CHAPTER ONE - INTRODUCTION

People must sometimes be protected from themselves.[1]

On February 8, 1992, the British *Guardian* carried a story illustrated by a photograph of a man, sitting in his somewhat drab living room. He had a conservative haircut and moustache, reading glasses balanced on his nose, and a very worried look on his face. He had good reason for concern. His partner of twenty years had died of AIDS, he was nursing another friend with the same illness, and he was expecting to be sent to prison. His name was Anthony Brown.

Brown was part of a group of homosexual men who met at a private residence to participate in sadomasochistic sex. The activities varied from mild to extreme in nature, but no 'victim' had ever required medical treatment, and all had participated consensually, for their own sexual pleasure. The group had, from time to time, taken video footage of their activities – for viewing within the group – and, in 1987, one of these videos fell into the hands of the police Obscene Publications squad.

Police believed that they were viewing a *snuff* movie, that is, a movie in which a person is sexually tortured and then killed. In response, they launched a massive, expensive investigation, codenamed *Operation Spanner*. Gardens were dug up, looking for bodies. None, of course, were ever found.

Criminologist Bill Thompson explains that "despite looking extremely foolish, the police went ahead with a charge of conspiracy to corrupt public morals to get a 'result'. They

[1] Rant J, sentencing a defendant in the *Brown* case, as reported in the *Guardian* newspaper, 21 November 1990, p. 6.

had to; this investigation into nothing had not only cost the taxpayer over £500,000, it had diverted police attention, time and resources from serious crime."[2]

More than forty people were charged. Twenty-six were cautioned and released, but fifteen defendants, including Brown, faced court. Brown, during his court appearances, refused to hide his face from the media. He told the *Guardian*:

> My sexuality is my own private business. The people I beat fully consented, enjoyed the beatings and were all over 21 […] S&M is about taking the submissive and dominant roles that exist in all sexual relationships further than often happens. I merely acted out fantasies I'd had for years. From my position as a sadist, it's not so much about inflicting pain as demonstrating domination. […] It's not so much the level of pain as the methods of inflicting it which submissives want more of. People don't realise that trust is an essential ingredient between subs and doms. Some of those in the case had partners, like me, for 20 years. You can't separate the sexual context from the acts. It's a golden rule that the dom will always stop when the sub cries enough.[3]

British justice disagreed. Brown was sentenced to imprisonment for two years and nine months, reduced on appeal to three months. Seven others received prison sentences. The remainder received a variety of fines, probation and suspended sentences. Brown, along with several others, appealed first to the Court of Appeal, then to the House of Lords. Finally, following their release from prison, they appealed to the European Court of Human Rights. In each case, they argued that consensual sadomasochistic sex

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[2] Thompson B (1994) *Sadomasochism*, Cassell, London, p. 2.
[3] Kershaw A (1992) "Inside Story – Spanner in the Works" *The Guardian*, 8 February 1992, p. 35.

resulting in actual or grievous bodily harm (not requiring medical attention) to the submissive participant, was not a matter for criminal law. In each case, they failed.

It is now established law in the UK, as a result of this case (known generically as *R v Brown* or as the 'Spanner Case')[4] that the law will not allow citizens to consent to bodily harm in the course of sadomasochistic sex.

No similar case has ever been brought in Australia. Consequently, Australian textbook writers treat *Brown* as though it gives the best available expression of what the law is likely to be in Australia.[5] The case is not binding on Australian courts, but may (as a starting point) be regarded as persuasive, until the law is established in Australia.

This thesis considers whether this should be so. Formally, the research question addressed is:

> Should it be permissible under Australian law for participants in sadomasochistic sexual activity to consent to having actual or grievous bodily harm inflicted upon them?

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[4] The reported cases are: *R v Brown, Laskey, Jaggard, Lucas, Carter and Cadman* [1992] 1 QB 491 (Court of Appeal); *R v Brown, Laskey, Jaggard, Lucas and Carter* [1994] 1 AC 212 (House of Lords); *Laskey, Jaggard and Brown v United Kingdom* [1997] ECHR 4. In this paper the central case will usually be referred to as *Brown*.

[5] See, for instance, *Halsbury's Laws of Australia*, 130-1135; Bronitt S & McSherry B (2001) *Principles of Criminal Law*, LBC Information Services, Sydney, p. 558ff; Crofts P (2001) *Essential Criminal Law* 2nd ed, Cavendish, Sydney, pp. 96-97 (which, however, erroneously argues that Australian legislation has overturned Brown. The legislation will be discussed below.); Rush P & Yeo S (2000) *Criminal Law Sourcebook*, LexisNexis Butterworths, Sydney, p. 191ff; Gillies P (1997) *Criminal Law* 4th ed, LBC, Sydney (though this author states, at 334, that Brown offers little contemporary guidance); Waller L & Williams C (2005) *Criminal Law, Text and Cases*, 5th ed, Butterworths, Sydney, 66; Bagaric M & Arenson K (2004) *Criminal Laws in Australia, Cases and Materials*, OUP, Sydney, 270; and Whitney K, Flynn M & Moyle P (2000) *The Criminal Codes – Commentary and Materials*, 5th ed, LBC, Sydney, pp. 160-175. It will be noted that few of these references are uncritical in their discussions of *Brown*, but it is still clearly treated as the leading case.

Theoretical approach

This paper is far from the first academic response to the decision in *Brown*. Analysis of *Brown* has combined with debates in the United States to produce a transatlantic debate on sadomasochism. This paper will review that debate and identify three principal theoretical approaches.[6] On analysis, however, none of these approaches are conclusive. Each theory proceeds from fundamental premises, and essentially applies those premises to *Brown*. Consequently, each theoretical argument is only likely to be persuasive to those who accept the fundamental premises. The liberal and the conservative will never see eye to eye on *Brown*, simply because one adheres to liberalism, and the other to conservatism.

To resolve this dilemma, this paper requires a theoretical approach which allows a principled conclusion regarding consent to sadomasochistic sex,[7] but does not require one to hold specific fundamental views – a theoretical approach equally open to liberalism, conservatism, and feminism. The approach suggested is that of treating *Brown* as a 'hard case'. The approaches of Hart and Dworkin to the resolution of hard cases will be discussed. Dworkin's approach will be preferred, because it focuses on principles, and thus allows a debate on principles, while Hart's 'judicial discretion' approach shifts decision-making responsibility to judges, who apply their own internalised ethics.

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[6] These are outlined below, and discussed in detail in Chapter Five.

[7] In this thesis, "consent to the infliction of actual or bodily harm in the course of sadomasochistic sex" and "consent to sadomasochistic sex" or "consent to BDSM" are used interchangeably; the latter two used as abbreviations for ease of syntax. The acronym BDSM is fully explained in Chapter Two but stands for bondage and discipline, dominance and submission, sadism and masochism.

Outline of argument

One difficulty with academic debate regarding sadomasochistic sex is that this form of sexuality is not well understood. Nowhere yet, with the possible exception of Bill Thompson's book *Sadomasochism*, has a serious attempt been made to explain this form of sexuality. This thesis commences, in Chapter Two, by attempting that task. It describes how *power* rather than pain is the core of sadomasochistic sex. The principal roles (dominant, submissive and 'switch') are discussed, along with the variety of relationship forms between them. Next, a primer on forms of sadomasochistic sex is given, along with an assessment of the legal position of each. Finally, a discussion of the ethics[8] of sadomasochistic sex, as accepted by its participants, is undertaken.

This assessment of the nature of sadomasochistic sex places the reader in a position to assess *Brown*. Chapter Three outlines the Court of Appeal result, the opinions given in the House of Lords, and the European Court of Human Rights judgment.

Chapter Four examines the political and legal responses to *Brown*. In particular, attention is drawn to *R v Wilson*, a subsequent case which was distinguished from *Brown* but which nevertheless seems to cast doubt on the original decision. Next, the assessment by the UK Law Commission is discussed, along with the failure of the Commission to tender a final report. Finally, the jurisprudence of other nations (principally the USA, but also Australia and Canada) is considered.

Chapter Five turns to the academic debate. Three principal theoretical positions are identified and discussed.

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[8] The term is used here in a behavioural, rather than a philosophical, sense.

The first is liberalism, based on Mills' statement that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."[9] Liberals oppose the outcome in *Brown*.

Second, 'critical feminism' is discussed. This viewpoint argues that the intersection of sex and violence holds nothing but danger for women. These basic arguments are provisionally accepted. As a result, critical feminism becomes a benchmark for the argument of this thesis. Any proposed consent regime must adequately distinguish between consensual sadomasochism on the one hand, and rape and domestic violence on the other.

Third, paternal conservatism is discussed. Paternal conservatism is the key philosophy underpinning the majority decision in *Brown*. To a paternalist, sadomasochism is similar to the use of hard drugs – an activity to which the misguided might consent, which may be enjoyed by some, but which the law should nevertheless forbid because it is inherently unacceptable. The sadomasochist, like the drug addict, must be protected from themselves.[10]

Each of these positions provides the basis for an analysis of *Brown*. Yet each requires the reader to accept fundamental premises. To take the first example, if one accepts Mills' doctrine, then liberalism is a powerful theory in relation to *Brown*; if one does not accept that position, liberalism is inconsequential.

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[9] Mill, J (1859) *On Liberty*, reprinted in *Brittanica Great Books of the Western World* (1952), vol 43, p. 271.
[10] The quotation at the head of this chapter is a classic paternalist statement.

The dilemma faced by analysts of *Brown*, then, is how to consider the question of consent to sadomasochism in a way that allows these various theoretical positions to remain on foot throughout the debate; how to consider the questions raised in *Brown* while avoiding the need, at the outset, to commit to a specific theoretical perspective. The following methodology is proposed.

Cases in which the correct answer is yielded neither by statute nor by unwritten law, are described as 'hard cases'. There are two classical paradigms for dealing with hard cases. Hart argues that the language of law is inherently ambiguous - that it has an 'open texture'. He argues that our legal system allows judges to exercise discretion in order to render judgment when a case threatens to fall through the law's open texture. Hart's view offers little assistance in the current case. It could not be used to assist an analyst to choose between the various theoretical positions advanced in relation to *Brown*; it would merely invite the analyst to vacate the decision to the judges.

The second paradigm, that of Ronald Dworkin, offers more hope. Dworkin argues that the law is founded on an underlying base of principles. In his view, when a judge is confronted with a hard case, the judge must seek out the principles applying to that decision, and rule in the manner most concordant with those principles. This approach is ideal for the current thesis, because it means all three theoretical perspectives begin in the same position. No *a priori* commitment to any set of principles is required.[11]

[11] Care should be taken here, lest claims to "neutrality" be overstated. The use of Dworkin's methodology clearly does involve *a priori* commitment to Dworkin's principles of Integrity of Law. If those principles are unsound, then an analysis based upon them would be equally unsound. A full exposition and defence of Dworkin's methodology and its foundational theories is beyond the remit of this thesis, however a range of key criticisms of Dworkin's principles will be discussed. Further, arguments about whether Dworkin, Hart, or another writer have best expressed the method for dealing with hard cases, are an order of magnitude more abstract than arguments about whether liberalism, feminism, or paternal conservatism provides the best means for dealing with the legal complexities of sadomasochistic sex. The former debate is important, but will not be resolved in this thesis.

Dworkin has, however, attracted extensive criticism from various traditions of jurisprudence. Chapter 6 considers a range of these criticisms, and offers modifications of Dworkin's theory.

In Chapter Seven, this thesis establishes a Dworkinian judge on an appeal bench. The defendants in *Brown* are then invited to appeal to this court *as though the offences had been allegedly committed, and the criminal actions brought, in Australia.* Three advocates – a liberal representing the appellants, a paternal conservative representing the Crown, and a feminist intervener, argue in favour of their own preferred Dworkinian principles. After considering these arguments the judge, Eunomia, identifies the most sound principles. The first, the principle of bodily inviolability, states that the law regards each person's physical body as inviolable. However Eunomia will note that this principle often concedes ground to countervailing principles. This explains the conventionally-accepted exceptions to the laws of assault.[12]

The more complex task involves the consideration of a principle underpinning Australian laws of sexuality. Eunomia examines a range of legal circumstances, relating to adultery, rape, the age of consent, marital rape, incest, homosexuality, prostitution, pornography, sexual servitude,[13] unlawful sex by persons in a position of trust, the deliberate spreading of infectious diseases, bestiality, and abortion. She finds that each of the three theoretical positions has some explanatory claims, and yet none of them provides an ideal fit. Instead, she takes the closest-fitting principle – the liberal principle – and modifies it after due consideration of the feminist and conservative principles. The result is a principle of sexual self-expression: freedom of sexual self-expression should be

[12] Such as surgery, pugilism, tattooing, contact sports, and circumcision. These and others will be discussed in detail in the course of the thesis.
[13] Entrapment of illegal immigrants to work in brothels.

extended to all adults, to the maximum extent consistent with the protection of vulnerable people and interests, unless that self-expression can be shown to be morally outrageous.

Finally, Eunomia combines the two principles to form a principle of sexual sadomasochism:

> The bodily inviolability of those who are sexually vulnerable shall be protected absolutely. Those who have no relevant vulnerability shall be free to consent to violation of their bodily integrity in order to express their sexual self-determination.

She applies this to *Brown* and rules that consensual sadomasochism should be permitted - the appeal should be allowed.

Chapter Eight considers one remaining objection which may be raised by the feminist and conservative advocates: that if BDSM were permitted, it could provide camouflage for perpetrators of sexual assault and domestic violence. Chapter Eight develops a consent regime which would allow the implementation of the principle, without sacrificing protection of rape and domestic violence victims. Such a regime, it is argued, would be superior law than *Brown* in Australia. At the very conclusion, model legislative provisions are drafted and proposed.

CHAPTER TWO – BDSM

Being your slave, what should I do but tend
Upon the hours and times of your desire?[1]

This chapter presents a primer on sadomasochistic sex (BDSM). Unfortunately, the overt symbols of sadomasochism (whips, chains, collars, the dominatrix in black leather boots) lend themselves to a superficial popular understanding of this form of sexuality. In this chapter, explanations will be presented in a style as neutral as possible.

While neutrality is the only appropriate academic way to approach the material, this approach also risks superficiality, because one of the defining aspects of BDSM is its capacity to inspire emotion, from excitement to revulsion. There will be ready opportunities for both emotional viewpoints to be explicated in forthcoming chapters.

Difficulty of making accurate academic assessments of BDSM

BDSM has not been the subject of widespread academic discussion. It has attracted some level of notice in the disciplines of sociology and psychology, but not sufficient to establish a base of received academic knowledge.[2] Most importantly, the BDSM community itself is not strident. Few authors have attempted to explain BDSM from the practitioner's perspective.

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[1] Shakespeare, Sonnet 57. Space prevents reproduction of the entire sonnet, but it has been adopted, almost as a theme, by the BDSM community.

[2] Indeed, discussion of BDSM has proved dangerous to some in an academic context. An example is Dr Roger Bowen, formerly President of the New Paltz campus of the State University of New York, who in 1997 resigned following criticism of his support for a student conference on women's sexuality. The objections arose from two sessions, one of which related to sex toys and the other of which related to BDSM. See Arenson, K (1997) "At SUNY, a Conference about Sex is Criticised" *New York Times*, 7 November 1997.

Furthermore, the BDSM community is a child of the internet. The anonymity of the internet and its ability to make geography irrelevant have enabled BDSM practitioners to form online communities where information is passed and contacts are made. These communities have proliferated in various fora, but there is little consensus as to which can be regarded as authoritative. Even in well-regarded fora, authors and contributors are likely to be identified by user names, not by their actual name. Furthermore, most discussions are had in 'notice board' fora, which are unmoderated and often temporary. Thus there is little in the way of preserved, authoritative material.

There are a range of 'serious' BDSM websites presenting resources for those in the BDSM community. However, given the often-anonymous sources and the relative lack of quality control, these are best regarded as akin to self-reported primary observations. Consequently they have value, but the value must be appropriately weighed.

This chapter will italicise the quotations drawn from such sources, and will add an asterisk to the footnote, by the author's name (or assumed internet identity), in order to make the nature of the source clear.

Acknowledgement of definitional prejudice

It is important that this chapter is presented early, however by explaining BDSM in generous terms early in this thesis, contrary perspectives might be defined out of contention. If BDSM is, in this chapter, presented only as wholesome and is *defined* by a sophisticated system of irreproachable consent, then contrary arguments would have the ground cut from under them and, by defeating them, this thesis would accomplish little.

Consequently, the points made in this chapter must be regarded as provisional and contested. Contrary views will be indicated briefly during this chapter, and explored in more depth later in the thesis. The purpose of this chapter is to supply basic understanding and common terminology; not to exclude views which do not suit the author's position.

Basic concepts

BDSM and other alternative sexualities

'BDSM' is an amalgam of three acronyms: Bondage and Discipline (BD), Dominance and Submission (DS), Sadism and Masochism (SM). In direct quotations throughout this thesis, other versions (principally SM and S/M) will be encountered. There is, for current purposes, no distinction between them. 'BDSM' will be used as a broad term, and specific practices will be specifically identified.

There are other alternative sexualities which do not fall within the ambit of BDSM. Gay sex, lesbian sex, group sex, and commercial sex are probably the most obvious (although gay men, lesbians, groups, and prostitutes may also engage in BDSM). In addition, more objectionable forms of sexuality such as bestiality, necrophilia, and paedophilia also fall outside BDSM.

BDSM practitioners use the word 'vanilla' to describe mainstream, customary heterosexual sex without any alternative sexual content. 'Vanilla' is used as an alternative to the more objectionable 'normal' (which implies abnormality on the part of BDSM practitioners). Initially, this term was given a pejorative twist by some practitioners,

implying that sex in the 'vanilla' community was bland and boring. However it no longer appears to be used in that sense, and the BDSM community has never been sufficiently prevalent to make the term objectionable to the broader community. Consequently this thesis will, without implying any pejorative meaning, adopt the term 'vanilla' to refer to non-alternative, mainstream (hetero)sexualities.

Power at the heart of BDSM

BDSM is extremely broad. A person restrained by their lover using silken scarves is practising BDSM. A person enduring the process of having their scrotum nailed to a board is also practising BDSM. A person who has a perfectly normal marriage except that they accept domestic discipline from their partner, is practising BDSM. A person who allows themselves to be 'forced' to drink another person's urine is practicing BDSM.[3]

The uniting feature of all BDSM activities is *consensual exchange of power*. One person – the submissive – gives up specifically defined powers of self-determination and another person – the dominant – agrees to determine those matters for the submissive. Power exchange may be from the minor – what a submissive will wear, or how they will be touched during sex – through to major life decisions in relationships characterised by

[3] These graphic examples are presented neither to shock nor to titillate. The two more extreme – the nailing and the urine – were both referred to in *R v Brown*. More importantly, however, if this thesis sanitises BDSM by only referring to the more mild, inoffensive practices, this may result in a situation where BDSM is *normalised* and an argument for legal consent is made on this basis. A squeamish failure to examine BDSM in some of its more extreme forms would be a prime example of the bias against which caution was given above – many of the objections to BDSM focus on the more extreme practices. If these are ignored for the sake of delicacy, those rebuttals are robbed of their teeth. It will not be necessary to present pornographic or offensive levels of detail in this thesis; however neither will this thesis resile from the extremity of the practices.

BDSM. All of the BDSM activities considered below involve, in some way, a voluntary disturbance of the socially-normalised power relationships within couples.

Bywater described this dynamic as follows:

> What *is* at the heart of it is the surrender and capture of power. This lies below the surface of even the most 'vanilla' sexuality, in which the partners, however transiently, may wish to consume and be consumed, to hurt and be hurt, to vanquish and to die. Sadomasochism portions out this dualism, each partner taking one role, both experiencing a greater catharsis as a result, as well as an unimaginably greater intimacy of what the French call *le regard* and what we don't have a word for. Far from being a matter of gratuitous cruelty on the one part and overblown, rotted supersensuality on the other, a sadomasochistic encounter which may seem repellently ugly to an observer is a matter of irradiating tenderness and *caritas* to the two engaged therein.[4]

Safe, sane and consensual

'Safe, sane and consensual' is a prominent slogan in the BDSM community.[5] 'Safe', in this sense, is used to suggest that the only harm arising from BDSM activities should be deliberate and constrained. Bruising from a spanking would be 'safe'; bruising from a bound person falling from a table would not. Superficial burns from dripping candle wax would be safe; severe burns from a beeswax candle would not.[6]

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[4] Bywater, M (1998) "A Surrender of Power" (Book review of Phillips, A, *A Defence of Masochism*), *New Statesman*, 17 April 1998, p. 46.

[5] Egan, K (2007) "Morality Based Legislation is Alive and Well: Why the Law Permits Consent to Body Modification but not to Sadomasochistic Sex", *Albany Law Review*, p. 1617.

[6] On this point, see the brief but informative guide at the following internet address. This is a good example of the dissemination of safety information within the BDSM community: MissBonnie*

'Sane' implies not letting one's fantasies get out of hand. In particular, a submissive should not meet a dominant for the first time unless a third party knows where the submissive is and when he or she can be expected to leave. Sane also implies keeping activities within comprehensible limits. A submissive may have fantasies of being bound and available for an entire football team; acting on those fantasies would be more likely to result in arrest than satisfaction.

'Consensual' in the sense of negotiating consent, is discussed below.

Participation

It is difficult to estimate the extent to which BDSM is practiced. Unlike a homosexual couple, who face discrimination if they merely walk down the street holding hands, a BDSM couple can safely move through society without appearing obvious.[7] They have little need to expose their sexuality. This has frustrated some researchers:

> Estimates vary from a low of about two percent to a high of twenty-five percent of the population. This wide range of estimates exists because sadomasochists don't wish to be counted - they tend to be "in the closet." Being a sadomasochist is not considered by the general population to be proper, and since there is no flourishing SM rights movement, there is little, if any, support for individuals who openly announce that they are sadomasochists. Why be singled out for possible ridicule, or

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(unknown) "Wax Melting Temperature" *Collar N Cuffs*, http://collarncuffs.com/resources/doku.php?id=wax_melting_temps (Accessed 15 April 2010).

[7] It is surely ironic that a homosexual couple, whose sexual activities are legal, cannot have their marriage recognised; while a heterosexual dominant and submissive, whose activities potentially breach current criminal law, may marry.

> loss of a job? Most sadomasochists feel it is best to keep their sexual interests a secret from all except those they play with.[8]

A figure often cited is the Kinsey Institute estimate that between 5 and 10 percent of Americans have engaged in some form of BDSM play.[9] However the Kinsey Institute's website indicates that this figure was derived from a 1982 *Playboy* magazine survey – and is thus dated and academically dubious.[10] A 2003 Australian survey reported far lower numbers. Just 2.0 percent of men and 1.4 percent of women responded affirmatively to the prompt "Have you participated in B&D or S&M? That's Bondage and Discipline, Sadomasochism, or dominance and submission."[11] The low numbers in this case may be an artifact of the question. The response to questions such as "In the past year, have you spanked or been spanked by a partner during sex?" or "In the past year, have you used handcuffs with a partner during sex?" may have been somewhat higher.

The same authors found no evidence to support any hypothesis that an interest in BDSM was a result of previous coercion, psychological distress or sexual difficulties. They concluded that it was "simply a sexual interest or subculture attractive to a minority."[12]

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[8] Breslow, N (1999) "SM Research Report" *Sexuality.org*, http://www.sexuality.org/authors/breslow/nbres.html (Accessed 19 April 2010).

[9] As an example making this citation, see Cloud, J (2004) "Bondage Unbound: Growing Numbers of Americans are experimenting with Sadomasochistic Sex. But is it always Safe and Sane?" *Time*, 19 Jan 2004, p. 104.

[10] Kinsey Institute (2010) "Frequently Asked Questions" *Kinsey Institute for Research in Sex, Gender and Reproduction*, http://www.kinseyinstitute.org/resources/FAQ.html#bdsm (Accessed 19 April 2010).

[11] Richters et al (2003) "Autoerotic, Esoteric and Other Sexual Practices Engaged in by a Representative Sample of Adults" *Australian and New Zealand Journal of Public Health*, April 2003, p. 185.

[12] Richters et al (2008) "Demographic and Psychosocial Features of Participants in Bondage and Discipline, "sadomasochism" or Dominance and Submission (BDSM): Data From a National Survey" *Journal of Sexual Medicine*, vol. 5, pp. 1660-1668. The direct quotation is from p. 1667.

Roles

The submissive[13]

The submissive is, paradoxically, the most important person in any BDSM encounter. They establish the boundaries within which the rest of the encounter occurs. Once those boundaries are established, the submissive gains sexual fulfillment from giving up control to a dominant:

> The short version … is this: "The submissive gives up control to the Dominant until such a time they feel it necessary to take that control back". This means that it is the submissive who is ultimately in control and the Dom who is in charge until such a time he loses that power from the submissive.[14]

A submissive should not be mistaken for an inferior. A couple who occasionally take dominant and submissive roles in the bedroom may well be equals in the rest of their relationship.[15] During BDSM sex, the dominant and submissive are best seen as equal people with complementary sexualities. The submissive gives up power, and the dominant takes it up, for their *mutual* pleasure:

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[13] It is probably necessary to apologise at this point to grammar purists, but the terms "dominant", "submissive" and "switch" have all been given noun-forms within the vernacular of BDSM. Thus the first two can function either as nouns or as adjectives; the third as a noun or a verb.

[14] MstrCerebus* (a screen name for Guss, S) (2001) "Who's in Charge?" *Leather N Roses* http://www.leathernroses.com/generalbdsm/mstrcerebusincharge.htm (Accessed 13 April 2010)

[15] Or, in deference to feminist arguments, they might be no more unequal than any other couple in society.

> *There are two kinds of strengths: the strength to lead, and the strength to follow; the strength to control, and the strength to yield. There are two kinds of power: the power to strip another's soul bare, and the power to stand naked.*[16]

The slave

A slave's submission is not episodic. Rather, they regard themselves as being 'owned' by their dominant. Every aspect of the slave's life is subject to the control of their dominant, who makes all decisions, from the sexual through to the mundane – the dominant decides when and how the couple will have sex, and the dominant decides what sort of washing powder the couple will use.[17]

The word 'slave', however, is a loaded term. In the United States, in particular, it carries racial overtones and is contrary to the Thirteenth Amendment.[18] More broadly, slavery in its true sense – the sense whereby persons become chattels for legal purposes – is unlawful under international law in accordance with the *International Covenant on Civil and Political Rights*.[19]

The difference between 'slave' in the BDSM sense and in the senses considered above is the underlying fact of consent. A BDSM slave would be theoretically free to leave the relationship at any time. In reality, broad factors (economics, opportunity, social

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[16] Tovah, Y* (undated) "The Healthy Submissive" *Submissive Loving*, http://www.submissiveloving.com/healthysub.html (Accessed 13 April 2010)

[17] Interestingly, a respectful and sensible depiction of such a relationship was provided in the often-conservative US *Time Magazine*: Cloud, J (2004) "Bondage Unbound: Growing Numbers of Americans are experimenting with Sadomasochistic Sex. But is it always Safe and Sane?" *Time*, 19 Jan 2004, p. 104.

[18] Thirteenth Amendment to the US Constitution: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

[19] Art. 8.

circumstances, children) may bind a BDSM slave into his or her current relationship just as similar factors may hold a vanilla person in a poor relationship. A BDSM slave, then, is at risk of falling prey to domestic violence if their underlying consent is not regularly and freely renewed.

The masochist

Masochists are less interested in the power exchange aspects of BDSM and more interested in the direct physical stimulation received from pain. One psychologist with significant clinical experience assisting masochists, wrote (on a BDSM website):

> In keeping with its paradoxical nature, masochism provides not so much a state of weakness, but a sense of surrender, receptivity and sensitivity. Masochism is the condition of submitting fully to an experience, which counters lives that, in our Western society, are ego-centered, constrained, rational, and competitive. Strength can be a terrible burden. It is a constraint, which can be relieved in moments of abandonment, of letting down and letting go. So it is hardly surprising that the pull of masochistic experiences should be so strong in a culture that overvalues ego strength at the expense of a fuller experience of all dimensions of psychic life.[20]

For a masochist, context is important:

> Masochists … seem to have a different type of nervous system than the rest of us have. Levels of pain that would traumatize other people send them into ecstatic

[20] Hayden, D (2001) "Psychological Dimensions of Masochistic Surrender" *Leather N Roses*, http://www.leathernroses.com/generalbdsm/haydensurrernder.htm (Accessed 13 April 2010). Categorising this piece presents problems. It is published on a BDSM website, not in an academic journal, yet it does not simply relate personal experience, but rather appears to be a professional statement in an unusual forum.

