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## Forces of Consent

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**Forces of Consent**

**Susan R. Schmeiser**

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What law institutes . . . is not simply an exterior limit or subjection, but equally an interior emotional structure which will bind the subject through fear and through love, through fascination and through fealty, to the theatre of justice and truth.

— “Introduction: Psychoanalysis and Law” (Goodrich, 1997).

Some people have to be tied up to be free . . . .

— “James,” participant in S/M community (Apostolides, 1999).

### **Reason’s unreason**

In his widely cited article “Violence and the Word,” legal theorist Robert Cover (1986) describes the process by which violence undergirds legal authority. To say, as Cover does, that “[l]egal interpretation takes place on a field of pain and death,” (p.1601) to point to the “unseverable connection between legal interpretation and violence” (p.1610), is not necessarily to lament that fact. Indeed, Cover argues that the law’s violence is an occasion for a certain relief: better that violence be partly contained within law than that it be always elsewhere. “As long as death and pain are part of our political world, it is essential that they be at the center of law” (Cover, 1986, p.1628). Hence the violence with which law’s interpreters must enforce their edicts, the coercion and domination brought to bear on those who transgress the social contract, emerges as the inevitable, if sometimes distressing, predicate of a civilized society. As a system of collective decisionmaking and individual adjudication within shared values and understandings, law provides, for Cover, a forum for “the domesticating of violence” (p.1628). But what about forms of violence that resist domestication?

One such form might be sadomasochism, the consent to which receives no recognition under Anglo-American law. In several cases decided over the past three decades, British and American courts have treated sadomasochistic practices as illegal violence against the masochist regardless of his professed consent. What might we make of the legal treatment of erotic force—

which I distinguish emphatically from sexual and other forms of abuse—under Cover’s framework, which understands violence as integral to law’s rational interpretation and application? Why does consent seem so illusory to courts in this context? In the discussion that follows, I attempt to complicate Cover’s account and to provide a more nuanced understanding of the juridical subject’s fraught relationship to legal authority. While critics have produced incisive analyses of the ways in which the jurisprudence of sexuality troubles legal categories such as public and private and status and conduct,<sup>1</sup> they have largely neglected sadomasochism as a site where legal subjects negotiate the intersections between and among law, power, reason, and violence.<sup>2</sup> In addition to considering these issues, though, I shall also propose an analogy between the function of consent in the sadomasochistic context—its juridical illegibility and the legal trepidation to which its suggestion gives rise—and its function in a seemingly quite different context: that of psychoanalysis.

In a footnote to his article, the buried and unremarked status of which belies its significance, Cover alludes to a link between violence and eroticism that would seem to threaten his faith in the rational, deliberative capacity of law to domesticate violence. Over the course of his discussion, Cover seeks to explain both how law’s violence differs from extralegal violence and how legal interpretation has come to “depend[] upon the social practice of violence for its efficacy” (p.1613). Having just established that considerations emanating from cultural, moral, psychological, and evolutionary forces usually inhibit our infliction of pain on others (considerations potentially overridden within hierarchies of authority, as suggested by the infamous Milgram experiment to which Cover alludes), Cover then qualifies this general statement with the observation that “[t]here are some deviant individuals whose behavior is

inconsistent with such inhibitions” (p.1613). Indeed, the existence of such “deviant individuals” whose inhibitions against violence fail is, for Cover, precisely what makes law necessary.

Rather than elaborate on this exception to his general rule in the body of his argument, though, he drops a footnote invoking “persons whose behavior is both violent toward others and apparently reckless in disregard of violent consequences to themselves,” behavior that is “frequently accompanied by a strange lack of affect” (p. 1613, note 29). He then refers his reader to select psychiatric literature on affectless violence. Immediately following this allusion to “deviant individuals” in the text, he declares that “almost all people are fascinated and attracted by violence, even though they are at the same time repelled by it” (p. 1613). In the note that purports to explain this claim, Cover cites a book called *Patterns of Sexual Behavior* that describes, in his summary, “varying cultural responses to linking pain and sexuality” (p. 1613, Note 30). Following this citation, he remarks off-handedly: “Whether there is a deeper sado-masochistic attraction to pain or violence involving more serious forms of imposition or suffering of pain that is similarly universal is a matter of dispute.” (p.1613, Note 30). Where the former example of violence derives its strangeness from the participants’ lack of affect, then, the latter is noteworthy specifically because of its origins in “attraction” or sexuality.

If it seems a bit odd that an ongoing “dispute” about the universality of “a deeper sadomasochistic attraction to pain” and its imposition should have no bearing on a discussion of law’s inherent and necessary violence and the deliberative capacity that domesticates it, I would argue that Cover’s disengagement reflects an aporia at the heart of his argument. These notes, taken together, seem to represent the specter of irrationality in Cover’s argument. By “irrationality,” I mean forces ranging from desire to psychosis that potentially erode the deliberative capacity required for acts of judicial interpretation—acts whose complicity with

corporeal violence Cover so eloquently describes. Footnotes 29 and 30 follow Cover's sole admission in the text of his article that the violence of legal interpretation may not be entirely extricable from acts of violence that do not, as does the former, subtend social order, and that are *not* authorized by the originary violence of the social contract. Cover first concedes the existence of "deviant individuals" (whose violent acts indeed make law necessary), and then universalizes this deviance to "almost all people" who share an attraction to violence and may only be deterred from engaging in it by a simultaneous repulsion. Rather than explore the possible ramifications for this less-than-deliberative relationship to violence, however, Cover consigns it to a couple of footnotes, to medical texts (the DSM-III, etc.) and anthropological accounts of sexual deviance. In relegating such examples of violence to footnotes, Cover suggests that these are somehow different from the acts of violence with which his deliberating jurists enforce their reasoned decisions. Yet, if the centrality of violence to law makes possible "the domesticating of violence" (Cover, 1986, p. 1628), then to what extent is this violence the domain of putatively irrational actors acting out of irresistible impulses, rather than of more or less committed judges and their willing lackeys?

Thus, in one of the most compelling and influential accounts of legal violence and its rationalist premise, sadomasochism makes a brief appearance as potent psychic force, a "deeper . . . attraction." Even exiled to a footnote, this force haunts the deliberative feats that comprise legal interpretation and that rely upon and justify certain acts of violence. The troubled relationship of law's violence to sadomasochistic violence, I would argue, lies behind legal nonrecognition of consent to sadomasochism. S/M sexuality mirrors the operations of law itself: the consent of the masochist to the sadist's complete domination (indeed, the masochist's orchestration of his own submission) is a potentially disruptive reflection of the social contract.

In this sense S/M literalizes the application of force to bodies, which the law renders invisible and antiseptic. As Michel Foucault has described, “[t]he citizen is presumed to have accepted once and for all, with the laws of society, the very law by which he may be punished” (1977, pp. 89-90). What happens then when the largely obscured operations of power and punishment find an erotic and often parodic enactment in the theater of the bedroom—or dungeon?

### **Sexual autonomy, social injury**

Sadomasochistic sexuality is obviously not the sole sexual area that receives legal disapprobation, but its status is particularly complicated because it represents a perceived intersection between sex on the one hand and violence on the other. The challenge for law lies in the admixture of the two, legally conceptualized as discretely constituted practices here brought together in an unholy alliance by actors whose judgment is irredeemably compromised by perversion or duress. When courts consider S/M, they seem most troubled by this combination of sex and violence, declining to rule in these instances on the regulability of sex (that is, construing S/M as something other than a sexual practice in order to avoid wading into the murky waters of sexual regulation), and yet acutely aware of the way in which it provides a predicate for violence. Thus, they attempt to secure a boundary between the two while simultaneously suggesting that it is sadomasochism’s traversal of this boundary that necessitates legal intervention.

The jurisprudence of sexuality more generally demonstrates an abiding ambivalence about the extent to which social order can, and must, tolerate expressions of erotic desire. Sexuality functions as a site of particularly intense legal contestation and regulation whenever it appears to pose a threat to the conceptual categories that organize legal reason. Within this

framework, *Bowers v. Hardwick* (1986), overruled this term in *Lawrence v. Texas* (2003) by the United States Supreme Court, represented for many years the limit case of the individual choice model with respect to sexuality. If, as the majority in that case contended, homosexual sodomy constitutes a “victimless crime,” (*Bowers v. Hardwick*, 1986, p. 195), then it no longer exists solely in the realm of individual self-definition (per Blackmun’s dissent), but rather enacts a violation of social order. It thus becomes a public act against the social body, rather than a private use of individual bodies.

In this infamous case, the Supreme Court reversed a lower court decision that invalidated Georgia’s law against sodomy on constitutional grounds, holding that such a law did not abridge any fundamental right. Whereas the lower court found that “his [Hardwick’s] homosexual activity is a private and intimate association that is beyond the reach of state regulation” (p. 189), Justice White for the majority maintained instead that this activity is very much the subject of state regulation. His reasoning here suggests that what we consider most private, *i.e.*, consensual sexual activity practiced in the bedroom, is in fact public in its implications.

Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home. . . . [A]nd if respondent’s submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road (p. 195).

What does it mean to call certain sexual activity a “victimless crime”? Within the legal lexicon, “[a] crime may be defined to be any act done in violation of those duties which an individual owes to the community . . .” (West Publishing, 1990, p. 370). This designation suggests that even consensual sexual acts take place in an intensely public register by transgressing the social contract. Indeed, such acts may lack identifiable victims, but that is not to say that they do not

victimize: they wreak their putative injury on the entire community. Justice Burger's concurrence also defied any attempt to assimilate this case to a paradigm of individual rights and choices: "This is essentially not a question of personal 'preferences' but rather of the legislative authority of the State" (*Hardwick*, 1986, p. 197). A case that began as an effort to assert and preserve the sanctity of individual rights—most significantly, that of privacy—becomes, over the course of the decision, a ratification of community (especially community morality) and of the State's power.

Justice Blackmun's efforts to place sodomy in the context of constitutionally significant personal liberties therefore failed to recognize the extent to which the majority already defined sodomy as above all a public act with public repercussions.

[The] fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of those intensely personal bonds (p. 205).

For Blackmun, the freedom to choose one's intimate associations, at work above all in sexual relations, is constitutive of the individual; indeed, "the issue raised by this case touches the heart of what makes individuals what they are" (p. 211). But his account elided the extent to which this notion of the individual is always bound up, in our legal system, with social contexts, conventions, and relations. Attempts to combat the decision over the years on privacy and individual choice grounds repeatedly confronted this conflation of private and public: the way in which the majority placed a seemingly private act, consensual adult sexuality, within the eminently public domain of crime, and, by extension, social disintegration. Until *Lawrence*, recourse to the value of individual freedom failed to eradicate this specter of social decay.<sup>3</sup> Homosexuality (specifically gay male sexuality) in *Hardwick* thus eroded the very distinction

between public and private upon which the Supreme Court's jurisprudence of sexual freedom and sexual choice previously had relied.

In *Lawrence*, however, the individual choice model finally wins the day, although the specter of social decay (heralding "a massive disruption of the social order") makes an insistent appearance in Justice Scalia's alarmist dissent (*Lawrence v. Texas*, 2003, p. 59). Justice Kennedy, writing for the majority, invalidates on privacy grounds a Texas statute outlawing certain sexual acts between participants of the same sex. Where *Hardwick* paradoxically effaced the boundary separating the individual body from the body of the polity while simultaneously endeavoring, as Kendall Thomas (1993) has persuasively argued, to safeguard bounded masculinity,<sup>4</sup> *Lawrence* resinscribes the boundedness of places, bodies, and rights. Under *Lawrence*, private sexual expression between consenting adults, practiced in the home, without possible injury to anyone involved, is not the State's business. This case, emphasizes the Court,

does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. . . . The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle" (*Lawrence*, p. 36).

If *Hardwick* understood the bedroom as continuous with the town square and the practices engaged therein to inflict a social injury, *Lawrence* erects, or resurrects, apparently impermeable walls between privacy's inner sanctum, the home, and the legal expression of public condemnation. Sodomy statutes such as those at issue in *Hardwick* and *Lawrence*, according to the majority, have "far-reaching consequences" that exceed mere prohibition of a particular sexual act, "touching upon the most private human conduct, sexual behavior, and in the most private of places, the home" (p. 16). In other words, *Lawrence* shuts the bedroom door and

closes the curtains against the harsh glare of the criminal law—at least with respect to those autonomous actors whose consent is not suspect.

Indeed, the opinion commences by championing freedom from government intrusions into not merely the life of the home, but also the life of the mind and the body. “Freedom,” writes the Court, “extends beyond spatial bounds. . . ,” embracing “more transcendent dimensions” (*Lawrence*, pp. 9-10). These dimensions together constitute what the Court calls “an autonomy of self.” With its rhetoric of choice, then, *Lawrence* not only offers a salutary counterpart to the essentialist model of homosexuality currently in vogue among gay rights advocates and others,<sup>5</sup> but also underscores an axiom of democratic liberalism: the indissoluble continuity between choice and human autonomy. These statutes, according to the majority, “seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals” (*Lawrence*, 2003, p.16). Language of choice abounds in the decision, closely tied to notions of freedom: liberty requires the freedom to choose one’s romantic partners as well as one’s sexual practices.<sup>6</sup>

And yet, despite the far-reaching implications of the opinion’s endorsement of sexual privacy and sexual autonomy—implications that Scalia locates in the likely extirpation of all morality-based legislation, from prohibitions against incest and adultery to the exclusion of same-sex unions from the institution of marriage—its logic may actually buttress the legal regulation of S/M sex, at least as that regulation has taken shape under Anglo-American law. While *Hardwick* extrapolated outward from a putative violation of the individual body to a violation of the social body, whereby the latter became the victim of a so-called victimless crime, *Lawrence* severs this continuum in the name of autonomy and individual choice. Cases on sadomasochism, however, reason in the reverse direction: they perceive a broad-based injury to

the polity and then locate that injury on the body of the complicit participant, thereby designating that participant a victim irrespective of his professed consent. Once the participant becomes a victim, moreover, the model of choice and autonomy that *Lawrence* so compellingly extols arguably requires legal intervention. In the words of Cheryl Hanna, who supports the legal regulation of sadomasochism, “[t]o 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” (Hanna, 2002, p. 289). A victim suffers not only harm, but often specifically a violation of her autonomy and free choice—a violation properly redressed by the criminal law.

As I discuss in some detail below, courts render even the non-complaining masochist a victim by denying the rationality of a person who would submit voluntarily to the practices that characterize S/M sex, and therefore by refusing the possibility of volition in this context. One legal scholar (Morse, 2002) has noted that “[t]he maximal liberty our society accords to adults flows essentially from the capacity for rationality that most adults possess. Our capacity for reason is the ground that supports autonomy and freedom . . .” (p.1035). If the masochist in a sadomasochistic encounter lacks rationality, then principles of autonomy and freedom would seem to call for her protection rather than for recognition of her capacity to offer consent.

Within the Anglo-American jurisprudence of sadomasochism, then, consent becomes the principle seemingly most imperiled. Here again consent is intimately tied to conceptions of privacy and individual choice, since, as Elaine Scarry points out, citing then-Judge Cardozo, the notion that “[e]very human being of adult years and a sound mind has a right to determine what shall be done to his own body” (*Schloendorff*, 1914, p. 93) has become a fundamental precept of our legal system. S/M, like homosexual sodomy for the *Hardwick* Court, thus represents a form

of erotic expression that traverses the legally enunciated boundaries between private and public, as well as those between sex and violence, pleasure and pain, and activity and passivity. In the 1993 English case *Regina v. Brown*, Lord Templeman explicitly denies the applicability of Cardozo's lofty principle of bodily autonomy and freedom to the sadomasochistic context.

Counsel for the appellants argued that consent should provide a defence to charges under both section 20 and section 47 [of the Offences Against the Person Act of 1861, representing wounding and actual bodily harm, respectively] because, it was said, every person has a right to deal with his body as he pleases. I do not consider that this slogan provides a sufficient guide to the policy decision which must now be made (*Regina v. Brown*, 1993, p. 235).

While investigating other matters, the police in this case came across videotapes depicting ritualized S/M encounters that featured the appellants engaged in evidently painful practices with an array of other men. Appellants, convicted of assault, sought relief on the ground that the trial court erroneously refused to entertain a defense of consent to the charges against them. Reducing the Cardozo principle to a mere "slogan" in the instance at hand, Lord Templeman, like the *Hardwick* majority, subsumes the individual choice model under the overriding interests of the polity.

Another reading of Lord Templeman's rejection of this principle in the arena of sadomasochism might emphasize the conspicuous silence of its qualifying language: specifically, the portion of Cardozo's statement that limits its purview to those "of sound mind." Although Lord Templeman does not address this aspect directly, the rest of the case goes on to suggest that no amenable recipient of sadomasochistic violence possibly could be considered "of sound mind," and that therefore "policy" requires the protection of both its individual and larger public victims from such an ill-begotten semblance of consent. Sadomasochism thus evokes the degradation not only of the body, as did homosexual sodomy for the *Hardwick* Court, but of the

will itself. In the reasoning of the courts that have considered S/M, the most significant meditations upon which involve only male participants,<sup>7</sup> the consent of the masochist to the sadist's infliction of violence is pure illusion or delusion, since no reasonable person—no autonomous, rational male subject—would deliberately invite sexualized violence. In their mutual absence, will and reason come to stand in a tautological relationship to one another: one who “consents” to (a) compulsion necessarily lacks the reason to offer effective consent; without reason, one's will must be compromised. *Pace* the S/M community's credo “safe, sane and consensual,” Anglo-American law locates in such practices danger, irrationality and coercion, all of which justify the State's intervention.<sup>8</sup>

### **Consent's illocutionary force**

In a democratic political order where governance by consent organizes the relationship between citizens and their leaders, their laws, and their “law-enforcers” (including those who determine and administer sanctions for violating the law), consent, like legal interpretation, must remain yoked to rationality in order to maintain the credibility of the entire system. Each act of effective consent, whether at the voting booth, in the acceptance of a contract, or in the sharing of one's body, is deemed to reflect a deliberative process and a capacity to reason through the options and their consequences. (Hence, economic models frequently assume not only rational actors, but “perfect information” as well.) In addition, though, Scarry has noted that Enlightenment legal narratives—of the social contract, of democracy—predicate notions of consent upon various bodily acts such as residency. For example, a subject consents to be governed merely by residing, however passively, in a given territory. It is the fact of the subject's physical presence, rather than any articulated act of will on the subject's part, that constitutes

consent.<sup>9</sup> She argues therefore that, contrary to strict Cartesian versions of human subjectivity that posit a disembodied self, Enlightenment autonomy is inextricable from concepts of embodiment. “The phenomenon of consent through residence (like consent in the earlier medical context [she has discussed]) makes it clear that what is at stake is not an unanchored notion of autonomy but autonomy-as-grounded-in-the-human-body” (Scarry, 1990, p. 874).

Yet in the context of sadomasochism, the body’s apparent consent to its injury becomes evidence of the will’s subversion. Scarry writes that, “[i]n general, the whole notion of consent theory stands the distinction between active and passive on its head, since consent theory claims that it is by the will of the apparently passive that the active is brought into being” (1990, p. 881). The very essence of volition in the Western tradition, according to Scarry, is exemplified in bodily movement—the will controls the body, and the ability to move about freely is the *sine qua non* of liberty. If mere bodily stasis invites the jurisdiction of the sovereign, however,<sup>10</sup> then the body’s apparent passivity might constitute the most forceful kind of consent: the authorization of a political order. Thus, Scarry suggests, “[t]he mystification of active and passive in consent may originate from the mystification of the active and passive in the body. If it is the case that consent is a redistributive site, then it is also appropriate that consent entails an immersion in the body where active and passive are already profoundly confounded” (1990, p. 883). Although Scarry never addresses sadomasochism with respect to the corporeal demonstration of consent (and moreover declines notably to address it in another text where it would seem even more germane—that is, in *The Body in Pain*), S/M explicitly relies and plays upon this mystification of active and passive.

Narratives of consent in political and medical contexts, as Scarry argues, represent consent as an affirmative act, indeed as a kind of performative that occasions procedures and

political orders as though the will were at work even in its apparent incapacitation. “Though we are subjugated to governors, though we are anesthetized and subject to someone else’s hand, we will tell one another narratives about our sovereignty, how it is the will of the anesthetized patient that guides the hand of the surgeon, how it is the residence of the citizen within the state that brings that state into being” (Scarry, 1990, p. 882). In the context of sadomasochism, however, the combination of sexual arousal and apparent bodily passivity is thought to render the masochist’s will unable to speak its necessary resistance. The masochistic body is thus legally unintelligible: actively aroused, yet passively wounded, it must reflect an unsound mind. But of course the masochist’s apparent surrender to the will of the sadist is only possible because of a prior act of authorization on the part of the masochist.

Indeed, if one takes the example of Leopold von Sacher-Masoch—masochism’s namesake—to heart, the masochist’s submission follows a process of persuasion and education in which he brings his despotic counterpart into being. As Gilles Deleuze writes in his commentary on Sacher-Masoch’s 1870 novel *Venus in Furs*:

In Masoch’s personal adventures as well as in his fiction, and in his personal case as well as in the structure of masochism in general, the contract represents the ideal form of the love-relationship and its necessary precondition. A contract is drawn up between the subject and the torturer, giving a new application to the idea of the jurists of antiquity that slavery itself is based on a contract. The masochist appears to be held by real chains, but in fact he is bound by his word alone. The masochistic contract implies not only the necessity of the victim’s consent, but his ability to persuade, and his pedagogical and judicial efforts to train his torturer (Deleuze, 1991, p. 75).

Deleuze emphasizes the disparate structures of masochism and sadism, as exemplified respectively in the works of Sacher-Masoch (and his personal relationships) and the Marquis de Sade. Whereas masochism operates according to the logic of the contract, sadism for Deleuze has a more institutional quality, compatible with authoritarianism (p. 76).<sup>11</sup> Indeed, Deleuze

finds the composite term “sadomasochism” catechrestic and deems it inadequate to account for the incommensurability of two vastly divergent impulses and their corresponding political sympathies (one quintessentially democratic, the other totalitarian) (pp. 37-46). Sacher-Masoch’s dominatrixes (for they are all women) are not sadists in the Sadean sense; rather, they are figures for the masochist’s phantasmatic projections, fashioned by the masochist’s extravagant imagination—and an elaborate contractual arrangement—into idealized mistresses (Deleuze, 1991, p.41).

In Theodor Reik’s (1949) classic text on the subject, *Masochism in Modern Man*, the psychoanalyst observes a phenomenon of a different valence at work in masochistic subjectivity, which he designates the “provocative factor.” “The masochist uses all possible means at his disposal to induce his partner to create for him that discomfort which he needs for attaining his pleasure. He forces another person to force him” (Reik, 1949, p. 84).<sup>12</sup> Reik’s description here casts a different light upon the masochistic “contract” than does that of Deleuze: not the apotheosis of reasonable negotiation and persuasion, but rather the product—or process—of a kind of coercion or exercise of will. This double force is no less potent for the fiction of passivity under which it operates. Even more strikingly, perhaps, Reik writes:

In considering the obduracy and the relentlessness of the provocation one is inclined to ascribe to the masochist who behaves in this way a tyrannical and despotic character. A strong will is to be sensed in this instigation which refuses to be repulsed and does not take “Yes” for an answer. It is strange and worthy of meditation that the masochist whose character is one of complete submission to his object, of utter obedience, insists in his approach that his will alone be carried out—disregarding his object’s wishes  
(p. 7).

In other words, it is the masochist who, in his insistent demands for subjection and debasement, becomes the despot. Far from being the passive recipient—much less the

victim—of another’s brutality, or a pliant being of compromised will, the masochist in Reik’s formulation emerges as an active, even tyrannically forceful, agent of his own submission.

Although legal accounts of the practice adopt the more widely accepted description “sodomasochism” to understand the dynamic between its participants, their focus on the masochist’s consent to his domination—its legal validity and decisive role in producing the activity under judicial examination—renders these analyses relevant in this context. I have suggested that legal responses to sodomasochism wrestle with the problem of consent through the matrices of private and public, active and passive, and sex and violence, attempting to maintain the integrity of these categories while addressing a practice that appears to erode all such distinctions. I will now turn more specifically to two American cases that dramatize the courts’ investment in rescuing consent in the interest of rationality.

### **Assaults on the will**

*People v. Samuels* (1967) appears to be the first American case to consider the phenomenon of consensual sodomasochistic activity. This California decision has come to stand in American law for the proposition that *consent is no defense to the state’s charge of assault in sodomasochistic encounters*. Decided in 1967, the case provides a fascinating dominant cultural glimpse into the sexual subcultures of the era, including the San Francisco gay bar scene and the apparent existence of a network of male sodomasochists.<sup>13</sup> The defendant in the case challenged his conviction for distribution of obscene materials and for assault in the California Court of Appeals. At issue in the case are several films the defendant produced allegedly for the purposes of containing—even sublimating, through “art” and “science”—his sodomasochistic proclivities

and contributing to the scientific study of the Kinsey Institute. As he learned from a man whom he met through the local network, the Institute was at the time investigating S/M in the course of its research on American sexual practices.<sup>14</sup> The defendant, described by the court as “an ophthalmologist” who “recognized the symptoms of sadomasochism in himself,” combined his “hobby of photography” with his penchant for S/M to create films depicting sadomasochistic scenes between men (*People v. Samuels*, 1967, p. 441).

The first question for the court to determine involves the authenticity and related admissibility of the films themselves: do the films in fact mimetically depict what they purport to represent, *i.e.*, the beating and consequent wounding of one man by another? That is, are the wounds that appear on the body of the masochist the product of artifice, cosmetic augmentation as the defendant claims, or are they “actual” physiological responses to the defendant’s beatings? On this issue, the prosecution called as a qualified expert witness Lowell Bradford, Director of the Santa Clara County Laboratory of Criminalistics, who examined both films under review by the court and deemed them “truth” rather than fiction. “There was no evidence that either the ‘vertical’ or ‘horizontal’ films had been retouched and Bradford was of the opinion that both films truly and correctly represented what was before the camera at the time” (*Samuels*, 1967, p. 443). The defendant countered this testimony with an account in which he described “pulling his punches” to minimize the impact of his beatings and stopping the camera periodically during the filming to apply cosmetics so as to create the illusion of progressive wounding. He also called his own witness, “a surgeon and physician whose practice included serving as team physician for a high school football team for a period of 10 years,” who “was of the opinion that the marks on the victims in the ‘vertical’ and ‘horizontal’ films could have been caused only in part by the blows inflicted during the course of said films . . .” (*Samuels*, 1967, p. 444). Although the

testimony provides conflicting readings of the film with regard to the severity of the injuries it purports to represent (and therefore of the nature of the acts represented), the court fails finally to choose between them. Rather, it states merely that the film has been adequately authenticated for evidentiary purposes.<sup>15</sup>

Next the court considers charges against the defendant of conspiracy to prepare and distribute obscene material, finding the evidence insufficient as a matter of law to convict him. In particular, the court criticizes the jury instructions at trial for failing to emphasize the requirement that both preparation and distribution are predicates of such a charge. While the element of preparation is uncontested, no evidence exists to suggest the defendant intended that his films should be viewed anywhere but in his own home and, of course, in the scientific laboratories of the Kinsey Institute. Distribution to the Institute actually works in the defendant's favor here, since the preparation of such material "in aid of legitimate scientific or educational purposes" (*Samuels*, 1967, p. 446, quoting the jury instructions) constitutes a complete defense to that charge.

But the court rejects the defense's argument that consent on the part of all participants in his films—in particular, of the men receiving his blows—disposes of the other charge against him: that of assault. Noting that "consent of the victim is not generally a defense to assault or battery, except in a situation involving ordinary physical contact or blows incident to sports such as football, boxing or wrestling" (*Samuels*, 1967, p. 447), the court suggests that the nature of the activity determines the legitimacy of the consent offered. Yet, in the very next sentence, the court shifts emphasis from the nature of the activity to the putative nature of the actors: "It is also the rule that the apparent consent of a person without legal capacity to give consent, such as a child or insane person, is ineffective" (*Samuels*, 1967, p. 447). Here of course it is the practice at

issue—somasochism—that defines the nature of the participants (in particular, that of the masochist) as childlike, mad, irrational.

Despite the testimony of the football physician, who declared that (unlike, one presumes, in the sporting context) here the visible wounds on the body of the masochist were at least partly fabricated for aesthetic—especially insofar as aestheticism is continuous with eroticism—purposes, the court nonetheless emphasizes the qualitative difference between this situation and “ordinary physical contact or blows.” Whereas the judge therefore deems the sentiment with which the films were produced too ambiguous to constitute an unequivocal intent to prepare and distribute obscene material, he still reads their content as evidence of illegal activity. Although the football physician contended that the wounds of the masochist must have been embellished, then, his testimony presented a certain irony, since his area of expertise is explicitly contrasted to the practices depicted in the films. The aesthetic-erotic amplification of the masochist’s wounds tells a different kind of story than the mere depiction of injuries inflicted by one man upon another would suggest: these injuries are outside the bounds of legally cognizable conduct precisely because of their erotic aesthetic. While the authentication of the films as evidence would seem to provide a transparent window onto an illegal practice, their opacity—the extent to which their representational status remains illegible—actually highlights the opacity of the practice itself. It is this opacity that the court attempts to render pellucid by firmly resurrecting the very legal categories that S/M threatens to displace.

Ultimately, the court concludes that this practice could not have been undertaken consensually by the wounded parties, all claims to the contrary notwithstanding, because a masochist does not meet the criteria for a rational subject capable of consent.

It is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force likely to produce great bodily injury. Even if it be assumed that the victim in the ‘vertical’ film did in fact suffer from some form of mental aberration which compelled him to submit to a beating which was so severe as to constitute an aggravated assault, defendant’s conduct in inflicting that beating was no less violative of a penal statute obviously designed to prohibit one human being from severely or mortally injuring another (*Samuels*, 1967, p. 447).

This reasoning that conceives of masochistic sexuality as irreconcilable with consent is achieved by means of a tautology: no rational subject would consent to his own wounding (despite the series of examples the court has adduced where wounding is “incidental” to, or even inherent in, the chosen activity), and therefore anyone who does consent to such wounding is not a rational subject. “Common knowledge” permits no other conclusion. Thus the court, much like the films themselves, generates or amplifies an injury to the masochist, his will, and his rationality where none or little might have existed.

In a later case (*Commonwealth v. Appleby*, 1980), the Massachusetts Supreme Court attempts to determine whether a riding crop, used by one man on another during the course of a sadomasochistic relationship, constitutes a “dangerous weapon” under the law, and whether the injuries inflicted with this instrument amount to “assault and battery” if their recipient welcomed them for sexual gratification. The court’s dilution of the issues in the case to such a formalistic inquiry is particularly striking in light of its disputed factual background. While the defendant Appleby claims not only that his relationship with his lover was fully consensual, but also that his lover had initiated the specific sexual practices at issue—and indeed had acted the perfect masochist by entreating and eventually persuading him to participate after he saw how excited the other man became at his blows<sup>16</sup>—the alleged victim in this case provides a vastly divergent

account. He maintains that the entire relationship was one of duress in which he submitted to the sadomasochistic whims of a man on whom he was financially and psychologically dependent.

The Massachusetts jury hearing the case found Appleby guilty of assault and battery with a dangerous weapon, and the state supreme court agreed to review his appeal directly. Appleby alleges error on three counts: first, he claims that the judge should have granted his motion for a directed verdict on the grounds that insufficient evidence existed to support the elements of the charge (assault and battery); second, he asserts that the judge should have instructed the jury that intent to produce sexual gratification necessarily contravened the charge; and third, he contends that the putatively consensual context furnishes an absolute defense to the charge. In essence, Appleby counters his conviction on the theory that the implement involved cannot be deemed a “weapon” since he wielded it with the intent to produce sexual satisfaction, and that the consent of his lover to do so should provide a complete defense.

Although his lover’s account raises significant questions about Appleby’s version of the relationship as a consensual sadomasochistic one, the court assumes that consent did in fact exist in order to reach the legal question of “whether the State can regulate, by the law of assault and battery, violent behavior which occurs in private, consensual sexual relationships” (*Appleby*, 1980, p. 1060). While the court cites a prior case in which it construed the “private, consensual conduct of adults” as outside the purview of a statute prohibiting “unnatural and lascivious acts,” it distinguishes the situation under review by virtue of the element of violence. “Any right to sexual privacy that citizens enjoy, and we do not here decide what the basis for such a right would be if it exists, would be outweighed in the constitutional balancing scheme by the State’s interest in preventing violence by the use of dangerous weapons upon its citizens under the claimed cloak of privacy in sexual relations” (*Appleby*, 1980, p. 1060). Sexual privacy thus loses

its private character when it involves violence. Of course, in myriad cases where complainants have charged defendants with sexual violence (*e.g.*, rape and sexual assault), courts have permitted this very “cloak of privacy” to shield the activity in question from judicial scrutiny, to mute its coercive edges, and to justify legal nonintervention.<sup>17</sup> Why then does sadomasochism seem to demand legal action?

Here, as in the previous decision, instead of the “victimless crime” of sodomy we have a crime with a victim, albeit one who may have invited, even orchestrated, the practice at issue. Unlike in the case of sodomy, however, in their consideration of S/M these courts first perceive a broad-based injury to social order and rationality, and then locate that injury specifically on the body of the wounded, but acquiescent, subject.

The fact that violence may be related to sexual activity (or may even be sexual activity to the person inflicting pain on another, as Appleby testified) does not prevent the State from protecting its citizens against physical harm. The invalidity of the victim’s consent to a battery by means of a dangerous weapon would be the same, however, whether or not the battery was related to sexual activity (*Appleby*, 1980, p. 1069).

For these courts, S/M cannot find a home within existing legal categories: it is not properly violence of a kind associated with sporting events (boxing, football), surgical intrusion, or bodily mutilation (tattooing, piercing), because the desire for arousal gives rise to the activity; yet neither is it properly sex, because conduct elsewhere recognizable as violence produces the arousal.<sup>18</sup>

Legal scholars fall prey to the same vexed constructions: what for one amounts to “consensual sex with potentially violent aspects” (Pa, 2002, p. 77), for another represents a perilous intersection between sex and violence where the two “becom[e] intertwined and indistinguishable” (Hanna, 2002, p. 239). These constructions are not incidental questions of

emphasis, but rather frame the legal analysis. Monica Pa, who understands S/M as sex in which “the presence of negotiation and consent . . . removes core features of violence . . .” (Pa, 2002, p. 77), calls for legal recognition of consent where no complaining witness denies its existence. Hanna, on the other hand, foregrounds the violence in S/M, regarding it as a potentially dangerous sibling of domestic abuse and other forms of “private” violence. Hanna argues specifically that the legal regulation of violence, even consensual violence, functions as a necessary check on male aggression—in other words, as a central mechanism for enforcing “civilized masculinity,” or the encouragement of aggressive behavior only where it carries some social utility (pp. 254-55).<sup>19</sup> Thus, for Hanna, as for the courts, S/M unregulated permits rapacious male brutality to flourish without the domesticating structure of organized sport or the justificatory pursuit of a public good.

In my discussion thus far, I have, along with the texts with which I am engaging, assumed a realm of conduct properly described as “violence.” None of these texts—neither the theoretical nor the jurisprudential—attempts to question or to contemplate what makes a given encounter or situation violent. Does “violence” describe a kind of force wielded by one person against another? Does it rely on the result a given action produces: pain, injury, compliance? Although the difference between a caress and a gunshot, between diplomatic negotiation and the “shock and awe” of military force, may seem self-evident, violence is not, I would argue, a stable and coherent epistemological category. For Cover, violence seems to encompass actions that override the recipient’s autonomy and freedom: the force with which police officers and others authorized by the state deprive people of liberty, property, life. The process through which a convicted defendant becomes incarcerated may not involve any bodily injury at all, but it does entail violence of the kind that Cover prefers to remain at the center of law. S/M sexuality may

provide a useful arena in which to begin interrogating the category of violence once we cease to presume that we all understand and agree upon its parameters.

What worries us about S/M is its barefaced conflation of pain and pleasure. The lack of social utility that Hanna, following the courts, associates with S/M corresponds to what Walter Benn Michaels (1987) usefully dubs the “autotelic logic” of masochism: that is, subjection for subjection’s sake. Masochism defies the kind of instrumentalism that such sanctioned activities as sport or surgery represent, since the condition of submission it seeks to produce explicitly serves no other goal than itself. In Benn Michaels’ wonderful reading of Sacher Masoch, Leopold von Krafft-Ebing’s case studies, and other nineteenth-century texts, the masochist actually emerges as the exemplar of free market capitalism, the quintessential embodiment of the kind of autonomy that liberal democracy promotes. He writes that “the masochist loves what the capitalist loves: the freedom to buy and sell, the inalienable right to alienate” (Benn Michaels, 1987, p. 133). In other words, the masochist exploits his own freedom precisely in order to forfeit it in the name of erotic pleasure. The masochistic contract thus represents an equally emphatic exertion of autonomy (I, being free to enter into an agreement with you, my equal) and relinquishment of that same autonomy (hereby subject myself to you as your slave).

Those commentators who decry the practices of S/M, who doubt the validity of consent in this context, or who at the very least seek to strike a balance between sexual autonomy and necessary legal paternalism, tend to disregard the masochist in favor of the sadist. For instance, one commentator purporting to analyze masochism worries that “[t]he sadist may find a particularly vulnerable individual, humiliate and demean her or him and in the end render that person into a compliant partner willing to ‘consent’ to the infliction of pain on her or himself . . .” (Freckleton, 1994, p. 59). This anxiety around sadistic aggression unchecked arguably masks

or deflects an anxious suspicion of someone who would eagerly and indeed aggressively incite his own submission, who would devise and delight in his own punishment.<sup>20</sup>

### **Enacting subjection**

If courts perceive the extent to which sadomasochistic practices play out fundamental legal and political narratives of consent and subjection only in their denunciation of these practices as outside the bounds of cognizable—legally “normal”—human behavior, then theorists of S/M, detractors as well as proponents, have made this reflective function central to their understandings. In an early essay by Judith Butler (1982), a contribution to a 1982 collection of essays entitled *Against Sadomasochism*, she bemoans the way in which S/M lesbians purport to remove themselves from the social/political sphere in their sexual practices. According to Butler,

Sm lesbians tend to make very strong distinctions between what is real power and violence and what is sm power and violence. They mark their sexual lives off from the world, announcing that once you have entered the land of sm, everything is consensually agreed to, self-created, self-controlled. . . . The private is made distinct from the public; in fact, it is so distinct that the power relations in sexuality do not have anything to do with power relations out there. When one enters into sm, one enters in from free choice. One does not make this choice from a given biographical, social, or historical perspective. Like the capitalist social theorists of the 18th century (who are also responsible for the naive notion of “consent” which permeates United States legal doctrine and which lesbian sm accepts), one chooses ex nihilo, one leaves one’s worldly position and simply states what one naively and purely wants. Wants do not have a history or a social context. They appear and are acted upon (p.172).<sup>21</sup>

For Butler, who derides this concept as “naive,” S/M directly mirrors legal discourse by pretending that consent can exist outside of social and economic matrices of power and subordination. Lesbians who engage in sadomasochistic practices recognize their own marginalization and oppression “out there,” and yet contend that they engage in rituals of

domination and submission in a purely volitional realm where erotic desire takes on the transcendent status of truth.

What Butler elides in this account, of course, is the ways in which S/M's highly ritualized functions, which may entail scripts, roles, props, and physical spaces designed for group participation, perform power relations in a manner that often self-consciously attempts to deconstruct the dichotomy of public and private. Her critique, however, effectively highlights the limitations of a framework that defines volition and compulsion diacritically—that is, a framework that understands autonomy (including freedom, choice and consent) as opposed to and exclusive of compulsion or coercion. Such an opposition, as Butler demonstrates, structures pro- and anti-S/M discourses alike. Where one promotes S/M as a forum for unfettered, robust choice, the other decries it as a practice rife with coercion, constraint and delusion.

Over the past two decades, theorists have taken up the notion of S/M as a theater of power relations and have celebrated the ways in which it illuminates their erotic potential. For Pat Califia (1983), one of the most vocal proponent of lesbian and other forms of sadomasochism, “the uniforms and roles and dialogue become a parody of authority, a challenge to it, a recognition of its secret sexual nature” (p. 135). That is, sadomasochism has something to tell us not only about the extent to which power and its uneven allocation informs eroticism<sup>22</sup>—the old power-makes-sex-sexy refrain that reverberates through many critiques of attempts to remove sexuality from the domain of power relations—but also about the erotic subtext of power's exercise in apparently nonsexual realms. Like Califia, on whose work he in part relies, Leo Bersani (1995) sees S/M as an exposé of power's erotic underpinnings.

S/M, far from dissociating itself from a fascistic master-slave relation, actually confirms an identity between that relation and its own practice. It removes masters and slaves from economic and racial superstructures, thus confirming the eroticism of the master-slave

configuration. It is of course true that, outside such extreme situations as police- or terrorist-sponsored scenarios of torture, this configuration is, in the modern world, seldom visible in the archaic form of face-to-face relations of command and violation. Power in civilized societies has become systemic, mediated through economy, law, morality. But this hardly means that S/M is not a repetition of the power informing (giving form to) all such mediations. It is a kind of X-ray of power's body, a laboratory testing of the erotic potential in the most oppressive social structures (Bersani, 1995, p. 89).

Bersani's analysis here provides a rejoinder of sorts to Butler's: whereas Butler faulted S/M participants for claiming to remove themselves from social and political dynamics of power and oppression based on cultural identity and economic resources, Bersani applauds precisely this removal—indeed sees it as a kind of “laboratory.” The “fascistic master-slave” relation Bersani celebrates is, one would imagine, predicated upon and productive of no regime of power other than an erotic one. If we find such a model implausible and potentially consistent with deeply coercive political systems, Bersani suggests, we must remember that our own system secures the ideals of consent and rational deliberation by means of a process of disciplining and occluding the very erotic forces that threaten to disrupt it.

This process of discipline and occlusion plays a central role in the organization and preservation of law. For instance, Cover and others have offered compelling accounts of law's monopolistic relationship to violence. Whereas Cover applauds law's monopoly on violence in light of the alternatives, Walter Benjamin understands this monopoly as less a matter of domesticating violence than one of maintaining law's hegemony, whether to good ends or bad. In his “Critique of Violence” (1921), Benjamin confronts the reader with

the surprising possibility that the law's interest in a monopoly of violence vis-à-vis individuals is not explained by the intention of preserving legal ends but, rather, by that of preserving the law itself; that violence, when not in the hands of the law, threatens it not by the ends that it may pursue but by its mere existence outside the law (pp. 135-36).

In this view, the force that masochism enacts and provokes, the order of eroticized subjection that it calls into being, may represent a species of “violence” that threatens law most insistently. Practices that play erotically on structures of dominance and submission and their institutional incarnations (*e.g.*, master and slave; police officer and criminal suspect; teacher and student) pose a challenge to law’s monopolistic relationship to punishment—indeed, to its reliance on punishment, or threats thereof, as a means of deterring enforcing conformity and obedience. Deleuze writes: “The masochist regards the law as a punitive process and therefore begins by having the punishment inflicted upon himself; once he has undergone the punishment, he feels that he is allowed or indeed commanded to experience the pleasure that the law was supposed to forbid” (Deleuze, 1991, p. 88). S/M reflects back on law in hyperbolic, eroticized terms the conditions of subjection and coercion that law’s operations rationalize and disguise.

### **Reasonable men**

Many scholars who have written on sadomasochism seem to conflate lesbian and gay male versions of the practice, and others either have not bothered to distinguish between various iterations based on the gender of the participants, have assumed the classic configuration of male masochist and female dominatrix (which has its roots in such venerable texts as Thomas Otway’s Restoration play *Venice Preserv’d* (1682, 1994)<sup>23</sup> and von Sacher-Masoch’s writings), or have explicitly suggested that the phantasmatic nature of the practice exceeds the prior gender identification of those involved. Bersani (1995), for example, writes: “Since the kick, the jouissance, of S/M depends both on the exercise and on the relinquishing of power, the gender of the participants seems to me irrelevant to S/M’s reinforcement of prevailing structures of domination and oppression” (p. 198, Note 25). Yet the paradigmatic instances of

sadomasochistic sexuality in law involve only men, in pairs or groups; and here the gender of the participants, I would argue, has *everything* to do with the judicial responses to the practice. The law's ideal subject—the notorious “reasonable man”—is male, among his other characteristics, but his masculinity is of a specific nature: it is virile yet self-restrained unless justifiably provoked. Unrestrained masculinity is potentially rapacious (although the parameters of this category have shifted over the past few decades under pressure from feminists and others), while restrained masculinity may be goaded into violence, say, in response to fighting words, but its constitutive aspect is its rationality; hence legal categories arise to protect its seeming excesses to the extent they are deemed rational.<sup>24</sup>

Indeed, the law of provocation, which mitigates murder to manslaughter where one spouse (usually a husband) has found the other engaged in adultery and then killed the lover, and its development in American law offer in the figure of the provoked husband an interesting foil to the masochist. Reflecting on what he calls “the unwritten law” of the nineteenth century, historian Hendrik Hartog (2000) traces three prominent American trials in which husbands who slew their wives' paramours were acquitted of all charges on the theory that they were justifiably provoked into homicide. Although the provocation defense is generally limited to situations in which a husband, finding his wife and her lover *in flagrante delicto*, acts immediately in “the heat of passion,” these trials involved killings committed in public, long after “passion” had cooled. Nonetheless, defense lawyers prevailed here by constructing an apparently paradoxical, but ultimately compelling, narrative that relied upon and reinforced certain ideals of masculinity. On the one hand, they persuaded jurors that these defendants had acted in fits of madness, a natural response to the provocation of cuckoldry; at the same time, they portrayed their clients as warriors, with whom they encouraged jurors to identify, valiantly defending the embattled

institution of marriage (Hartog, 2000, pp. 224-25). Under this “unwritten law,” then, reasonable men could abdicate their reason and, consequently, their manliness—but only to secure both rationality and masculinity ultimately in the name of honor and tradition. In other words, the law of provocation has functioned, as Hanna would have it, to “civilize” masculinity by rendering both exceptional and inevitable a particular instance of murderous aggression. The masochist, by contrast, consolidates his masculinity through an unparalleled act of will precisely in order to renounce it: as potentially uncivilized an act of force as that of his obliging partner.

Ideals of masculinity similarly structure the doctrine mandating the regulation of S/M. The major cases holding that consent provides no defense to sadomasochistic “assault” importantly involve only men, since these opinions explicitly contrast S/M with, as the House of Lords put it, “manly diversions”<sup>25</sup> such as boxing and other violent sporting events.<sup>26</sup> One man’s consent to a beating (not to mention burning, whipping, branding, and what the Lord Templeman (*Brown*, p. 236) calls “genital torture”) by another solely for sexual gratification, without the mediating structure of a referee or financial remuneration, seems to these judges entirely incompatible with legally cognizable rationality. No other gender configuration would so starkly challenge prevailing notions of rationality; no other configuration would so closely resemble those activities—boxing, football, the social contract—from which sadomasochistic practices cry out, for these jurists, to be distinguished.

Male masochism, that least “manly” of the diversions, cannot form the basis for reasoned consent under Anglo-American law. In the introduction to his analysis of white masculinity and masochism, David Savran (1998, p. 10) suggests that masochism is “part of the very structure of male subjectivity as it was consolidated in western Europe during the early modern period”—that is, in the period leading up to the Enlightenment, to the coalescence of legal reason as we now

know it. Savran argues, in brief, that as pedagogical practices of flagellation gave way to a culture of self-discipline (a “shift from physical coercion to ideology” (p. 26)), most succinctly captured by Locke’s autonomous, free-willing but self-denying man of discipline, erotic flagellation emerged as the guilty, stigmatized pleasure of those who failed to achieve this disciplined state. In essence, the rod which is spared the child may come back to haunt the man, to govern his fantasies and to render him abject, infantile, perverse.

Particularly germane to my discussion here is Savran’s suggestion that flagellation, and its Enlightenment counterpart masochism (the eroticized double of self-discipline), raise the specter of homoeroticism not only in sexual relations, but more significantly in the relations that constitute democracy, the industrious society, and patriarchy.

For masochism, as the (necessary) failure and resexualization of the Oedipus complex, represents no more nor less than a scandalous eroticization of patriarchal relations, a desire for the father that is transformed into a desire to submit to the cruelty of the father’s will and all he represents . . . . Masochism functions, in short, as a mode of cultural reproduction that simultaneously reveals and conceals (through mechanisms of disavowal) the homoeroticism that undergirds patriarchy and male homosocial relations (p. 32).

To the extent that masochism represents an erotic theater of self-government—of the self authorizing, even orchestrating, its own domination by a governing body of its own design—the consent that brings this theater into existence remains too disturbing to invite legal recognition. Even if, as Savran later proposes (p. 225, citing Kotz, 1992), the masochistic fantasmatic may actually serve to reinscribe masculinity and, perhaps, the regime of legal reason it supports,<sup>27</sup> courts are unlikely to see through the ruse. They remain unable to permit the male masochist the prerogative of consent, reserved for only “reasonable men.”

One more recent case that would seem to herald a willingness on the part of courts to recognize consent in certain situations involving S/M practices (indeed, a case that partially

animates Hanna's efforts to shore up the treatment of S/M as primarily violence warranting regulation) ultimately fails to disrupt the doctrine that I have outlined above. In 1999, a New York appellate court addressed the issue of consent to a heterosexual sadomasochistic encounter after a jury convicted the defendant on counts of kidnapping, sexual abuse and assault of a woman whom he had met through an internet chat room (*People v. Jovanovich*, 1999). Under an interpretation of the state rape shield law, the trial court had redacted portions of e-mail messages that the complainant wrote to the defendant— portions potentially germane to his claimed belief that the woman had consented to all of the sexual practices at issue. These redacted portions detailed her sexual fantasies, her interest in plots for a potential "snuff film," aspects of her sadomasochistic relationship with another man, and her self-description as a "pushy bottom" (or, in the court's explanation, a bottom who pushes her partner to inflict greater pain). With these elisions, the narrative that the jury heard conformed to certain familiar parameters: an online seduction of a vulnerable college girl; a sexual assault against her involving painful practices; a deviant and devious male assailant; and a victim whose low self-esteem induced her to succumb to acts that she did not want to perform. Inclusion of these communications, however, would have complicated this narrative enormously by demonstrating her interest and involvement in sadomasochistic fantasies and practices, and therefore by raising the possibility that the defendant was acting on what he believed to be her desires. The appellate court holds that, in excluding this evidence, the trial court misapplied the rape shield law, an error that impeded the defendant's ability to mount an effective defense.

Like *Samuels*, *Appleby* and *Brown*, though, this case reiterates the rule that consent provides no defense to assault, even with respect to "violence in which both parties voluntarily participate for their own sexual gratification," since, "just as a person cannot consent to his or her

own murder, as a matter of public policy, a person cannot avoid criminal responsibility for an assault that causes injury or carries a risk of serious harm” (*People v. Jovanovich*, 1999, p. 197 note 5). Hence, evidence of consent here goes only to the defendant’s potentially reasonable belief that he was satisfying his partner’s desires, not to the propriety of his actions if in fact he were doing so; it therefore bears on the kidnapping and sexual abuse charges, but not the assault charge. In other words, conceived as assault, S/M becomes a strict liability crime to which the defendant’s mental state, his beliefs regarding his partner’s consent or anything else, remains irrelevant. Conceived as a variety of rape or sexual abuse, however, sadomasochistic practices may require an inquiry into the question of consent. In this respect, the court may indeed have been influenced by the gender of the participants, since a woman’s desire to be subjugated sexually does not, in our culture, fall clearly outside the purview of a “reasonable” belief. If male masochism represents the unthinkable, then female masochism represents a pervasive cultural trope that in no way disturbs the dominant social or sexual order.<sup>28</sup>

Indeed, Cover’s faith in the potential for law to domesticate violence may in fact depend upon an undisturbed continuity between legal rationality and bounded, virile yet restrained, masculinity. Theories of legally sanctioned and legally proscribed sexuality and violence that focus solely on consent and autonomy therefore miss a crucial aspect of the construction of the legal subject when they neglect the significance of (certain ideals of) masculinity to juridical conceptions of rationality. For example, legal scholar William Eskridge (1996) argues for a legal regime of consent and sexual freedom—the achievement of which he associates with the goals of “gaylaw”—that respects the autonomy of the legal subject to make unfettered choices concerning sexual objects and practices. Although he acknowledges that “[t]he limits of consent as an organizing principle reflect the limits of liberalism itself . . .” (p. 54), Eskridge sees an expansion

of liberalism to cover the instances of consensual sexuality it currently prohibits as a remedy to these “limits.” “The regulatory regime envisioned by gaylaw would start with the bedrock liberal precept that human decisionmakers ought to be free to engage in the sexual activity of their mutual choice” (Eskridge, 1996, p. 66). Hence, his account elides the extent to which liberal ideals of autonomy and rational choice rely upon a masculinized legal subject whose “consent” to a practice such as sadomasochism radically threatens the legal structures and categories that sustain liberalism. A scene from a Califia story (“Jesse,” in Califia 1996, p. 28) involving lesbian S/M provides the opening for his discussion and a point of reference (the paradigmatic instance of consensual, though extralegal, sex) throughout Eskridge’s argument. In this instance and others, Eskridge fails to theorize the link between consent and masculinity, and ways in which S/M threatens that connection by revealing its sexual content, the erotics of power, and the possibility of masculine subjection and humiliation.

If we think about consent-grounded-in-the-body as, in Elaine Scarry’s formulation, a “redistributive site,” a place where the mystification of active and passive occurs, then we may begin to conceive of consent as an authorization or enactment of, rather than mere capitulation to, power. Sadomasochism, at least in its relationship to law, may provide one venue for this redistributive potential. Kaja Silverman’s description of the male masochist and his performance of subjection offers a useful framework for understanding how the embrace of subordination in this context comes to be such a forceful act. For Silverman (1992), masochism in particular not only reveals the erotics of power, but even more insistently dramatizes the mechanisms by which we are constituted as cultural, social, and political subjects. Unlike Deleuze’s account, with its focus on the mother,<sup>29</sup> her psychoanalytic model emphasizes the paternal function in the organization of male masochism. She understands subjectivity as predicated on Oedipal loss and

self-division; both occur when the child internalizes the father's prohibition—which instantiates “the Law” in this account—against his desire for the mother. The father, standing in for culture and its regulatory function, thus occasions a disruption of the child's happy bond with its mother, and inculcates in the child an unconscious to which his now repressed desire retreats.

What is it precisely that the male masochist displays, and what are the consequences of this self-exposure? To begin with, he acts out in an insistent and exaggerated way the basic conditions of cultural subjectivity, conditions that are normally disavowed; he loudly proclaims that his meaning comes to him through the Other, prostrates himself before the gaze even as he solicits it, exhibits his castration for all to see, and revels in the sacrificial basis of the social contract. The male masochist magnifies the losses and divisions upon which cultural identity is based, refusing to be sutured or recompensated. In short, he radiates a negativity inimical to the social order (Silverman, 1992, p. 206).

Silverman's larger-than-life masochist, the quintessential drama queen, flaunts his loss and refuses consolation. Yet her account also emphasizes the masochist's active involvement in his debasement and dissolution, processes that mimic even while they potentially disrupt the subject's interpellation into social order. This homology between subjectivity—or citizenship—and masochism does not just entail submission of the self to the Other, the law, the sovereign, but also describes the process by which the subject can bring (force?) those forces into being.

I do not mean to suggest that no critiques of sadomasochism are possible apart from those whose primary interest lies in reasserting law's domesticating or civilizing function. For example, Didi Herman (1996) advances a critique of S/M that understands it as trivializing the most pernicious forms of both legal and extralegal violence that it appears to mimic.

In my view, s/m pornography and practice are “immoral” because they trivialize, exploit, and eroticize “real” pain and degradation. In real life people are bound, tortured, raped, and killed every day, and I would argue that the “play-acting” or mimicking of suffering makes this real experience of suffering less real, more symbolic, and ultimately repeatable (by all of us) by articulating it with *pleasure* (Herman, 1996, p. 152).

Her argument derives its purchase from the premise that “real life” is in danger of imitating artifice, those symbolic representations of violence that associate it with pleasure, an argument similar to—and informed by—ones feminists and Supreme Court justices alike have marshaled against other forms of sexual simulation. Although she argues expressly from “morality” rather than from an investment in legal coherence or fictions of rationality, Herman attempts to use the law to regulate a practice that exposes the very relations of power and dominance that sustain law. But if law produces the cultural fantasies that inform S/M (and S/M the cultural fantasies that inform law), then to use the tool of law to proscribe S/M is to leave intact the larger narratives that make both law and its inevitable inversions possible. S/M’s disruptive force lies in its proximity to the very legal structures that maintain power and discipline under the guise of consent and rational deliberation. How reasonable are the men who beg for more?

### **Assaults on the psyche**

Critics of psychoanalysis have also described the function of consent in that context as irreducibly fraught. In a sense, these critics understand psychoanalysis as variety of assault to which consent is presumptively void. Psychoanalysis, in this view, thus occupies a position homologous to that of S/M within the range of appropriate (dare I say “manly”?) medical and psychological treatments to which patients routinely agree.<sup>30</sup> Ernest Gellner (1996), for example, argues that once a subject enters into psychoanalysis, she suffers from what he dubs “The Pirandello Effect”; she ceases to occupy a world of reasoned deliberation and soberly considered competing options, and falls instead into a kind of *mise-en-abîme*. Henceforth, psychoanalytic discourse effaces all external referents and advances itself as the sole, and desperately needed though resisted, explanatory framework. Gellner describes the prospective patient, sitting in his

analyst's ante-chamber, parting with his hat and umbrella (soon to become vestiges of a world left eternally behind), and preparing to evaluate psychoanalytic treatment as one among many solutions to his problems. There, in the anteroom, the subject still retains the ability and the autonomy to choose: "He is not or not yet choosing a vision which, if true, devalues all rival visions: nor opting for one which is so constructed as to be incommensurate with all the others, so that a choice between it and them can only be a leap, and never a reasoned argument" (Gellner, 1996, p. 47).

Once the subject becomes a patient, however, indeed as the condition for becoming a patient, he abandons—or, more accurately in Gellner's account, is gently but firmly expropriated of—his evaluative faculties, the ability to assess the analytic process "objectively." His abandoned accessories, representing for Gellner the patient's forfeited rationality, further suggest a kind of emasculation that resonates strongly with masochism.

The objective language—the opportunity-cost assessment, and all that goes with it—he leaves in the ante-room with his coat, hat and umbrella, not necessarily at his first visit, but not too long after. That he should do so is recognized as an integral part of the treatment. As he goes 'into analysis', he enters a different world (Gellner, 1996, p. 47).

This new and all-consuming world, one that rapidly indoctrinates the analysand into its premises, is characterized by a vertiginous self-referentiality: any attempt to extricate himself, any objection he may level against the process or the analyst, becomes evidence of his resistance, and therefore of the necessity for the treatment. "One can perhaps best describe all this as a kind of 'free-fall' condition. All foundations have been removed from underneath the analysand's feet, *by the very terms of reference of the therapy which he has freely consented to undergo*" (Gellner, 1996, p. 48) (emphasis in original). Within this "free-fall" condition, the patient's initial consent, his voluntary entrance into the treatment office, at once loses its meaning; instead it becomes the

basis upon which the analyst, and psychoanalytic doctrine, claim that all subsequent protests constitute mere resistance. This is a strange variety of consent indeed, one that, though reasonably given, cannot be reasonably retracted or modified.

What began as consent metamorphoses ineluctably into something seemingly quite different and potentially quite dangerous. Specifically, Gellner constructs the analytic transference, the emotional structure that keeps the patient returning and accords an apparently unassailable authority to the analyst, as an addiction. Worse still, transference for Gellner conducts its insidious work in the guise of a contract, that emblem of rationality and autonomy. He asserts that “psychoanalysis is powerfully addictive, and ‘transference’ is the name, though not in any serious sense the explanation, of this phenomenon . . . . Transference is the covenant, the bond, the social cement, the social contract of this movement” (Gellner, 1996, p. 55). This addiction, disguised as consent, thus makes up the “social contract” that lends psychoanalysis its power.

How does a quintessentially volitional act such as consent get immediately subsumed into compulsion? This process remains rather puzzling, that is, until we recall Eve Kosofsky Sedgwick’s (1993) brilliant observation that, in late capitalist culture, volition itself has become subject to the forces of addiction. “As each assertion of *will* has made voluntariness itself appear problematical in a new area, the assertion of will itself has come to appear addictive” (Sedgwick, 1993, p. 141). In other words, as Sedgwick so eloquently demonstrates, to the extent that our culture organizes itself largely around these twin categories of compulsion and volition, it necessarily runs up against the seemingly paradoxical ways the two haunt one another: an assertion of one thinly veils the presence of the other. In the psychoanalytic scenario, the act of consent to the process may prove so forceful that it sets in motion an addiction; likewise, the

patient inevitably gives herself over to the transference, to the repetition compulsion it entails, only to mask, temporarily, the psychoanalytic imperative to discover freedom, to take responsibility for the unconscious, to choose.

Certain acts of consent may seem so insistent that they come to resemble their opposite. One such act is the act of consent that authorizes the assault on the psyche, on its defenses, its structures of repression and disavowal. Another is the act of consent that authorizes the assault on the inviolable masculine body, on his reason, and thereby on the autonomous subject of liberal democracy. In our culture's voracious appetite for reason, the will, and the fictions of freedom they support, these ideals may also emerge as a species of addiction, an addiction projected onto the practices that instantiate them most provocatively. But we can learn from those whose forceful enactments of submission appear to challenge our notions of autonomy and consent. For instance, although the courts and others cast him persistently as dupe in a drama of violence and delusion, the masochist remains ill-suited to this role. With his insistence on living out his subjection on his own terms, the masochist may provide a salutary counterpart to the pervasive figure of the victim, in legal and therapeutic cultures alike. As the psychoanalyst Jessica Benjamin reminds us, "a theory or politics that cannot cope with contradiction, that denies the irrational, that tries to sanitize the erotic, fantastic components of human life cannot visualize an authentic end to domination but only vacate the field" (Benjamin, 1988, p. 10). Such components of human life abound in S/M and psychoanalysis, as well as in culture at large, try as we might to force them out of view.

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<sup>1</sup> Two of the most important contributors to these discussions are Janet Halley and Kendall Thomas, both legal academics whose work transgresses the parameters of conventional law review writing and analysis (although their most “transgressive” pieces are published, significantly, in nonlegal journals). See, for example, Halley (1993); Halley (1996); Thomas (1992).

<sup>2</sup> One exception to this general neglect is William N. Eskridge's “The Many Faces of Sexual Consent” (1996; p. 47). Although Eskridge explores sadomasochism as one sexual arena in which courts should vindicate individual choice and sexual freedom, he fails to perform a sustained analysis of why courts disavow consent in this context. I shall address some of the limitations of his argument later in this article. Another more germane exception is Carl F. Stychin, *Law's Desire: Sexuality and the Limits of Justice* (1996), whose analysis of the English case *Regina v. Brown* in part informs my discussion. But while Stychin is primarily interested in “how law, as a set of discourses, works to pathologise gay male sexuality” ( p. 128), I am interested rather in how nonnormative sexual practices such as sadomasochism, especially in their interaction with legal norms, reflect upon the mechanisms by which law represses its fundamental allegiance with the forces that threaten to destabilize it. Two more recent engagements with the legal treatment of S/M sex arrive at opposite normative conclusions with respect to the wisdom and desirability of criminalizing such practices (Hanna, 2001; Pa, 2001). Neither attempts to theorize what consent might mean in this context, why the legal treatment of S/M effectively occludes or effaces the masochist, or how paradigms of autonomy vs. coercion, volition vs. compulsion, might circumscribe their analyses. I address certain aspects of their discussions below.

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<sup>3</sup> Slightly fewer than one third of the states maintained “sodomy” laws in their statute books when *Lawrence* came before the Supreme Court, and fewer still specifically targeted same-sex conduct. Nonetheless, the Chief Justice of the Alabama Supreme Court recently wrote an astonishingly vitriolic concurring opinion in a decision denying a lesbian mother custody of her children in which he invoked, among other considerations, the criminal status of “homosexual conduct” in Alabama and other states to underscore the disastrous consequences of such custody. (*Ex Parte H.H.*, 2002).

<sup>4</sup> Reading the opinion against the famous Schreber case, Thomas demonstrates how homosexual sodomy for the *Hardwick* court raises the prospect of the penetration, and consequent dissolution, of the male body and hence of masculine identity: “The ‘deeper malignity’ of ‘homosexual sodomy’ [which the Court, following Blackstone, deems worse than rape] lies in the fact that, unlike rape, sex between men represents an assault on the normative order of male heterosexuality—indeed, an abdication of masculine identity as such” (Thomas, 1993, p. 42).

<sup>5</sup> It does so by refusing to stabilize the category “homosexual.” One of the most stunning aspects of the majority opinion is the facility with which it migrates from the designation “homosexual persons” to the far more elastic “persons in a homosexual relationship.” Unlike the *Hardwick* opinion, *Lawrence* does not rely on a metonymic relationship between sodomy, or even gay and lesbian sexual expression, and gay identity (see Halley, 1993, p. 177), and nor does it hypostasize homosexual identity by positing some immutable characteristic that defines and delineates homosexuality.

<sup>6</sup> For example: “adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons . . .” (*Lawrence*, p. 17);

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“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice” (*Lawrence*, p.17).

<sup>7</sup> *Iowa v. Collier* (1985) represents one limited exception to this focus on men. There, an Iowa appellate court considered the question of whether sadomasochistic practices constitute a “social activity” within the meaning of the governing statute exempting such activities from the definition of “assault.” The state brought assault charges against the owner of an “out-call model business” who engaged in violent sex with one of his employees (and allegedly threatened her life with a loaded gun) following an argument over her use of drugs with and failure to seek remuneration from a customer. She incurred significant injuries at his hand and vehemently denied consenting to the encounter. The defendant sought a jury instruction on the defense of consent, contending that “sadomasochistic activity” fit within the ambit of § 708.1:

where the person doing any of the above enumerated acts [those intended to cause pain or injury, those intended to place someone in fear, and those involving threats with a firearm or other dangerous weapon], and such other person, are voluntary participants in a sport, social or other activity, not in itself criminal, and such act is a reasonably foreseeable incident of such sport or activity, and does not create an unreasonable risk of serious injury or breach of the peace, the act shall not be an assault.

Iowa Code § 708.1. In rejecting the defendant’s appeal of his conviction, the *Collier* court deemed it “obvious” that “the legislature did not intend the term to include an activity which has been repeatedly disapproved by other jurisdictions and considered to be in conflict with the general moral principles of our society” (*Iowa v. Collier*, 1985, p. 307). This determination rests not on the issue of consent and its legitimacy in this context, however, an issue the court largely

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disregards, but rather on the putative injury that S/M sex (itself arguably not at stake on these facts) wreaks on the public. In this sense, the case resembles *Hardwick*.

<sup>8</sup> Although I have described the legal regulation of S/M sex as an Anglo-American phenomenon, it bears noting that in 1997 the European Court of Human Rights denied a challenge to the *Brown* decision that attempted to cast it as a violation of the European Convention on Human Rights. The men convicted of assault and other offenses in the *Brown* case appealed to the ECHR, arguing specifically that their conviction amounted to interference by a public authority with their right to respect for their private lives that was not “necessary in a democratic society,” as required under the second paragraph of Article 8 of the Convention. In the opinion of the ECHR, however, the applicants’ contention that their activities constituted “matters of sexual expression [protected under the Convention], rather than violence. . . ,” fail because the “acts of violence . . . could not be considered of a trifling or transient nature” (*Laskey v. United Kingdom*, 1997, para. 39). Instead of illuminating the line that might delineate “sexual expression” from violence, the Court assumes that the existence of “physical injury,” indeed in the Court’s view “serious disabling injury” (presumably, although not explicitly, referring to the scarring and blood-drawing effects of the branding, piercing and other activities that left marks on the bodies of their recipients), necessarily signifies the presence of violence. Indeed, following *Brown*, the Court analogizes some of the acts involved to “genital torture” (*Laskey v. United Kingdom*, 1997, para. 40). Having drawn this analogy, the Court seems to forget torture’s figurative function, remarking decisively that “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” (*Laskey v. United Kingdom*, 1997, para. 40). Once the Court has named

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these S/M practices torture, the conclusion follows ineluctably that “the prosecution and conviction of the applicants were necessary in a democratic society for the protection of health” (*Laskey v. United Kingdom*, 1997, para. 50).

<sup>9</sup> Scarry traces this representation of consent from Plato's *Crito* to Locke's *Second Treatise of Government* and Rousseau's *On the Social Contract*, thereby defining a more general Western tradition, although she is most interested in how it plays out in Enlightenment and post-Enlightenment rhetoric. (See Scarry, 1990, pp. 876-82.)

<sup>10</sup> This is not to say that the kind of corporeal stasis that signifies consent here also resolves the question of jurisdiction. Other factors in addition to the legal subject's physical presence determine whose law properly applies to that subject. I thank the anonymous reviewer for reminding me that jurisdiction is not reducible to consent or even citizenship.

<sup>11</sup> In *Venus in Furs*, Severin, the novel's narrator, entreats Wanda (his “Venus”) to enter into an explicit contract with him in which he commits himself as her slave—a condition that entails physical as well as psychological punishment—in exchange for the promise that she will always wear furs. “I want your power over me to become law; then my life will rest in your hands and I shall have no protection whatsoever against you. Ah, what delight to depend entirely on your whims, to be constantly at your beck and call!” She complies. (Sacher-Masoch, 1991, p. 195).

<sup>12</sup> Reik (1949, p. 4) actually separates out this phenomenon from the others he has enumerated that constitute, in his observation, the essence of masochism: the factor of suspense, the demonstrative feature, and what he calls “the special significance of phantasy.” He differentiates the provocative factor from these since, he contends, provocation is more accurately a technique to bring about encounters that will satisfy the masochistic urge, and not properly a characteristic

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of masochism itself. In my view, though, Reik overstates the case here: is not the provocative episode itself integral to the masochistic satisfaction? In other words, doesn't the exercise of power in successful provocation contribute significantly to the release derived from its phantasmatic abdication?

<sup>13</sup> The court matter-of-factly describes the initial meeting of two participants who later create an S/M film as follows: "The man in the 'vertical' film was an individual whom [the defendant] had met either at a 'gay' bar or at Foster's [a location obviously familiar to the court, but unidentified in the opinion]. Defendant thought his name was 'George,' but did not know his present whereabouts. The man approached him and stated that he was an 'M' looking for an 'S.' The man thereafter came to defendant's home and voluntarily submitted to the beating" (*Samuels*, 1997, p. 443).

<sup>14</sup> The defendant's activities only came under police scrutiny after he met a man named Anger who offered to develop his films for him if he would donate them to a collection at the Institute, which was then interested in sadomasochistic sex. Anger developed one set of films without incident in San Francisco, but when one of the next set ended up in the hands of the Eastman Kodak Company in Palo Alto after the San Francisco photoshop forwarded it to them for processing, Eastman Kodak turned in the film to the Palo Alto police. Eventually Anger was apprehended by the San Francisco police when he attempted to pick up the developed film at the San Francisco shop.

<sup>15</sup> Every document presented into evidence during a trial, including photographs and films, must be "authenticated": the party wishing to admit the document must demonstrate that it is what it purports to be, *i.e.*, not a forgery or a counterfeit. Of course, authentication goes to the heart of at

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least one issue before the court here: the authenticity of the S/M acts depicted in the films, whether those acts were “really” performed and their injuries actually produced, or whether the acts and their injuries were largely simulated. While this issue would seem highly salient to others under consideration, the court sidesteps a judgment on the films’ verisimilitude by remarking off-handedly that the evidence is sufficiently authenticated for the purpose of deciding other issues in the case.

<sup>16</sup> According to his version, “Appleby never enjoyed whipping Cromer; he enjoyed the sexual effect it had on Cromer and the fact that Cromer allowed him to have anal intercourse after each beating. When asked if he intended to strike Cromer, he said, ‘I did it with the intent to turn him on sexually’” (*Appleby*, 1980, p. 1056).

<sup>17</sup> Feminist theorists and lawyers have made this point forcefully over the past three decades to substantial effect. The argument that privacy doctrine has shielded marital rape and battery from state intervention, and therefore sanctioned male violence against women, figured perhaps most famously in Catharine MacKinnon’s *Feminism Unmodified* (1987). Many states, however, still have statutes on their books requiring a more stringent showing to prove cases of marital rape or sexual assault, and providing for lower penalties when such cases do result in a conviction.

<sup>18</sup> As one Lord remarks in the *Brown* case (1994) involving group sadomasochistic activities, “In my opinion sado-masochism is not only concerned with sex. Sado-masochism is also concerned with violence. The evidence discloses that the practices of appellants were unpredictably dangerous and degrading to body and mind and were developed with increasing barbarity and taught to persons whose consents were dubious or worthless.” (p. 235).

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<sup>19</sup> Hanna would carve out a space for “safe and consensual S/M in its purest form,” which, she maintains, “really does not need to trouble the law” (p. 288). Yet she would exempt the “purest” S/M from regulation solely by dint of its apparent unregulability: the unlikelihood that such practices will come to the attention of law enforcement, without a complaining witness, in the absence of videotape or other memorializing evidence.

<sup>20</sup> Such anxieties find an interesting parallel in approaches to pain and suffering that characterized late nineteenth and early twentieth-century American humanitarianism. Historian Karen Halttunen (1995) describes how attitudes toward pain (etymologically related to “punishment,” as she notes) began to shift in the eighteenth century from a sense of pain as inevitable to one of pain as detestable and unacceptable, if productive of a perverse satisfaction in those inflicting it and onlookers alike. As this shift took place, humanitarian reformers emerged who sought to arouse revulsion for slavery, corporal punishment and other violent practices. In their attempts to represent the infliction of pain as distasteful and dangerous to spectators, in whom the spectacle of suffering might incite sexual arousal as well as cruelty, however, these reformers paradoxically eroticized pain themselves by representing and producing such spectacles as obscene, illicit.

<sup>21</sup> (Butler was at the time writing under the name “Judy.”) The volume represented one perspective in the feminist “sex wars.” In my perhaps anachronistic reference to Butler’s early essay, I do not mean to suggest that Butler would currently maintain the position that essay articulated; rather, I refer to that text because it represents one of the more eloquent and incisive anti-S/M writings, and therefore seems worthier of examination than many of the more reductive polemics.

<sup>22</sup> Some S/M proponents laud the therapeutic value of a practice that celebrates the connection between sex and pain, particularly as a forum for working through sexual trauma such as childhood sexual abuse. Self-described masochists like novelist Dorothy Allison contend that the repetition of sexual subjugation and humiliation in a regulated environment that they have “chosen” to enter enables them to achieve some degree of control over sexual trauma and the feelings of guilt and helplessness it produces. This rationale for S/M evokes Freud’s

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interpretation of his grandson's "fort-da" game. According to Freud (1961, pp. 12-17), the boy repeatedly enacted the disappearance and reappearance of an item at the end of a string in order to diminish the sense of helplessness occasioned by his mother's daily departures, to gain mastery over the loss and potentially to enact revenge upon her for it. Viewed thus, the explanation of S/M as a therapeutic reenactment of sexual trauma relies on an obfuscation of activity and passivity: the trauma creates the necessity for a therapeutic working-through, the form of which is then overdetermined by the form of the trauma; yet the reenactment of that violation engenders a sense of agency in the traumatized subject. Jessica Benjamin, however, counters Freud's suggestion "that the eroticization of pain allows a sense of mastery by converting pain into pleasure" by contending that, "[f]or the slave, intense pain causes the violent rupture of the self, a profound experience of fragmentation and chaos" (Benjamin, 1988, p. 61).

<sup>23</sup> Antonio, a speaker in the Senate, implores the young Aquilina to kick him as he crawls under the table in the character of a dog (p. 347):

**Aquil.** Hold, hold, hold, sir, I beseech you. What is't you do? If curs bite, they must be kicked, sir. Kicked thus.

**Anto.** Ay, with all my heart. Do kick, kick on; now I am under the table, kick again—kick harder—harder yet. Bow wow wow, wow, bow! Od, I'll have a snap at thy shins! Bow wow wow, wow, bow! Od, she kicks bravely!

<sup>24</sup> In addition to the fighting words doctrine, which denies First Amendment protection to speech presumed to incite a violent reaction in a reasonable man, and the law of provocation, one thinks of men who respond violently to perceived homosexual solicitations and receive mitigated sentences based on a "homosexual panic" or "homosexual advance" defense. See, for example, Mison (1992, p. 133).

<sup>25</sup> According to Lord Lowry:

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Sado-masochistic homosexual activity cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society. A relaxation of the prohibitions in sections 20 and 47 (of the Offences Against the Person Act of 1861) can only encourage the practice of homosexual sado-masochism, with the physical cruelty that it must involve (which can scarcely be regarded as a 'manly diversion'), by withdrawing the legal penalty and giving the activity a judicial imprimatur (*Brown*, p. 255).

<sup>26</sup> Despite their “controlled” environment, the linguistic system through which sadomasochists negotiate the terms and limits of their practice, and the procedures they employ to secure corporeal boundaries even in their apparent violation, the Law Lords emphatically differentiate these activities from the culturally and legally legitimate ones they might be said to resemble. In Lord Jauncey of Tullichettle’s words:

Your Lordships were further informed that the activities of the appellants, who are middle aged men, were conducted in secret and in a highly controlled manner, that code words were used by the receiver when he could no longer bear the pain inflicted upon him and that when fish-hooks were inserted through the penis they were sterilised first. None of the appellants however had any medical qualifications and there was, of course, no referee present such as there would be in a boxing or football match (*Brown*, p. 238).

<sup>27</sup> Savran invokes Judith Butler's notion of “phallic divestiture” to suggest that, if this notion applies here, “then male masochism would represent a particularly ‘subtle strategy of the phallus, a ruse of power,’ working to consolidate rather than imperil masculinity.”

<sup>28</sup> For instance, on the masochistic fantasies of women in contrast to those of men, Reik observes:

Compared with the masculine masochism that of women shows a somewhat attenuated, one could almost say anemic, character. It is more of a trespassing of the bourgeois border, of which one nevertheless remains aware, than an invasion into enemy terrain. The woman’s masochistic phantasy very seldom reaches the pitch of savage lust, of ecstasy, as does that of the man. . . . The masochistic phantasy of woman has the character of yielding and surrender rather than that of the rush ahead, of the orgiastic cumulation, of the self-abandonment of man (Reik, 1949, p. 216).

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<sup>29</sup> This maternal focus might suggest that Deleuze understands Sacher-Masoch's masochism to arise and flourish in the realm of the pre-Oedipal. Silverman not only disputes this reading of Deleuze, but moreover persuasively identifies in Deleuze's maternal focus the same disavowal on his part that he locates at the center of male masochism: the disavowal of paternal power. The radical force of this disavowal, according to Silverman, situates the theorist and the masochist alike squarely in the Oedipal realm (Silverman, 1992, pp. 210-12).

<sup>30</sup> R.D. Hinshelwood (1996), an analyst himself who is sympathetic to the psychoanalytic project, wrestles with this question of the patient's consent to treatment. Since psychoanalysis predicates its treatment on the observation that every subject is a split subject, it must, Hinshelwood argues, contend with the ways in which this self-division complicates the status of patient consent. In particular, he considers the analogy between psychoanalytic treatment and surgical treatment (one first invoked by Freud, who called upon analysts to demonstrate the same dispassionate precision that surgeons must) (Hinshelwood, 1996, p. 98). In the surgical context, the patient gives his consent prior to an operation; if during the course of the procedure, the surgeon discovers another condition requiring surgery, she may only proceed if she has obtained prior consent to exceed the bounds of the intended surgical procedure. To continue without this consent is considered unethical. "Is this similar to the psychoanalyst going ahead on his own judgement of what is necessary when he finds the patient no longer predisposed to the methods of psychoanalysis—for instance, when negative transference (i.e. resistance and defences) emerges?" Over the course of his discussion, Hinshelwood suggests that while, unlike that of the surgical patient, the analysand's consent may be suspect, the analyst must often proceed anyway. This imperative to proceed heedless of the integrity of the patient's consent derives from a

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benign paternalism intent not on imposing a particular outcome on the patient, but on helping the patient learn to integrate various facets of her psychic life. The analyzed mind is, in this view, the mind most capable of real consent.

John Forrester (1997) also remarks on the surgery analogy, suggesting that “it is the implication of Freud's often quoted and much contested exhortation to the analyst to model himself on the surgeon that the patient model himself, or be modeled, upon the surgical patient—giving up his autonomy and independence so as to make possible ‘free association’ and allow the analyst the liberty of interpretation, the possibility of dissecting his mind.” (p. 225).