Here, the practical effect of the doctrine is to check the passions and prejudices of the jury, who may in fact believe that prostitutes, like gay men, are sexual deviants, undeserving of the law's protection. Were the court to have come to the opposite conclusion, it would have given license to pimps and johns to beat and rape prostitutes, and then claim S/M. Even worse, had it allowed consent to be a defense, the court would have implied that there are "good girls" and "bad girls" and that "bad girls" get what they deserve, just as when, as a legal matter, prostitutes could not be raped.

Hence, both the ECHR and Lord Jauncey are correct that it is not enough to engage in a case-by-case analysis as to consent because there are social consequences to carving out an "S/M exception" beyond the parties in any one case. There are social messages implicit in any legal rule, and long-term consequences that far outlive the particulars of any case. By refusing to define S/M as a "social activity," the Iowa court in effect protects those who could otherwise be defined as sexually deviant and protects against what some have called a "cult of violence."¹⁴⁵ The court exercises its paternalistic function to protect

¹⁴³ *Collier*, 372 N.W.2d at 304.

¹⁴⁴ See *id.* at 307.

¹⁴⁵ See WILLIAM STACEY & ANSON SHUPE, *THE FAMILY SECRET: DOMESTIC VIOLENCE IN AMERICA* 196 (1983) ("[W]e think there is good reason to believe that a cult of violence is spreading throughout our society and affecting every sector. [The cult is not an organized group rather it] is an acceptance of violence, learning to expect it, to tolerate it, and to

against violent anarchy, and, in the process, sets forth a code of conduct that protects those once deemed unworthy of protection, again reinforcing a norm of civilized masculinity.

2. *Regina v. Emmett*

People often experiment with dangerous activities without knowing what they are doing, making the risk of injury highly probable. This was precisely the problem in *Regina v. Emmett*,¹⁴⁶ another British case decided after *Regina v. Brown*. The case involved a heterosexual couple who were living together and subsequently married by the time of trial so that the wife was able to invoke spousal privilege and refuse to testify.¹⁴⁷ The defendant was charged under the Offenses Against Person Act of 1861, the same statute under which the defendants in *Brown* were charged. The case came to the attention of the police after the "victim's" doctor reported that one of his patients had suffered injuries that gave him cause for concern.

There were two instances that gave rise to the allegations. In the first instance, the defendant placed a plastic bag over his partner's head, tied it at the neck with a ligature, and tightened it to the point where she could no longer endure the pain. This is a practice known as erotic-asphyxiation, which is intended to heighten the sexual pleasure for both parties. He engaged in oral sex with her, and at some point became so lost in his own excitement that he lost track of what was happening to her. He eventually became aware that she was unable to speak, having lost oxygen. He removed the bag, and although she lost consciousness, she remained alive. The following day she went to see her doctor. She suffered from a subconjunctival hemorrhage in both eyes and had bruising around her neck—both caused by lack of blood flow to the head. It was clear that if the episode had continued, she could have suffered brain damage and eventually death. A few weeks later she returned to the doctor's office. On this occasion, the defendant had poured lighter fluid on her and lit it—again to heighten sexual pleasure. She suffered a burn on her breast

commit it, however much one dreads it. This cult is stimulated by a violent environment that affects each generation of men and women, making them yet more desensitized to the problem.").

¹⁴⁶ See *Regina v. Stephen Roy Emmett*, [1999] E.W.C.A. 2651 (June 18, 1999), at <http://www.bailii.org/ew/cases/EWCA/1999/2651.html>.

¹⁴⁷ See *id.* at ¶¶ 5–6.

that became infected, although because she sought immediate medical help, she had no permanent scarring.¹⁴⁸

Her doctor notified the police and the state arrested the defendant. He admitted to these acts, claiming that they were consensual sexual activities, although he did say that he was the one who initiated the idea to engage in S/M. He was convicted based on his own statements and the testimony of the doctor and sent given a suspended sentence. He appealed. The appellate court rejected his argument that this case was different from *Brown* in that it involved a heterosexual couple.¹⁴⁹ The defendant further argued that his case was analogous to *Regina v. Wilson*,¹⁵⁰ in which a husband had branded his wife's buttock with his initials, at her request. In that case, the court dismissed his conviction, suggesting that *Brown* did not apply to consensual activity between husband and wife where there was no injury greater than that of a tattoo.¹⁵¹ In distinguishing *Emmett* from *Wilson*, the appellate division of the criminal court of England held that here the injuries were qualitatively different and noted that a number of people had died in the last few years of erotic-asphyxiation. Emmett's activities objectively revealed a realistic risk of more than just a transient or trivial injury. This was not merely rough and undisciplined love play, but involved dangerous undertakings that carried a high likelihood of harm.¹⁵²

Was the court correct in disallowing consent as a defense here? Even assuming the "victim" enthusiastically and willingly consented, the court here did the right thing. Activities such as erotic-asphyxiation and burning are very high-risk endeavors, and in the course of sexual excitement, it is quite easy to be overcome by passion. By disallowing consent, the court facilitates two important policy goals. First, it protects the victim if she did not consent. We have no way of knowing if the victim, like many abused women, was afraid to testify, or if she was a loyal sex partner standing by her man. But more importantly, it serves as a deterrent to those people who "play" but do not know the rules. Mr. Emmett would not have been prosecuted if he did not cause injury, as there would have been no evidence upon which to base his conviction. Thus, the law sends a symbolic message to proceed cautiously and carefully—do not play with fire—for if you

¹⁴⁸ See *id.* at ¶ 11.

¹⁴⁹ *Id.* at ¶ 23.

¹⁵⁰ 1997 Q.B. 47 (Eng. C.A.).

¹⁵¹ See *id.*

¹⁵² See *Emmett*, [1999] E.W.C.A. at ¶ 29.

do, and someone is injured, you will be criminally culpable. Even if the defendant intended no harm, even if he knew the rules, he was no doubt grossly reckless in his conduct. Some people do accidentally die from S/M encounters that go too far, and hence, there is a clear public safety argument to be made in cases that involve asphyxiation, burning, and bondage, which, in rare cases, can also lead to death.¹⁵³

3. *People v. Jovanovic*

Before engaging in any sexual intimacy, both parties should consent. Yet, discerning when consent is withdrawn poses particular problems for the law in S/M. In S/M, force and resistance is part and parcel of the encounter. "No" actually means "yes." Pain and pleasure become indistinguishable. Being bad is being good. *People v. Jovanovic*, initially discussed in the Introduction, pushes at the edge of consent. It is a hard case, and hence a bad case for either side of this debate to hold up as an example of what is right or wrong with the current doctrine of violent consent. In most S/M cases involving heterosexual couples the question of consent becomes a "he said-she said" inquiry. In *Jovanovic*, however, there was independent evidence of consent beyond the defendant's testimony. The victim, a Barnard College undergraduate, was not a novice to the world of S/M. Rather, through her e-mail exchanges with Jovanovic, it is clear that she at least knew the language of S/M. Second, by her own testimony, she consented to some activity with Jovanovic—but as her e-mail fantasies became reality, she found herself at first ambivalent and then afraid. Furthermore, Jovanovic is not a pimp or a careless lover or a homosexual man involved in an underground S/M 'sex scene—he is an Ivy-educated graduate student.

Jovanovic illustrates the extreme difficulty in S/M cases of discerning what consent even means. Even those who initially consent to S/M encounters, as did the complainant in this case, can change their minds, unaware of what exactly it is that they are getting into, particularly with a first time partner. Furthermore, although proponents of

¹⁵³ In a recent case in Quincy, Massachusetts, for example, Barbara Asher, a self-identified dominatrix, admitted to police that after her client, Michael Lord, died of a heart attack while in restraints in her dungeon, she and her boyfriend chopped up the body and disposed of the remains in a Dumpster. See David Wedge & J.M. Lawrence, *Woman in S&M Case No Longer Working with Cops*, BOSTON HERALD, Aug. 18, 2000, at 3. This case reportedly sent women sex workers underground, fearing that they might become the target of a police crackdown. See J.M. Lawrence & David Wedge, *S&M Pros Lay Low in the Sex Death Fallout*, BOSTON HERALD, Aug. 17, 2000, at 21.

S/M stress the role of negotiation and communication, the facts of *Jovanovic* indicate that the meaning of consent was, at best, ambiguous. What started as consensual S/M arguably became sexual violence.

A detailed analysis of the facts shows why this is such a bad case. According to the victim, after arriving at Jovanovic's apartment, he gave her some tea, which she found to have a chemical taste. They then looked at a book and watched a movie, both of which depicted violent sex scenes. They talked. He asked her to take off her sweater and her pants and she complied. She did not protest when he tied her arms and legs spread-eagle on a futon frame. Jovanovic went to the kitchen and came back with some candles, including a white candle in a glass. The complainant protested, asking him not to burn her and to be untied. When the glass was full of molten wax, he poured it on her stomach, then pulled down her panties and dripped wax around her vaginal area, and then onto her nipples. He then placed ice cubes where he had poured the wax. She screamed and asked him to stop. She was then blindfolded.

After about an hour of this, he untied her and carried her to his bed. She asked him not to rape, dismember or kill her. When he asked, "Is there anything else that you don't want me to do, she answered, "Yes, don't do anything that you can get arrested for." When he responded, "Do you think that I am going to get arrested for this?" the complainant replied that he would have to kill her if he did not want to get arrested. At this point, he said, "That's easily enough done," and pinched her nose shut and put his hand over her mouth for a minute until she felt dizzy.

He told her that she needed to learn self-defense and that the only victim who had escaped Jeffrey Dahmer was proficient in martial arts. He hog-tied her so that she was on her stomach. He next retrieved two batons from the closet, and penetrated her rectum with either a baton or his penis, causing her intense pain. She next remembered waking up sometime the following morning. He untied her and tried to give her self-defense lessons, and when she tried to run away, he tied her up again. Eventually she freed herself, fought him off, got her clothes and left.

The day after the encounter, Jovanovic e-mailed her again, saying that she had left her gold chain in his apartment. He also said, "I have the feeling the experience may not have done as much good as I'd hoped, because you weren't acting much smarter at the end than you were at the beginning." She replied that she was "purged by emotions,

and pain," and that while she was "quite bruised mentally and physically" she was "never so happy to be alive."

After the victim reported him to the police, Jovanovic was charged and convicted of kidnapping, sexual abuse and assault, which created some doctrinal difficulty for the court. The New York Supreme Court, Appellate Division opinion makes clear that consent is a defense to kidnapping and sexual abuse and thus the e-mails are relevant to Jovanovic's state of mind as to the reasonableness of his own belief that the victim was consenting. They also show the victim's state of mind as to whether she did consent, calling into question her credibility. The victim apparently admitted in the e-mails that she was involved in another relationship with someone. She wrote, "[H]e was a sadomasochist and now I'm his slave and its (sic) painful, but the fun of telling my friends 'hey I'm a sadomasochist' more than outweighs the torment."¹⁵⁴ She later wrote in response to Jovanovic's question as to whether she was submissive sometimes, "I am what those happy pain fiends at the vault call a 'pushy bottom.'"¹⁵⁵ Thus, the court is correct that these e-mails are relevant to the issue of consent and suggest why the complainant may have motive to fabricate non-consent as to the sexual assault and kidnapping charges.

But what about the assault and battery charge? Jovanovic never took the stand, and thus his attorney did not suggest that Jovanovic admitted to the encounter, but that, if he did, he should still be able to show that the victim consented as to all charges, including the assault and battery charge. The court agreed and held that "upholding the conviction on the assault charges, as the dissent suggests, would ignore the prejudice resulting from Jovanovic's inability to adequately challenge the complainant's credibility and reliability."¹⁵⁶

In a footnote, the court rejected the defendant's argument that there is a constitutional right to engage in S/M and qualified this holding stating:

There is no available defense of consent on the charge of assault. . . . Indeed, while a meaningful distinction can be made between an ordinary violent beating and violence in which both parties voluntarily participate for their own sex-

¹⁵⁴ *Jovanovic I*, 700 N.Y.S.2d 156, 164 (N.Y. App. Div. 1999).

¹⁵⁵ *Id.* at n. 4 ("The defense explains that The Vault is a club catering to sadomasochists, and a "pushy bottom" is a submissive partner who pushes the dominant partner to inflict greater pain.").

¹⁵⁶ *Id.* at 171-72.

ual gratification, nevertheless, . . . a person cannot avoid criminal liability for an assault that causes injury or carries with it a risk of serious harm, even if the victim asked for or consented to the act. . . . And, although it may be possible to engage in criminal assaultive behavior that does not result in physical injury, we need not address whether consent to such conduct may constitute a defense, since the jury clearly found here that the complainant was physically injured.¹⁵⁷

There is a complete logical disconnect between this statement and the court's holding. Jovanovic never claimed that the injuries the victim sustained were inflicted by someone other than himself, and there was corroborating testimony from a neighbor who heard sounds as if "someone was undergoing a root canal."¹⁵⁸ Furthermore, the complaining witness promptly told five people about the encounters, and some observed her injuries. In addition, the complainant went to a hospital. Lab results on her clothing corroborated injury. She was bruised and suffered burns from candle wax, and was physically restrained for an extended period of time. These injuries go far beyond a little love play that just got out of hand.

If consent is not a defense to assault, what legal relevance do the e-mails have to the assault and battery charge? Arguably none. The e-mails in no way disprove that she was either not injured, or that someone other than Jovanovic caused the injuries. The dissent correctly points out that her corroborated testimony was sufficient as a matter of law to uphold the assault charges and that the trial court's instruction that consent was not a valid defense to that charge was proper.¹⁵⁹ By not separating out the sexual abuse and kidnapping charges from the assault charge, and thus reversing the entire conviction, the Appellate Division implicitly suggests that the jury could have found that she consented to the violence that was part of a sexual encounter.

The majority is doctrinally sloppy in its analysis and too quick to reverse the entire conviction. What is striking is that, unlike in *Collier*, where the court passed no moral judgment on the prostitute, here the court is skeptical and judgmental of a young college woman who might be curious about S/M. In taking issue with the fact that Jovano-

¹⁵⁷ *Id.* at 168 n. 5 (internal citations omitted).

¹⁵⁸ *Id.* at 174 (Mazzarelli, J., concurring in part and dissenting in part).

¹⁵⁹ *See id.*

vic was portrayed as a monstrous sadist, while the complainant was portrayed as a naïve and innocent girl, the court stated:

The excluded e-mails stating that the complainant and Luke [another man] had a master-slave relationship that included the infliction of pain, and that the e-mail in which the complainant referred to "the pain fiends at the vault" and herself as a "pushy bottom," i.e. a masochist who pushes the dominant partner to inflict more pain than intended, would have enabled Jovanovic to provide a counterpoint to the People's portrayal of the complainant and avoid the prejudice potentially created by the unbalanced portrayal. It would also have permitted Jovanovic to effectively place the complainant in a somewhat less innocent, and possibly more realistic, light. For instance, the complainant made certain remarks in her e-mails, such as "rough is good," and "dirt I find quite erotic," for which she provided the jury with completely innocent explanations. Defendant was unable to plausibly offer alternative, more suggestive readings of such e-mail remarks, as long as the jury was unaware of the extent of the complainant's interest in sadomasochism.¹⁶⁰

Here the court suggests that "she asked for it, she got it," or that she at least should have known better. It is a classic "blame the victim" decision. The court is clearly repulsed by her interest in S/M, and is far more sympathetic to a "good young man" than to a "bad college girl."

The New York Court of Appeals was intellectually lazy in upholding the Appellate Division's opinion. In two short sentences, they held that because the e-mails are admissible under the "interests of justice" exception to the Rape Shield Law, they had no authority to overturn.¹⁶¹ Yet, the court failed to explain how the e-mails would be relevant to the assault charge, and, as such, now opens the door for other defendants charged with both sexual abuse and physical assault to introduce evidence of consent as to both charges by invoking the S/M defense.

¹⁶⁰ *Id.* at 200-01.

¹⁶¹ *Jovanovic II*, 95 N.Y.S.2d 846 (2000) ("Motion to dismiss appeal granted and appeal dismissed upon the ground that the reversal of the Appellate Division was not on the law alone or upon the law and such facts which, but for the determination of the law, would not have led to reversal. Although the order states that the reversal is on the law, the opinion reveals that an independent ground for reversal was the applicability of the CLP60.45 (5) 'interests of justice' exception to the Rape Shield Law.").

In the vast majority of cases where defendants have invoked consensual S/M as defense to a sexual assault charge, other courts have consistently held that evidence that the victim may have been interested in or engaged in S/M in the past is barred under Rape Shield Laws.¹⁶² The Appellate Division breaks with precedent not only on questions of substantive criminal law, but on the applicability of evidentiary issues as well. Even more appalling is that both the Supreme Court and the Court of Appeals failed to engage in any historical or doctrinal analysis of consensual violence itself and the relationship between sexual and nonsexual violence. They would have been well advised to consult both *Brown* and *Jobidon* before rendering an opinion.

The New York County District Attorney's Office has said that it will retry the case, a decision that has incited public controversy.¹⁶³ Many believe that it was Jovanovic, and not the complainant, who was the victim, and that the District Attorney is being over-zealous, anti-male, and sexually puritanical.¹⁶⁴ After the decision, the District Attorney's office offered Jovanovic a no-jail sentence if he plead guilty. Already having spent more than twenty months in jail, Jovanovic refused, claiming that the sex was consensual.¹⁶⁵ This decision, and the public reaction to it, ought to give pause to those who understand that the costs of a system of unrestricted freedom fall most directly on women, who are at most risk for abuse and exploitation.¹⁶⁶

¹⁶² See, e.g., *People v. Murphy*, 919 P.2d 191 (Colo. 1996) (Colorado Rape Shield Statute barred evidence of victim's sexual orientation or that the victim had agreed to try some "rough sex"); *State v. Stevens*, 1995 Del. Super. LEXIS 294 (victim's preference for "rough sex" inadmissible under Delaware Rape Shield Statute); *State v. Miller*, 600 N.W.2d 55 (Wisc. 1999) (questioning victim as to whether she ever engaged in rough sex was in error under Wisconsin Rape Shield Statute). See also Roger Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases*, 22 FORDHAM URB. L.J. 271 (1995); Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 709 (1995); Rosemary C. Hunder, *Gender in Evidence: Masculine Norms v. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127 (1996).

¹⁶³ Kenneth Lovett et al., *Cyber Ollie Now Faced with New Trial*, N.Y. POST, July 7, 2000, at 2.

¹⁶⁴ See, e.g., Robyn E. Blummer, *Rape Shield Laws Have Outlived Their Usefulness and Should be Shelved*, SALT LAKE CITY TRIB., Jan. 7, 2000, at A11.

¹⁶⁵ Laura Italiano, *Cybersex Suspect Nixes Deal*, N.Y. POST, Dec. 14, 2000, at 12.

¹⁶⁶ See SCHULHOFER, *supra* note 133, at 278.

4. In a Bind

Yet, S/M, in theory, need not offend feminist sensibilities when one begins with the premise that it is an activity rooted in sexual autonomy. Thus, for example, the National Organization of Women ("NOW") has started an S/M policy reform project to reverse the organization's stance against the practice as dehumanizing to women, instead arguing that it promotes physical and sexual expression.¹⁶⁷ Sex and erotic desire can be positive and liberating for women, and some have argued that the question of S/M is intricately related to issues such as abortion and access to birth control, fundamentally being a question of sexual autonomy, not sexual violence.¹⁶⁸

Furthermore, many women in same-sex relationships embrace the practice of S/M, and thus the demarcation between man as sadist and woman as masochist is blurred.¹⁶⁹ From this liberal, autonomous feminist perspective, women, like men, can freely make decisions. Indeed, there are both social¹⁷⁰ and biological¹⁷¹ reasons as to why both receiving and inflicting pain on another is pleasurable and desirable for both women and men. By stigmatizing S/M, the law implicitly pathologizes women and denies them the same sexual agency that men have. Just as in the *Spanner* case, the Paddleboro case, discussed in the Introduction, raises the issue as to whether the law of S/M will now be used to persecute women who are involved in same sex relations. It remains to be seen whether this is an isolated incident or an emerging pattern but the fear remains that women may be once again denied sexual agency through selective prosecution or restraints on sexual agency.

¹⁶⁷ See NOW S/M Policy Reform Project at <http://members.aol.com/NOWSM/home.html> (visited Feb. 2, 2000) (describing an ad hoc group of members of NOW who support freedom of sexual expression for consenting adults, inspired by caucus discussions held at NOW's Lesbian Rights Summit).

¹⁶⁸ See *id.*

¹⁶⁹ See generally Mary Becker, *Women, Morality, & Sexual Orientation*, 8 UCLA WOMEN'S L.J. 165 (1998) (arguing that heterosexual relationships are more problematic for women than are lesbian relationships).

¹⁷⁰ See, e.g., CHANCER, *supra* note 24; LYNDY HART, *BETWEEN THE BODY & THE FLESH: PERFORMING SANDOMASOCHISM* (1998); JOHN MUNDER ROSS, *THE SANDOMASOCHISM OF EVERYDAY LIFE* (1997); *STUDIES IN DOMINANCE & SUBMISSION* (Thomas S. Weinberg, ed.) (1995).

¹⁷¹ See, e.g., David Tuller, *Probing the Limits of Pain & Pleasure*, SAN FRAN. CHRON., June 29, 1997, at 3Z1 (quoting Dossie Easton, a therapist, advocate for battered women and aficionado of sandomasochism, "Runner's high is a good example of something that might be close to what people get out of the S/M stimulus. People's endorphin systems kick in—endorphins are the opiates that your body naturally produces.").

In addition, the case law represents only a tiny portion of the range of S/M experiences. While traditionally we think of males as sadists and women as masochists, the world of S/M twists and plays with power relationships. Consider the following interview by Lauren Goodlad with two women who each work as a dominatrix:

Lady Alfonsa describes herself as a therapist, not a sex worker. Since 1991 she and her partner, Mistress Midori, have built up a cottage industry in domination-for-hire. Their "toys"—the men and women who employ their services—are bound, disciplined, and punished. Most are successful professionals in positions of authority.

"If it is not sex that you are providing," I ask, "why do they come to you?"

"They want to be controlled," Alfonsa replies.

"They want," Midori says, "to be brought to the breaking point—especially the men."

"And what is that breaking point?" I ask.

Midori reflects for a moment.

"Usually when they cry."¹⁷²

This interview illustrates that power and powerlessness are mutable; they are not gender specific or role specific.¹⁷³ The argument that S/M is a male construct does not fully account for the many roles that people play. Males may indeed crave a sense of powerlessness, just as women can crave power. From this perspective, then, S/M promotes, not inhibits, women's sexual agency.

In contrast, some "regulatory" feminists, such as Andrea Dworkin and Catharine MacKinnon, argue that consent is illusory within a male dominated context as the social system serves to make women subordinate.¹⁷⁴ Within the context of S/M, there could be no consent, even if a woman says yes, given the misogynistic and violent patriar-

¹⁷² Goodlad, *supra* note 23, at 35; see also David Wedge & J.M. Lawrence, *Woman in S&M Case No Longer Working with Cops*, BOSTON HERALD, Aug. 18, 2000, at 3.

¹⁷³ See also Harold Levy, *Sex Isn't S/M Goal*, TORONTO STAR, July 28, 1998, at B3. The article describes the trial of "Made de Sade," a dominatrix who was arrested after police raided her "Chamber of Erotica." Dr. Roy Baumeister, a psychologist at Case Western Reserve University, testified that it is often older white men who are drawn to sadomasochism, often wanting to be spanked and dominated. "It is separation from real life for them." *Id.*

¹⁷⁴ See generally ESKRIDGE, *supra* note 36 at 254-55; ANDREA DWORKIN, *THE ROOT CAUSE IN OUR BLOOD: PROPHECIES & DISCOURSE ON SEXUAL POLITICS* 96-111 (1976); CATHARINE MACKINNON, *TOWARDS A FEMINIST THEORY OF THE STATE* 126-54 (1982).

chal culture in which we live. Consent is merely an expression of the "false consciousness of the oppressed."¹⁷⁵ Thus, "that women on occasion take pleasure in their own submissiveness, is simply a manifestation of their disempowered state."¹⁷⁶

Others reject the idea that sadomasochistic encounters are informed by open negotiations. "It is rather more likely that the participation in sadomasochism is predetermined to varying degrees so that the ritual of consent is empirically irrelevant."¹⁷⁷ And there is at least anecdotal evidence to suggest that some people often agree to engage in some form of S/M, only to regret it later.¹⁷⁸ For many, there is a clear gender distinction between men's and women's experience with pleasure and pain. As Robin West has argued, "Women's subjective, hedonic lives are different from men's. The quality of our suffering is different from that of men's, as is the nature of our joys. . . . Women suffer more than do men."¹⁷⁹

The problem, then, from a feminist perspective, is that there is no one perspective on S/M. Both liberal and regulatory feminists point to both the good and the bad of S/M for women. S/M is hard for feminists, as it is unclear whether it promotes sexual agency or promotes sexual exploitation or both. In practice, whether S/M is an exercise of individual autonomy or social coercion is far more dependent on the particulars of the situation. It may very well be that within same-sex female relationships, the concerns over power and exploitation are less salient.¹⁸⁰ Furthermore, even the context of *Jova-*

¹⁷⁵ Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 186 (2000) (discussing MacKinnon and Dworkin).

¹⁷⁶ *Id.* at 184 (discussing differences between radical feminism and radical feminist legal theory).

¹⁷⁷ Robin Ruth Linden, *Introduction*, AGAINST SADOMASOCHISM 9, (Robin Ruth Linden, et al. eds., 1982).

¹⁷⁸ See *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993). In that case, a wife sued a husband in divorce for the intentional infliction of emotional distress for pursuing sadomasochistic activities with her. See *id.* In *Fielder v. Texas*, initially a wife consented to "playful" bondage and discipline games with her husband, but then he forced her to participate in activities such as piercing her genitals and shackling her nude to metal rings in a closet he called "the cave." The couple separated, and later Ms. Fielder killed her husband in what she argued was a case of self-defense. See 756 S.W.2d 309 (Tex. Crim. App. 1988). See also Marissa Jonel, *Letter from a Former Masochist*, in AGAINST SADOMASOCHISM, *supra* note 177, at 16-22 (providing a statement from a lesbian who used to practice S/M describing it as a cover to encourage women to be violent).

¹⁷⁹ West, *supra* note 175, at 149.

¹⁸⁰ See generally Becker, *supra* note 169; PAT CALIFIA & ROBIN SWEENEY, *THE SECOND COMING: A LEATHERDYKE READER* (1996).

novic, the complainant felt, in her own words, simultaneously liberated and oppressed. What makes *Jovanovic* such a bad case for feminists is that we want her to be both free from social restraints to explore her sexuality, and we want the law to set boundaries for her sexual partner and, to some extent, herself. Yet, it becomes impossible to have it both ways—tied up and tied down.

Even if one is theoretically persuaded by liberal feminist arguments that consent can be real and that, for many women, S/M actually promotes, not punishes, women's sexual pleasure, at some point the law must draw lines. Not even liberal feminists would suggest that it would be acceptable to inflict death or to maim someone for some sort of sexual gratification. Thus, the question is not whether the broad concept of S/M is good/bad for women, but rather, how far is too far?¹⁸¹

Professor Stephen Shulhofer has argued in *Unwanted Sex*:

The effort to distinguish permitted from prohibited force pulls the law into a hopeless quagmire, with under-enforcement the inevitable result. But this problem can't be solved by moving the line between the two kinds of force to a slightly different place. What is perhaps more surprising, and certainly more frustrating, this problem can't be solved by prohibiting *all* uses of force. That approach won't avoid the vagaries of distinguishing permitted from impermissible force, because physical activity, some of it forcible, is inherent in intercourse. And many of the other physical aspects of sexuality, though not inherent in intercourse, are expected and pleasurable, provided that there is consent.¹⁸²

True, to prohibit all force would be ridiculous. But giving consent a legal definition that embodies the notion of negotiation, qualitative and informed decision-making will not necessarily make for a better legal regime of sexual autonomy either. Inevitably, the law will find itself in somewhat of a quagmire within the S/M context, deciding on a case-by-case basis how far is too far and when the risk of serious injury and death is too great. In this context, the law must not only bal-

¹⁸¹ For example, a recent case in San Diego highlights how far can be too far in the private pursuit of pleasure. John Ronald Brown was convicted of second-degree murder after he amputated the leg of a man to satisfy a sexual fetish. See J. Harry Jones, *Unlicensed Doctor Gets 15 Years in the Death of a Man After the Amputation of Leg*, SAN DIEGO UNION-TRIBUNE, Dec. 18, 1999, at B4.

¹⁸² SCHULHOFER, *supra* note 166, at 279.

ance sexual agency with concern for coerced choices, but it must factor in the level of violent aggression, even if consensual, that the state will tolerate. As soon as women, in particular, start to embrace violence that is outside of a competitive, regulated sphere, they will no doubt find that they once again will become the victim, and not the victors, in the struggle for sexual autonomy and equality.

If S/M that resulted in actual serious physical injury were to be decriminalized, there would no doubt be a series of consequences, intended and unintended. For example, if the law of consensual violence mirrored the law of consensual sex, a defendant could not be held criminally culpable if his belief that the victim consented was both honest and reasonable. Many commentators have argued that reasonableness has a social meaning,¹⁸³ or as one court stated, "It is time to put to rest the societal myth that when a man is about to engage in sexual intercourse with a 'nice' woman, a little force is always necessary."¹⁸⁴ Force and resistance are often evidentiary as well as legal standards by which the reasonableness is measured. Thus, if a victim is physically injured in the course of a sexual encounter, the force applied by the defendant often negates the reasonableness of his belief in consent, as we assume that reasonable people cannot and do not consent to being beaten. Physical injury is often the only evidence, beyond the victim's testimony, that proves the element of non-consent. It is far easier to prosecute a rape case when the victim is injured than it is if she has sustained no bodily injury at all.

In contrast, in the S/M context, force and resistance are actually consented to by the parties. And thus, in almost every sexual encounter the defendant could argue that he was reasonable in believing that the other person consented to injury. Even if the victim withdraws consent by shouting no, no means yes. Even if she struggles and is injured, pain is the ultimate cathartic experience. If consent were allowed as a defense in the S/M context, defense attorneys would have carte blanche to raise it in every sexual assault case where the victim is injured. This would essentially gut rape law jurisprudence as it now stands. So too could defense attorneys raise the S/M defense in many cases of domestic violence, undermining the slow and steady strides the law has made in sanctioning male violence.

¹⁸³ See, e.g., Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013 (1991).

¹⁸⁴ *State v. Rusk*, 424 A.2d 720 (Md. 1981).

If courts extended the consent doctrine to S/M, not only could this in practice be used to justify violence against women, but it could also, at a more theoretical and abstract level, reinforce oppressive cultural norms. It is notable that the literature on S/M rarely makes any reference to race. Indeed, the mainstreaming of S/M seems to be taking place among the upper middle class, which is predominately white. The language of S/M—slave, master, bondage, domination—may have a particular meaning within consensual sexual activities, but it derives from a history of legal racism and slavery. It is important to understand the multiple and complex meaning of these concepts and why, for some at least, the whole notion of S/M could be considered dehumanizing when examined within a larger cultural context.

For centuries, racial sadists abused their powers to inflict pain on slaves.¹⁸⁵ Many arguments about maintaining slavery were premised on the assumption that slaves preferred it that way. The dynamic of slavery is the same dynamic of power and powerlessness in sadomasochistic relationships, in many respects, even though in the latter we presume consent.¹⁸⁶ Within this historical context, we must ask ourselves if (white) America's fascination with S/M is not more deeply rooted in a collective cultural consciousness that still assumes women and racial minorities should be subservient to white men. Consider that S/M fantasies often involve the binding and whipping of the "slave" by the "master," evoking the image of white slave owners disciplining slaves in Antebellum America.¹⁸⁷ There are implications to opening up the Pandora's Box of consensual violence, not the least of which is that it sends a symbolic message that some forms of sexual oppression are acceptable so long as the oppressed party says yes.¹⁸⁸

Perversions of S/M, or not by-the-book S/M, can have horrible dehumanizing results, affronting concepts of human respect and dignity. Take, for example, the case of John Edward Robinson.¹⁸⁹ Going

¹⁸⁵ CHANCER, *supra* note 24, at 24.

¹⁸⁶ See *id.* at 169–71.

¹⁸⁷ For a description of an S/M scene depicting a "slave" being whipped by a "master," see West, *supra* note 175, at 188–90 (quoting M. MARCUS, A TASTE FOR PAIN: ON MASOCHISM AND FEMALE SEXUALITY 204–10 (1981) ("[s]ome people . . . are born into inequality and bondage and can only be happy by losing their false freedom and equality and giving themselves over to submissiveness and slavery.")).

¹⁸⁸ William F. McDonald, *The Role of the Victim in America*, in ASSESSING THE CRIMINAL 295, 295–96 (Randy E. Barney & John Hagel III eds., 1977) ("The criminal justice system is not for [the crime victim's] benefit, but for the community's. Its purposes are to deter crime, to rehabilitate criminals, punish criminals, and to do justice . . .").

¹⁸⁹ See Tim Hrenchir, *KBI Tries to Snare Suspects On Web*, TOPEKA CAPITAL-JOURNAL, July 3, 2000, at A1.

by the name of "Slavemaster," Robinson would strike up Internet relationships with women interested in sadomasochism.¹⁹⁰ When two women traveled to meet him face-to-face, both claimed that he brutalized them far beyond what they had intended. Upon his arrest, a search of his property turned up two dead women. Later, three more bodies were found in his storage locker. Robinson had also been in another relationship with a woman who had allegedly signed a "slave contract," for which she paid him \$17,000. True, Robinson is nothing more than a serial killer who used the Internet as a way to find victims. He represents a new kind of cyber-sex criminal, something which has given the Justice Department great pause for concern.¹⁹¹ But apart from his ability to lure women to him under the guise of S/M, what about the "sex slave" contract he had with another woman? Enforceable? Sexual slavery violates human rights¹⁹² and sexual slavery contracts are arguably void on public policy grounds.¹⁹³

III. BOUND TO THE LAW

In no way should this argument be construed as a moral judgment on those who practice safe and consensual S/M and are careful and communicative with their partners. Many people who engage in S/M follow clear rules and guidelines, which include that one cannot drink or do drugs or anything else that could impair one's judgment. Indeed, many questions surrounding violation of sexual autonomy in the course of an acquaintance or date rape situation would be far more easily answered if everyone engaged in similar negotiations, made clear when yes meant no and no meant yes, and refrained from the excessive use of drugs and alcohol. Furthermore, the literature on S/M suggests that people who practice S/M can experience a type of nirvana. In "Closer," a song from gothic group Nine Inch Nails, the song's narrator experiences himself through violating another. As Lauren Goodlad explains, "The Other's physical pain takes the place

¹⁹⁰ See *id.*

¹⁹¹ *Justice Department Ponders Net-Based Serial Murders*, NEWSBYTES, June 8, 2000 (quoting Janet Reno as concerned about how to prosecute cyber-sex crimes).

¹⁹² See, e.g., Susan Jeanne Toepfer & Bryan Stuart Wells, *The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding the Trafficking of Women*, 2 MICH. J. GENDER & L. 83 (1994) (reviewing the International Treaty Law Prohibitions on Trafficking in Women); Nora V. Demleitner, *Forced Prostitution: Naming an International Offense*, 18 FORDHAM INT'L L.J. 163 (1994) (reviewing the history of forced prostitution and white slavery).

¹⁹³ See *In re Baby M.*, 525 A.2d 1128 (N.J. Super. Ch. Div. 1987) (contract for surrogate void for public policy even though no statutory prohibition).

of what he himself is incapable of feeling—his own reality: his dream of getting *closer to God*.”¹⁹⁴ Thus, safe and consensual S/M in its purest form really does not need to trouble the law.

Nevertheless, we simply do not know how many people who practice S/M play by the rules. Nor does everyone find that S/M brings them “closer to God.” People do sometimes regret consenting to a sexual experience.¹⁹⁵ True, the criminal law does not punish people for inflicting emotional harm, nor does it hold defendants strictly liable when someone experiences emotional ambivalence the “morning after.”¹⁹⁶ Rather, the criminal law protects a civilized society from actual physical violence.

Where the law should draw the line between “love bites” and criminal biting, for example, is a question that no one can definitively answer. In one example, the Marv Albert case, the physical evidence clearly showed that his accuser sustained bite marks and bruises on her back.¹⁹⁷ Mr. Albert eventually pled guilty to assault and battery.¹⁹⁸ But it is curious that even though he was charged with assault and battery, as well as sexual assault, the prosecution never argued that consent was irrelevant to the issue of bite marks. Whether the prosecution would have been able to successfully argue that one cannot consent to “love bites” we will never know. The question remains whether this type of injury sufficient to hold Albert strictly liable? Was the injury itself is what one would reasonably expect from a sexual encounter? Arguably yes. Did it cause the complainant to suffer *serious* bodily injury? Arguably no. Yet, these questions were never put to a jury, and thus we have very little gauge as to where community sentiment lies on the question of how much violence is too much violence.

Admittedly, these cases will indeed be decided one at a time, and courts will continue to struggle to decide the bounds of the law. But better that law protect against amateurs and punish true sadists than condone intimate violence. No doubt, there are far more people who

¹⁹⁴ Goodlad, *supra* note 23, at 38.

¹⁹⁵ See Mark M. Hager, *Sex in the Original Position: A Restatement of Liberal Feminism*, 14 WIS. WOMEN'S L.J. 181 (1999); see also Morrison Torrey, *Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women*, 2 WM. & MARY J. WOMEN & L. 35 (1995).

¹⁹⁶ See generally KATIE ROPHI, *THE MORNING AFTER* (1993).

¹⁹⁷ See Commonwealth of Virginia, Dep't of Crim. Just. Servs., Div. of Forensic Science, Certificate of Analysis, Case No. 970212004 (Aug. 4, 1997) (bite marks on victim's back matching Albert's DNA).

¹⁹⁸ Steve Ziplay, *On the Road Back, Remorseful Marv Getting Counseling*, *NEWSDAY*, OCT. 24, 1997.

have been victimized by sexual violence than those who have been held criminally culpable for engaging in safe, consensual S/M.

The argument that disallowing consent somehow stigmatizes S/M and discourages people from exploring the bounds and boundaries of power and powerlessness in their intimate relationships does not seem to hold true in real life. As noted in the Introduction, the practice of S/M is widespread and increasingly culturally acceptable. There is no evidence that law enforcement is going around busting sex clubs or setting up stings to crackdown on the practice, at least in the United States. The Paddleboro case is the first reported of its kind in the United States. To the contrary, law enforcement seems to look the other way unless someone files a complaint or there is overwhelming evidence of physical injury. What is telling is not that there are so many cases, but so few.

On a more practical note, it is extremely difficult to prosecute cases where the participants have played by the rules. Without a complaining witness, the state still requires evidence that there was, in fact, an assault in order to meet its burden of proof beyond a reasonable doubt. With the rare exception of videotapes or medical testimony or a defendant's confession, truly safe and consensual S/M cases are not likely to ever be pursued. States rarely prosecute cases of domestic violence when the victim will not testify.¹⁹⁹ It seems highly unlikely that many prosecutors will waste their time on cases with little evidence, and where the harm is questionable at best. While this reality certainly will not protect all defendants who might be singled out by law enforcement because of their sexual orientation or their sexual status, it does diminish the fear that the moral police could be all powerful. Of course, were there to come a time when social currents change and prosecutorial discretion becomes abused, we ought to revisit the law. But now, the data suggests that decriminalizing the intentional infliction of criminal injury because it takes place within a sexual context would create far more risk of injury, far more glorification of violence and oppression, and many more victims.

To suggest that anyone should have the right to control, beat, or brutalize another and escape culpability under a theory of sexual consent violates our deepest notions of freedom, human rights, and civility. We have outlawed the most violent of sports and set clear rules for organized competition. We now criminalize domestic violence and

¹⁹⁹ See Hanna, *No Right to Choose*, *supra* note 33, at 1898–1909 (describing the prosecution of domestic violence victims when the witness is unwilling to cooperate.).

have expanded the definition of rape, thereby sanctioning violence that takes place within the confines of a sexual relationship. The law has evolved to set norms of civilized masculinity, and, increasingly, civilized humanity.

Recent cases involving injury that results during an S/M encounter force us to stop at that crossroad between sex and violence. When we ask in which direction the law ought to travel, it is clear from our journey thus far that to follow the path of sexual autonomy will lead us on the path to violence. While the sports exception to assault and battery is embedded with its own set of cultural norms and values about the benefit and inevitability of male aggression, at the very least the law has sought to confine the detour from the doctrine of violent consent. We can accept some intentional infliction of harm so long as the path of the law is marked with rules and regulations and referees, and where the power among the participants is relatively balanced. But to allow the doctrine to detour at sex on the road to autonomy, without the safeguards and protections and rules and referees intrinsic to sport, to veer off into an area where power imbalance between the parties, be it physical or economic or social, is far too common, is to travel dangerously close to violating notions of fundamental freedom and human rights. To follow the path of violence is to travel backwards. Today, here in Zion, we remain free by staying in bondage to the law.