> orbit. They love it, and they want more. I must emphasize one point: Masochists feel *very* particular about the pain they enjoy. It must be felt only under controlled, consensual circumstances. They experience the pain of an auto accident, punch in the face, bee-sting, or similar treatment exactly like the rest of us, and dislike it just as much.[21]

Slaves, submissives, and masochists are not discrete groups. A person may be any one, or any combination of the three; and may drift between them over time. Perhaps the best way to distinguish them is according to the context which an activity such as percussive play takes on. Let us assume that a submissive, a slave, and a masochist are all receiving firm blows with a riding crop. For the submissive, the thrill is likely to arise from the sense of helplessness; for the slave, the thrill comes from the broader context of obeying their dominant; for the masochist, the thrill arises directly from the contact of crop on skin.

The dominant

The dominant obtains sexual satisfaction from exerting control. Within this broad definition, dominants vary widely. Some dominants enjoy having a submissive who desperately seeks to obey, and requires no restraints. Some dominants enjoy the struggle with a submissive who attempts to resist. Some dominants do not enjoy the use of pain at all; some will use pain to enforce discipline upon their submissives; a true sadist will derive sexual satisfaction from inflicting pain upon a masochist.

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[21] Wiseman, J (1996) *SM101: A Realistic Introduction*, 2nd ed, Greenery Press, San Francisco, p. 18.

Dominants require far more specific skill-sets than submissives. Effective bondage, for instance, requires the dominant to learn a range of safe roping techniques, and percussive play requires practice in techniques to apply precisely the desired amount of force. Most importantly, the dominant is always responsible for the safety of the submissive. One website advises new dominants:

> *The submissive you find may desire being hurt, are you willing to maintain a state of control, with one foot grounded in the present, to ensure that hurt does not become harm? If you lack the self-control to do this, please leave your fantasies in the realm of dreams.*
>
> *If someone is going to entrust you with their life then you are going to have some serious responsibilities. Once you find activities that interest you, you will need to learn how to do these activities safely.*[22]

From a legal perspective, much of what a dominant does places them at risk of both civil and criminal liability. Their activities almost always provide the physical elements of criminal assault, tortious assault, and often false imprisonment. The only way a dominant can protect themselves is by constantly maintaining an awareness of their submissive's consent – and as *Brown* shows, even this may provide little protection in criminal law. Even with great care, however, things may go wrong. Too much force may be used inadvertently. A submissive's reactions may be misinterpreted. A dominant may get carried away in the heat of the moment and act beyond the bounds of consent (in this latter case liability would be inevitable and justified).

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[22] MissBonnie* (2009) "I'm Domme So What Now?" *Collar N Cuffs*, http://collarncuffs.com/resources/doku.php?id=starting_out_domme (Accessed 15 April 2010).

The switch

A switch derives sexual pleasure from both the dominant and submissive roles.[23] Again, there are a broad variety of practices within this general category. For example, a bisexual person might feel submissive towards one gender and dominant towards the other. Within some couples, each partner may take turns fulfilling the dominant and submissives roles. At any one moment, however, in any specific scene, a switch will be in either a dominant or submissive role.

Switches are sometimes derided by 'pure' dominants and submissives. "*Some in our community look down on those who switch, thinking you should 'make up your mind' and be either a Top or a bottom.*"[24]

Relationships

Monogamy

Monogamy is still the archetypal relationship form in the BDSM world. Monogamy in BDSM relationships takes on two primary forms. The first is the predominantly vanilla couple engaging in BDSM play on an episodic basis. For these couples, BDSM may be a minor part of their sexuality.

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[23] Veaux, F* (undated) "So What's with Switches Anyway" *BDSM?* http://www.xeromag.com/fvbdswitch.html (Accessed 15 April 2010).
[24] Lord Saber* (1999) "Switches and BDSM" *Leather N Roses*, http://www.leathernroses.com/submission/saberswitches.htm (accessed 15 April 2010).

BDSM does, however, have its own characteristic form of monogamy. Where a dominant and submissive enter into a relationship characterised by BDSM, they may hold a 'collaring' ceremony:

> *The collar is a physical symbol of ownership within dominance and submission just as the wedding ring is within vanilla relationships. Some of us choose to take it just as seriously as a wedding ring if not more seriously than a ring.*[25]

For a dominant to seek to obtain submission from another dominant's collared submissive would be the equivalent of, in the vanilla world, one person endeavoring to seduce another person's spouse.

Emotional monogamy

Emotional monogamy describes a situation in which partners are emotionally committed to one another, but are free under agreed circumstances to engage in sex with others. Within BDSM this takes two common forms: first, within a couple the dominant partner may be regarded as free to have sex with others; this is seen as affirming their freedom and dominant position, while the inability of the submissive partner to have sex with others reinforces their submissive role and lack of self-determination. Second, within a couple the dominant partner might 'give' the submissive partner to others for sex.

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[25] Cerina X* (c2010) "Ownership and Collars" *Submissive Loving*, www.submissiveloving.com/collar, (accessed 13 April 2010).

BDSM groups

Finally, even prior to the advent of the internet, BDSM activities often occurred in group settings. At least two of the key cases (*Brown*[26] and *Paddleboro*[27]) arose from such 'play parties'. These parties fall into two broad categories – some are a forum for indiscriminate group sex; more commonly, however, people at these parties are likely to 'play' primarily or exclusively with their own partner, while learning by observing other couples. Such groups sometimes hold social functions with no overt sexual context,[28] but rather providing a forum where BDSM couples can exercise the dynamics of their relationship in a semi-public setting. Other group functions might take on a seminar format, for couples (and particularly dominants) to learn and share techniques. BDSM groups are relatively common in Australia. A short series of internet searches identified such groups in each capital city except Darwin.[29]

BDSM activities

Power exchange

In a power exchange situation, the submissive agrees to obey their dominant without the need for bondage or other restraints. In such a situation the submissive will obey any command within their agreed limits. Such commands may be complicated, sexual and

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[26] See Chapter 3
[27] See Chapter 4
[28] Perhaps the most stark example is the BDSM 4 Wheel Drive group: (http://4wdbdsmgetaway.net/) (Accessed 15 April 2010)
[29] **Adelaide:** SA Munch (www.bdsmaustralia.net/samunch.html); **Brisbane**: Brissy Darling Downs BDSM Group (www.brissydarlingdowns.ausbdsm.org); **Canberra**: Canberra BDSM Group (www.collarme.com/CanberraBDSM); **Hobart**: BDSM Fetish Manor (See http://www.abc.net.au/tasmania/stories/s662106.htm); **Melbourne**: Men at Work (http://www.club80.net/index.php?menuid=25); **Perth**: The Fetish Manor (http://thefetishmanor.com/main.html); **Sydney**: The Hellfire Club (www.hellfiresydney.com). All accessed 15 April 2010.

challenging; or they may be mundane and domestic. The submissive obtains joy from the sense of pleasing their lover; while the dominant obtains a complementary pleasure from being served in this way.

> *A submissive gives control over themselves to the dominant, expecting to receive use of that control in return. If a submissive does not submit, there is no dominance in return. If a dominant does not use the power given him/her, then the submission will end. It takes both, doing their part, to create the power exchange.*[30]

There are few legal risks associated with this form of BDSM.

Bondage

Bondage involves the dominant placing physical limitations on the submissive. This is most commonly accomplished by using ropes, or leather or metal cuffs. In addition, sensory deprivation techniques such as blindfolds and gags are best considered as bondage tools.

Bondage is almost certainly the most widespread BDSM activity. The use of handcuffs, silk scarves or business ties to restrain a lover is probably so commonplace that it is not regarded by most vanilla couples as 'kinky' at all. Despite this, bondage is deceptively dangerous. A failure to allow sufficient circulation to bound extremities can be dangerous; a person bound in one position for extended periods is at risk of positional

[30] Raven Shadowborne* (1999) "Power Exchange" *Leather N Roses*, www.leathernroses.com/generalbdsm/powerexchange.htm (accessed 13 April 2010)

asphyxiation; and a bound person left alone is in danger in an event such as a house fire.[31]

Percussive play

Percussive play involves striking the body of the submissive. Classically, this may involve a submissive being spanked on the buttocks with an open hand. However, there are an extraordinary range of implements used in BDSM play (the most common are canes, crops, whips and rulers) and they are applied to virtually every part of the body, with an emphasis on erogenous zones.

Percussive play is attractive to many participants for a number of reasons. The pain from being struck releases endorphins which may stimulate arousal. The physical violation inherent in being struck emphasises the fundamental power exchange of BDSM. Many participants prize the visual impact of spanked flesh or welts. Finally, many submissives regard their capacity to 'take' a spanking or whipping as evidence of the zeal of their submission.

Percussive play is dangerous. The wrong instrument, applied with too much force, could create far more pain than the submissive has agreed to endure. Furthermore, application

[31] For an example in Australian law, see the sentencing remarks of Lyons J in *R v Meiers*, QSC, unreported, 8 August 2008, in which a wife bound a husband during consensual BDSM play, including a ligature around his throat, then left him alone. He died of asphyxiation. Lyons J accepted that Mrs Meiers had no malicious intent, but that she had not sufficiently supervised him. Lyons J sentenced Meiers to 3 years imprisonment, suspended after 12 months. Risks of bondage activities are discussed in the chapter "Risk Factors and Warning Signs" in Wiseman, J (2000) *Jay Wiseman's Erotic Bondage Handbook*, Greenery Press, San Francisco, pp. 71-86. He specifically discusses positional asphyxia at page 273ff. Virtually every 'serious' BDSM website includes information on bondage safety. A good example is MissBitch & MissBonnie* (2010) "Introduction to Bondage Safety", *Collar N Cuffs*, http://collarncuffs.com/resources/doku.php?id=bondage_safety (Accessed 17 April 2010).

of too much percussive force to vulnerable areas such as the breasts, the testicles or the kidneys may cause damage:

> *The basic principle is that you want to whip body areas where the stroke will cause pain but no significant damage, especially to anything underneath the skin. 'No significant damage' is defined as anything that will not heal on its own; welts and bruises are not generally considered significant damage. The heavier the stroke, the more carefully it must be placed.*[32]

Genitorture

Genitorture involves the direct application of pain to the genitals of the submissive. The penis, scrotum, testicles, vagina, clitoris and nipples are all common targets for this form of play. They may be subjected to a range of harsh stimulation including the use of clamps, piercing, superficial cutting, and burning. For masochists, in particular, genitorture produces intense feelings of arousal:

> *for many men, [their penis is] the centre of sexuality and a symbol of sexual potency and when someone helplessly undergoes abuse of his most precious appendage the psychological charge is immense. A site normally associated with indulgent pleasure is being transformed into a vulnerable target for punishment and pain.*[33]

The legal dangers of genitorture are clear. The forms of harm can be relatively severe, and there are serious risks of infection, or the transmission of blood-borne diseases. The areas subjected to genitorture are all relatively vulnerable. Safety information is available

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[32] This quotation appears early in the broader chapter "Flagellation" in Wiseman, J (1996) *SM101: A Realistic Introduction*, 2nd ed, Greenery Press, San Francisco, p. 175ff.

[33] Anonymous (undated) "Male Genitorture" *Devus Community*, http://www.devus.com/wiki/Male_Genitorture (Accessed 17 April 2010).

within the online community, but somewhat more sporadically than for the more common forms of BDSM play.[34]

Humiliation

Many submissives obtain sexual stimulation from two forms of humiliation: embarrassment (such as a male forced to purchase and wear female underwear) and the use of language which in other contexts would be insulting or belittling. A submissive might cringe at being called a range of derogatory names, while simultaneously becoming aroused:

> *Some males need to be called naughty boys or told in no uncertain terms that they are wicked, or worthless, or unmanly. Verbal humiliation, however, consists of more than just teasing. It is as delicate an art as a proper birching and even more difficult to master. Before you try a scene including humiliation, talk it over with your submissive! If you inadvertently bruise his bottom, he will probably forgive you; if you mock his most sensitive point, you could wreck your relationship.*[35]

From a legal perspective humiliation is benign, and unlikely result in assault, which is the focus of this thesis.[36]

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[34] For instance, see Rose V* (1997) "Genitorture" reproduced at *Denver Sub*, http://www.denversub.com/genitorture.html (Accessed 17 April 2010) and Anonymous (undated) "Genitorture – Safety" *Devus Community*, http://www.devus.com/wiki/Genitorture_-_safety (Accessed 17 April 2010).

[35] Mistress Lorelei (2000) *The Mistress Manual: The Good Girl's Guide to Female Dominance*, Greenery Press, San Francisco, p. 100.

[36] Note however that non-consensual and routine humiliation of a family member can constitute domestic violence. The relationship between BDSM and domestic violence is discussed below, and further in later chapters of this thesis.

Toilet play

Toilet play involves excrement or urine, either expelled onto the submissive, or consumed by the submissive. Such conduct is extreme, but was discussed in *Brown*. For the submissive enthusiastic for such activities, it represents one of the most utter forms of degradation and thus of devotion. Toilet play also comes with significant dangers. While urine is unlikely to be harmful, faeces abounds with infectious material and bacteria.[37] The risk of disease from this form of activity is very high – yet the legal risk is negligible.

Consent

BDSM has developed its own system regarding consent. It will become apparent that consent within BDSM is far more complicated, and its management far more sophisticated, than is usually encountered in the vanilla world.

Safewords and safe signals

A dominant needs a means of understanding how a submissive is responding to BDSM activities, particularly when they are still new to one another. A novice submissive may express a desire to be caned hard with a riding crop, yet on the first stroke they may find that the fantasy was far more alluring than the reality.

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[37] Perhaps because faecal play is considered so extreme, is it not discussed in the "mainstream" BDSM internet sites. The most informative discussion which could be located was on a Health Services question and answer forum hosted by Columbia University, entitled "Go Ask Alice" at http://www.goaskalice.columbia.edu/6234.html (Accessed 17 April 2010).

In vanilla relationships, withdrawal of consent presents little difficulty. A woman who cries out "No, stop, get off me!" has clearly withdrawn her consent and the sex must stop. A sexual partner who begins crying during sex is presumptively no longer enjoying themselves. BDSM is more complex. A submissive may wish to protest and scream, all the while enjoying the futility of their efforts; a submissive enduring genitorture may cry, while deriving enormous satisfaction. Another mechanism is necessary.

The usual means of communication is via a *safeword*. A safeword is a nonsexual word which the submissive can utter in order to withdraw consent. The archetypal system of safewords is that of 'traffic lights', where if the submissive utters the word 'yellow' it means *slow down, I am close to my limits and can take little more* while the word 'red' means *the scene must stop right now.* Other safewords might be words such as *banana* or *motorcycle* – the safe word can be any word which will be remembered by the submissive under duress, and which is unlikely to be spoken in any normal sexual context:

> *By using a safeword, the submissive may yelp, wince, cry, plead for mercy, scream for the cops, threaten revenge, and so forth, and such behaviours need not overly concern the dominant. They are "part of the game." But if the submissive utters their safeword, the dominant must respond.*[38]

Similar systems for the withdrawal of consent can be seen in other contexts related to assault. For instance, consider a martial artist 'tapping out' by tapping the floor or their opponent to indicate their submission in a match.[39] Continued infliction of harm after that 'tapping out' would in all likelihood be criminal assault.

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[38] Wiseman, J (1996) *SM101: A Realistic Introduction*, 2nd ed, Greenery Press, San Francisco, p. 52.

[39] For example, Articles 5.1.1 and 5.1.2 of the International Brazilian Jiu-Jitsu Federation Rules (the world body for this sport) state "Submission occurs when a technique forces an opponent into admitting defeat by: (1) tapping with the palm against his opponent or the floor in a visible manner [or] (2) tapping with his feet on the ground (if he is unable to use his hands)." *International Brazilian Jiu-Jitsu Federation* Internet site, www.ibjjf.org/rules accessed 28 June 2010.

Safewords within the BDSM community are regarded as 'no-fault'. A submissive should not be made to feel that they have failed or disappointed a dominant by using a safeword, else they may feel inhibited from doing so in future, even when in significant distress.[40]

Hard and soft limits

'Limits' are things which a BDSM practitioner simply will not do. Both dominants and submissives commonly have limits, and these are often used as an early measure of compatibility.

> *In BDSM, limits are any kind of boundary or restriction placed on one or both partners. They can be physical (e.g., a bad knee or back might make certain types of bondage unsafe), mental or emotional (e.g., something that triggers a phobia or recalls a past trauma), or experiential (anything that one partner just isn't ready for yet)."*[41]

A 'hard' limit is something the practitioner will not contemplate under any circumstances. A 'soft' limit, on the other hand, is something the submissive does not wish to do, but in appropriate circumstances it may be possible to negotiate consent in this area.[42] For instance, a submissive might assert, as a soft limit, the use of gags. In

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[40] This aspect is discussed at MissBonnie* (2009) "Safeword" *Collar N Cuffs*, http://collarncuffs.com/resources/doku.php?id=safewords (Accessed 17 April 2010). It is also discussed at Lord Suttle* (undated) "A Study of Safewords" *Albany Power Exchange* http://www.albanypowerexchange.com/BDSMinfo/safe_words.htm (Accessed 17 April 2010).

[41] Slakker* (undated) "Limits and Negotiations" *Albany Power Exchange* http://www.albanypowerexchange.com/ BDSMinfo/limits.htm (Accessed 17 April 2010).

[42] See the definition of hard and soft limits under "Limits" at CY Worldwide* (2007) "BDSM Bondage and Fetish Glossary and Definitions, *The BDSM Store*, http://www.bdsmstore.com/glossary.html (Accessed 17 April 2010).

time, however, once a relationship of trust has been established with a particular dominant, they may work together towards opening this experience. Without this detailed process and without very explicit consent, a soft limit places an activity outside the submissive's consent. Within the BDSM community, a claim by a person to have no limits "*is usually a sign of an inexperienced player who does not yet know what their limits are. In reality, even the most hardened and experienced players have limits.*"[43]

Checklists and other negotiation aids

The range of practices undertaken by BDSM participants has led to the development of several devices to allow participants to quickly negotiate very specific forms of consent. Perhaps the most common is a 'BDSM checklist'. Several versions are available freely online.[44] One of these is reproduced at Appendix A. It contains dozens of different practices, and enables each participant to indicate first, their level of interest in a particular activity and second, their level of experience with that activity.

Checklists are a useful tool for fleshing out specific aspects of consent. The sheer number of activities indicates that mere consent to 'do BDSM' with a partner would be effectively meaningless.

A submissive who completes a checklist to indicate his or her basic sexual preferences is not taken to be providing general consent to undertake those activities with anyone who happens to come along. Unless a checklist is completed with a specific consent-situation

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[43] MissBonnie (2009) "Limits" *Collar N Cuffs*, http://collarncuffs.com/resources/doku.php?id=limits_negotiations (Accessed 17 April 2010).

[44] A good example, the checklist attached at Appendix A, was found on the *Latches* website at http://latches.webslaves.com/checklist.htm (Accessed 17 April 2010).

in mind, it provides evidence of general sexual inclinations, not evidence of episodically-specific consent.

Contracts

If BDSM is a strong element of a couple's relationship, they might draw up a 'slavery contract' setting out the rights and obligations of each party in the relationship. Such contracts usually declare the nature of the relationship; specific practices which the couple wishes to engage in; specific practices which the couple will not engage in; and the extent to which the relationship will be monogamous. A contract might also state the couple's safewords, and set out a mechanism for amending and/or ending the contract.[45] A sample contract is at Appendix B.

A BDSM 'contract' of the type described here is not valid for the purposes of contract law. It would fail on the basis that it is an agreement between two people within their private relationship, not intended to create a legal relation between them;[46] or on the basis that public policy interests inhibit the court from enforcing the agreement.[47]

However, a contract can be a strong indicator of consent. If a slave has signed a 'contract' indicating their consent to percussive play using a strap, it is reasonable for their dominant partner to expect that the consent is enduring – provided consent can be withdrawn through the use of a safeword.

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[45] A general discussion of BDSM contracts can be found at MissBonnie (2009) "D/s Contracts" *Collar N Cuffs*, http://collarncuffs.com/resources/doku.php?id=d_s_contracts (Accessed 17 April 2010).
[46] *Balfour v Balfour* [1919] 2 KB 571 is authority for the presumption that agreements between domestic partners are presumed not to be intended to create legal relations.
[47] The leading case is *Wilkinson v Osborne* (1915) 21 CLR 89.

Comparison with vanilla consent

Consent in vanilla sex is, in many ways, ill-defined and legally contested. A person need not actually establish consent to sex: it is sufficient that they are not aware of, or reckless as to, the *lack* of consent.[48] Consent may be vitiated by a range of factors such as intoxication, mistake as to the nature of the act, mistake as to the person of the other party, or duress. However the relevant consent is consent to 'sexual intercourse'. Even within vanilla sex, variations in sexual activity are sufficient that this conception of consent is quite vague. What, exactly, does consent to 'sexual intercourse' cover?[49] By consenting to sexual intercourse, has a woman consented to oral sex? Has she consented to anal sex? Has she consented to rough, painful penetration?

BDSM, on the other hand, has far more specific protocols. This does not mean that all couples follow the protocols, and does not mean that a wrongdoer might not proceed to undertake criminal assaults on a bound person despite their lack of consent. In a BDSM context there are at least mechanisms to enable consent to be explicitly negotiated, modified, and withdrawn. As Hanna states:

> Those who engage in safe and consensual S/M have much to teach the rest of us about what consent really means. Within the S/M context, consent is not merely the absence of "no," but a far more qualitative conversation that involves negotiation, the sharing of fantasies and the setting of limits.[50]

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[48] *Crimes Act 1900* (NSW) s.61HA.

[49] Note, on this point, recent research from the Kinsey Institute in the USA which indicated widespread disagreement (from a social perspective, not a legal perspective) about what actually constitutes 'having sex': Sanders et al (2010). Misclassification bias: diversity in conceptualisations about having 'had sex.' *Sexual Health* 7(1): 31–34.

[50] Hanna, C (2001) "Sex is Not a Sport: Consent and Violence in Criminal Law", *Boston College Law Review*, vol. 42, p. 247. Note that Hanna is ultimately a critic of BDSM, for reasons discussed below and in Chapter 5.

BDSM and domestic violence

Two of the signal features of BDSM – physical violence and emotional dominance – are also the characteristic features of domestic violence. The current author is ready to contemplate the validity of BDSM as a form of sexuality, yet the current author would not tolerate, let alone defend or extol, domestic violence.

The relationship between the two will be explored during this thesis, particularly when considering feminist views. Yet it is important at the outset to present, from the perspective of the BDSM community, the difference between the two. The question of whether the *law* should accept this difference remains open for current purposes.

BDSM practitioners clearly differentiate between their own sexual practices and domestic violence. Bywater states:

> There is a difference between the masochist and the damaged, abused woman, though the latter sometimes tries to cope with her situation by attempting to persuade herself that she is eroticising, rather than perpetuating, her own injuries. Plenty of men – not sadists but bastards – are ready to prey upon these women; but that is nothing to do with sadomasochism and everything to do with simple old-fashioned misogynistic nastiness and opportunism.[51]

[51] Bywater, M (1998) "A Surrender of Power" (Book review of Phillips, A, *A Defence of Masochism*), *New Statesman*, 17 April 1998, p. 46.

Wiseman presents a list of factors he regards as differentiating BDSM from abuse, including the following:

- SM play is negotiated and agreed to ahead of time. Abuse is not.
- SM play can be done in the presence of supportive others. Abuse needs isolation and secrecy.
- SM play has responsible, agreed-upon rules. Abuse lacks such rules.
- SM players do not feel that they have the intrinsic right, by virtue of their gender, income, or other external factors, to control the behaviour of their partners. Abusers often do.[52]

BDSM practitioners such as Wiseman appear reluctant to acknowledge that BDSM may provide particularly attractive camouflage for a perpetrator of domestic violence. Such an offender may manipulate their victim into a situation where forms of abuse can be passed off as 'BDSM play'. At later points this thesis will resume this discussion, first from the perspective of feminist theory, and subsequently as a test for a proposed legal consent-mechanism. If the law is to allow consent to harm within BDSM, it must be able to adequately differentiate between BDSM and domestic violence.

Conclusion

BDSM encompasses an extraordinarily broad range of sexual practices ranging from the mild and safe, to the outrageously dangerous. The unifying feature of BDSM sexual

[52] Wiseman, J (1996) *SM101: A Realistic Introduction*, 2nd ed, Greenery Press, San Francisco, pp. 41-42.Note that Wiseman's list is far more extensive, although not all of his examples are equally compelling.

activities is that they all involve the exchange of power. A submissive yields power to a dominant, who then exerts that power for their mutual gratification.

BDSM practitioners have developed a range of 'consent aids' including safewords, limits, checklists, and contracts. These enable participants to gain a very clear understanding of one another's sexual preferences and boundaries. However it cannot be guaranteed that these will be used effectively, or indeed at all, by all participants.

With a sound understanding of BDSM in place, it is now possible to examine *Brown* as a very specific BDSM situation which resulted in a number of participants being jailed, despite the consent of the submissives.

CHAPTER THREE – R V BROWN

An ironic observation made by myself and others at the Old Bailey was the fetish wear of the Judges and Barristers. You know the deviant sort of stuff, horsehair wigs, red robes, black robes, fancy shoes etc etc.[1]

The facts leading to police operation *Spanner* and the arrest of some participants has been set out in Chapter One. The relevant charges were preferred under s.47 of the UK *Offences Against the Person Act 1861*:

> Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable ... [to a maximum penalty of five years imprisonment].

At common law, the words "actual bodily harm" are not judicially defined, but are given their normal meaning,[2] provided the harm caused is not merely transient or trifling.[3]

Three defendants were charged with the more serious offence under s.20 of the same Act:

> Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of [an offence], . . . and shall be liable ... [to a maximum penalty of five years imprisonment].

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[1] R.Jaggard, a defendant in *R v Brown*, in an internet body modification e-zine article regarding his experience. http://www.bmezine.com/news/people/A10101/spanner/ accessed 12 January 2010. It is impossible to definitively authenticate the article as being written by Jaggard, so this material should be treated with caution. No conclusions are drawn from it in this paper.

[2] *R v Metharam* [1961] 3 All ER 200.

[3] *R v Donovan* [1934] 2 KB 498. *Metharam* and *Donovan* essentially state the law in the UK and in all Australian jurisdictions, with a subtle variation in Victoria, where the equivalent offence is that of "causing injury" (*Crimes Act 1958* (Vic), s.18).

Grievous bodily harm, at common law, simply means "really serious injury".[4] Wounding, on the other hand, requires the breaking of the skin and damage beyond the outer layer of skin.[5]

The defendants each pleaded guilty to the charges once the trial judge had ruled that the consent of the 'victims' in each case was not relevant to the offences. They were sentenced to substantial prison terms, from two years and seven months (Brown) to four years and six months (Laskey, who was also charged with keeping a disorderly house, producing an obscene article, and possessing a child pornography image). The defendants appealed both the ruling regarding consent, and the gravity of their sentences, to the Court of Appeal. The Court of Appeal upheld the ruling (and thus the convictions), but substantially reduced the sentences, now ranging from three months (Brown) to twenty-one months (Laskey). The defendants indicated an intention to appeal to the House of Lords, and the Court of Appeal certified the following question for the Law Lords:

> Where A wounds or assaults B occasioning him actual bodily harm in the course of a sadomasochistic encounter, does the prosecution have to prove lack of consent on the part of B before they can establish A's guilt under section 20 and section 47 of the 1861 Offences Against the Person Act?[6]

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[4] *DPP v Smith* [1961 AC 290, 334. Again, this states the law in Australian jurisdictions except Victoria, where the formula "serious injury" is inserted directly into the statute (*Crimes Act 1958* (Vic), s.16, 17). Note however that all jurisdictions have developed other circumstances of aggravation relating to assaults (sp the degree of harm is not the only factor relevant to aggravation).

[5] *R v Wood & McMahon* (1830) 168 ER 1271. *R v Smith* (1837) 173 ER 448. This common law definition applies in Australia to all jurisdictions except South Australia, Victoria and the Northern Territory, none of which retain a separate crime of wounding.

[6] *R v Brown* [1994] 1 AC 212, 215.

Judgments in the House of Lords

Five Law Lords heard the appeal in *Brown*. Three answered the certified question 'no' (thus ruling against the appellants) and two answered 'yes'. Their views are outlined below.

Lord Templeman

Lord Templeman commenced by noting that common assault (i.e. assault causing no harm) is not an offence if the consent of the victim is given, and he noted that a range of other activities, such as surgery, circumcision, ear piercing, and tattooing are not assaults where consent is given. He then set out to find a rationale underpinning these exceptions.

In *R v Coney*,[7] a prize (bare knuckle) fight was held to be unlawful, despite the consent of the participants, because it constituted a breach of the peace, and because the injury of the participants was contrary to the public interest. In *R v Donovan*,[8] a man was convicted after beating a prostitute, with her consent. It was held to be unlawful to beat someone in such a way that injury was likely. Finally, in *Attorney General's Reference (No. 6 of 1980)*,[9] the court set out the relevant test: that it is not in the public interest for harm to be caused, regardless of the consent of participants, unless there is a countervailing legal right or public interest.

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[7] *R v Coney* (1882) 8 QBD 534
[8] *R v Donovan* [1934] 2 KB 498
[9] *Attorney General's Reference (No. 6 of 1980)* [1981] QB 715

Adopting the test in *Attorney-General's Reference (No. 6 of 1980)*, Lord Templeman set out to balance the public interests for, and against, sadomasochistic sex, acknowledging that the Parliament would be able to do the job in a better-informed manner than the Court. The first prominent characteristic of his assessment was his treatment of homosexuality. It is difficult to escape the conclusion that Lord Templeman saw homosexuality as intrinsically bad. He cited, for instance, a statement from the Court of Appeal in *Brown* in relation to a young man "corrupted" by the group including the appellants, who had since "settled into a normal heterosexual relationship," a fact which gave "some comfort"[10] to the Court. It is evident that the homosexuality of the men in *Brown* counted against the public interest, in the mind of Lord Templeman.

As a second factor, Lord Templeman raised the spectre of HIV/AIDS, noting that two of the participants had contracted HIV, one of them dying – although he noted that neither of them apparently contracted HIV as a result of the sadomasochistic group encounters.

The third factor is the risk of injury, although Lord Templeman himself noted that none of the participants in this case had been seriously injured: "It is fortunate that there were no permanent injuries to a victim though no one knows the extent of harm inflicted in other cases."[11]

It is curious that these three factors – the most significant factors leading Lord Templeman to the view that sadomasochistic sex was contrary to the public interest –

[10] *R v Brown* [1994] 1 AC 212, 235-236. Emphasis of "normal" added. Note that Lord Templeman was quoting – with obvious approval – from Lord Lane's opinion in the Court of Appeal.
[11] *R v Brown* [1994] 1 AC 212, 236.

included an irrelevancy (homosexuality), and two risks, neither of which had come to pass (HIV and injury).

Against these, Lord Templeman considered the argument of the appellants that "every person has a right to deal with his body as he pleases."[12] He quite properly noted the weakness of this argument, which if taken at face value would justify, for instance, consumption of hard drugs.

Lord Templeman's reasoning led to a conclusion which appears based more upon his personal moral code than upon the arguments canvassed above. He stated: "Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised."[13]

Lord Templeman answered the certified question in the negative.

Lord Jauncey of Tullichettle

Lord Jauncey's reasoning closely followed that of Lord Templeman. He reviewed the precedents listed above, and formed the view that the certified question could only be answered by considering where the public interest lay. His consideration of the public interest focused substantially on the *potential* for harm arising from sadomasochism, rather than the actual harm caused by the appellants' activities. He stated:

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[12] *R v Brown* [1994] 1 AC 212, 235.
[13] *R v Brown* [1994] 1 AC 212, 237.

> Without going into details of all the rather curious activities in which the appellants engaged it would appear to be good luck rather than good judgment which has prevented serious injury from occurring … When considering the public interest potential for harm is just as relevant as actual harm.[14]

He concluded, "I have no doubt that it would not be in the public interest that deliberate infliction of actual bodily harm during the course of homosexual sado-masochistic activities should be held to be lawful,"[15] and that if any more radical change should be made in recognition of changed public interests, the Parliament (rather than the Courts) should be the agent of change.

Lord Jauncey therefore answered the certified question in the negative.

Lord Lowry

Lord Lowry closely followed the reasoning of Lords Templeman and Jauncey, though he restated his consideration of the key precedents listed above, and added a substantial history of the statutory provisions under which the appellants had been charged. At the conclusion of this assessment he stated the view that "it is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason and that it is an assault if actual bodily harm is caused (except for good reason)."[16]

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[14] *R v Brown* [1994] 1 AC 212, 246.
[15] *R v Brown* [1994] 1 AC 212, 246.
[16] *R v Brown* [1994] 1 AC 212, 254.

In Lord Lowry's view BDSM was not a "good reason." He referred to sadomasochism as "a perverted and depraved sexual desire"[17] and stated:

> 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 can only encourage the practice of homosexual sado-masochism and 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.[18]

While Lord Lowry's views on homosexuality are more understated than those of Lord Templeman, it is curious that in the space of a few lines he twice refers specifically to *homosexual* sadomasochism (the word 'homosexual' appears nowhere in the certified question), and contrasts it with 'manly diversions.'

Lord Lowry answered the certified question in the negative, completing the majority.

Lord Mustill

Lord Mustill commenced his judgment by characterising the case as "a case about the criminal law of violence [whereas] in my opinion it should be a case about the criminal law of private sexual relations, if about anything at all."[19] In his view, the arrest of the defendants was based upon moral repugnance regarding their *sexual* conduct but, there being no appropriate sexual offence to capture the conduct, adventitious resort was had

[17] *R v Brown* [1994] 1 AC 212, 255.
[18] *R v Brown* [1994] 1 AC 212, 255.
[19] *R v Brown* [1994] 1 AC 212, 256.

to the law of criminal violence. On that basis, Lord Mustill was inclined to give a narrow reading to the provisions of the statute.

Unlike the majority judges, however, Lord Mustill found little assistance in the authorities. He was unable to accept the approach taken by the majority judges, of expressing a spectrum of levels of violence, then fixing (by reference to the public interest) a point at which consent could no longer be said to be effective; the presence of exceptions such as surgery complicated such an approach. Furthermore, consent itself is a complex concept, particularly where the consent may be to the *risk* of harm, or to variable levels of harm. Finally, the only other potential indicator, that of hostile intent, also required exceptions (or else well-motivated euthanasia, for instance, might be permissible). On this basis he concluded that the authorities did not yield a "general theory of consent and violence"[20] which could simply be applied to the current case.

Lord Mustill then worked his way through a series of instances in which consent to violence has been considered (violence causing death, duelling, prize fighting, contact sports, surgery, lawful correction, dangerous pastimes, bravado, religious mortification, rough horseplay, and fighting), and formed the view that, taken together, these did not yield a general theory either; rather, "the court is in such cases making a value-judgment."[21] Having obtained no principled guidance from the authorities, Lord Mustill stated:

[20] *R v Brown* [1994] 1 AC 212, 264.
[21] *R v Brown* [1994] 1 AC 212, 265.

> I prefer to address each individual category of consensual violence in the light of the situation as a whole. Sometimes the element of consent will make no difference and sometimes it will make all the difference. Circumstances must alter cases.[22]

He proceeded with this approach, commencing by carefully separating his own moral views from his duties as a judge, and taking as his philosophical point of departure a liberal view[23] expressed in the following terms:

> … the state should interfere with the rights of an individual to live his or her life as he or she may choose no more than is necessary to ensure a proper balance between the special interests of the individual and the general interests of the individuals who together comprise the populace at large.[24]

Implicitly, however, this is the opposite of the question posed by the majority judges. Where Lord Mustill asks whether there are considerations sufficient to justify removing this private freedom, the majority Lords ask whether there are considerations sufficient to overcome the public interest in prohibiting violence.

Lord Mustill finally considered whether there are factors which may justify interfering with the right of a person to consent to harm in the course of sadomasochistic sex. He considered infection, HIV/AIDS, inadvertent grave harm, and the potential for 'corruption' of the young. He found that none of these provided sufficient reasons to set aside the capacity to consent. Accordingly, he answered the certified question in the affirmative.

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[22] *R v Brown* [1994] 1 AC 212, 270.
[23] Lord Mustill expressly disclaimed this as an endorsement of liberalism, but it is clearly a liberal view.
[24] *R v Brown* [1994] 1 AC 212, 273.

Lord Slynn of Hadley

Lord Slynn arrived at an affirmative answer by a different route. He considered the same three principal authorities as the other judges (*Coney*, *Donovan*, *Attorney-General's Reference No. 6 of 1980*) and along with them considered an Australian case, *Pallante v Stadiums Pty Ltd (No. 1)*.[25] He noted that *Coney*, in particular, focused on prize fighting where the death or serious injury of a participant was very likely; and where the purpose was to draw crowds who would gamble, become excited, and fight amongst themselves (the implications for public order thus becoming significant). He adopted the same 'spectrum of harm' approach adopted by the majority judges, but fixed the limits of consent between actual and grievous bodily harm:

> … the line should be drawn, between really serious injury on the one hand and less serious injuries on the other. I do not accept that it is right to take common assault as the sole category of assaults to which consent can be a defence and to deny that defence in respect of all other injuries. In the first place the range of injuries which can fall within "actual bodily harm" is wide …[26]

Consequently, unlike Lord Mustill who considers the authorities inadequate, Lord Slynn found that they supported consent as a defence to assault causing actual bodily harm in private. He recognised there were further policy issues to be considered, but his view was that parliament should undertake that task, which was unnecessary for resolution of the current case. He thus answered the certified question in the affirmative.

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[25] *Pallante v Stadiums Pty Ltd (No. 1)* [1976] VR 331. Lords Jauncey and Mustill also considered this case but neither found it persuasive.
[26] *R v Brown* [1994] 1 AC 212, 280.

Judgment in the European Court of Human Rights

The defendants completed their prison sentences, and filed to appeal their case to the European Court of Human Rights on the basis that the prosecution violated the European Convention on Human Rights, Article 8 (which guarantees respect for "private and family life").[27] The UK Government, however, contended that its law, and its application of the law, did not breach the convention because it was "for the prevention of disorder or crime", one of the circumstances in which Article 8 contemplates an exception.[28]

The Court unanimously found for the government, stating:

> The Court considers that one of the roles which the State is unquestionably entitled to undertake is to seek to regulate, through the operation of the criminal law, activities which involve the infliction of physical harm. This is so whether the activities in question occur in the course of sexual conduct or otherwise.[29]

The defendants had, therefore, exercised their appeals fully and unsuccessfully, however as the next chapter will indicate, the controversy regarding this case was far from complete.

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[27] The appellants also made this point before the House of Lords, and it was dealt with by some of the judgments, but was not central to the *ratio decidendi* of any judge and is therefore not discussed above.
[28] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, at www.echr.coe.int, accessed 13 January 2010
[29] *Laskey, Jaggard & Brown v The United Kingdom* [1997] ECHR 4, [43].

CHAPTER FOUR – RESPONSES TO BROWN

> *Some of the evidence of the activities of the defendants in* … Brown *clearly shocked some respondents, but they were equally shocked to learn that the sexual activities in which they had participated voluntarily for years without, as they thought, harming anybody, were regarded by the law as criminal.*[1]

An academic and public policy debate quickly followed *Brown*, taking up the question implicit in all five of the Lords' speeches: from the perspective of public policy, ought BDSM to provide a new consent-based defence to charges of actual or grievous bodily harm? This chapter traces the cases following *Brown*, the public policy debate which followed it, and examines similar cases in the USA, Canada, and Australia. Chapter Five then discusses the academic responses.

Responses in the UK

The Spanner Trust and concurrent publicity

Before the internet, BDSM participants in the UK had few points of contact other than through a limited, underground 'fetish scene' at clubs specialising in BDSM. *Brown* led to an increased self-awareness for BDSM practitioners as a group. The appeal to the European Court of Human Rights was funded in part through private donations managed by a lobby group, *Countdown to Spanner*, formed after the Court of Appeal judgment but before the appeal to the House of Lords. Donations were sufficient that a trust, the Spanner Trust, was formed to provide ongoing public advocacy on behalf of BDSM practitioners. The Spanner Trust remains in effect today, and was most recently

[1] United Kingdom Law Commission (1995) Discussion Paper 139, *Consent in the Criminal Law,* p. 134.

active in early 2009, opposing UK laws with the potential to make possession of BDSM related pornography unlawful.[2]

R v Wilson

The *ratio* in *Brown* has only been considered in depth in one further case in the UK, *R v Wilson*.[3] In *R v Wilson*, Mrs Wilson implored her husband to permanently mark her body with his name, as a sign of her devotion to him. He acquiesced somewhat reluctantly. Initially she wished him to personally tattoo his name on her breasts, but he had no knowledge of tattooing. Eventually they settled upon him branding his initials upon her buttocks using a hot knife. The wounds failed to heal effectively, Mrs Wilson sought medical treatment, and the matter was reported to police.

At first instance, the judge followed *Brown* and held that Mrs Wilson's consent provided no defence. On appeal, the court distinguished *Wilson* from *Brown* on two grounds, neither of which appear logical.

The first ground was that the judges in *Brown* had held that personal adornment such as tattooing was an exception whereby consent justifies bodily harm, and that "we cannot detect any logical difference between what the appellant did and what he might have done in the way of tattooing. The latter activity requires no state authorisation, and the appellant was as free to engage in it as anyone else."[4] This argument seems to suggest that where a hurt is designed to leave permanent scarring for personal adornment (as in *Wilson*) consent is valid, yet where a hurt is designed to accomplish a more transient

[2] The website of the Trust is at www.spannertrust.org
[3] *R v Wilson* [1996] 3 WLR 125.
[4] *R v Wilson* [1996] 3 WLR 125, 128.

pleasure while *not leaving permanent damage or scarring* (as in *Brown*), consent is not valid. This seems difficult to justify.

The second ground was that "Consensual activity between husband and wife, in the privacy of the matrimonial home, is not … a proper matter for criminal investigation, let alone criminal prosecution."[5] This observation leads to one of two conclusions, neither of which are supportable in light of *Brown*. The first would be that consensual sadomasochistic sex within a marriage would be justified with the consent of both parties, because it too would be "consensual activity between husband and wife, in the privacy of the matrimonial home." This conclusion finds no support in the majority judgments in *Brown*. The second conclusion would be that the sexuality of the defendants in *Brown* (gay men involved in group sexual activity) somehow criminalised activity which would be acceptable in a heterosexual, married environment. This would be inconsistent with the overt statements in *Brown* that the majority judges did not wish to discriminate against homosexual people.

The decision in *Wilson* sits uncomfortably beside *Brown*. This has been remarked upon academically:

> Beyond its ephemeral voyeuristic and entertainment value, *Wilson* is an unremarkable case, but it does valuable service by demonstrating that *Brown* was a regrettable decision that has become an unsatisfactory precedent. […] the criminal law is seriously defective when the Court of Appeal feels obliged to go as far as it did in *Wilson* in taking liberties with their Lordships' decisions so that common sense and justice can prevail.[6]

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[5] *R v Wilson* [1996] 3 WLR 125, 128.
[6] Roberts, P (1997) "Consent to Injury: How Far Can You Go?", *Law Quarterly Review*, vol 113, p. 37.

It appears that *Wilson* was an attempt to confine the outcomes in *Brown* without directly challenging them. The Court of Appeal was bound by *Brown* and therefore had to find some way to distinguish the facts in *Wilson* from those in *Brown*. Following *Wilson*, it seems that the following can be stated: The consent of the victim is no defence to criminal liability for the infliction of bodily harm in the course of BDSM. However, such consent might be effective if given within the confines of a marriage, and in the matrimonial home. Further, such consent may be effective if it leaves permanent scarring or marking in the manner of an adornment.

The Law Commission Assessment

The judges in *Brown* challenged the Parliament to review of the role of consent in relation to bodily harm. Lord Templeman, for instance, stated, "Parliament can call on the advice of doctors, psychiatrists, criminologists, sociologists and other experts and can also sound and take into account public opinion."[7] In 1994, the UK Law Commission published a consultation paper entitled "Consent and Offences Against the Person". A second discussion paper, *Consent in the Criminal Law*, was released the following year.

The Law Commission attempted to understand how BDSM was characterised by its participants. Its contributors, unlike the defendants in *Brown*, were not under the immediate threat of criminal sanction and were thus able to present their views as a matter of public policy. The Commission's report presented substantial verbatim

[7] R *v Brown* [1994] 1 AC 212, 234-235.

testimonials by practitioners.[8] Neither the law nor the academic literature had previously considered BDSM so sympathetically. The Commission cited evidence to the effect that:

> [The aim of BDSM practitioners] is not pain *per se*, which they fear as much as anyone else, but pleasurable excitation which is linked, or becomes switched to, sexual pleasure. They may suffer some degree of injury, but they view this much as a sports player views the risk of injury which is inevitably found in most games. Another respondent said that SM sex is essentially a matter of role-playing. One person is the giver of "punishment", and the other is the receiver. They may frequently reverse roles. They may be both of the same sex or of different sexes. It greatly enhances the enjoyment for the receiver if he or she feels completely under the domination of the giver. Hence, temporarily, the giver is granted complete control. A third respondent said that SM games often involve "fantasies of domination and submission," and that the different roles are freely entered into and do not necessarily reflect the participants' roles in real life. These second and third factors, that SM sex is consensual and that roles may readily be reversed, were repeatedly stressed by respondents who had personal experience of the practice.[9]

Evidence before the Commission canvassed three specific issues. The first of these was that for a considerable group of people, BDSM related activity was a core element of their sexual self-expression and sexual fulfillment. One academic contributor stated:

> Although to the outsider what is going on may appear to be no different from casual or malevolent violence, for sadomasochists it is a meaningful part of sexual activity. Social meanings should normally be assessed from the standpoint of the participants in an activity, particularly within the field of sexual activity, given the

[8] United Kingdom Law Commission (1995) Discussion Paper 139, *Consent in the Criminal Law,* ch. 10, *passim.*
[9] United Kingdom Law Commission (1995) Discussion Paper 139, *Consent in the Criminal Law,* p. 137.

> social sensitivity surrounding the area and the sheer range of activities which possess sexual meanings for different people.[10]

The second important issue noted by the committee was that BDSM was a widespread and potentially dangerous activity, whose risks could be reduced by disseminating information regarding safe BDSM practice. However, the Committee noted that in the period following *Brown*, BDSM organisations were inhibited from providing such advice lest they be accused of aiding and abetting criminal conduct. For instance, the Committee heard that:

> For private sado-masochists, Spanner has had a very negative effect. There is a clamp-down on sado-masochism. Sado-masochists have no ready access to safe sex literature or safe practice literature. It has also discouraged people from coming to our clubs and social spaces – the network of safety advice.[11]

The result was that the decision in *Brown* had a perverse impact on their Lordships' stated concern for public welfare and preventing HIV transmission. People did not stop practicing BDSM as a result of the judgment, but were without guidance as to safe practice.

Finally, the Committee heard that *Brown* had strained the relationship between police and BDSM practitioners. This was primarily motivated by a desire to avoid self-incrimination:

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[10] United Kingdom Law Commission (1995) Discussion Paper 139, *Consent in the Criminal Law,* p. 145. The contributor cited was N. Bamforth.

[11] United Kingdom Law Commission (1995) Discussion Paper 139, *Consent in the Criminal Law,* p. 145. The name of the contributor – a masochist – was not given. This was not unusual in this particular report, given the reticence of contributors to 'out' themselves publicly as BDSM practitioners and, potentially, 'violent criminals'.

> Last year the gay community was very loath to give the police any advice at all in the serial murder case. It was only when information was given via the GALOP group[12] that the heterosexual murderer was identified … Illegality drives a wedge between the minority community and the police making people less willing to give information regarding the genuinely dangerous, in case they are prosecuted themselves.[13]

The Law Commission formed the provisional conclusion that BDSM practitioners should be able to consent to actual and grievous bodily harm which fell short of a 'seriously disabling injury.' The Commission stated:

> … nobody may give a valid consent to seriously disabling injury, but subject to this limitation the law ought not to prevent people from consenting to injuries caused for … sexual purposes.[14]

Unfortunately, the Law Commission never produced a final report to Parliament on the issue of consent to bodily harm. The Commission's consideration of consent was re-focussed to examine consent in sexual offences, in order to contribute to a Home Office law reform project. By the time the Commission was able to return to a focus on consent in relation to assault, it determined that the task was too great. In its Annual Report for 2000-2001, the Commission stated:

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[12] "GALOP works to prevent and challenge homophobic and transphobic hate crime in Greater London." See the group's website at www.galop.org.uk

[13] United Kingdom Law Commission (1995) Discussion Paper 140, *Consent in the Criminal Law,* p. 145. This quotation was given by the same contributor cited at fn 11 above.

[14] United Kingdom Law Commission (1995) Discussion Paper 140, *Consent in the Criminal Law,* p. 146. Note that this conclusion effectively represented a specific application of their broader conclusion that it should be possible for a person to consent to harm falling short of a seriously disabling injury.

> Bearing in mind the amount of work that would be required to reach conclusions on the very difficult and sensitive issues involved, and the improbability of any consensus being reached, we have now decided that it would not be worthwhile for us to produce any further report on this topic.[15]

Brown, consequently, remains valid law in the UK (perhaps as modified by *Wilson*).

Concurrent jurisprudence in the USA

Courts in the USA have, on several occasions, had to deal with the issue of consent to bodily harm for the purposes of BDSM activities.

In *People v Farrell*,[16] the defendant took his date to a hotel room, then slashed her (superficially) with razor blades and burned his initials into her breasts, thighs and buttocks with a cigarette, leaving permanent scarring. "Acts of sexual relation" occurred during this process. The defendant argued that the complainant had consented to the acts (essentially by her silence). The complainant argued (and the jury found) that her silence indicated fear, not consent.

Farrell has little to do with BDSM. Acts of violence occurred concurrently with acts of sex, and the violence may have had a sexual context for the perpetrator, but there is no sense in which the violent acts occurred for the gratification of the receiver. *Farrell* did, however, establish that consent is no defence to an assault of this character. Even if the

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[15] United Kingdom Law Commission (2001) Annual Report 2001, *A Year of Achievement*, p. 30. I am grateful to Ms Fiona Alexander of the Law Commission who clarified the somewhat confused outcome of this consultation process, and referred me to the 2001 Annual Report.

[16] *People v Farrell* 322. Mass 606; 78 NE 2d 697; 1948.

complainant had consented, the consent would have been invalid. Interestingly, on this point the court considered the English case *R v Donovan*[17] which significantly informed the House of Lords 45 years later in *Brown*.

The first consideration of sadmasochism *per se* came in *People v Samuels*.[18] At this time, sadomasochism was still regarded as a psychological disorder and the case was dealt with on that basis. The very first words of the judgment state that the defendant "recognised the symptoms of sadomasochism in himself."[19] Samuels filmed several scenes of sadomasochism in which he whipped a willing masochist. Cosmetics were used to make the whipping appear more severe than it actually was. Samuels provided the films to a contact from the Kinsey Institute, which was studying sadomasochistic sex. The Kinsey Institute sent them to a commercial developer, who notified police.[20] Samuels was charged with assault and indecency offences.

The masochist could not be found to testify. Samuels unsuccessfully raised a consent defence:

> … 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 such sports as football, boxing or wrestling … 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.[21]

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[17] *R v Donovan* (1934) 2 KB 498
[18] *People v Samuels* 250 Cal. App. 2d 501; 1967.
[19] *People v Samuels* 250 Cal. App. 2d 501, 504; 1967.
[20] The similarity with the accidental discovery of films in *Brown* is compelling, if legally irrelevant.
[21] *People v Samuels* 250 Cal. App. 2d 501, 513-14; 1967.

Samuels was convicted, and the case established a precedent that consent was no defence.[22]

In *People v Appleby*,[23] the defendant was convicted of assault and battery with a dangerous weapon (a riding crop).[24] Appleby and his victim, Cromer, were in an ongoing homosexual sadomasochistic relationship from which Cromer fled. In this case the masochist testified that he had never consented to sadomasochistic activity within their relationship, but participated in such activity under duress. Appleby argued a consent defence. The court preferred the evidence of Cromer that he had not consented, but in any case found that the consent would have been irrelevant. The court refused to distinguish between violence in a BDSM context and malevolent violence:

> 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.[25]

Both *Samuels* and *Appleby* were followed in *State of Iowa v Collier*,[26] in which a 'pimp' beat a prostitute who was working for him. She testified that he beat her when she returned after an all-day 'appointment' with no money, having consumed drugs with the client. Collier argued the prostitute had requested the beating for her own gratification to

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[22] See the discussion by an anonymous case reviewer in the *Harvard Law Review* (1968) "Note – Recent Cases – Consent of Masochist to Beating by Sadist is no Defence to Prosecution for Aggravated Assault – *People v Samuels*", vol. 81 (1967-68), pp. 1339-1342.
[23] *People v Appleby* 380 Mass. 296, 402 NE 2d 1051; 1980
[24] This has been the object of some unnecessary criticism in the liberal secondary sources. The judgment did not indicate that a riding crop is a dangerous weapon *per se*, but that it is so regarded when used for a violent criminal purpose.
[25] *People v Appleby* 380 Mass. 296, 402 NE 2d 1051, 1060; 1980
[26] *State of Iowa v Collier* 372 NW 2d 303; 1985

celebrate her birthday. Iowa allowed a statutory consent defence to assault in the case of "sport, social or other activity." On a literal reading, "other activity" could encompass anything, effectively defeating the assault statute. The Court construed the section more narrowly, concluding that BDSM did not fall within the bounds of "sport, social or other activity":

> it is obvious to this court 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.[27]

The first hints of a more permissive jurisprudence came in *People v Jovanovic*.[28] In *Jovanovic*, the defendant struck up an online conversation with the complainant, who disclosed to him that she was submissive in a BDSM relationship. They exchanged emails in which she discussed her BDSM-related fantasies. In late 1996 she went to his apartment and during the evening she was bound to a piece of furniture, had candle wax dripped on her genitals, and was penetrated sexually. The complainant stated that she did not consent; Jovanovic argued that the entire encounter was consensual.[29] He was charged with kidnapping, sexual abuse and assault.

Jovanovic sought to adduce in evidence copies of emails and instant messages sent to him by the complainant. Prosecutors objected under 'rape shield' laws (which prevent evidence designed merely to highlight the complainant's sexual history). The trial court excluded the evidence, and Jovanovic appealed. The Supreme Court of New York found that the rape shield laws had been misapplied, stating that the relevant evidence:

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[27] *State of Iowa v Collier* 372 NW 2d 303, 307; 1985. It is curious that the court referred to 'repeated' disapproval by other courts, when it introduced its survey of the authorities by noting how few cases were on point.

[28] *People v Jovanovic* 263 AD 2d 182; 700 NYS 2d 156; 1999.

[29] As will become apparent, no decision on facts has ever been made.

> … would also have permitted Jovanovic to effectively place the complainant in a somewhat less innocent, and possibly more realistic, light. For instance, the complainant made certain remarks in her e-mails, such as "rough is good," and "dirt I find quite erotic," for which she provided the jury with completely innocent explanations. Defendant was unable to plausibly offer alternative, more suggestive readings of such e-mail remarks, as long as the jury was unaware of the extent of the complainant's interest in sadomasochism.[30]

It is implicit in *Jovanovic* that the complainant's consent would have been relevant to the charges, if such evidence had been admitted. Clearly, it would have been relevant to the kidnapping and sexual abuse charges, neither of which would have been sustainable if consent were shown. Unfortunately the relevance of consent to the assault was never properly tested: Jovanovic refused a series of plea deals, and in late 2001 the charges were dropped.[31]

The final case was not, in the end, a case at all. Police raided a BDSM party in Attleboro, Massachussetts, in July 2000 and arrested two participants on a range of charges, some of which seem ridiculous (for example, possessing a masturbatory implement). One defendant was charged with assault for striking the buttocks of another participant with a wooden spoon – allegedly a dangerous instrument. The case was widely reported[32] and became popularly known as the 'Paddleboro' case. A support group, the Paddleboro Defense Fund, was established to raise money for the two defendants' legal costs.[33]

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[30] *People v Jovanovic* 263 AD 2d 182, 201; 700 NYS 2d 156, 171; 1999.

[31] The subsequent history is narrated in the judgment on Jovanovic's civil action for malicious prosecution, unreported but available online as *Jovanovic v New York, Bonilla and Fairstein* 2006 US Dist LEXIS 59165

[32] See, e.g. "Sadomasochistic Club Arrests in Attleboro" (wire credit: Associated Press) *The Boston Herald*, 10 July 2000.

[33] A great deal of information is available from the Paddleboro Defense Fund's website, www.paddleboro.com. Unfortunately, given the time which has elapsed since the case, the Internet

Their signature products were a wooden spoon emblazoned with "Paddleboro" and marketed as an "Official Paddleboro Dangerous Weapon", and a bumper sticker reading "If wooden spoons are outlawed, then only outlaws will have wooden spoons."[34]

The charges were eventually dropped, ostensibly due to irregularities with warrants and irregularities in the arrest process. The case is important because it resulted in a public coalescence of the American BDSM community, and because it exposed the fraught relationship between BDSM and the 'vanilla' public:

> Attleboro Mayor Judith H. Robbins … told the *Providence Journal* that she "does not want these kind of people in [her] community." Attleboro is a place of small businesses and triple-decker houses, with a sign at the highway exit proudly advertising the Boys Division Basketball victory. The prosecution's support seems to be coming not from high moral outrage, but rather from New England Puritan not-in-my-backyard objections. Letters to the *Providence Journal* complain about the "negative attention" being lavished on the town, and Attleboro locals have complained about the rougher elements they felt SM parties introduced. Most guests at the Attleboro party were not locals. In that sense, this is a classic American clash: one person's inalienable rights are another person's ruined neighborhood.[35]

In summary, the US law seems to be in much the same position as that of the UK: criminality for assault in the course of sadomasochistic sexual activity cannot be vitiated by consent. The USA has, however, lacked a case parallel to *Brown*, as the consent of the victim in every case other than *Samuels* was contested, and in no case has the victim testified, as they would have in *Brown*, on behalf of the defendant.

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domain name has expired. However the site has been archived and can be viewed using the Wayback Machine application at www.archive.org (accessed 10 Feb 2010).

[34] A parody of a popular gun-rights slogan.

[35] Chihara, M (2000) "Paddleboro" www.nerve.com (accessed 10 Feb 2010).

Canadian precedent

In Canada's only BDSM case, *R v Welch*,[36] the defendant was charged with aggravated rape (rape in which bodily harm is caused) after a sadomasochistic encounter. Consent was contested, but the facts were not put to the jury because the trial judge ruled consent to be irrelevant. The Ontario Court of Appeal reviewed the British and US precedents, as well as a key prior Canadian Case (*R v Jobidon*,[37] relating to consensual participation in a fistfight).

The Canadian statute[38] is slightly different in that assaults are defined to be without consent. The face of the statute thus implies that consent should provide a defence. In *Jobidon* and *Welch* the courts clarified that common law limits apply to consent. Thus circumstances such as surgery do not provide exceptions to assault laws (as they do in the UK); rather, they establish the limits on the consent which can be given under the statute. In general, the precedent established in *Jobidon* and followed in *Welch* is that consent cannot be given for 'no good reason'. BDSM was not considered to be a good reason:

> The sadistic sexual activity here involved bondage (the tying of the victim's hands and feet) and the intentional infliction of injury to the body and rectum of the complainant. The consent of the complainant, assuming it was given, cannot detract from the inherently degrading and dehumanizing nature of the conduct. Although the law must recognize individual freedom and autonomy, when the

[36] *R v Welch* 25 OR 3d 665, [1995] CanLII 282.
[37] *R v Jobidon* [1991] 2 SCR 714, [1991] CanLII 77.
[38] *Criminal Code* (Can) s.265(1)(a).

> activity in question involves pursuing sexual gratification by deliberately inflicting pain upon another that gives rise to bodily harm, then the personal interest of the individuals involved must yield to the more compelling societal interests which are challenged by such behaviour.[39]

Brown and BDSM in Australian law

Brown has rarely been referred to in Australian law, and never in a case on similar facts. It was cited as evidence for the general proposition that one cannot consent to assault, in order to refuse bail to an Aboriginal man who sought to undergo traditional punishment (being speared through the leg, punched, struck with boomerangs, and having boomerangs thrown at him) for homocide.[40] Lord Templeman's "Cruelty is uncivilised" dictum has been quoted twice by the same judge, but never in a case relating to BDSM.[41]

BDSM has been considered in manslaughter cases. In *Boughey v R*,[42] the defendant (appellant) was convicted of murder after he participated in sex with his victim, while pressing on her carotid artery (a dangerous practice which reputedly increases sexual arousal). The argument that he did so with her consent, and without malice, gave him no benefit, as his conduct was, within the terms of the Tasmanian *Criminal Code*, likely to cause death.[43]

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[39] *R v Welch* 25 OR 3d 665, [1995] CanLII 282.
[40] *Barnes v R* [1997] NTSC 123.
[41] By Sully J in *R v McDonald* [2001] NSWCCA 301 (neglect of a mentally ill young man); and again in *R v Hendradinata; R v Rossi; R v Antaredjo* [2003] NSWCCA 161, [12] (extortion and beating).
[42] *Boughey v R* (1986) 161 CLR 10.
[43] *Criminal Code* (Tas) s.157(1).

Brown was directly considered in *R v McIntosh*, in which Vincent J gave the fullest current exposition of the law in relation to BDSM in Australia. In this case, erotic asphyxiation[44] led to the death of a participant. In that case, Vincent J stated:

> First, it is not, of itself, and I repeat that expression, of itself, in the case of consenting adult persons, contrary to the law of this jurisdiction to engage in activities that could be described as bondage or sexual sadomasochism.
>
> Second, the possibility that an activity involves the application of physical force to another and is accompanied by a real risk of even quite serious injury does not, of itself, render that activity unlawful. If that were the case many sporting contests would become unlawful.
>
> Third, apart from some special circumstances which the law has guarded carefully, and which are not present here, no recognition will be accorded to the consent of an individual to the infliction of significant physical injury upon himself or herself.
>
> In my opinion, if the sadomasochistic activity or bondage activity to which a victim consents involves the infliction of any such injury or the reckless acceptance of the risk that it will occur, then the consent of the victim will not be recognized.[45]

The Human Rights (Sexual Conduct) Act 1994

In 1994, the United Nations Human Rights Committee determined that the Tasmanian law criminalising homosexual sex was a violation of the rights of homosexual people

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[44] Wrapping of a cord or similar ligature around the neck to restrict the flow of oxygen. This is known within BDSM circles as 'breath play' and is considered extreme and dangerous, for obvious reasons.
[45] *R v McIntosh* [1999] VSC 358, [11]-[14]. This view was quoted with approval in *R v Stein* [2007] VSC 300.

under the *International Covenant on Civil and Political Rights.*[46] In response, the Commonwealth Parliament, relying on its external affairs power,[47] passed the *Human Rights (Sexual Conduct) Act 1994*, which effectively invalidated the Tasmanian provision.[48] The Act stated:

> Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.[49]

There has been some speculation that this Act may also extend to BDSM. Bronitt, for instance, stated:

> It may be strongly argued that the restrictions on consent in *Brown* constitute an arbitrary interference with privacy within the terms of the Commonwealth Act, and thus should not apply in the common law in Australia.[50]

This view is almost certainly too optimistic, for six reasons. First, any purposive interpretation of the Act will recognise that the parliament was addressing itself primarily to homosexual sex. None of the second reading speeches in the Parliament addressed the question of BDSM.[51]

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[46] *Toonen v Australia* (1992) UNHRC 488/1992
[47] *Constitution*, s. 51(xxix).
[48] For inconsistency, under s. 109 of the *Constitution*.
[49] *Human Rights (Sexual Conduct) Act 1994* s. 4(1).
[50] Bronitt, S (1995) "Protecting Sexual Privacy Under the Criminal Law: *Human Rights (Sexual Conduct) Act 1994* (Cth)" *Criminal Law Journal* vol. 19, 228.
[51] The relevant dates of debate are 12,13 and 19 October 1994 (House of Representatives) and 9 December 1994 (Senate).

Second, despite the broad language in the provision, there are probably implied limitations. For instance, incestuous sex between adults would be protected on a literal reading of the provision, yet one would expect much more clear language if the parliament was to overturn such a longstanding law. Once the existence of such implied limitations is established, it becomes an open question whether BDSM should also be considered outside the limits of the Act.

Third, the act refers to 'sexual conduct'. If this phrase means 'conduct for sexual gratification' then BDSM may fall within the provision. However, the very complexity identified in *Brown* was that the conduct is equally 'violent conduct'. If a court were to separate the violent aspects of a BDSM participant's conduct, from those involving more customary 'sexual' conduct, it would be possible to place that violent conduct outside the ambit of the Act.

Fourth, the meaning of 'consenting' would require clarification. The heart of the issue in *Brown* is whether consent can actually be given to harm arising from BDSM. If such consent cannot be given, then it is plausible to argue that BDSM participants cannot fall within the provisions of the *Sexual Conduct* Act.

Fifth, the interpretation in *R v McIntosh* of the state of the law in relation to BDSM in Australia is inconsistent with Bronitt's interpretation. While this is a decision of a single judge in a Supreme Court, it has since been approved (in the same court) and never departed from by a higher authority.

Finally, the provisions of the Act refer to arbitrary interference. A prosecutor, relying on *Brown*, could argue that a restriction on BDSM is not arbitrary, because it is calculated to

protect citizens from physical harm, and that this is a proper purpose for a law. Such an argument would, on current law, be powerful.[52]

Summary

This chapter has considered the judicial and governmental responses to *Brown* in four common law jurisdictions: The UK, Canada, Australia, and the US, where *Brown* can be read alongside a parallel jurisprudence which had been developing for some decades. All four jurisdictions reject a consent defence for BDSM, but none of them do so convincingly. *R v Wilson* casts significant doubt on *Brown* in the UK. The UK Law Commission was unable to reach a decision. In the USA, *Jovanovich* received some level of support from the courts, but was never finally brought to trial. In Canada, the judge in *Welch* was "not without some hesitation" in making a decision (to disallow consent as a defence).[53]

Finally, in Australia, the position of BDSM remains unclear. *Brown* has never been adequately considered on analogous facts, and despite occasional claims to the contrary, the Parliament did not, in the *Human Rights (Sexual Conduct) Act 1994*, move to clarify the law relating to BDSM.

Given this lack of resolution, the next chapter in this thesis turns from the legal authorities to the academic debate which has arisen since the decision in *Brown*.

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[52] This was essentially the argument relied on by the UK, opposing the appeal of the *Brown* case to the European Court of Human Rights.
[53] *R v Welch* 25 OR 3d 665, [1995] CanLII 282.

CHAPTER FIVE – THEORETICAL PERSPECTIVES

What might really be objectionable is that group sado-masochism (especially homosexual group sado-masochism) is not generally perceived as being part of sexual self-expression within stable pair-bonds, and that taking the emotional propaganda out of sex strikes at the root of the ideology of the family which has been heralded so frequently as a social good.[1]

Since *Brown* and *Wilson*, the issue of consent to BDSM has primarily become an academic discussion. A review of this academic literature has identified three primary theoretical approaches to *Brown*. This chapter outlines those approaches, and in doing so presents a review of the academic literature on *Brown* and on the legal position of BDSM more generally.[2]

This chapter commences by presenting the liberal view that the law has no place in the regulation of private sexuality, except to protect a third party from harm. This view finds some support in a liberal strand of feminism, which holds the view that BDSM may provide women with opportunities to establish and practice their own sexual self-determination. The more prominent feminist view, however, is that a consent-to-BDSM defence would be abused by rapists and perpetrators of domestic violence. In this conception, violent sex is always bad for women as a group, and therefore ought to be unlawful.

Finally, the orthodox view is presented: a paternalistic conservative perspective, which holds that assault causing actual bodily harm is not in the interests of the consenting

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[1] Bibbings, L and Alldridge, P (1993) "Sexual Expression, Body Alteration and the Defence of Consent", *Journal of Law and Society*, Vol 20(3), p. 360.

[2] This chapter benefited, during early stages of research, from the thoughtful outline of theoretical positions provided to the UK Law Commission by Paul Roberts of the University of Nottingham, and reproduced as Appendix C of the 1994 discussion paper *Consent in the Criminal Law*.

party, so it is proper for the law to intervene to save consenting victims from their own poor judgment.

It should be confessed at the outset that the presentations of the three key theoretical positions below will be necessarily abbreviated. Each of the three has a rich scholarly history, and a thesis of this length could not hope to describe them in detail in a manner which would do them justice. The author is thus left with the choices of abandoning a theoretical approach altogether, or presenting relevant theories in summary form. The latter approach has been adopted, accepting the weaknesses which will necessarily follow.

Liberalism

Liberals take, as their point of intellectual departure, Mill's seminal work *On Liberty*[3] and in particular his statement that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."[4] Mill's essay contains other passages which offer significant guidance on the issue of whether the law should prohibit BDSM. The following passage is compelling:

> But there is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it affects others, only with their free, voluntary and undeceived consent and participation. […] It comprises, first, the inward domain of consciousness … Secondly, the principles require liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of

[3] Mill, J (1859) *On Liberty*, reprinted in *Brittanica Great Books of the Western World* (1952), vol 43, p. 267. Page numbers in this chapter refer to the *Brittanica* page numbers.
[4] *ibid* p. 271

> doing as we like, subject to such consequences as may follow; without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.[5]

Mill's view was defended, expanded, and placed in a specifically sexual context by Hart in *Law, Liberty and Morality*. He stated:

> … interference with individual liberty […] is itself the infliction of a special form of suffering – often very acute – on those whose desires are frustrated by the fear of punishment. This is of particular importance in the case of laws enforcing sexual morality. They may create misery of a quite special degree. For both the difficulties involved in the repression of sexual impulses and the consequences of repression are quite different from those involved in the abstention from 'ordinary' crime. Unlike sexual impulses, the impulse to steal or to wound or even kill is not, except in a minority of mentally abnormal cases, a recurrent and insistent part of daily life. Resistance to the temptation to commit these crimes is not often, as the suppression of sexual impulses generally is, something which affects the development or balance of the individual's emotional life, happiness and personality.[6]

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[5] *ibid* pp. 272-273
[6] Hart, HLA (1963) *Law, Liberty and Morality*, p. 22.

If this position is accepted, then it should be possible to consent to assault for the purposes of BDSM provided there is full and informed consent, and provided there is no harm to others.

It is worthwhile at this point to distinguish liberalism from libertinism. The writings of the libertine, de Sade, portrayed graphic and shocking violence for sexual gratification, regularly resulting in the death of the tortured. The foundation of libertinism is, in fact, a variant of the natural law philosophy: "For Sade, following one's natural impulses and drives was a duty in itself, no matter how depraved the action or diabolical the consequences."[7] In de Sade's *The Philosophy of the Bedroom*, Madame de Saint-Ange justifies libertinism to the younger Eugénie thus:

> … let us be certain indeed that this species of disorders, to whatever extreme we carry them, far from outraging Nature, is but a sincere homage we render her; it is to obey her laws to cede to the desires she alone has placed in us; it is only in resisting that we affront her.[8]

For a libertine, if harm to others gives pleasure and discharges "the desires [Nature] alone has placed in us" it is justifiable. Thus the libertine would reject the liberal's acceptance that the law is right to interfere to prevent harm to others.

The distinction between liberalism and libertinism led to a trap for counsel in *Brown*. Lord Templeman relates that the appellants argued that "every person has a right to deal with his body as he pleases."[9] This seems to reflect libertinism more than liberalism,

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[7] Corkhill, A (2004) "Kant, Sade and the Libertine Enlightenment" in Cryle P & O'Connell L (ed) *Libertine Enlightenment: Sex, Liberty and Licence in the Eighteenth Century*, Palgrave MacMillan, Basingstoke, p. 62.
[8] De Sade (1795) *Philosophy of the Bedroom*, dialogue the third.
[9] *R v Brown* [1994] 1 AC 212, 235

which left it open to the rebuttal (that a person should not, for instance, be entitled to consume hard drugs) which Lord Templeman duly delivered. Hoople made a similar observation:

> I would argue that SM practitioners were never really represented in *R v Brown*. Rather, SM practitioners were represented *as* a stereotype, as a gross caricature of a Sadeian libertine, or, perhaps more to the point, as "normal" society's diabolical "other," as the social's Mr Hyde, so to speak.[10]

Liberal voices have been easily the most prominent in the academic and public debate following *Brown*. The campaigns run by the Spanner Trust and Paddleboro Defense Fund were liberal in nature. The liberal argument has been consistent – that BDSM does not harm participants or anybody else; and that in consequence there is no basis for restricting the autonomy of the participants. Falsetto stated:

> If the principal thought [of the House of Lords] is rooted in the recognition of the harm principle, it remains an unstable notion that there was, in this case, any harm at all. The victims suffered no permanent injuries of any kind. Moreover, harm is generally understood to be something which was unwelcome by the victim. In this case however, the "victims" did not see the acts as anything of the kind. For those participating in sado-masochistic behaviour, they perceive the actions as beneficial and pleasurable.[11]

A necessary implication of liberalism is that individuals are better judges of their own best interests than the law can be. As Athanassoulis argued:

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[10] Hoople, T (1996) "Conflicting Visions: SM, Feminism and the Law. A Problem of Representation", *Canadian Journal of Law and Society*, vol 11(1), p. 186.

[11] Falsetto, B (2009) "Crossing the Line: Morality, Society and the Criminal Law", *Cambridge Student Law Review*, vol. 5, p. 187

> … others can have a benevolent interest in me, but I have a fundamental connection to my own well-being which no one else, however well-meaning, can replicate. To make decisions on behalf of another person not only degrades that person by assuming that they are incapable of doing so themselves, but places an enormous burden on the person making the decision to get it right.[12]

Other liberals noted that the nature of the act very much depends on its definition and context. Bix, for instance, stated:

> … someone speaking at Hyde Park Corner could be described either as "a Nazi sympathiser preaching racial hatred" or as "a participant in political debate." Both descriptions would be accurate, but our inclination to protect the right of this person to speak might depend on the characterisation. Is *Brown* about sexual practices between consenting adults in private, or is it about a particular, deviant, legally unprotected sexual practice?[13]

Mullender noted that if the Lords had adopted a liberal perspective in *Brown*, they could have protected the interests of all who were subject to the law, by setting appropriate consent rules; consequently, for those who saw self-determination as more important than the protection of the law (and who wished to practice BDSM) the capacity to do so was there; while for those who want the protection of the law from assault, including in the context of BDSM, the protection of the law would remain (because consent would be required).[14]

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[12] Athanassoulis, N (2002) "The Role of Consent in Sado-Masochistic Practices" *Res Publica* vol 8, p. 142.
[13] Bix, B (1993) "Assault, Sado-masochism and Consent" *The Law Quarterly Review* v.109, pp. 541-2.
[14] Mullender, R (1993) "Sadomasochism, Criminal Law and Adjudicative Method: R v Brown in the House of Lords", *Northern Ireland Legal Quarterly*, vol 44(4), pp. 380-387. This point is particularly made on p. 387.

Feminism

Feminism cannot be described in simple, uncontroversial terms. Feminism is, rather, a convenient collective appellation for a broad range of perspectives which enable a critique of virtually any aspect of society (including its laws). The breadth of feminism, and the divergence of thought among feminists, means that even trying to define feminism is a complex academic exercise. Delmar stated:

> Many would agree that at the very least a feminist is someone who holds that women suffer discrimination because of their sex, that they have specific needs which remain negated and unsatisfied, and that the satisfaction of these needs would require a radical change (some would say a revolution even) in the social, economic, and political order. But beyond that, things immediately become more complicated.[15]

A range of seminal *expressions* of feminism, as opposed to *definitions* of feminism, cast light on the core social critique of feminism. For instance, de Beauvoir stated:

> She is defined and differentiated with reference to man and not he with reference to her; she is the incidental, the inessential as opposed to the essential. He is the Subject, he is the Absolute, she is the Other […]
>
> Now, what peculiarly signalizes the situation of woman is that she – a free and autonomous being like all human creatures – nevertheless finds herself living in a

[15] Delmar R (1986) "What is Feminism" in Mitchell J & Oakley A (eds) *What is Feminism?* Pantheon Books, New York.

> world where men compel her to assume the status of the Other. … How can a human being in a woman's situation attain fulfillment?[16]

Some feminists staunchly resist the notion of authoritative definition.[17] It is well beyond the task of this thesis to attempt to authoritatively define what feminism means, or to select from among the range of feminist perspectives an "ideal-type"[18] to apply to an analysis of *Brown*.[19] Instead, the approach will be to draw from the existing literature on *Brown* the key self-identified feminist themes. This does not mean other feminist authors might not raise other arguments about *Brown*; it simply means they have not done so in the current literature.

A review of the literature suggests two distinct feminist arguments in relation to *Brown*. The first perspective, liberal feminism,[20] considers that women, as much as men, are entitled to pursue sexual self-expression and sexual fulfillment.[21] Consequently, consensual BDSM must be supported where it represents the free sexual self-expression of the participants. Pa, a proponent of this view, states:

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[16] De Beauvoir, S (1953) "Introduction" to *The Second Sex*, reprinted in Nicholson, L (1997) *The Second Wave – A Reader in Feminist Theory*, Routledge, New York, pp. 13-17.

[17] An excellent discussion of this debate can be found in Thompson, D (2001) *Who's Afraid of Defining Feminism?* Paper given to the Australian Womens Studies Association conference, Macquarie University, 31 Jan – 2 Feb 2001.

[18] This term is used here in the Weberian sense: see Weber M (1949) *The Methodology of the Social Sciences*, The Free Press, Glencoe.

[19] Any such attempt would be fraught in any event, leaving the current author open to accusations of raising a straw person, or to more general arguments that the wrong "ideal type" has been chosen.

[20] Again, definition presents difficulties. "Liberal feminism" and "Critical feminism" will be two terms used in this paper in order to identify the positions described below. However these are not 'authoritative' terms in the usual sense and are not posited as such.

[21] This view was identified by Weinberg, Swensson and Hammersmith as the "Sexual Autonomy" model of discourse about sexuality, which was particularly associated with feminist authors writing about sex from a female perspective, where the woman was not merely the object of sexual activity. Weinberg, Swensson and Hammersmith (1983) "Success at Work and Play: Sexual Autonomy and the Status of Women: Model of Female Sexuality in US Sex Manuals from 1950 to 1908" *Social Problems* Vol. 33, pp. 312-324. For further discussions of female sexuality from a liberal feminist perspective see, for example, Easton D and Liszt C (1997) *The Ethical Slut*, Greenery Press, San Francisco; Gerhard J (2001) *Desiring Revolution: Second Wave Feminism and the Rewriting of American Sexual Thought, 1920 – 1982*, Columbia University Press, New York; and Willis E (1992) *No More Nice Girls: Countercultural Essays,* Wesleyan, New York.

> Regulating sex is incredibly complicated because sex is complicated. This is particularly true given how our society overburdens the significance of sex, casting "rational" sexual practices as foundational for a good social order and regulating desire in the service of promoting community health […] deviant sexual practices are viewed as unique in their ability to destabilize social orders on a very intimate level. However, sex laws should be shaped by social realities based on an honest assessment of what is actually occurring in private society, rather than romanticized conceptions of coquettish procreative love which fictionalises carnal pleasures as fitting within some logical order.
>
> Legal constructions of sexuality often abnegate the ineffable and pluralistic nature of pleasure. By dismissing the abberant as violence, the law strips the experience of its humanity and social worth. In understanding S/M sex, we must first hold back this reductive strategy and acknowledge how and why S/M sex may invoke certain emotive responses. S/M undermines desire's presumed autonomy, shows the constructed nature of sexuality, and disputes the romantic myth of sex as natural and spontaneous.[22]

Hanna also presents this argument, although in the end she does not find it sufficiently compelling:

> Sex and erotic desire can be positive and liberating for women, and some have argued that the question of S/M is intricately related to issues such as abortion and access to birth control, fundamentally being a question of sexual autonomy, not sexual violence.[23]

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[22] Pa, M (2002) "Beyond the Pleasure Principle: The Criminalisation of Consensual Sadomasochistic Sex" *Texas Journal of Women and the Law*, Vol, 11, pp. 91-92.

[23] Hanna, C (2001) "Sex is Not a Sport: Consent and Violence in Criminal Law", *Boston College Law Review*, vol. 42, p. 281.

A second argument put by this liberal feminist strand relates to the dynamics of BDSM relationships. Feminists have argued that the socially mandatory adoption of a 'traditional' heterosexual married partnership, with a dominant male breadwinner and a subservient female responsible for domestic duties, should be supplanted by other relationship forms (or, at least, should not be uncritically accepted as normal). In *The Feminine Mystique*, Friedan (a former women's magazine writer) captured this concern:

> I helped create this image. I have watched American women for fifteen years try to conform to it. But I can no longer deny my own knowledge of its terrible implications. It is not a harmless image […] The material details of life, the daily burden of cooking and cleaning, of taking care of the physical needs of husband and children – these did indeed define a woman's world a century ago when Americans were pioneers, and the American frontier lay in conquering the land. But the women who went west with the wagon trains also shared the pioneering purpose. Now the American frontiers are of the mind, and of the spirit. Love and children and home are good, but they are not the whole world, even if most of the words now written for women pretend they are.[24]

In BDSM relationships, couples consciously determine the form their relationship will have. The male might adopt the submissive role; partners might take turns in the dominant and submissive roles. While it would strain credulity to suggest that a relationship based on BDSM represents some form of utopian feminist relationship, it does at least provide a situation in which couples step outside the socially pervasive 'normal' relationship formats:

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[24] Friedan, B (1963) *The Feminine Mystique*, Penguin, London, p. 59.

> … S/M's highly negotiated assumption of particular roles carefully acknowledges power in sexual relationships. This is untrue for many traditional heterosexual relationships that are often blind to how structural power dynamics inform their personal exchanges. In this manner, S/M is particularly suitable for a feminist agenda because it provokes the *self-aware assumption* of roles, such as master and servant, dominant and submissive, teacher and pupil. As self-conscious, neither nature nor biology cast the characters; rather, either gender can assume either role. This performance of roles reveals how social identities are not fixed but highly commutable and open to invention and transformation.[25]

The more prominent feminist critique, however, is far less liberal in its approach. The conflict between feminism supportive of, and feminism opposed to BDSM, must be seen in the light of the broader 'feminism sex wars' which effectively marked the end of 'second-wave' feminism in the late 1970s and early 1980s. Committed feminists were divided into two groups – those who supported free sexual self-expression as the right of women and those who saw sex as fundamentally patriarchal, and who saw sexual desire as a tool of oppression against women.[26]

Arguing the permissive case, Califia (a self-identified lesbian sadist) stated:

> For some people outside the subculture, the fact that S/M is consensual makes it acceptable. They may not understand why people enjoy it, but they see that S/M people are not inhumane monsters. For other people, including many feminists, the fact that it is consensual makes it even more appalling. A woman who deliberately

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[25] Pa, M (2002) "Beyond the Pleasure Principle: The Criminalisation of Consensual Sadomasochistic Sex" *Texas Journal of Women and the Law*, Vol, 11, pp. 90-91

[26] See, as a primer, Currie, K and Levine, A (1987) "Whip Me, Beat Me, and while you're at it cancel my NOW Membership – feminists war against each other on pornography" *Washington Monthly*, June 1987. A more substantial radical feminist position is put in various articles in Linden et al (eds) (1982) *Against Sadomasochism – A Radical Feminist Analysis*, Frog In The Well, San Francisco.

> seeks out a sexual situation in which she can be helpless is a traitor in their eyes. Hasn't the women's movement been trying to persuade people for years that women are not naturally masochistic? Originally, this meant that women do not create their own second-class status, do not enjoy it, and are the victims of socially constructed discrimination, not biology. A sexual masochist probably doesn't want to be raped, battered, discriminated against in her job, or kept down by the system. Her desire to act out a specific sexual fantasy is very different from the pseudopsychiatric dictum that a woman's world is bound by housework, intercourse, and childbirth.[27]

Responding directly to Califia, Mackinnon argued that BDSM merely reproduces male-dominant sexuality under a slightly more complex guise:

> The relational dynamics of sadomasochism do not even negate the paradigm of male dominance, but conform precisely to it: the ecstasy in domination ("I like to hear someone ask for mercy or protection"); the enjoyment of inflicting psychological as well as physical torture ("I want to see the confusion, the anger, the turn-on, the helplessness"); the expression of belief in an inferior's superiority belied by the absolute contempt ("the bottom must be my superior … playing a bottom who did not demand my respect and admiration would be like eating rotten fruit"); the degradation and consumption of women through sex ("She feeds me the energy I need to dominate and abuse her") … and the same bottom line of all top-down sex: "I want to be in control". These statements are from a female sadist. The good news is, it is not biological.[28]

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[27] Califia, P (2000) *Public Sex – The Culture of Radical Sex* 2nd ed, Cleis Press, San Francisco, pp. 72-73.
[28] Mackinnon, C (1989) "Sexuality" in *Towards a Feminist Theory of the State*, reprinted in Nicholson, L (1997) *The Second Wave – A Reader in Feminist Theory*, Routledge, New York, p. 169. The "female sadist" she quotes is Califia and the quotes appear in the reference given immediately above.

The critical feminist approach is founded on the propositions that the intersection of sex and violence is never acceptable and is particularly dangerous for women.

The Private/Public distinction in feminist theory

One of the key arguments that immediately seems to inform feminist debates about BDSM is the ongoing argument about the distinction, if indeed there is a distinction, between the "private" and "public" realms of conduct. Liberal thought essentially classifies conduct into "public" and "private" and privileges private conduct from state interference. Some feminist writers reject this dichotomy and point to the implications which private conduct may have for public circumstances, and the impact public policy will have upon private circumstances:

> The private or personal and public or political are held to be separate from and irrelevant to each other; women's everyday experience confirms this separation yet, simultaneously, it denies it and affirms the integral connection between the two spheres.[29]

It follows from this view of the public/private distinction that BDSM activities, even when conducted in the privacy of one's own home and relationship, may nevertheless have broader implications for (particularly) women everywhere. Most obviously, if an acceptance of BDSM led to a normalisation of sexual violence against women, then even BDSM conducted in private might have grave implications for women at risk of

[29] Pateman C (1989) "Feminist Critiques of the Public/Private Dichotomy" *The Disorder of Women*, Stanford University Press, Stanford p. 131. See, for further discussions (among a broad literature) Chinkin C (1999) "A Critique of the Public/Private Dimension" *European Journal of International Law*, Vol 10, pp. 387-395; and Tabrea D (2010) "From Private to Public: Is the Public/Private Distinction Gender Discrimination?" *META: Research in Hermeneutics, Phenomenology and Practical Philosophy*, Vol 2, 562-567.

violence, and consequently for women throughout society. It is therefore necessary to address the question of sex and violence in this thesis without retreating to an (untested) claim that BDSM conducted in the privacy of the home cannot have external consequences. It will become apparent from the following discussion that this thesis will rest on no such claim.

Sex and violence

Feminism is uniquely qualified to discuss the relationship between sex and violence. Rape and domestic violence epitomise patriarchal abuse of women, and both of these crimes clearly involve violence with some level of sexual content to the conduct.[30] Mackinnon drew these two conceptual strands together:

> If sexuality is central to women's definition and forced sex is central to sexuality, rape is indigenous, not exceptional, to women's social condition. In feminist analysis, a rape is not an isolated event or moral transgression or individual interchange gone wrong but an act of terrorism and torture within a systematic context of group subjection, like lynching.[31]

Feminist critiques in these areas of law have been responsible for some significant developments in the law (for instance the removal of marital rape immunity). Under these circumstances, it is unsurprising that feminist critiques are skeptical of any proposed law reform legitimising violence in a sexual context. American feminists in

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[30] Care is needed here. It is not the author's intention to offend or even engage with the commonly-stated view that rape/sexual assault is about violence not about sex; rather, the point here is that sexual penetration is the factor which distinguishes sexual assault from other assaults; a similar point could be made in relation to indecent assault. Additionally, the common social statement that rape is about violence not sex is contested by some theoretical feminists, particularly radical and separatist feminists.

[31] McKinnon, C (1989) *Toward a Feminist Theory of the State*, Harvard University Press, Massachussetts, p. 172. A similar point is made at some length in the chapter "Engendering Sadomasochism" in Chancer, L (1992) *Sadomasochism in Everyday Life*, Rutgers University Press, New Brunswick.

particular, take their jurisprudential cues from cases such as *Farrell*, *Collier* and *Jovanovic*, all of which involved allegedly nonconsensual violence perpetrated on women by men who then raised consent as a defence. Following the House of Lords decision in *Brown*, Bradwell wrote:

> Sexual abuse overwhelmingly affects women and girls and demonstrates that there is insufficient practical protection in English law to protect minors, vulnerable adults or public decency. The impact of legislation legalising sexual violence in a private sexual context will inevitably result in legalising violence against women because of difficulties of consent. Liberalising consent to receiving injuries from sexual violence in a culture which frequently disbelieves survivors of violence is not an appropriate context in which to introduce such a law.[32]

Duncan[33] takes up this point, noting that the threshold for consent in sexual assault cases in the UK was set very low by *DPP v Morgan,*[34]where it was determined that an honest belief in consent, even if that belief is unreasonable, is sufficient to negate *mens rea* in a rape charge. Duncan's point is well made, particularly in relation to a case such as *Jovanovic*, where consent was contested and where, in the end, the defendant's stoic insistence that consent was given, was sufficient that the charges were dropped.

The most significant expression of this feminist critique is by Professor Cheryl Hanna, who characterised the legal dilemma as follows:

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[32] Bradwell, J (1996) "Consent to Assault and the Dangers to Women" *New Law Journal*, vol 146, p.1683
[33] Duncan, S (1995) "Law's Sexual Discipline: Visibility, Violence and Consent" *Journal of Law and Society*, vol 22(3), pp. 326-352.
[34] *DPP v Morgan* [1975] 2 All ER 347

> The law is intended to prevent the powerful from hurting the powerless; by criminalizing S/M that results in injury, the law arguably protects masochistic women from sadistic men who injure them in the course of non-consensual sexual relations, effectively eliminating the "she likes it rough" defense. Thus, the law imposes normative standards of sexual conduct on men that are non-violent and non-dominating, again, civilized masculinity. At the same time, the law limits women's pursuit of pleasure through pain, thus prescribing normative behaviors that can be paternalistic and repressive. The current doctrine of consent assumes that no reasonable woman would or should consent to sexual activity that involves violent domination, just as it once assumed women had no right to play sports.
>
> The current doctrine of consent also fails to recognize that "rough sex" is not always victimizing to the masochist […] the inability of the law to distinguish between situations which are consensual and empowering and those that are humiliating and victimizing presents an unresolved and unresolvable dilemma.[35]

Hanna acknowledges that whichever way the law in this matter proceeds, one group is likely to suffer – if the balance is struck in favour of consent, the nonconsenting will suffer the risk of physical violation; while if the balance is struck in favour of prohibition, the genuinely consenting will suffer the loss of a right. Hanna supports the view that consent defences will be abused by perpetrators of rape and domestic violence with an impressive array of cases.[36]

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[35] Hanna, C (2001) "Sex is Not a Sport: Consent and Violence in Criminal Law", *Boston College Law Review*, vol. 42, pp. 269-270.
[36] Hanna, C (2001) "Sex is Not a Sport: Consent and Violence in Criminal Law", *Boston College Law Review*, vol. 42, fn 141.

On closer inspection those cases seem to bear against, rather than for her argument. In two of the cases she cites, *Ohio v Hardy*[37] and *Ewing v Texas*,[38] the defendants alleged consent on the part of the victim, the victim denied having consented, and the jury found in favour of the victim's version of events. In two cases the court expressly considered consent to have been vitiated by circumstances (these were *People v Hooker*[39] where consent was procured by years of torture and *Horowitz v State*[40] where the victim was severely inebriated). In *Ohio v Roquemore*[41] the issue in question was evidence by a profiler, and the consent defence was not decided, and in *Mendyk v Florida*[42] a consent defence was not even raised. Taken as a whole, these cases suggest the American courts have been able to determine whether consent was present and genuine.

However, rebutting Hanna's examples is not equivalent to rebutting her argument, which remains sound: allowing a formal defence that the victim 'likes it rough' must, logically, invite defendants to assert that defence even when they know the defence is untrue.

Consent

Some feminist writers hold that all sexual activity between men and women is coercive, to the point where what the law considers to be 'consent' is no more than a reaction to (patriarchal) social conceptions of women, female bodies, and female sexuality. "If sex is

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[37] *Ohio v Hardy* 1997 Ohio App LEXIS 4588
[38] *Ewing v Texas* 1997 Tex App LEXIS 4527
[39] *People v Hooker* 244 Cal Rptr 337, 1988
[40] *Horowitz v State* 1996 Tex App LEXIS 1080
[41] *Ohio v Roquemore* 85 Ohio App 3d 448, 1993
[42] *Mendyk v Florida* 545 So. 2d 846, 1989

normally something men do to women, the issue is less whether there was force than whether consent is a meaningful concept."[43]

From this perspective, consent to sadomasochistic sex is by definition impossible, even as consent to *sex*, let alone as consent to violence. Such an intellectual critique still appears quite radical and, absent a paradigmatic change in law and society, cannot readily be incorporated as a critique of the current thesis. The current thesis will assume, contrary to this view, that it *is* logically and socially possible for individual free agents to give consent to sex, to violence, and to sexual violence. The question at hand is whether the law will recognise that consent, in relation to specific criminal offences.

The feminist challenge

The feminist perspective discussed by Bradwell, Duncan and Hanna above[44] presents two cogent challenges to any proposal to allow consent to sadomasochistic sex: first, any proposal must contain appropriate safeguards against abuse of the defence by perpetrators of rape or domestic violence. If a consent defence does not enable the Court to distinguish between consensual BDSM and violent rape or domestic violence, then conscience surely demands that consent should provide no defence. Second, the law must ensure consent is genuine, and not the result of improper coercion. Thus, to argue that a practitioner's right to consent to BDSM should be protected, one must also argue that a person's right and capacity to decline, or to withdraw, consent should be protected. These challenges will be returned to in the latter stages of this thesis, as a test against which to measure the proposed model.

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[43] MacKinnon, C (1989) *Toward a Feminist Theory of the State*, Harvard University Press, Massachussetts, p. 178.
[44] Henceforth identified in this paper as 'critical feminism'.

The dominant paradigm: paternal conservatism

Paternal conservatism justifies the state in making rules which limit the liberty of citizens, for the benefit of those citizens. The philosophy is paternal in the sense that the state's perception of benefits takes precedence over that of the person whose interests are at stake; in much the same way as a parent may make legal decisions for a child, regardless of the child's perceptions of their own best interests (which may be flawed through immaturity or inexperience).[45]

The paternal conservative perspective in *Brown* is fundamental. The majority judges' conception of what is good for the participants in *Brown* characterises their judgments. For example, where Lord Templeman states that "the violence of sado-masochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the participants and unpredictably dangerous,"[46] he is essentially asserting the right to protect the participants from themselves. This is a classic paternalistic argument.

To recognize the Paternalism in *Brown* as *conservative* paternalism, one might begin with the canons of conservatism defined by Kirk, who stated:

> … the essence of social conservatism is preservation of the ancient moral traditions of humanity. Conservatives respect the wisdom of their ancestors … they are dubious of

[45] A fuller expression of paternalism as a philosophy may be found in the *Stanford Encyclopedia of Philosophy*, at http://plato.stanford.edu
[46] *R v Brown* [1994] 1 AC 212, 236

> wholesale alteration. They think society is a spiritual reality, possessing an eternal life but a delicate constitution: it cannot be scrapped and recast as if it were a machine.[47]

Three of Kirk's canons are particularly relevant to an understanding of a conservative position in relation to *Brown*:[48]

- Belief in a … body of natural law, which rules society as well as conscience … True politics is the art of apprehending and applying the Justice which ought to prevail in a community of souls;
- Faith in prescription … Custom, convention, and old prescription are checks both upon man's anarchic impulse and upon the innovator's lust for power; and
- Recognition that change may not be salutary reform: hasty innovation may be a devouring conflagration, rather than a torch of progress.

With these canons in mind, the majority judges' views in *Brown* seem more principled and less dogmatic. If it is accurate to label the majority judges conservative, then one could construct their task in the following terms: A new change was being proposed by the appellants in *Brown*, and the judges' task was to determine whether the proposed change would be salutary reform or hasty innovation. In this task they had two guides. The first, custom and convention, was profoundly against the appellants, who were arguing for the validity of a radical form of sexuality practiced (in this instance) outside stable relationship-pairs, by homosexual men. Recall Lord Lowry's comment that "Sado-

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47 Kirk, R (1985) *The Conservative Mind From Burke to Eliot* (Rev ed; original published 1953), Regnery, Washington DC, p. 8

48 Kirk, R (1985) *The Conservative Mind From Burke to Eliot* (Rev ed; original published 1953), Regnery, Washington DC, pp. 8-9. The other three canons are, in short, an affection for diversity in human experience; a conviction that social ordering requires social classes; and a commitment to the notion of personal property.

masochistic homosexual activity cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society."[49]

The second guide was "natural law" according to moral conscience. Which decision "ought to prevail in a community of souls"? In answering, the judges might well have noted Lord Patrick Devlin's argument in response to HLA Hart's renewal of liberalism in a sexual context in *Law, Liberty and Morality*. Devlin wrote:

> [I]f men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.[50]

The answer reached by the majority judges on this moral question is exemplified by Lord Templeman's famous statement that "Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised."[51]

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[49] *R v Brown* [1994] 1 AC 212, 255.
[50] Devlin, P (1965) *The Enforcement of Morals*, Oxford University Press, Oxford, p.10. A similar passage was quoted with approval in a US judgment, in which a husband and wife had an agreement that if she drank alcohol (she was an alcoholic) he could beat her as a form of chastisement. Her consent was held to be no defence: *State v Brown* 143 NJ Super 571 (1976), 579.
[51] *R v Brown* [1994] 1 AC 212, 237.

Some of the submissions to the Law Commission inquiry adopted a conservative perspective. Consider the view expressed by the Legal Committee of the Magistrates Association:

> The abuse of sex and violence is not conducive to the public interest. Society should set its face against such abuse, in the law and in other ways. The infliction of bodily harm imposes burdens on the victims and upon society (eg family, dependants, friends, the health service, social services, the community). Breeding and glorifying cruelty is barbaric and degrading to body and mind of everybody involved. Individual membership of society carries obligations and duties and responsibilities as well as rights. Society does have the moral and ethical and social right to insist upon minimum standards of acceptable conduct.[52]

The only paternalist article in the general literature specifically directed towards *Brown* was a short piece by Edwards, in which she stated:

> The *cri de coeur* of those sexual liberals who argue that the decision is a fundamental invasion of privacy will continue. Rights and freedoms are not abstract. It is an intellectually barren advocate of civil liberties who argues that infliction of harm in auto-erotic arousal of the proportions which constitute ABH should not be a crime. The law is about protecting from harm, the weak and vulnerable, not for protecting the excesses of the cruel and violent, to satisfy their libidos.[53]

The paternal conservative argument in relation to BDSM would assert that any conception of 'the good life' which involves accepting actual bodily harm is flawed. A person who desires and enjoys such a relationship will, on this argument, be better off if

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[52] Quoted in the Law Commission report, para 2.6, p. 15.
[53] Edwards, S (1993) "No Shield for a Sadomasochistic Libido" *New Law Journal* 143, p. 406

the assaults are criminalised, even though they themselves cannot see that this is so. They will be better off because they will be freed from a circumstance where violence and degradation are visited upon them.

Conclusions

This chapter has reviewed the literature surrounding three key theoretical perspectives on the question of whether individuals should be able to consent to harm inflicted in the course of BDSM. Paternal conservatism, while virtually unrepresented in academic debates, represents the legal status quo. It is philosophically adequate to explain the approach taken by the majority judges in *Brown*. A second perspective, critical feminism, would agree with the outcome in *Brown*, though not with its reasoning. For critical feminists, a combination of sex and violence can never be justified, and any consent defence will inevitably be abused by rapists and domestic violence offenders.

Set against these philosophical perspectives are two variations of liberalism. Mainstream liberalism argues against that participants in BDSM should be at liberty to consent to actual bodily harm provided it causes no harm to third parties. Liberal feminism argues that BDSM is a natural extension of the freedom of non-procreative sexual self-expression which has long been a core value of feminism.

Any of these philosophical positions could provide an answer to the question of whether adults should be permitted to consent to harm during BDSM. Each of them begins with an underlying philosophical premise. Critical feminism begins with the premise that the law is unequal in its treatment of men and women, particularly where the combination of

sex and violence is concerned; paternal conservatism begins with the premise that it is appropriate for law to coerce citizens for their own benefit, or for the benefit of social institutions and moral values; liberalism begins with Mill's dictum. Each perspective then applies that underlying premise (and the body of theory built on that premise) to the facts in *Brown*, *Jovanovic*, and similar cases, and arrives at an inevitable result.

Thus it seems that for proponents of these philosophical positions, views on *R v Brown* really just represent an exposition of the underlying philosophy. Their conclusions tell us more about where they begin – what are their initial premises – than about where they end up. Thus, a resolution of the most appropriate outcome in *R v Brown* requires an attempt to adjudicate between these three philosophical schemes.

Were the parliament to be the body of adjudication, there would be no problem. Parliamentarians could essentially choose a philosophical position, and draft statutes to suit. From a judicial perspective, in the absence of guidance from the legislature, the task is more complicated. On reflection, one can see that the judges in *Brown* did just choose a philosophy. The majority judges accepted the premises and outcome arising from paternal conservatism. Lord Mustill (despite his protestation to the contrary) selected liberalism. Lord Slynn, alone, felt that the answer emerged from precedent, and thus was relieved of the need to choose a philosophy at all.

Academics who have engaged in debate over the outcome have, in essence, debated whether the four judges, excluding Lord Slynn, chose wisely from the menu. This debate, in the end, adds very little. It is almost tautological to recognise that the liberals consider the Judges should have chosen liberalism; or to recognise that the paternal conservatives feel the judges chose wisely.

An effective critique of the decision in *Brown* would not rely on, or be bound by, any specific philosophical premise. Such a critique would not ask, "Did the judges choose wisely," but rather, "Is there a way to select from among the possible arguments and outcomes, without simply allowing the choice to devolve into a menu-selection by whichever judges happen to be sitting in the case?" Having answered this, the subsequent question would be, "If the judges applied this method in *Brown*, what would the outcome have been?"

The current literature on *Brown* does not yield a discussion of the sort described above. In the following chapters, this thesis will seek to fill this gap in the literature by attempting an adjudication among the various philosophical positions.

CHAPTER SIX – HARD CASES

Full steam ahead and damn the syllogisms![1]

How might one analyse the decision in *Brown* on philosophical grounds in a manner which does not simply reveal the critique as an artefact of the critic's prior philosophical views? Any methodology must be suitable in circumstances where neither a specific statute, nor a specific principle of common law, can resolve the legal issue - a *hard case*.

One logical possibility would be for the court to admit that the current law does not know the answer to the controversy raised by the parties. However in our legal system any dispute, once put before an appropriate court, will receive judgment.[2] "Hard cases thus raise concerns about the legitimacy of the judicial process. The hard cases debate is largely about which adjudicative methods do or do not meet these concerns."[3] This chapter seeks to identify an appropriate adjudicative method for consideration of *Brown*.

HLA Hart and the 'Open Texture' of the law

Discussion of hard cases focuses on the writings of HLA Hart and Ronald Dworkin.[4] Hart argued that the law, consisting of *words*, is inevitably going to encounter areas of ambiguity, because language is inherently imprecise. He stated:

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[1] Hart, HLA (1977) "American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream" *Georgia Law Review* Vol 11:5, 974. It should be noted, of course, that this was *not* a statement of the Professor's own legal philosophy!

[2] *R v Commonwealth Court of Conciliation and Arbitration; ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389.

[3] Bakan J (1992) "Some Hard Questions about the Hard Cases Question" *University of Toronto Law Journal* vol. 42, p. 505.

[4] This statement must be made with apology to the plethora of other powerful legal academics who have contributed to the debate. While each of these have made contributions, the debate really has swirled around the writings of Hart and Dworkin.

> In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide. […] Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*.[5]

According to Hart, when judges find that the 'texture' of the law is too open to yield the answer to a case, judges should exercise *judicial discretion*:

> The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case.[6]

Jennex observes of Hart: "In hard cases – cases in which it is unclear what the law requires – there is no legally required dispensation, so … judges are entitled to use discretion in making their decision."[7]

Hart's theory gives little guidance as to *how* judges should exercise this discretion. May they simply decide based on their own predilections? Any assessment of "competing interests" will surely be affected by the judge's own values. Hart himself acknowledged that his work left this discussion for others. He stated:

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[5] Hart, HLA (1961) *The Concept of Law*, Clarendon Law Series, Oxford University Press, Oxford, p. 123-4.
[6] Hart, HLA (1961) *The Concept of Law*, Clarendon Law Series, Oxford University Press, Oxford, p. 132.
[7] Jennex, D (1992) "Dworkin and the Doctrine of Judicial Discretion" *The Dalhousie Law Journal*, vol. 14, p. 473.

> Much indeed that cannot be attempted here needs to be done to characterise in informative detail … the varied types of reasoning which courts characteristically use in exercising the creative function left to them by the open texture of law in statute or precedent.[8]

Dworkin's Theory of Hard Cases

Dworkin argues that judges in hard cases should examine the principles which underlie the law, and determine the rights of the parties based on those principles.

Integrity

The foundation of Dworkin's theory is that our body of laws, taken as a whole, has integrity.[9] "Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community."[10]

In Dworkin's view, it is possible to observe an interlocking set of high-order, relatively abstract principles which give a general description of our system of laws. For instance, principles such as "equality before the law" and the "right to free speech" would be identifiable at this level. These principles are relevant to understanding our laws, but they are not justiciable laws in themselves.

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[8] Hart, HLA (1961) *The Concept of Law*, Clarendon Law Series, Oxford University Press, Oxford, p. 144.
[9] "Integrity" was a curious choice of word by Dworkin. The word has two distinct meanings. In one sense it refers to "soundness of moral principle and character"; in another sense it refers to "the state of being whole, entire or undiminished." It is not always clear how Dworkin meant his use of the word to be interpreted. In this thesis, it is generally taken to indicate the second of these meanings.
[10] Dworkin, R (1986) *Law's Empire*, Hart Publishing, Oxford, p. 255.

Underpinning these principles are lower-order, more 'concrete' principles. These principles, described by some writers as "mid-level" principles,[11] are more detailed and less abstract. A mid-level principle might be "the law should protect people from harm to their reputations." This principle is clearer than the higher-level principles, but still not justiciable in itself.

Finally, beneath these mid-level principles, are rules. Rules are commonly expressed in statutes and judgments, are much more precise, and are justiciable in themselves. So, following the examples above, the existence of a general "right to free speech" and a mid-level principle that "the law should protect people from harm to their reputations", might result in a Defamation Act, intended to maximise free speech, while protecting reputations.

The core notion of integrity is that the body of general, abstract principles sets the general parameters for the mid-level, more concrete principles; and that these principles set the parameters for rule-making. A new rule which is coherent with the surrounding body of principles contributes to integrity; a new rule which is not coherent with those principles will detract from integrity.

Dworkin's process therefore results in law that is more, rather than less coherent. Coherence is not intrinsically valuable[12] but strong arguments can be made for its importance. Litowitz, for instance, summarises Dworkin's claims for the value of integrity as follows:

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[11] See Henley, K (1993) "Abstract Principles, Mid-Level Principles, and the Rule of Law" *Law and Philosophy*. Vol 12, pp. 121-132.

[12] To take a common example, laws under the Nazi regime may well have been coherent, without being in the slightest bit laudable.

> Integrity is itself a distinct political virtue that serves as an ordering criterion when the other virtues conflict. Integrity helps to align legal decisions with deeply held … principles. Integrity arrives at the best harmony between what law is and what law should be, given our goals and aspirations.[13]

Integrity does not mean stasis. However if radical changes are to be made, disturbing the pattern of principles, it would be expected that these would be made by the parliament, and not by the courts. This point was, in effect, made by Lord Jauncey of Tullichettle in his speech in *Brown*:

> If it is to be decided that such activities as [sadomasochistic sex] are injurious neither to [the submissive] nor to the public interest then it is for Parliament with its accumulated wisdom and sources of information to declare them to be lawful.[14]

In such a process, the role of the courts remains aligned with integrity: that is, minimising innovation and maximising consistency with the law read as a whole.

Conflict between principles

Principles are not absolute. "One principle might have to yield to another, or even to an urgent policy with which it competes on particular facts."[15] In the example developed

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[13] Litowitz, D (1994) "Dworkin and Critical Legal Studies on Right Answers and Conceptual Holism" *Legal Studies Forum*, Vol. 18, p. 146. The ellipsis in this quotation omits the word "moral", with apologies to Litowitz, for reasons discussed above. Principles need not be moral in order to be embodied in Integrity.
[14] *R v Brown* [1994] 1 AC 212, 246
[15] Dworkin, R (1997) *Taking Rights Seriously* (New Impression with a Reply to Critics), Duckworth, London, p. 92. This point has sometimes eluded Dworkin's critics. Consider, for instance, Buller's erroneous statement that Dworkin claims "no ruling … can be acceptable if it contradicts a previously established concrete principle of law": Buller, R (1993) "A History and Evaluation of Dworkin's Theory of Law" *The Dalhousie Law Journal* vol. 16, p. 178.

above, the 'freedom of speech' principle conflicts with the 'protection of reputation' principle, with the result that a person's freedom of speech does *not* allow them to maliciously harm the reputation of others. The right to freedom of speech yields, in this case, to the right of the subject to their reputation. This characteristic distinguishes principles from rules:

> Dworkin identifies principles with requirements of justice, fairness, or some other dimension of morality. As such, they do not set out legal consequences that follow automatically when the conditions provided are satisfied. Rather, they state reasons that argue in one direction, but do not necessitate a particular decision. Rules, on the other hand, are applicable in an all-or-nothing fashion. If the facts that a rule stipulates are given, then either the rule is valid and the answer it supplies must be accepted, or it is not valid and thus contributes nothing to the decision. If two rules conflict, then one of them cannot be a valid rule.[16]

When two principles collide, how should a judge determine which will yield?

Concrete rights

To resolve this question, Dworkin refers first to the *concreteness* of rights. Concrete rights are "more precisely defined so as to express more definitely the weight they have against other political aims on particular occasions."[17] These can be contrasted with 'abstract rights' which are the "grand rights of popular rhetoric [such as the] right to free speech

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[16] Parent, W (1981) "Interpretation and Justification in Hard Cases" *Georgia Law Review* vol. 15, p. 102.
[17] Dworkin, R (1997) *Taking Rights Seriously* (New Impression with a Reply to Critics), Duckworth, London, p. 93.

or dignity or equality, with no suggestion that these rights are absolute, but with no attempt to suggest their particular impact on complex social situations."[18]

To continue the example given above, assume that in a particular case at hand, there were three principles: freedom of speech, protection of reputation, and a principle that "a witness before a court may speak freely." The first principle is highly abstract; the second more concrete; and the third most concrete of the three. Thus 'freedom of speech' is limited by 'protection of reputation' but the extent of this protection is limited by the judicial immunity principle.

Consequently, for a principle to prevail, rather than yielding, it must be sufficiently concrete.

Institutional principles

Finally, to be useful in the determination of hard cases, principles must be *institutional* in nature. A principle is institutional if it emerges from an organisation which provides a coherent socio-political environment. A state, to take the most obvious example, is an institution. Dworkin gives the example of a chess tournament, which gives its participants a set of rights, exercisable only in the context of that tournament, and exercisable only against others in that tournament. Thus the rights – for instance, the right to take the prize-money if one should win – are institutional in nature.[19]

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[18] Dworkin, R (1997) *Taking Rights Seriously* (New Impression with a Reply to Critics), Duckworth, London, p. 93.

[19] Dworkin, R (1997) *Taking Rights Seriously* (New Impression with a Reply to Critics), Duckworth, London, pp. 101-105. The current author has applied Dworkin's theory in another self-contained institutional framework, that of Australian Football: See Marinac, A (2007) "Dworkin on the Half-Forward Flank: The Jurisprudence of AFL's 'Spirit of the Laws'" *Marquette Sports Law Review* vol 17, p. 503ff.

For a principle to be useful in resolving a hard case, it must emerge from the relevant institution. A citizen of the United States, for instance, would be unable to plead their fifth Amendment rights before an Australian court.[20] The principle being argued is very concrete in nature, but simply not relevant to the current institution.[21]

Dworkin, then, holds that a right based on concrete, institutional principles will be strong, and ought to be identified and defended by the court. It may, under appropriate circumstances, yield to other principles, yet even in such cases the court must give due weight to the first principle before deciding that it must yield.

Local Priority

A third factor to assist the choice between competing principles is for a judge to consider how 'local' the principle is within the law. If the law is divided into 'departments' (torts, criminal law, etc) then a judge should give "a kind of local priority"[22] to principles within the same department as the current case.

For example, the concept of *consent* may be found in various areas of law.[23] Consent is supported by the principle that *certain legal and social relations may only be undertaken where those participating are capable of giving consent, and have done so.* This principle, however, is quite abstract. In different areas of law, the notion of consent will be supported by different,

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[20] 5th Amendment to the Constitution of the United States of America, ratified 1791: "No person shall … be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[21] Having said this, the defendant would be able to rely on similar principles arising from Australian law, for instance to avoid double jeopardy.

[22] Dworkin, R (1986) *Law's Empire*, Hart Publishing, Oxford, p. 250.

[23] In this paragraph, a series of principles are asserted. While they seem true to the current author, it would require thorough analysis and argument for them to be properly proven. They serve their purpose here, even if they were found to be inaccurate on further study.

more concrete principles. For instance, underlying consent in contract law is the principle that *one must give consent positively through word or deed*, resulting in the rule that silence cannot be construed as acceptance of an offer.[24] The principle in relation to sexual assault might be stated: *to negate consent, one must (if conscious and free) communicate this lack of consent through word or deed, so that it would be unreasonable for the other party to believe consent was present.*[25] Thus, for sex, silent acquiescence or other forms of conduct may constitute consent, provided the conduct was not the result of unconsciousness or duress.

A judge examining a question relating to consent-by-silence might note these instances of consent in the law, and would regard the more *local* principle as more persuasive. Thus, in a corporations law case, the judge would likely be more persuaded by the contract law principle.

Local priority is a tendency, not a rule:

> [A judge should] not be so ready to defer to local priority … when traditional boundaries between departments have become mechanical and arbitrary, either because popular morality has shifted or because the substance of the departments no longer reflects popular opinion.[26]

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[24] *Felthouse v Bindley* (1862) 142 ER 1037.
[25] This principle is broadly based on an assessment (by the author) of the *Crimes Act 1900* (NSW) s.61HA. The provisions in the statute, of course, are far more detailed as to consent. The point here is to show that one legal concept may rest on slightly different principles in different 'local' contexts.
[26] Dworkin, R (1986) *Law's Empire*, Hart Publishing, Oxford, p. 253.

Dworkinian principles and adjudication of hard cases

Dworkin argues that a judge in a hard case must look beyond legal rules to discover the "principles that 'underlie' or are 'embedded in' the positive rule of law."[27] A decision must be made which "[applies] the most coherent theory of settled law."[28]

Hart's judges are not bound by any such requirement. Their discretion is relatively unfettered. Dworkin's judges do not use discretion to fill the 'open texture' of law; rather, they must "render decisions that enforce already-existing law … in a manner that represents the latter as an internally consistent political theory."[29] They must render decisions that confirm, rather than challenging, integrity of law, even where this would require a judgment contrary to the judge's own personal discretion.

Dworkin and morality

In *Hard Cases*, Dworkin gave morality two roles. First, it was among the many factors a judge might take into account when developing a theory of principles: "when Hercules[30] fixes legal rights he has already taken the community's moral traditions into account, at least as these are captured in the whole institutional record …"[31] Second, morality could be used to assist a judge to identify principles which had been supported in the past but which ought now to be departed from. On this view, if the judge "can show by

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[27] Dworkin, R (1997) *Taking Rights Seriously* (New Impression with a Reply to Critics), Duckworth, London, p. 105.
[28] Buller, R (1993) "A History and Evaluation of Dworkin's Theory of Law" *The Dalhousie Law Journal* vol. 16, p. 181.
[29] Jennex, D (1992) "Dworkin and the Doctrine of Judicial Discretion" *The Dalhousie Law Journal*, vol. 14, p. 475.
[30] Hercules is Dworkin's ideal judge. He will be properly introduced below.
[31] Dworkin, R (1997) *Taking Rights Seriously* (New Impression with a Reply to Critics), Duckworth, London, 125-126.

arguments of political morality that such a principle, apart from its popularity, is unjust, then the argument from fairness that supports the principle is overridden."[32]

In *Law's Empire*, Dworkin gave a somewhat different role to morality, stating that a judge "must choose between eligible interpretations [of potentially relevant principles] by asking which shows the community's structure of institutions and decisions … in a better light from the standpoint of political morality."[33]

Morality, and political morality, run as themes through both works – perhaps more so in *Law's Empire* – as Dworkin explores the relationship between law and morality. This same exploration is the central theme running through *Justice in Robes*[34] and it has been an enthusiastic theme for Dworkin's critics. The following understanding of law and morality which will be employed in this thesis if Dworkin's adjudicative method is found to be suitable to resolve the thesis' topic question.

First, it appears unrealistic to argue that the social forces of morality and law are entirely distinct.[35] A complex relationship exists between the two. Neither social force is monolithic – questions of law, and questions of morality, are heavily contested. The two social forces do not share jurisdictions – all Australians might be bound by the same law, while Catholic and Muslim Australians have different moral structures, sharing moral values with adherents outside Australia. Finally, the two social forces interact with, and influence one another. Under the right circumstances, forces of morality might change the law; similarly, changes in the law may adjust the moral consensus. Consequently, it

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[32] Dworkin, R (1997) *Taking Rights Seriously* (New Impression with a Reply to Critics), Duckworth, London, 122-123.
[33] Dworkin, R (1986) *Law's Empire*, Hart Publishing, Oxford, p. 256.
[34] Dworkin R (2006) *Justice in Robes*, Belknap Press, Cambridge Massachusetts.
[35] This argument has, however, certainly been mounted by "hard" positivists including Raz.

would be unreasonable (particularly on a topic as morally fraught as sadomasochistic sex) for this thesis to pretend moral values can be entirely divorced from an analysis of *Brown*.

Once this is accepted, there appear to be three ways in which morality might impact on Dworkinian adjudication: First, it might be argued that Dworkinian principles are only valid if they are morally valid; that if a judge purports to discover an *immoral principle*, the principle cannot stand. This is a key argument of natural law theorists, but is difficult to sustain, partly because morality is a contested concept, but also because the body politic has the capacity to legislate immorally, and thus develop immoral principles, if it so wishes.[36]

Second, it might be argued that morality is a factor when a Dworkinian judge assesses the "fit" of various proposed principles.[37] This would be a curious process, because it would beg the question of how the judge determined the appropriate moral standard. Dworkin himself identifies this complexity, noting that a judge who engaged "his own moral and political conviction" in such a circumstance will be making a political judgment which is "itself complex and will sometimes set one department of his political morality against another."[38] Determining the appropriate standard would be all but impossible in cases such as *Brown*, where morality is the very stuff of the dispute. It might be possible to consider morality if there is a settled moral consensus, but such circumstances seem less likely in hard cases.

Third, the advocates in a hard case might draw on moral values as they argue for their preferred interpretation of the principles surrounding the legal issue. Once the role of

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[36] Waldron explored this theme in Waldron (2003) "Legislating With Integrity" *Fordham Law Review* Vol 72, pp. 373 – 394.
[37] cf fn28 above.
[38] Dworkin, R (1986) *Law's Empire*, Hart Publishing, Oxford, p. 256.

these advocates is taken into account, the circumstances exist for multiple moral perspectives to be introduced into the case, and considered by the judge. This process, discussed below, would seem to have significant value, by allowing a hard case to engage with various moral values without regarding any of them as deteminative.

Finally, a judge might apply a final "moral screen" once a particular principle has been identified. Once a judge has determined the principle which ought to guide the instant hard case, the judge might then pause to ask "How morally supportable or morally outrageous is this decision likely to be, and to whom?" The judge could then include such considerations in any written judgment. It is unlikely that moral considerations will carry the day against well-supported, coherent principles, but this approach will at least ensure that judges are not pretending to undertake their duties in a moral vacuum. Dworkin appears to accept this as a possible course of action for a judge, noting that a judge might be able to decide on moral grounds if, having identified the relevant law, "he found the law too immoral to enforce."[39]

The acceptance of such a final moral "screen" opens Dworkin's process to accusations that, in the end, he has been unable to provide a process for guiding judges in Hard Cases. Ultimately, a critic might argue, some judges will have to return to a discretionary decision as to moral outrage, which places them in the same position as a Hartian judge. This is, however, not so. Dworkin's process, as understood and presented in this thesis, invites judges in the final step of their judgment, to consider whether the outcome in a hard case would be so morally outrageous that it should not be enforced. Thus, a legal test is prescribed, and judges are invited to apply the facts to that test. The judges are not invited to refer to their own personal moral standards, or their own mere

[39] Dworkin, R (1986) *Law's Empire*, Hart Publishing, Oxford, p. 262.

preferences. They exercise a discretion, but it is a constrained and guided discretion quite unlike the "at large" discretion afforded a Hartian judge.

Hercules J

Our system of laws is simply too complex to allow any judge of normal human capacity to survey the full sweep of its principles. Instead, Dworkin invented a judge "of superhuman skill, learning, patience and acumen, whom I shall call Hercules."[40] He then confronted Hercules with a series of hard cases.

Hercules began in the manner of most judges, by looking to the constitution, the statute and to the common law. Because the case is a hard case, none of these were sufficiently helpful. Instead, Hercules was required to develop a "concept of principles that underlie the common law by assigning to each of the relevant precedents some scheme of principle that justifies the decision of that precedent."[41] Baker has described this process as "primarily one of discovery rather than invention. The emphasis is on consistency in an overall coherent pattern."[42] Thus the task of judges is to "show which principles provide the best justification of a particular legal record."[43]

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[40] Dworkin, R (1997) *Taking Rights Seriously* (New Impression with a Reply to Critics), Duckworth, London, p. 105.
[41] Dworkin, R (1997) *Taking Rights Seriously* (New Impression with a Reply to Critics), Duckworth, London, p. 116.
[42] Baker, L (1980) "Dworkin's Rights Thesis: Implications for the Relationship Between the Legal Order and the Moral Order" *Brigham Young University Law Review,* vol 4, p. 847. This point should not be taken too far. Other authors have pointed out that Hercules' interpretive process will almost certainly involve some "creative" element, albeit limited by the material being interpreted, much as an academic researcher might call on the materials of others, while using those in a manner amounting to creativity. See, for instance, Valcke, C (1989) "Hercules Revisited: An Evolutionary Model of Judicial Reasoning" *Mississippi Law Journal* Vol 59, pp. 1-69. Some Critical Legal Scholars, discussed in detail below, argue that the law is so fundamentally incoherent that any attempt to establish principles will be *primarily* creative or inventive.
[43] Dworkin R (1984) "A Reply by Ronald Dworkin" in Cohen, M (1984) (ed) *Ronald Dworkin and Contemporary Jurisprudence*, Duckworth, London , p. 250.

Thus, Dworkin suggests that an appropriately skilled judge would be able to articulate a coherent body of principle with a close fit to our empirically-observable laws. The development of these principles would encompass some consideration of moral values; and conflict between the principles would be resolved by reference to factors such as the concreteness, institutional nature, and local priority of the principles. Once the principles were sufficiently understood, the judge should rule in a manner designed to maximise coherence with those principles – thus maximising integrity of law.

Criticism of Dworkin

Dworkin's views have attracted such a quantity of criticism that "Critical-of-Dworkin" could almost be a genre unto itself. He published an entire volume, *Justice in Robes*, essentially devoted to responding to his various critics.[44] Much of this criticism has considered whether Integrity of Law provides an adequate basis for a universal legal theory,[45] and whether a corollary claim of Integrity of law is that there must be a "single right answer" to any legal dilemma.[46] Relatively little criticism has focused on the

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[44] Dworkin R (2006) *Justice in Robes*, Belknap Press, Cambridge Massachusetts.

[45] See, among many others, Alexander L & Kress K (1997) "Against Legal Principles" *Iowa Law Review* Vol 82, pp. 739 – 786; Coleman J (2001) *The Practice of Principles*, OUP, Oxford; Greenawalt K (1977) "Policy, Rights and Judicial Decision" *Georgia Law Review* Vol 11, p. 991 - 1054; Hunt, A (ed) (1992) *Reading Dworkin Critically*, Berg, Oxford (containing a range of essays on this theme); Raz J (1972) "Legal Principles and the Limits of Law" *Yale Law Journal* Vol. 81, pp. 823-854; and Soper P (1977) "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute" *Michigan Law Review*, Vol 75, pp. 473-519. Finally, Shapiro has given a good introduction to the various lines of battle in Shapiro S (2007) "The Hart-Dworkin Debate: A Short Guide for the Perplexed" *University of Michigan Law School Public Law and Legal Theory Working Paper Series*, Working Paper 77, http://ssrn.com/abstract=968657

[46] The entire "Single Right Answer" argument seems, to the current author, misplaced. Dworkin has never stated that his view was that there is a single, unassailably right answer to any legal conundrum; rather, he points out that any legal thinker by applying Dworkin's process, may come to an answer they consider to be right. That is, Dworkin's method allows those using it to actually reach a decision. The decades-long process of rebutting the "one right answer thesis" is surely one of the most energetic attacks ever mounted on a straw man. In the view of the current author, Dworkin has the last word on this debate in *Justice in Robes*, pp. 41-43. Examples of the debate are Munir M (2006) "How Right is Dworkin's Right Answer Thesis and his Law as Integrity Theory?" *Journal of Social Sciences*, Vol. 2, pp. 1-25; Munzer, S (1977) "Right Answers, Pre-existing Rights and Fairness" *Georgia Law Review*, Vol 11, pp. 1055-1068; Priel D (2011) "One Right Answer? The Meta Edition" *York University, Osgoode Hall Law School Working Paper Series*, http:..ssrn.com/abstract=1835982; Tokson M (2006) *Is There Really No Right Answer to Hard Moral Questions? Moral Realism an Dworkin's Right Answer Thesis*, unpublished, cited by permission of the author.

narrower application of Integrity *as an adjudicative theory to be deployed in hard cases.* However it is possible to discern a number of criticisms of Dworkin which, if valid, would have implications for any adjudicative method based on Integrity.

Dworkin and the Positivists

Dworkin based his theory of Integrity on a rejection of key views of Hart, one of the towering positivists of the 20th century. Dworkin and the positivists have parried and riposted on various questions, and in true philosophical fashion have resolved few of them.

Dworkin began by asserting that Hart had committed the positivists to a position where positivist judges could only recognize rules, and never principles. He stated that positivism "is a model of and for a system of rules, and its central notion of a fundamental test for law[47] forces us to miss the important roles of these standards that are not rules [e.g. principles]."[48] In response, the development of "inclusive" or "soft" legal positivism argued that positivism is not self-evidently required to deny the utility of principles in judicial decision-making.

"Soft" positivists make two arguments. First, they argue that it is not the case that positivism can only recognise rules and never principles; rather, in their view, positivism denies the natural law view that rules *must for their validity* be based upon and supported by

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[47] Dworkin refers to Hart's rule of recognition.

[48] This formed a key part of his opening salvo in the debate, in which he began "I want to make a general attack on positivism, and I shall use HLA Hart's version as a target, when a particular target is needed." See Dworkin, R (1997) *Taking Rights Seriously* (New Impression with a Reply to Critics), Duckworth, London, p. 22.

moral principles. This allows a positivist to consider principles for guidance without taking them as binding doctrine.[49]

A second argument is that positivism admits the use of principles provided there exists in the polity an appropriate rule of recognition, which allows such principles to be considered when considering which norms qualify as "law".[50]

Either of these inclusive positivist arguments suggest broad agreement between Dworkin and inclusive positivists that principles exist, and that they *can matter* during judicial decisionmaking.

Further debate between Dworkin and the positivists has spun away from the resolution of hard cases, and focused on more conceptual philosophical questions about how one might recognize rules, principles, standards and norms, and how these interact with one another. These arguments are beyond the scope of the current thesis.

Natural Law criticism: Dworkinian principles are a cipher for natural principles of law

Debates between Dworkin and various proponents of Natural Law theories are less famous, but perhaps more fundamental. Natural Law theorists began by arguing that, in his rejection of positivism, Dworkin was effectively arguing from the position of methodological natural law,[51] but doing so imperfectly. Richards, for instance, paraphrased Dworkin as arguing that the principles which might be identified by a

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[49] For an example of this argument see Lyons D (1977) "Principles, Positivism and Legal Theory" (Review of *Taking Rights Seriously*), *Yale Law Journal*, Vol 87, p. 462.
[50] For an example of this argument see Dare T (1997) "Wilfrid Waluchow and the Argument from Authority" *Oxford Journal of Legal Studies*, Vol 17, p. 349.
[51] Methodological natural law, in short, holds that morality can be empirically observed underpinning systems of law, and thus morality can form the basis for assessment and criticism of those laws.

Dworkinian judge are inherently morally based, and thus obedience to the law is inherently moral. Richards states:

> Dworkin's principles constitute a class of moral considerations, a class to which courts must resort when reasoning in hard cases. Consequently, Dworkin concludes, legal and moral concepts, at least in hard cases, cannot be logically bifurcated in the manner that positivism supposes.[52]

This argument rests on a subtle misreading of Dworkin. There is a difference between Dworkin's acceptance that Hercules might consider moral factors when determining the fit of potential principles; and attributing some moral value to those principles themselves.

A stronger attack came from Natural Law scholars such as Alexander and Kress, who argue that any critical assessment of Dworkinian principles must rest on moral grounds; essentially, principles are only adequate if they are morally supportable. If this is the case, and the validity of legal principles rests on an underlying structure of moral principles, then Dworkinian legal principles serve no purpose, and judges faced with legal lacunae could directly consider those moral principles, without the interceding device of legal principles.[53]

The same rebuttal employed against Richards may be applied, with slightly more limited success, against Kress: there is a difference between arguing that legal principles must

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[52] Richards, D (1977) "Taking *Taking Rights Seriously* Seriously" *New York University Law Review* Vol 52, No. 6, p. 1279.

[53] This paragraph summarises, with the imprecision necessary in such a summary, the arguments developed in a series of papers, in particular Alexander & Kress (1997) "Against Legal Principles" *Iowa Law Review* Vol 82, pp. 739 – 786 and Kress (1999) "Why No Judge Should Be A Dworkinian Coherentist" *Texas Law Review* Vol 77, pp. 1375-1427,

rest on moral foundations (which Dworkin does not), and arguing that morality is a plausible factor when a judge determines fit (which Dworkin does). However Kress and his colleagues go further, arguing that the weight and validity of competing principles *cannot* be adequately assessed without reference to morals.

Two substantial responses may be made. First, it is not the case that legal principles are merely a cipher for moral principles. It is possible for principles to be definitive in an environment where public morality is heavily contested. Consider the Commonwealth *Sex Discrimination Act 1984*. That Act clearly established (Dworkinian) principles in relation to sex discrimination, yet it clearly did not reflect any moral consensus, at that time, as to the role of women in society.[54] The Act was laudable *because* it was in advance of public opinion and forced necessary changes to behaviours and attitudes. It would have been feasible, in 1984, to mount *moral* arguments against the Sex Discrimination Act and the new principles it asserted, however archaic those arguments might sound in 2012.[55] It is clear from this example, that legal principles and moral principles are taxonomically different.

Second, while moral considerations might well provide a basis for an individual to assess principles or rules, there are inevitably a range of moral positions one might take on any legal issue, and in addition there may be other ways of assessing legal propositions (for instance, according to ethical devices such as utilitarianism or Rawls' original position, or economic assessments, or by taking a vote or survey). Even if these methods have moral

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[54] Consider, for instance, that this legislation took place shortly after *Ansett v Wardley* 142 CLR 237, in which Ansett went to the High Court to defend its right to dismiss a female pilot, on account of her sex.

[55] For a neat summary of these, see the speech of Senator Baden Teague, speaking to the second reading of the Sex Discrimination bill (No. 2) 1983, on 29 November 1983. Senator Teague read on to the record a number of pamphlets sent to him by opponents of the bill, many of whom claimed a religious and moral opposition to the bill. His speech starts on page 2954 of Hansard. It should be noted that while he gave an airing to those views, his speech was opposed to them.

structures underpinning them, all the Natural Lawyers have really done is traded one contest – a legal dispute – for another – a moral dispute. As an adjudicative method, this has little to recommend it.

Dworkin and Critical Legal Studies

A third key criticism of Dworkin is mounted by the Critical Legal Studies (CLS) movement. CLS scholars mount three key criticisms relevant to this thesis.

First, they argue that the law is not the product of successive judges and legislators building on the work of those before them, but rather that it represents the temporary status quo arising from constant conflict between contradictory principles and political imperatives. "Legal decisions, then, are necessarily political decisions, and they reflect the conflicts, tensions, and compromises at work in the political arena. The law has no teleology apart from the interests of those who control the legal process."[56]

There is much in this criticism. Clearly, both our legislative and our judicial structures are built on a basis of conflict. The key dynamic of parliament is the Government in conflict with the Opposition; the key dynamic in any court is the Plaintiff in conflict with the Defendant. Judges, when judging a case, are typically limited to adjudicating on the arguments presented by those combatants. Legislation and court judgments therefore represent the outcome of a contest.

[56] Litowitz, D (1994) "Dworkin and Critical Legal Studies on Right Answers and Conceptual Holism" *Legal Studies Forum*, Vol. 18, p. 146.

Dworkin has responded by arguing that CLS scholars have confused contradiction with competition.[57] On this view, the law may indeed represent the status quo in an ongoing contest between divergent ideological views; this tension may be creative as well as destructive; but in any event it does not compromise Dworkin's view of integrity. In specific areas of law it ought to be possible to determine which ideological view – which set of principles – holds sway, and to rule consistently.

Altman, however, ripostes that what Dworkin identifies as competition between principles is in fact a reflection of broader conflicting ideological perspectives; consequently, by choosing one set of principles the judge is endorsing or promulgating an ideological position and not simply balancing principles.[58]

Second, CLS Scholars argue that the law is fundamentally incoherent. "The life of the law has not been logic, but a random walk."[59] On this argument, any attempt by a Dworkinian judge to establish the principles underpinning a legal dispute will be a creative exercise, because the law lacks the consistency necessary in order to establish such principles. This argument appears difficult to sustain. While it is acknowledged by Dworkin[60] that the law is far from absolute in its consistency and integrity, it would be a heroic intellectual stretch to conclude that the law is absolutely incoherent. The life of the law may not be absolute in logic, but this is not proof that it is a random walk. Depending on changes to the law, or changes to the society and environment in and

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[57] Dworkin, R (1986) *Law's Empire*, Hart Publishing, Oxford p. 269. Dworkin reiterates this view in Dworkin R (2006) *Justice in Robes*, Belknap Press, Cambridge Massachusetts p. 43.
[58] Altman, A (1986) "Legal Realism, Critical Legal Studies and Dworkin" *Philosophy and Public Affairs*, vol. 15, 205-236
[59] Balkin, J (1987) "Taking Ideology Seriously: Ronald Dworkin and the CLS Critique" *UMKC Law Review*, University of Missouri – Kansas City, Vol 55, p. 415. It is very likely Balkin's quote is a reference to Justice Oliver Wendell Holmes Jr's famous statement "The life of the law has not been logic, but experience." Holmes O (1881) *The Common Law*, p. 1, available online at *Project Gutenberg*, www.gutenberg.org
[60] See, for instance, Dworkin, R (1997) *Taking Rights Seriously* (New Impression with a Reply to Critics), Duckworth, London, 119.

upon which it operates, an area of law might be found to be more, or rather less, coherent at any point in time. An area of relative incoherence might make the task of a Dworkinian judge harder, but it would not make that task impossible.[61]

Finally, CLS scholars argue that no matter how impartial judges might strive to be, every judge has an ideological viewpoint. "The judge … will use her own standards in determining fit, and her own judgment in determining which moral and political principles are the best ones."[62] If this is so, it follows that there is in fact little difference between a Hartian judge exercising discretion, and a Dworkinian judge. The only real difference is that a Dworkinian judge is forced through the exercise of justifying his or her personal view by calling upon principles. "Even if there were a Dworkinian soundest theory … the theory would exert no effective pull or tug on the decisions of judges who fail to share its ideology."[63]

On this view, Lord Templeman would still, had he followed Dworkin, have ruled against the defendants in *Brown*. He would have had to follow the process of identifying relevant principles, but would have been likely to identify principles consonant with his personal views.

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[61] The author has struggled in vain to find an area of law, or potential law, in which a judge would find incoherence or nullity, and thus no assistance from principles. The closest the author can come is to consider a situation where a chattel – say a robot – reached a point of self-aware sentience and approached a court to insist that it has enforceable rights. However even in such a case, broad principles would at least shape the edges. A judge could consider the principle that a court should consider the suit of whomever is able to approach the court; a judge could consider the principle that human rights only apply to humans; a judge could consider other historical events in which legal chattels have claimed humanity, most obviously in the emancipation of slaves. None of these would provide the judge with a self-evident verdict, but neither would the judge be left completely without the guidance of principles.

[62] Balkin, J (1987) "Taking Ideology Seriously: Ronald Dworkin and the CLS Critique" *UMKC Law Review*, University of Missouri – Kansas City, Vol 55, p. 422.

[63] Altman, A (1986) "Legal Realism, Critical Legal Studies and Dworkin" *Philosophy and Public Affairs*, vol. 15, 217.

This argument is difficult to prove or disprove, because nobody except an individual judge knows whether they divorce their personal views from their judicial views. However the CLS argument has the ring of truth. A judge is, at least, likely to carry a predisposition or enthusiasm for principles which they find palatable. Neither Dworkin nor his supporters appear to have found an adequate rebuttal for this argument. This thesis will suggest, however, that this is not fatal, particularly once the role of advocacy is considered.

Two Adaptations of Dworkin's Theory

Following the above brief assessment of some the more prominent criticisms of Dworkin, it appears that Dworkin's theory remains defensible, but can be strengthened with a number of modifications taking into account, particularly, the criticism from the CLS movement. This thesis proposes to use Dworkin's methodology, subject to two modifications outlined below.

Analysis from the bottom up

To discover the relevant principles, Dworkin would have Hercules work from the 'top down'. Hercules must develop an overall theoretical scheme for the entire body of laws, and then show that within that coherent scheme, the principles developed for this specific case are consistent with other congruent areas of law; if there is inconsistency, this in turn must be explained. The result is a 'seamless web' of principles, capable of generating legal rights which the court must then uphold in hard cases.[64]

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[64] Dworkin, R (1997) *Taking Rights Seriously* (New Impression with a Reply to Critics), Duckworth, London, p. 115.

This top-down method, however, is beyond the power of any mortal judge. For Dworkin's theory to be practically useful, it must be capable of application by judges in the real world. Dworkin's theory could, however, be applied successfully from the *bottom up*, that is, by beginning with the dispute at hand, and then seeking to discover those principles relevant and necessary to resolving the dispute. Such a judge need not envisage the broadest sweep of law. They would focus on mid-level, concrete principles with high local value – the very principles which Dworkin would accept are most immediately relevant in the resolution of a hard case.

The current author is not the first to observe the difference between these approaches. Posner distinguished them as follows:

> In top-down reasoning, the judge … invents or adopts a theory about an area of law – perhaps about all law – and uses it to organize, criticize, accept or reject, explain or explain away, distinguish or amplify the existing decisions to make them conform to the theory and generate an outcome in each new case … that will be consistent with the theory…. In bottom-up reasoning … one starts with the words of a statute or other enactment, or with a case or mass of cases, and moves from there – but doesn't move far.[65]

Sunstein follows a bottom-up process in *On Analogical Reasoning*, in which he takes as an example the question of whether Ku-Klux-Klan style cross-burning is protected free

[65] Posner, R (1992) "Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights", *The University of Chicago Law Review* Vol 59, pp. 433-450. Posner is dismissive of bottom-up reasoning, but his description quoted here remains apt.

speech. Various "propositions" (indistinguishable from Dworkin's "principles") are asserted and tested in order to ultimately provide an answer to the legal question.[66]

More recently, Dworkin himself appears to have expressed comfort with the bottom-up approach:

> When a new case arises, [Hercules] would be very well prepared. From the outside – beginning, perhaps, in the intergalactic stretches of his wonderful intellectual creation – he would work steadily in towards the problem at hand … Ordinary people, lawyers, and judges cannot do much of that. We reason from the inside-out: we begin with discrete problems forced upon us … and the scope of our inquiry is severely limited, not only by the time we have available, but by the argument we happen actually to encounter or imagine. […] There is no inconsistency in these two pictures – of Hercules thinking from the outside-in and of the mortal lawyer reasoning from the inside-out.[67]

Such a bottom-up restatement of Dworkin's theory of integrity allows for its practical application, in real cases such as *Brown*.

The importance of advocacy

The Hart-Dworkin debate, and the critiques of Dworkin, focus upon judges. While this is perhaps inevitable, given that the focus is on judicial decision-making, it does seem somewhat at odds with an adversarial justice system, in which advocates have a prominent place. It is commonly understood that advocates do far more than simply

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[66] Sunstein, C (1993) "On Analogical Reasoning" *Harvard Law Review* Vol 106, pp. 741 – 791. Part II commences on page 759.
[67] Dworkin R (2006) *Justice in Robes*, Belknap Press, Cambridge Massachusetts, pp. 54-55.

providing the raw material from which judges craft judgments – they can shape issues and influence outcomes through cogent argument and effective delivery.[68] The role of advocacy may moderate some of the key points of difference between Dworkin and his critics.

First, advocacy implies both contradiction and competition. In a classic two-party case, two advocates present facts, law and argument pertaining to the same legal dispute. Yet one will argue for liability; the other for exoneration. They may focus upon two or three words in a long contract, and each side may urge that those words have completely different meanings. They may bring arguments based on utterly opposed political ideologies. Here, in the courtroom, is the conflict which the CLS scholars describe as contradiction, and which Dworkin describes as competition. In fact, both may be right. The competing accounts of the law may well be contradictory, so that the two sides cannot be reconciled – and yet those two contradictory accounts are, without question, in competition. One will be supported. The judge's task is to determine which. Once the process of advocacy is taken into account, the differences between Dworkin and the CLS movement on this point seem far less crucial. Contradiction and competition both characterise legal cases – indeed, they lie at the heart of the process.

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[68] For an interesting examination of the relationship between advocates and the bench, see McAtee A & McGuire K (2007) "Lawyers, Justices and Issue Salience: When and How Do Legal Arguments Affect the US Supreme Court?" *Law and Society Review*, Vol 41, pp. 259-278. This article is representative of a far broader body of literature which discussed the role of advocacy generally; however the current author's research has not identified any previous work wherein the role of advocates in relation to Dworkin's or Hart's theories are discussed. The closest the current author can find is the following venerable yet still-fascinating paper which discusses the role of advocates in landmark cases: Shaefer, W (1956) "The Advocate as Lawmaker: The Advocate in the Reviewing Courts" *University of Illinois Law Review* Vol 1956, pp. 203-210. Nonet and Selznick, in *Law and Society in Transition* give legal advocacy a central place in a legal system which has advanced to the stage of "responsive law" (that is, a system more concerned with substantive justice than with legal formalism). There are broad parallels between the role they ascribe to advocacy under such circumstances, and the role the current author ascribing to advocacy in Hard Cases.

Second, advocacy may moderate a judge's underlying political ideology.[69] Even if CLS scholars are right, and judges bring an ideological viewpoint to their task, the advocates have every opportunity to demonstrate why that ideology ought not to be followed, at least in the instant case. This possibility – the chance to change a judge's mind – would be present in all cases where the judge was not actually *biased*, that is, incapable of bringing an impartial and unprejudiced mind to the case.[70] A claim that all judges in our system of justice are irretrievably biased would be a revolutionary claim, because on that basis our courts would be inherently incapable of undertaking natural justice. While some CLS scholars might be comfortable with this claim, it seems far broader than the claims typically brought to bear against Dworkin. For the purpose of this thesis, it appears safe to argue that if the CLS argument is valid, and judges are not puritanically neutral, effective advocacy can moderate any ill effects.

Finally, advocacy provides a means by which a moral voice may be raised. As described above, the relationship between morality and law has exercised all sides of the Hart-Dworkin debate. This chapter has argued that, while morality is not central to our legal process, neither are the two concepts entirely distinct. Law and morality have a complex interaction which varies in pattern from issue to issue and case to case. Advocates before a court may present arguments relating to morality. Advocates may portray their preferred outcome as morally superior; and that of their opponents as immoral. These *moral* arguments, in a hard case, are almost certain to have some level of impact on a judge's assessment of "fit". It is unreasonable to be more assertive about the role of morality in this form of decision-making, but it is certainly reasonable to accept that

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[69] It would be too much to hope that a judge's underlying ideology might be utterly extinguished; the author will happily settled for "moderated"; if this point is carried, the CLS critique of Dworkin is not defeated, but is of significantly less gravity.
[70] *Laws v ABT* (1990) 170 CLR 70.

morality is relevant at some level – and advocacy provides a means for morality to intersect with the legal process.

One the importance of advocacy is identified, it becomes clear why this thesis will prefer Dworkin's legal method as a means for resolving *R v Brown*. Once *Brown* had been identified as a Hard Case, the prosecution in a Dworkinian court would have been at liberty to argue for the existence of principles sympathetic to a guilty verdict; the defence lawyers would have been able to argue for the existence of contrary principles which would lead to acquittal. This process cannot be undertaken in a Hartian court, where the advocates would have been required to make a direct appeal to the judges to exercise an open discretion in the advocate's favour.

Second, Dworkin's approach allows for judges to properly express themselves in their written judgments. A Hartian judge can do little more than review the authorities, determine that a lacuna exists, and explain how they personally would fill that lacuna. Even if they endeavour to explain why, their explanation is likely to be idiosyncratic and *obiter dicta*. The majority judgments in *Brown* are prime examples.

In a Dworkinian court, however, a judge would be obliged to explain, as *ratio decidendi*, the process they had followed to establish the relevant principles. They would be required to indicate other judgments or statutes which reflect those principles. In a subordinate court, the judgments would then be open to appeal and review. Even in a higher court, it would be open to judges in subsequent cases to review the reasoning and either affirm it or depart from it.

A proposed methodology

This chapter has identified Dworkin's approach to the resolution of hard cases as being potentially suitable to resolve the conundrum of *R v Brown*. It has several fundamental strengths. First, it appears consistent with the process Courts actually undertake to resolve cases. The process of analogical reasoning which underpins Dworkin's method, is the customary accepted method of legal reasoning in our courts.[71] Second, once the importance of integrity is accepted, Dworkin provides a method which allows the various theoretical perspectives expressed in relation to *R v Brown* to be fruitfully assessed against one another.[72] The question becomes, in essence, which of the competing theoretical approaches is most consistent with the surrounding body of law – which theory has the best fit?[73] Third, Dworkin's method allows for the inclusion of morality as a factor of reasoning without either begrudging its presence or making grand claims about its centrality.

However several modifications will be necessary in order to use Dworkin's adjudicative method while minimising some of the criticisms of his opponents.

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[71] Consider the views of Brennan CJ on his swearing in as Chief Justice of the High Court: "Judicial method starts with an understanding of the existing rules; it seeks to perceive the principle that underlies them and, at an even deeper level, the values that underlie the principle. At the appellate level, analogy and experience, as well as logic, have a part to play." Speech, 21 April 1995, www.hcourt.gov.au

[72] Note, however, the reservation expressed in fn 11, in Chapter 1 above. The contingent phrase "once the importance of integrity is accepted" is important. This chapter has endeavoured to explain why, in this thesis, the importance of integrity has been accepted. It is certainly open to other interlocutors to argue that integrity should not be accepted.

[73] It should be acknowledged, however, that Dworkin's method is not entirely neutral with respect to the competing philosophies. Because an analysis based on Integrity looks to the current body of law, it is likely that conservative positions are given an advantage over radical views (call it the advantage of incumbency). It remains the case, however, that Dworkin's approach facilitates engagement between various philosophical positions in a way that has not occurred to this point in the debate on *Brown*.

First, anyone attempting to apply Dworkin's methodology would be better to work from the bottom up, rather than the top down. As noted above, Dworkin himself seems comfortable with that approach.

Second, Dworkin's methodology must be adjusted so that advocates and advocacy have a role. Rather than having a judge simply examine the surrounding body of principles to determine those relevant to the case, it would be preferable to present that judge with advocated competing theories. This allows the methodology to acknowledge the CLS characterisation of our legal system as the product of endless struggle between opposed value perspectives; and also allows testing of Dworkin's recharacterisation of the same conflict as *competition*.

Finally, advocates must be allowed to make moral claims, so that morality is not alien to the legal decision-making process. The judge will then, as a final step, be required to consider whether the best-fitting principles are within broad bounds of moral acceptability.

The decision to employ Dworkin's method to assess *R v Brown* does not mean other adjudicative methods (such as Hartian discretion, or a Natural Law appeal to higher morality, or a CLS assessment on the basis of underlying political ideologies) could not also be undertaken. Each could provide a useful analysis. However for the task undertaken in this thesis, Dworkin provides the most appropriate methodology.

The next chapter will take the *Brown* dispute into the court of Eunomia,[74] a judge similar to Dworkin's Hercules. Unlike Hercules, Eunomia must reason from the bottom up, not the top down.

Three advocates will appear before Eunomia, representing the three theoretical perspectives discussed earlier in this thesis. A liberal will act for the appellants. A paternal conservative will act for the Crown. Finally, a critical feminist will be an intervener. Each advocate will have their opportunity to claim that their strongest theoretical position provides the best fit with our laws of violence, and laws of sexuality. At the end of the Chapter, Eunomia will be in a position to provide a Dworkinian analysis of *Brown*. This process, it is submitted, will at least minimise the impact of the CLS criticisms, by giving full play to opposing (or contradictory) theoretical and ideological positions

[74] Eunomia was the minor Greek Goddess of Law and Legislation, a daughter of Themis (who is often depicted in legal works blindfolded and holding the scales of justice) and Zeus; thus Eunomia may lack the full extent of the extraordinary capacities attributed by Dworkin to Hercules, while still offering instructive guidance!

CHAPTER SEVEN – APPEALING TO EUNOMIA

Dysnomia brings the city countless ills, but Eunomia reveals all that is orderly and fitting, and often places fetters round the unjust. She makes the rough smooth, puts a stop to excess, weakens insolence, dries up the blooming of ruin, straightens out crooked judgments, tames deeds of pride, and puts an end to acts of sedition and to the anger of grievous strife. Under her all things among men are fitting and rational.[1]

At this point it is possible to consider what the outcome might have been if the defendants in *Brown* had been able to appeal from the House of Lords[2] to an appellate court, presided over by Eunomia.[3]

Leave to Appeal

Eunomia's first concern would be whether *Brown* is a hard case. Can the appellants claim an institutional right exercisable against the world at large, neither bestowed nor formally restricted by law, in relation to which neither statute nor common law provided sufficient clarity?

The appellants claim the right to consent to being harmed, actually or grievously, during BDSM. The judges in the House of Lords themselves conceded they had been unable to find precedents on point. They sought to determine whether BDSM should represent an additional 'exception category' allowing consent to bodily harm. The majority judges

[1] Solon, Fragment 4, c.600-700 BC

[2] *Brown* is used as the base in this thesis because of its centrality in the academic argument, and because no similar case has been argued in Australia. However, the purpose of the thesis is to identify the appropriate *Australian* law. Where authority and principles are cited in this chapter, they will be Australian authorities and principles, notwithstanding that *Brown* is a British case.

[3] As noted in the previous chapter, Eunomia essentially represents the same academic device as Dworkin's Hercules, with the slight limitation that she must reason from the bottom up, not the top down. This chapter will respectfully adopt the literary device, employed by Dworkin, of referring to Eunomia in the third person. To remove doubt, the analysis and conclusions of Eunomia are those of the current author, and are not ascribed to any other source unless citation is given to that effect.

considered that an exception category should only be recognised where there is a countervailing legal right or public interest.[4] Having identified this test, the judges made only perfunctory reference to laws of sexuality and thus failed to establish whether a countervailing legal right, relating to sexuality, existed.[5]

Consequently, Eunomia would be likely to consider *Brown* a hard case, and she would hear the appeal.

The parties

The appellants in *Brown* will be represented by a liberal, who will urge the Court to find that the relevant principles in *Brown* accord with Mill's statement that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."[6]

The Crown will be represented by a paternal conservative, who will support the majority judges in *Brown*. The conservative advocate will argue that the true purpose of positive, healthy sexuality is to reinforce and support important social institutions and values, most notably that of marriage.[7] The protection and support of marriage is in turn supportive of (conservatively-constructed) society. The role of the law is therefore to support this positive, healthy sexuality.

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[4] *Attorney General's Reference (No. 6 of 1980)* [1981] QB 715.
[5] Discussions of sexuality by the judges in *R v Brown* consisted primarily of the observation that homosexuality was no longer unlawful.
[6] Mill, J (1859) *On Liberty*, reprinted in *Brittanica Great Books of the Western World* (1952), vol 43, p. 267.
[7] Finnis, J (1997) "The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations" *American Journal of Jurisprudence*, Vol 42, pp. 97-134. See also Bryan, J (2007) "Sexual Morality: An Analysis of Dominance Feminism, Christian Theology and the First Amendment" *University of Detroit Mercy Law Review*, Vol 84, pp. 655-714.

Finally, an intervener will adopt a critical feminist perspective, and argue that sex is a gendered concept which cannot properly be understood without considering the gender power relations which underpin sexual conduct. The feminist advocate will argue that the law should mitigate against the use of sexuality as an expression of power against women.

Eunomia will proceed by examining our body of laws relating to violence and to sexuality, and considering the arguments of each advocate. This will enable her to identify the appropriate principles, and thus to rule in the case.

Preliminary consideration: laws relating to violence and bodily inviolability[8]

The judgment of the House of Lords in *Brown* was consistent with the notion that the law regards each person's physical body as inviolable, and will protect it against the slightest hurt. This principle underpins the criminal law of assault, and the tort of battery.[9] However the Lords also discovered a range of circumstances in which the law allows physical harm. They struggled unsuccessfully to find a unifying factor to justify these exceptions. Eunomia might require the appellants to consider the same exceptions, to identify whether a principle emerges which supports their case.[10]

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[8] This form of words was taken from *Department of Health and Community Services v JWB & SMB ("Marion's Case")* (1992) 175 CLR 218, [11] (Mason CJ, Dawson, Toohey & Gaudron JJ).

[9] The authoritative expression was given by Hawkins, who indicated any injury "be it never so small" constituted a battery. Hawkins, W (1716) *A Treatise of the Pleas of the Crown*, Savoy, London, bk 1, p. 134. The more modern authority is *Collins v Wilcock* [1984] 3 All ER 374.

[10] In this thesis, for the sake of brevity, the individual principles underlying the law of violence will not be given a separate analysis from the conservative, feminist and liberal viewpoints; it is sufficient if the final principle, identified below as the principle of bodily inviolability, is acceptable to all of the parties.

The range of occasions in which assault can be justified include[11] normal social touching (such as inadvertent jostling on a bus, or touching someone to get their attention in a noisy environment); common assault (in which no harm is caused); assault by police in the course of their proper duties; surgery (by consent or during an emergency to save life); good samaritanism (the intervention of a first aider); boisterous horseplay; contact sports (by consent, and generally within the rules of the game); religious mortification (for instance, ritual self-flagellation); ritual male circumcision (for religious or cultural reasons); tattooing and similar forms of cosmetic body modification; the lawful chastisement of children; and participation in combat.

The range of exceptions are so disparate that there is no clear principle which seems to link them. However it is possible to categorise them into more manageable groups.

The first group involves assaults which cause no harm (i.e. common assaults). Normal social touching, even without consent, is not an assault[12] and consent is a defence to allegations of common assault (which causes no actual harm).[13] This category of assaults can be disregarded in relation to *Brown*, as the legislative provisions which led to the charges were clearly focused on actual and grievous bodily harm, not common assault.

A second identifiable category includes bodily violations which may lawfully be carried out, even without the consent of the victim, because the "assaulting" party relies upon an additional form of authority. Police, for instance, are entitled, in the course of their

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[11] References in law will be provided for each of these as they are discussed below.
[12] *Collins v Wilcock* [1984] 3 All ER 374
[13] *Schloss v Maguire* (1897) 8 QLJ 21. Note that in the 'code' jurisdictions the defence is made explicit in the statute: see the *Criminal Code* NT (s.187), Qld (s.245), Tas (s.182), WA (s.222). Note also that criminal law is not the only context in which the law considers questions of consent and social acceptability in relation to touching. An unwanted touch, of the merest sort, may also constitute sexual harassment provided it meets the test set out in s.28A of the *Sex Discrimination Act 1984* (Cth).

duties, to engage in conduct which would otherwise be an assault.[14] Military personnel engaged in battle are protected by combat immunity which allows them to assault and kill enemy combatants. [15] Finally, parents are entitled to chastise their children by inflicting reasonable physical punishment upon them for the purpose of "lawful correction."[16] Again, these exceptions are of limited relevance for a consideration of *Brown* because neither of their two conditions – higher authority, and assault without consent – are under consideration in *Brown*.

A third category involves assaults carried out during medical procedures. Surgery, the most obvious of these, may be carried out without consent in a dire emergency, but in any other event consent is required. [17] Similarly, a "Good Samaritan" will be protected for action taken while providing first aid, even if this is done without consent. [18] Again, this "medical" category of exceptions is unlikely to be relevant to *Brown* – none of the activities undertaken by the appellants was for any immediate health benefit and it was not argued that they possessed any special expertise (such as that of the surgeon)

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[14] *Nolan v Clifford* (1904) 1 CLR 492. The power is now statutory in all jurisdictions: *Crimes Act 1914* (Cth) s.3W; *Crimes Act 1900* (ACT) s.212; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s.99; *Criminal Code* (NT) s.441; *Police Powers and Responsibilities Act 2002* (Qld) s.21; *Criminal Law Consolidation Act 1935* (SA) s.271; *Criminal Code* (Tas) s. 27; *Crimes Act 1958* (Vic) s.459; *Criminal Code* (WA) s.564.

[15] Provided the shooting is lawful under the *International Convention Concerning the Laws and Customs of War on Land (1907)* (the "Hague Convention") and various other instruments of international law. The law relating to the identification and conduct of combatants is complex, and beyond the scope of this paper.

[16] Care should be taken here. The use of the term "reasonable" probably entitles parents to inflict *actual* bodily harm, but the infliction of grievous bodily harm (other than of the most minor and technical sort) is likely to be considered unreasonable. The standard authority for lawful correction is *Cleary v Booth* [1893] 1 QB 465. The "code" jurisdictions have also implemented legislative authority for lawful correction: Criminals Codes s.11 (NT), s.280 (Qld), s.50 (Tas), s.257 (WA).

[17] *Department of Health and Community Services v JWB & SMB ("Marion's Case")* (1992) 175 CLR 218, [12] (Mason CJ, Dawson, Toohey & Gaudron JJ). The defence is statutory in Tasmania (Criminal code s.51(3)), the Northern Territory (*Emergency Medical Operations Act 1973*), Queensland (Criminal Code s.282), and South Australia (*Consent to Medical Treatment and Palliative Care Act 1995*, s.13)

[18] This exception is given in a range of state Civil Liability provisions, and thus relates to liability in tort rather than criminal liability (torts to the person are as much an expression of the principle of bodily inviolability as are crimes against the person). It is generally subject to a requirement that the good Samaritan be acting in good faith and without recklessness. There are a range of other provisions varying from state to state, and discussion of them is beyond the ambit of this paper. As an example, see the *Civil Liability Act 2002 (NSW)*, Part 8. In the unlikely event that a good-faith Good Samaritan were prosecuted under Criminal law, it seems likely that a defence of necessity might be raised. *R v Davidson* [1969] VR 667 is instructive, although not exactly on point as it refers to action by a medical practitioner.

entitling them to undertake forms of harm which may not be undertaken by other people.

With these categories removed from consideration, the following exceptions remain: contact sports, horseplay, religious mortification, ritual male circumcision, and tattooing/body modification. Can a relevant principle be identified from among these?

Two of the exceptions appear consistent with an affirmation of the individual's freedom to participate in religious and cultural activities. Religious mortification is undertaken voluntarily by a participant as an act of devotion to their God.[19] Similarly, male circumcision is practiced in some religious and cultural groups as a rite of passage, and is lawful under these circumstances.[20] Finally, in some cultures, tattooing or other forms of body modification may also be justified as cultural practices (as much as self-expression).

Two of the exceptions (contact sports and rough horseplay) appear to allow people the freedom to voluntarily participate in activities which carry the risk or certainty of harm, on the understanding that they do so for their own recreation. [21] The harm in these cases is only lawfully justified if it is not caused by malice. In addition, contact sport is often held to be socially beneficial because physical activity and sports promote health generally. [22]

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[19] Curiously, no direct reference (other than *R v Brown* itself) to the legality of religious mortification can be found in Australian or British cases, perhaps due to the rarity of the practice and the negligible likelihood that a charge would ever have been brought to court. However the UK Law Commission discussed this issue in paras 10.1-10.15, citing one Scottish case, *William Fraser* (1847) Ark 280 (Arkley's Justiciary Reports, Scotland).

[20] See Queensland Law Reform Commission (1993) *Circumcision of Male Infants*, Miscellaneous Paper No. 6, December 1993; and Haberfeld, L (1997) "The Law and Male Circumcision in Australia: Medical, Legal and Cultural Issues" *Monash University Law Review*, vol. 23(1), pp. 92-122.

[21] For sport, see *Pallante v Stadiums Pty Ltd (No. 1)* [1976] VR 331. In relation to rough horseplay, see *R v Aitken* [1992] 1 WLR 1006.

[22] The policy link between sport and health is discussed in Ch. 2 of Australian Government (2010) *Australian Sport: The Pathway To Success*, Canberra. It should be accepted, however, that the link between

The remaining exceptions – tattooing, piercing, branding, and more esoteric forms of body modification such as tongue-splitting – allow people freedom of expression in relation to their own bodies. [23] It is instructive, in this context, to recall *R v Wilson*, and the court's statement that "we cannot detect any logical difference between what the appellant did and what he might have done in the way of tattooing." [24]

Consequently it can be seen that, once the nonconsensual and medically-related categories of permissible harm are set aside, the remaining circumstances in which one may consent to actual or grievous bodily harm all affirm a freedom or liberty: freedom of religion, freedom to participate in recreational activities, and freedom of self-expression. Each of these could be re-cast, in Dworkinian terms, as a mid-level principle: People are free to practice their religion, People are free to participate in sporting and similar recreational activities, and People are free to express themselves.

Once the existence of these principles is recognised, it can be seen that the principle of bodily inviolability readily concedes precedence when it conflicts with another underlying legal principle, but only to the minimum extent necessary to allow the other principle to operate. At the very least, it requires *consent* in each case.

BDSM does not appear to fit into any of the three freedoms outlined above. BDSM is not, in any sensible way, a "religious or cultural" practice. It might plausibly be argued

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sports and health is not inevitable or uncontested. Certain forms of sporting contest which result in regular injury, most notably boxing, have had their validity as "healthy" activities called into question.

[23] Consider, for instance, that when introducing new legislation prohibiting tattooing and body piercing for young people, the Victorian Attorney-General had to justify the legislation as a restriction on young people's right to self-expression under Victoria's Charter of Human Rights and Responsibilities (Legislative Assembly Hansard, 12 June 2008, p. 2314). For a discussion of this issue from a legal perspective see Watkins, A (1998) "Score and Pierce: Crimes of Fashion? Body Alteration and Consent to Assault" *Victoria University of Wellington Law Review*, Vol 28, p. 371.

[24] *R v Wilson* [1996] 3 WLR 125, 128.

that BDSM is an activity similar to sports or horseplay, such that participation ought to be protected, but this argument seems somewhat forced and trite. Sex might well be engaged in by many people for recreational purposes, but the legal (and indeed social) conception of sexuality extends well beyond merely treating sex as another form of recreation.[25] It might also plausibly be argued that BDSM is a form of self-expression, but the analogy with tattooing, for instance, is very tenuous and forced. If consent to BDSM is to be permitted, another, more suitable freedom must be identified.

The task for the appellants in *Brown* is now clear. To succeed in their appeal before Eunomia, they must demonstrate that there exists, in our current law, a countervailing principle or liberty which is of sufficient standing that the bodily inviolability principle should concede to it. The conservative and feminist advocates can defeat this argument either by showing that no such principle exists, or that any freedom relating to sexual activity is insufficiently strong to require concessions by the bodily inviolability principle.

Laws of Sexuality

Any countervailing principle will obviously arise from the law's perspective on sex. In *Brown*, two judges identified the case as arising from the conjunction of the laws of violence and of sexuality.[26] Is there a principle which underlies the modern legal approach to sexuality?[27] Eunomia will begin by examining various aspects of the law as it

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[25] To take an obvious example which will be considered in more detail below, pornography is not considered analogous to watching football or cricket on the television, because the nature of sex is generally considered to be different from the nature of football or cricket.

[26] *R v Brown* [1993] 2 All ER 75, 82 (Lord Templeman); 101 (Lord Mustill).

[27] It is almost unthinkable to pose this question without at least a passing nod towards Michel Foucault, whose work *A History of Sexuality* is a standard work of jurisprudence, feminist theory, and 'queer' theory. Foucault would in all likelihood see BDSM practitioners as another form of sexual actor whose sexual conduct is regarded as perverse by the broad network of normalising social power factors (of which law is only one). The law and social attitudes encapsulated by the majority judges in *Brown* would tend to support this interpretation. A deeper engagement with Foucault's theories would be fascinating but is beyond the

relates to sexuality, and will invite each advocate to reflect on the degree of fit between the advocate's theory, and the state of the law.

Adultery

Eunomia might begin by noting that the Christian Old Testament held that sex could only lawfully occur within a marriage. Any other form of sex was adulterous.[28] Adultery ceased to be a criminal offence in England around 1650,[29] but remained justiciable as a civil matter for centuries afterwards. A cuckolded husband might sue the seducer of his wife for damages for *criminal conversation* (damage to the husband's domestic comforts, and insult to his honour). Criminal conversation was sued regularly during the 19th century in Australia[30] but began to disappear from statute books around 1900.[31] It was finally extinguished in Australia in 1975.[32]

Adultery was as the principal ground for divorce[33] until 1975 when the *Family Law Act 1975* (Cth) instituted no-fault divorce. Adultery is no longer a criminal offence, nor a civil wrong, nor grounds for dissolution of marriage.

The liberal advocate could argue a strong fit between the liberal principle and the current (lack of) laws relating to adultery. Adultery, the liberal might argue, harms nobody

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ambit of the current paper, which is limited to a focus on the principles underlying the law itself, rather than examining the normative effect of the law within a broader web of normalising influences. For a very useful relation of Foucault's work to consent to BDSM see Duncan, S (1995) "Law's Sexual Discipline: Visibility, Violence and Consent" *Journal of Law and Society*, vol 22(3), pp. 326-352.

[28] Leviticus 20:10 "And the man that commiteth adultery with another man's wife, even he that commiteth adultery with his neighbour's wife, the adulterer and the adulteress shall surely be put to death" (*The Holy Bible*, King James ed).

[29] Blackstone, *Commentaries*, Bk IV, Ch. IV "Of Offences Against God and Religion"

[30] A fulsome account of the first such trial, *Hart v Bowman*, recounting the testimony of each witness, was printed in *The Australian* of 12 December 1828 and is reproduced at http://www.law.mq.edu.au/scnsw/Cases1827-28/html/hart_v_bowman__1828.htm

[31] See, for instance, the *Matrimonial Causes Act 1899* (NSW) s.92.

[32] *Family Law Act 1975* (Cth) s.120.

[33] See, for instance, the *Matrimonial Causes Act 1899* (NSW) s.12.

sufficiently to attract the protection of the law; for this reason, it is no longer unlawful. The feminist advocate, too, could argue that the state of law in relation to adultery reinforces the feminist principle: reform of divorce law in relation to adultery was part of the implementation of no-fault divorce, which has mitigated the power relationships by which wives were subject to the dominance of their husbands.[34]

The conservative, however, would struggle to argue that there is an effective fit between conservative principles and the laws of adultery. Adultery, in conservative terms, is terribly damaging to marriage, and is profoundly immoral.

Rape

Eunomia might then consider our laws regarding sexual and indecent assault. No person may penetrate another person sexually, or touch them sexually, without consent.[35]

Some of our earliest written caselaw refers to rape[36] and its precursors can be found in texts as old as the Justinian Code.[37] Blackstone provides a history of the crime and its punishment.[38] Eunomia might also note that transgression against these laws is extremely serious and conviction may lead to long imprisonment.[39]

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[34] For a discussion of the role of no-fault divorce in moving towards gender equality, see Melnick, E (2000) "Re-affirming No Fault Divorce: Supplementing Formal Equality with Substantive Change" *Indiana Law Journal* Vol 75, pp. 711-729.

[35] ACT: *Crimes Act 1900* s. 51; NSW: *Crimes Act 1900* s.61I; NT: *Criminal Code* s.192(3); QLD: *Criminal Code* s.349; SA: *Criminal Law Consolidation Act 1935* s.48; TAS: *Criminal Code* s.185, 127A; VIC: *Crimes Act 1958* s.38; WA: *Criminal Code* s.325.

[36] See *Whorewood v Corderoy* (1220) 145 ER 219, in which a groundless accusation of rape, brought before the court, was accepted as an actionable slander.

[37] Blume, H (2008) *Annotated Justinian Code* (2nd ed), Book 9, Title 13 "Concerning the Ravishment of Virgins or Widows or Nuns" online, University of Wyoming, http://uwacadweb.uwyo.edu/blume&justinian/default.asp

[38] Blackstone, *Commentaries*, Bk IV, Ch. XV "Of Offences Against the Persons of Individuals"

[39] ACT: *Crimes Act 1900* ss. 51, 54 – 12 years, 20 years aggravated; NSW: *Crimes Act 1900* s.61I, 61J – 14 years, life if aggravated and in company; NT: *Criminal Code* s.192(3) – maximum life sentence for any sexual assault; QLD: *Criminal Code* s.349 – maximum life sentence for any rape; SA: *Criminal Law Consolidation Act*

All three advocates could claim a strong fit between their proposed principles, and the laws relating to rape. The liberal could argue rape should be outlawed because it causes harm to another; the feminist could argue that rape is the archetypical instance of sex being used as a means of exerting power over women; the conservative could argue that forced sex outside marital bonds harms, and can never enrich, social values.

The age of consent

Eunomia may note that ages of consent are a relatively recent development. The first offences of 'carnal knowledge' did not appear on Australian statute books until the mid 19th century.[40] Each Australian jurisdiction now criminalises sex with children, indecent dealing with children, maintaining a sexual relationship with a child, and child pornography.[41] The Commonwealth has criminalised the conduct of any Australians who travel overseas for sex with children.[42]

Eunomia might also note that these crimes are considered to be among the most heinous crimes possible in our system of law. In some jurisdictions a prisoner, having completed

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1935 s.48 – maximum life sentence for any rape; TAS: *Criminal Code* s.185 – 21 years; VIC: *Crimes Act 1958* s.38 – 25 years; WA: *Criminal Code* s.325, 326 – 14 years, 20 years aggravated.

[40] For instance, in *Ward v Karnes*, heard in NSW in 1824 and reported in *The Australian* on 18 December 1824, the defendant seduced a 13 year old girl who became pregnant. The substance of the case was his refusal to marry the girl, not his action in having sex with a girl of that age. The age of consent in the UK in the same period was 12, under the *Offences Against the Person Act 1861*.

[41] ACT: *Crimes Act 1900* ss. 55, 56, 61, 64-66; NSW: *Crimes Act 1900* ss. 61N, 66A-66D, 66EA, 91G, 91H; NT: *Criminal Code* s. 125B, 125E, 127, 131A, 132; QLD: *Criminal Code* ss. 208, 210, 215, 228A-228D, 229B; SA: *Criminal Law Consolidation Act 1935* s.49, 58, 62, 63, 63A; TAS: *Criminal Code* s.124, 125A, 125B, 125D, 130-130D; VIC: *Crimes Act 1958* s.45, , 47, 47A, 49, 68-70; WA: *Criminal Code* s.60, 320 - 321A.

[42] *Criminal Code 1995* (Cth) Division 272.

a jail sentence for such an offence, might remain in prison under a preventative detention regime, for the protection of the public.[43]

Again, all three advocates could claim a strong fit with their theories. The Conservative may claim that sex with children of less than marriageable age is harmful, not only to the institution of marriage but also to the notion of family; the feminist could argue that this form of sexual conduct is about the use of power against the vulnerable; and the liberal would argue that the child is most certainly harmed, so the prohibition is justified.

Rape in marriage

In former times, a married woman had no legal personality separate to that of her husband.[44] The law held that by marrying, a woman gave enduring consent to sexual intercourse whenever her husband wished. Hale stated:

> the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract.[45]

The House of Lords removed the 'marital immunity' in the 1990 case *R v R*:

> … marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband. Hale's

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[43] *Crimes (Serious Sex Offenders) Act 2006* (NSW); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic). This form of preventative detention is not limited to paedophiles, but may also be used in relation to other serious sex offenders.

[44] This doctrine of law, known as *couverture*, was the target of Mr Bumble's ire in *Oliver Twist*, when that character famously stated that "The law is an ass."

[45] Hale, M (1736) *The Pleas of The Crown*, Vol. 1, Ch. 58, p. 629.

> proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable.[46]

In Australia, marital immunity to rape had been removed even earlier than *R v R.*[47] In 1993, the issue became notorious following a South Australian case in which the jury was instructed that it may be appropriate for a husband to use "a measure of rougher than usual handling" to persuade his wife to engage in intercourse. On appeal, the court stated:

> The legal position regarding persuasion by a husband of a wife who is initially unwilling to engage in sexual intercourse is quite clear. Wooing and persuasion are not unlawful. "Rougher than usual handling" if not with the consent of the wife, is an unlawful assault. If the wife consents to "rougher than usual handling", it is lawful, at least if it stops short of the infliction of physical harm. If sexual intercourse follows persuasion, whatever form the persuasion takes, the issue as to consent is whether the wife freely and voluntarily consented to such intercourse and did not merely submit to force or threats.[48]

Eunomia would note, then, that rape in marriage progressed, in the years immediately before *Brown*, from being a situation in which the rapist could claim immunity, to being one in which no immunity was available.

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[46] *R v R* [1991] UKHL 12; [1991] 3 WLR 767, 770.

[47] The defence became untenable following *R v L* (1991) 174 CLR 379. ACT: *Crimes Act 1900*, s. 69 (ins. 1985); NSW: *Crimes Act 1900* s.61T (ins. 1989); SA: *Criminal Law Consolidation Act 1935* s.73(3) (ins. 1976); VIC: *Crimes Act 1958* s.62(2). The "Code states" of Northern Territory, Queensland, Tasmania and Western Australia do not have a specific provision. Their sexual assault provisions once contained the words "not his wife" in the definition of sexual assault (thus enshrining the immunity). Those words no longer form a part of the codes, hence the removal of marital immunity is complete.

[48] *Question Of Law Reserved On Acquittal Pursuant To Section 350(1a) Criminal Law Consolidation Act (No.1 Of 1993)* (1993) 59 SASR 214, [27].

The feminist advocate is in the strongest position on this issue. The previous marital immunity was clear evidence that, within marriages, husbands exerted power over their wives by means of sex. "… arguments for the marital rape exemption keep the state from acting to equalize relations in the wife's interest and add state sanction to the power that husbands exercise."[49] The law's intervention to prevent this seems completely consistent with the feminist perspective. The liberal is also able to claim a strong fit on this issue, as the position of a spousal rape victim is no different to any other rape victim, from a liberal perspective. The sexual conduct harms another, and thus ought to be outlawed.

The conservative advocate may struggle somewhat, because conservative perspectives about marriage were responsible for the implementation and maintenance of the spousal immunity.[50] However the conservative could argue that spousal rape was the source of discord within marriages and actually undermined the social institution, so the removal of the spousal immunity was consistent with conservative principles. The conservative fit seems, however, somewhat forced.

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[49] Hasday, J (2000) "Contest and Consent: A Legal History of Marital Rape" *California Law Review* vol 88, p. 1491.

[50] An excellent history showing the relationship of the spousal immunity in the context of the historical legal nature of marriage can be found in Augustine R (1991) "Marriage: The Safe Haven for Rapists", *Journal of Family Law*, vol 29, pp. 559-590.

Incest

Laws against incest are found in the Old Testament[51] and preserved essentially intact in current law. It is unlawful to have sexual intercourse with a parent, son, daughter, sibling, grandparent or grandchild. The offence is punishable by lengthy jail terms.[52]

The original rationale for incest laws is often thought to have been the prevention of the effects of in-breeding. However Coleman notes that the taboo predates even rudimentary knowledge of genetics.[53] Further, in an age of reliable contraception, this argument seems to have less weight. It is also notable that other adults with an elevated risk of passing genetic defects to their children are not prevented from having sex or reproducing.

A stronger possible rationale is that most child abuse is incestuous in nature, and that the prohibition of incest protects children. Coleman notes that 75% of incestuous relationships are between father and daughter[54] and describes incest as "an abuse of family power."[55] An overview of NSW incest cases suggests that the cases brought before the court typically involve a family member who is below the age of 16,[56] intellectually disabled,[57] or nonconsenting.[58] Given that each of these groups are separately protected by law, and that the crimes are aggravated where the perpetrator is

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[51] Leviticus 18, *passim*.
[52] ACT: *Crimes Act 1900* s. 62 (10 years); NSW: *Crimes Act 1900* s.78A (8 years); NT: *Criminal Code* s.134 (14 years); QLD: *Criminal Code* s.222 (life); SA: *Criminal Law Consolidation Act 1935* s.72 (10 years); TAS: *Criminal Code* s.133 (25 years); VIC: *Crimes Act 1958* s.44 (25 years); WA: *Criminal Code* s.329 (3 years).
[53] Coleman, P (1984) "Incest: A Proper Definition Reveals the Need for a Different Response" *Missouri Law Review*, Vol 49, p. 258.
[54] *ibid* p.251.
[55] *ibid* p.263.
[56] For instance: *R v GS* [2002] NSWCCA 4; *R v ED* [2006] NSWSC 1512.
[57] For instance: *LAH v R* [2005] NSWCCA 400.
[58] For instance: *MJD v R* [2006] NSWCCA 151.

in a position of trust or influence, one may doubt whether an incest provision is necessary.

It is likely that incest provisions remain in the law for three reasons – the potential for incestuous sex to result in genetically disabled offspring; the potential for dominant family members to abuse their status to secure sex from other family members; and a powerful moral tradition or social taboo against sex between close family members.

The conservative advocate is in the strongest position on this issue.[59] The conservative would argue that laws against incest preserve proper, moral familial relationships. It is also likely that the conservative would argue on moral grounds that incestuous sex is morally outrageous, and therefore ought to be forbidden. The feminist would also be on strong ground. To the extent that incest is the result of dominant (male) family members exerting power over subordinate (female) family members, its criminalisation is consistent with feminist principles.

The liberal is in a curious position. If contraception can minimise genetic concerns by avoiding pregnancy; and if both parties genuinely consent, there does not seem to be a party being harmed. The liberal principle is unable to effectively account for our laws of incest.

[59] For an extraordinarily useful discussion of incest from various philosophical perspectives, see Cahill C (2005) "Same Sex Marriage, Slippery Slope Rhetoric and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo" *Northwestern University Law Review*, Vol 99, pp. 1543 – 1612.

Homosexuality

The Old Testament forbade homosexual relationships[60] and laws against homosexuality were cemented by the Natural Law theories of Aquinas in *Summa Theologia*, which argued that the natural purpose of sex was procreation, and that any non-procreative sexual activity was against nature.[61] Blackstone could barely bring himself to refer to homosexuality openly in his *Commentaries*, merely describing the offence of sodomy as "a crime not fit to be named" which was against "the express law of God."[62]

Homosexual sex remained unlawful[63] until the publication of the *Wolfenden* Report on Homosexual Offences and Prostitution in the UK in 1957. This report led to the decriminalisation of homosexual sex in the *Sexual Offences Act 1967* (UK).

South Australia was the first Australian jurisdiction to decriminalise homosexual sex (in 1975), and Tasmania the last, passing legislation in 1997 (although homosexual sex had been effectively decriminalised in Tasmania since the passage of the *Human Rights (Sexual Conduct) Act 1994* (Cth)).[64]

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[60] Leviticus 20:13: "And if a man also lie with mankind, as he lieth with a woman, both of them shall have committed an abomination; they shall surely be put to death, and their blood shall be upon them" (King James ed). The author quite deliberately avoids the ongoing argument about the relationship between Christianity and homosexuality, which is not relevant to the current thesis. The biblical text is provided as a historical legal reference, not a theological reference.

[61] Willet G (2009) "The Church of England and the Origins of Homosexual Law Reform" *Journal of Religious History* Vol 33 No. 4, p. 420. Willet also provides a valuable primer on biblical and church attitudes towards homosexuality in England.

[62] Blackstone, *Commentaries*, Bk IV, Ch. XV "Of Offences Against the Persons of Individuals"

[63] As will be apparent from the quotation from Kirby J which opened this thesis, the law typically outlawed "sodomy" or "buggery" (i.e. anal intercourse) rather than homosexuality *per se*. The effect, however, was to outlaw (male) homosexuality.

[64] See Ch. 3 above.

Eunomia may note that the law retains some forms of discrimination against homosexual people who cannot, for instance, marry. In the criminal law, the 'homosexual panic defence' remains viable, mitigating the liability of a person who assaults or even kills a homosexual person in 'panic' after the latter has signaled attraction or sexual interest.[65] While acknowledging that the current law still includes injustice, it remains the case that homosexuality, once regarded as a particularly heinous form of moral crime, is now decriminalised and widely socially accepted throughout Australia.

The liberal would be on the strongest ground in relation to homosexuality. Homosexual sex does not harm any third party, and there is no good reason for it to be outlawed. The only point at which the liberal principle is a poor fit, is the maintenance of some areas of discrimination. However the liberal might point to the fact that these are diminishing and increasingly appear anachronistic.

The feminist, too, is on strong ground in relation to homosexuality, as it avoids the nexus between gender and sex. The feminist principle would see no need to regulate or oppose homosexual sex.[66]

The conservative, however, will have a very poor fit on this issue. Homosexuality has been a key issue for conservatism over many years, which is probably the reason there are lingering areas of sanctioned discrimination. Conservative views consider homosexuality deeply immoral, and contrary to proper notions of family and marriage.[67]

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[65] *Green v R* [1997] HCA 50; (1997) 191 CLR 334
[66] Law, S (1988) "Homosexuality and the Social Meaning of Gender" *Wisconsin Law Review,* p. 187 – 236.
[67] Macedo, S (1996) "Homosexuality and the Conservative Mind" *Georgetown Law Journal* Vol 84, pp. 261 – 300; see also Wardly, L (2008) "Response to the Conservative Case for Same Sex Marriage – Same Sex Marriage and the Tragedy of the Commons" *Brigham Young Journal of Public Law*, Vol. 22, pp. 441 – 474.

Prostitution

Prostitution has been a fact of life in Australia since the earliest colonial times, when the lack of available females meant that prostitution was seen as morally evil but socially necessary.[68] In *R v Holden*, a murder case reported in *The Australian* on 10 November 1838, in which a husband murdered his wife, the victim is described in the following terms:

> The deceased had the character of being a drunken prostitute, and when drinking would stop two or three days away from home, for which, a short time before her death, she was sentenced by the Bench to the cells.[69]

During the twentieth century, the outlawed status of prostitution[70] led to most brothels being run by criminal syndicates. This led (most obviously in Queensland) to institutionalised corruption of 'vice squad' police, who allowed brothels to operate in return for illicit payments.[71] Impetus for decriminalisation of prostitution is likely to have come as much from a desire to curb organised crime and police corruption, as from any changed moral perception of prostitution.

Decriminalisation of prostitution allowed the introduction of a regulatory regime for prostitutes. In all jurisdictions other than South Australia[72] and Western Australia,[73]

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[68] See discussion in Idhe, E (2002) "Send More Prostitutes: An Alternative View of Female Sexuality in Colonial New South Wales" *Journal of Australian Colonial History*, Vol. 4, No. 2.
[69] *R v Holden*, SCNSW, 8 November 1838, reported in The Australian, 10 November 1838, reproduced at http://www.law.mq.edu.au/scnsw/Cases1838-39/html/r_v_holden__1838.htm
[70] In fact, the law often prohibited conduct surrounding prostitution, such as soliciting, or brothel-keeping, rather than prohibiting prostitution itself.
[71] The story of prostitution in Queensland from the 1950s through to the 1980s, and its complicated relationship with criminal syndicates and corrupt police, is perhaps best told in Dickie, P (1988) *The Road To Fitzgerald*, University of Queensland Press, St Lucia.
[72] Prostitution itself is not unlawful in South Australia; however soliciting for prostitution is unlawful, as is running a brothel: *Summary Offences Act 1953* (SA) Parts 5 and 6.

regulations now control such matters as where brothels may operate,[74] testing of prostitutes for sexually transmissible diseases,[75] and the licensing of brothel owners and managers.[76] Involvement in prostitution is lawful provided these regulatory requirements are met. A Melbourne Brothel, the *Daily Planet*, has even floated on the Australian Stock Exchange as a public company.[77]

The 'fit' between liberal principle and laws relating to prostitution is almost ideal. The legal schemes which now predominate exist in order to allow consenting adults to engage in prostitution as they wish, subject only to regulations which are intended to protect the prostitute, the client, and the public.

The feminist is unlikely to find a good fit between feminist principle and prostitution. Prostitution is likely to be seen as a commoditization of women, whose sexual attentions can be purchased. This may enable some women to use their sexuality to obtain financial independence; however in the majority of cases, it seems more likely that feminist principles would be uncomfortable with prostitution.[78]

The conservative view would be utterly at odds with prostitution. The commoditization of sex, in which a client may have sex with a stranger, with no emotional content, is entirely inconsistent with moral sex within marriage.

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[73] Prostitution in Western Australia is technically unlawful; it would have been decriminalised under the *Prostitution Amendment Act 2008*, which has been passed but has not commenced and appears unlikely to be proclaimed.
[74] For instance, *Prostitution Act 1992* (ACT) s. 18.
[75] For instance, *Prostitution Control Act 1994* (Vic) ss. 19-20.
[76] For instance, *Prostitution Act 1999* (Qld) Part 3. Note also s. 16 of the *Prostitution Control Act 1994* (Vic), which creates a specific offence of offensive behaviour towards a prostitute.
[77] The company name is Planet Platinum Limited, ASX code PPN.
[78] The liberal and feminist positions in relation to prostitution are compared in Sorooshyari, N (2010) "The Tensions Between Feminism and Libertarianism: A Focus on Prostitution" *Washington University Jurisprudence Review* Vol 3, pp. 167-194, especially pp. 183-194.

Pornography

Regulation of 'obscene' publications commenced with the *Obscene Publications Act 1857* (UK), which allowed for the seizure and destruction of such material.[79] The test for 'obscenity' was subsequently established as "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[80] This definition remained more or less intact for the following century.[81]

Administration of such laws in Australia became complex, because the Commonwealth did not have a general power of censorship, although it could ban importation of obscene material. Each State had its own legislation and enforcement system. At a national level, during the early part of the 20th Century, Australia retained a Censorship Board as a unit of the Department of Customs and Trade. In its early years, the Board was not focussed on pornography per se, but rather on immoral scenes contained in mainstream books and cinema.[82]

In *Crowe v Graham*[83] the court rejected the *Hicklin* test because the nexus between obscene publications and 'corruption' was tenuous. The court substituted a new test, resting on the objective notion of community standards of decency. This had two effects: the 'obscenity' was tied to a community standard, and not to any 'corrupting' outcome; and second, the definition of 'obscenity' became mobile, moving with

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[79] *Obscene Publications Act 1857* (UK).
[80] *R v Hicklin* (1868) LR 3 QB 360, 371 per Cockburn CJ
[81] This historical overview benefited substantially from the history given in Griffith, G (2002) *Censorship in Australia – Regulating the Internet and Other Recent Developments*, Briefing Paper 4/02, NSW Parliamentary Library Research Service, Sydney.
[82] See the extracts form early Board Annual Reports reproduced at http://libertus.net/censor/history/docarchive/oflc_history.html
[83] *Crowe v Graham* (1968) 121 CLR 375

community standards. By the early 1970s, censorship and classification were governed by three propositions:

- adults are entitled to read, hear and see what they wish in private and in public;
- people should not be exposed to unsolicited material offensive to them; and,
- children must be adequately protected from material likely to harm or disturb them[84]

While the legislation has been amended to account for new technologies such as videocassettes, explicit computer games and the internet, the standard remains essentially the same as that outlined in *Crowe v Graham*: "the standards of morality, decency and propriety generally accepted by reasonable adults."[85]

Under the current National Classification Code,[86] adults are entitled to view material which may "explicitly depict sexual or sexually related activity between consenting adults in a way that is likely to cause offence to a reasonable adult."[87] They may also watch 'X' classified movies, which may "contain real depictions of actual sexual activity between consenting adults in which there is no violence, sexual violence, sexualised violence, coercion, sexually assaultive language, or fetishes or depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers, in a way that is likely to cause offence to a reasonable adult."[88] In neither case, however, may the material be shown to a minor.

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[84] Griffith, G (2002) *Censorship in Australia – Regulating the Internet and Other Recent Developments*, Briefing Paper 4/02, NSW Parliamentary Library Research Service, Sydney
[85] *Classification (Publications, Films and Computer Games) Act 1995* s.11.
[86] A legislative instrument under the *Classification (Publication, Films and Computer Games) Act 1995*.
[87] National Classification Code, Clause 2, table item 2.
[88] National Classification Code, Clause 3, table item 2.

The theme, then, is one which retains 'community standards' as a relevant concept, but which in practice protects the right of adults to view virtually any sexually explicit material they wish.

All three of the advocates have claims of fit against the laws relating to pornography; and all three have difficulty with some aspects of those claims. The liberal may claim that the current state of pornography law reflects a liberal philosophy that adults should be entitled to do what they wish provided no other party is hurt. However the standard in *Crowe v Graham* imports an *objective* standard of "moral decency". The Liberal would struggle to account for this standard.

The conservative view would be that the standards in *Crowe v Graham* are evidence of the law regulating sexuality for the benefit of general social welfare; however the conservative would have difficulty explaining the breadth of pornographic material still lawfully allowed under the National Classification Code.

The feminist would have the most difficult task. Pornography is, in feminist terms, exploitative and dehumanising, objectifying women and regarding them only as sexual objects.[89] The feminist advocate might point to the National Classification Code requirement that pornographic material not include violence, coercion, or "purposefully demeaning" material, as offering a limited fit between feminist theory and the state of the law; however a feminist standard of "purposefully demeaning" would be likely to be much more stringent than the *Crowe v Graham* objective standard.

On balance, the liberal philosophy seems to have the strongest fit with the laws relating

[89] See, for instance, Willis E (1993) "Feminism, Moralism and Pornography" *New York Law School Review*, Vol 38, pp. 351-358. Willis describes pornography as "symbolic rape".

to pornography, but the fit remains somewhat uncomfortable.

Sexual servitude

Eunomia might note that the Commonwealth Criminal Code contains relatively new[90] offences relating to Sexual Servitude, whereby young women are brought into Australia via deceptive recruiting processes, and then held in near-slavery and forced to work as prostitutes. A description of the plight of these victims was given in *R v Tang*:

> The complainant acknowledged a "debt" to the syndicate in an amount of $45,000. For each customer serviced, the complainant's "debt" would be reduced by $50 … There were five complainants. All of them consented to come to Australia to work, on the understanding that, once they had paid off their "debt", they would have the opportunity to earn money on their own account as prostitutes. Upon their arrival the women had very little, if any, money in their possession, spoke little, if any, English, and knew no-one.[91]

It is now an offence to hold a person in sexual servitude, to participate in the running of a business involving sexual servitude, and to recruit sexual slaves by deception.[92]

All three advocates could validly claim a strong fit between these laws and their philosophies. The coercion involved in sexual servitude is antithetical to the liberal; the commoditization of women in sexual servitude is offensive to feminism; and forced commercial sex is entirely alien to the conservative conception of sexuality.

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[90] Introduced into the Criminal Code in 1999 by the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth). Similar provisions have been enacted in state law.
[91] *The Queen v Tang* [2008] HCA 39, quoted selectively from paragraphs 10-16.
[92] Criminal Code (Cth) Division 270, clauses 270.6 – 270.8.

Unlawful sex by persons in a position of authority

Eunomia would next note that the law in some jurisdictions provides special protection for young people who have reached the age of consent but who are vulnerable to adults holding positions of authority over them. An adult has a position of special care over a young person in relationships such as stepparent-stepchild, teacher-student, and coach-player.

It is an offence for the person in a position of authority to engage in sexual intercourse with the young person until the young person has reached the age of eighteen (the usual age of consent is sixteen). An offence is punishable by imprisonment for up to eight years.[93]

All three advocates may make some claims in relation to these laws, however the conservative may be in the strongest position, arguing that these laws place social institutions such as family, church, and schools in a special position, and impute special duties to those holding authority in those institutions. The deferral of sexual freedom in favour of the integrity of the social institutions is consistent with conservatism.

The liberal might argue that consent is vital to a liberal conception of sex, and that the relationships of authority between the offender and the young person vitiate the consent of the young person. However the liberal would struggle to explain why a sixteen year old, who would normally be able to have sex with whomever they chose, should be

[93] *Crimes Act 1900* (NSW) s.73. *Criminal Code* (NT) s.128.

unable to have sex with a person in a position of authority, no matter how valid or well-considered their consent.

Finally, the feminist would be able to point out that these laws recognise the very strong relationship between sex and power which is fundamental to the proposed feminist principle. The purpose of the law is to recognise that the older person occupies a position of power relative to the younger person, and that this power relationship may result in sexual manipulation. The fit between the feminist principle and this law is very strong.

Sexual activity by a person with an infectious disease

Eunomia would note that people who carry a sexually transmissible medical condition must not have sexual intercourse (including oral sex) with another person unless they first tell that person about the risk of acquiring the sexually transmissible disease. The other person must then voluntarily accept that risk.[94]

The liberal has the only philosophical principle with an adequate fit for this law. The voluntary acceptance of risk is classical liberalism. The conservative, on the other hand, would find it difficult to explain a law which carries such obvious risks to the health of the individual, and therefore the strength of the family and society. A conservative would, more likely, suggest that if sex were limited to monogamous, marital sex, the rate of infection in society would rapidly diminish.

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[94] *Public Health Act 1991* (NSW) s.13; *Crimes Act 1958* (Vic) s.19A. At this point, as a slight aside from the thrust of the current argument, the author must confess he is incredulous that a person can consent to unprotected sex with an HIV-positive partner, but that the person cannot consent to being bruised during a spanking by that same partner.

Finally, in relation to the feminist advocate, it is difficult to properly consider this law in gendered terms, unless perhaps it is to argue that the law puts women at risk if it allows the opportunity for men carrying infectious diseases to procure consent to sex. Alternatively, the feminist may possibly argue that the existence of restraints – the requirement that the infected person disclose their infection – provides protection for women against unscrupulous sexual partners.

Bestiality

Most jurisdictions have outlawed bestiality (sexual intercourse with an animal).[95] The liberal advocate would struggle to explain why, because these prohibitions limit the bounds of sexual conduct, without identifying a *person* who is harmed. The liberal might possibly argue that it is not unusual within the law for animals to be treated as though they have limited entitlement to rights analogous to those of humans.[96] This is not a point which should be pushed too far; taboos against bestiality are ancient and pre-date sophisticated schemes of human rights.

The feminist may struggle to explain this law too, except perhaps to note that bestiality is another example of sexual power being used against a vulnerable party, and that if such conduct were legitimate it would effectively support the use of sex-as-power against women.

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[95] NT: *Criminal Code* s.138; NSW: *Crimes Act 1900* s.79; QLD: *Criminal Code* s.211; SA: *Criminal Law Consolidation Act 1935* s.69; TAS: *Criminal Code* s.122; VIC: *Criminal Code 1958* s.59; WA: *Criminal Code* s.181. The ACT does not have a statutory provision making bestiality an offence.

[96] Consider, for instance, that all jurisdictions forbid animal cruelty: ACT: *Animal Welfare Act 1992* s.7; NSW: *Prevention of Cruelty to Animals Act 1979* s.5; NT: *Animal Welfare Act 1999* s.6; QLD: *Animal Care and Protection Act 2001* s.18; SA: *Prevention of Cruelty to Animals Act 1985* s.13(1); TAS: *Animal Welfare Act 1993* s.8; VIC: *Prevention of Cruelty to Animals Act 1986* s.9; WA: *Animal Welfare Act 2002* s.19.

The conservative position has a strong fit in relation to bestiality. The conservative advocate would be able to explain that bestiality compromises fundamental moral taboos, does not contribute to the maintenance of any social good or social institution, and should consequently be outlawed.

Abortion

Abortion remains a criminal offence in every jurisdiction except the ACT.[97] Each jurisdiction allows a defence where the abortion is carried out by a medical practitioner, with the consent of the pregnant woman, in order to preserve the wellbeing of the pregnant woman.[98] As a result, while abortion remains unlawful, most women who seek to terminate a pregnancy will be able to do so.

There is little social consensus regarding abortion. 'Pro-life' and 'pro-choice' arguments are still maintained vehemently by their respective proponents, and the issue is still dynamic and polarising. The liberal advocate before Eunomia is very likely to highlight the fit between the proposed liberal principle and the "pro-choice" position, and will argue a strong fit on the basis that most women who want an abortion will be able to get one. The conservative advocate, on the other hand, who places a very high value on procreative sex, would demonstrate a strong fit with the "pro-life" position, and would point out that no jurisdiction other than the ACT has actually legalised abortion.

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[97] The offence was removed by the *Crimes (Abolition of Offence of Abortion) Act 2002* (ACT).
[98] Four jurisdictions specifically provide a defence. Those are NT: *Criminal Code* s. 174; SA: *Criminal Law Consolidation Act 1935* s.82A; