SEX, BODILY HARM AND CONSENT:

A DWORKINIAN APPROACH

Submitted in the School of Law, Faculty of the Professions, the University of New England, for examination for the degree of Master of Laws.

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DECLARATION

I certify that the substance of this thesis has not already been submitted for any degree and is not currently being submitted for any other degree or qualification.

I certify that any help received in preparing this thesis and all sources used have been acknowledged in this thesis.

I declare that to the best of my knowledge and belief the law as stated in this thesis is current until 31 December 2011.

Anthony Schuyler Marinac

2 February 2012

In lieu of a dedication.

If I close my eyes, I am back in 1958, my first year in Law. I can still see Mr Vernon Treatt QC coming to the stage … to give a hundred first-year Law students another lecture in that most important discipline, criminal law. … I can hear him talking about the sections of the *Crimes Act 1900* of New South Wales dealing with 'unnatural offences'. I can still recall his rasping voice as he intoned the old provisions of section 79, spitting out the exceptionally ugly words of denunciation in the parliamentary prose:

Whoever commits the abominable crime of buggery, or bestiality, with mankind, or with any animal, shall be liable to penal servitude for fourteen years.

There, sitting on the strangely plush seats amid all my friends and colleagues, I felt the blood rushing to my face.

I shuffled my papers. I looked down.

Do any of them know? I asked myself. I hope they cannot guess.

I could not bear the shame.

I should be very, very quiet. Then, maybe, no-one will ever know. No-one will ever guess.

I will get through life alone and sexless. But I would rather die than be seen on the front page of the *Mirror*.

These were the means by which law became an instrument, not of liberty but of oppression. Not of equality but of discrimination. Not of human happiness but of cruelty and unkindness.

~ The Honourable Justice Michael Kirby
BA, BEc, LLM(Hons), AC, CMG
Justice of the High Court of Australia
Remembering Wolfenden

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Finally, with apologies for the conceit involved in doing so, I wish to acknowledge His Honour Justice Kirby. The quotation reproduced on the previous page has been a source of inspiration for me. I have no idea what His Honour's views on BDSM might be, but during the preparation of this thesis I have imagined, from time to time, first year law students studying criminal law, learning about *R v Brown*, and suddenly realising that their private acts of sexuality were, in the law's eyes, criminal conduct.

While I am grateful for the support and assistance of those mentioned above, errors herein are, of course, my own.

ABSTRACT

In *R v Brown*, the House of Lords decided that the consent of the victim is no defence to a charge of actual or grievous bodily harm inflicted during sadomasochistic sex. The same question has never been brought before an Australian court, but textbook writers regularly defer to *R v Brown* on this point. This thesis considers whether *R v Brown* should be followed in Australia.

Academic debate since *R v Brown* has largely been based on three separate legal philosophies: liberalism, which holds that a consent defence should be allowed; critical feminism, which argues that consent should not be allowed because sadomasochistic sex may just be another form of sexualised abuse of women; and conservative paternalism, which argues that consent should not be allowed because sadomasochistic sex provides no benefit, and much harm, to society and its values (and to the participants).

This thesis treats *R v Brown* as a hard case, in which neither statute nor precedent provides adequate guidance. Dworkin has proposed a method for resolving such cases, by considering the principles which underlie an area of law, and ruling in a manner consistent with those principles. Following this process, this thesis posits a hypothetical court, and invites three advocates – a liberal, a conservative, and a feminist – to argue that their philosophy best represents the principles underlying the laws of sexuality and laws of violence in Australia.

The judge in this hypothetical court eventually determines that the liberal principle offers the closest fit, but that it must be modified to take account of some strong claims from

the other two perspectives. Finally, the *application* of the principle must be modified in order to ensure that a sadomasochism defence does not become a shield for rapists and perpetrators of domestic violence.

The paper concludes that in Australia, *R v Brown* should not be followed. It should be possible to consent to bodily harm, short of disabling or fatal bodily harm, in the course of sadomasochistic sex. However such a defence requires a precise and sophisticated approach to consent. An appropriate consent regime will be proposed.

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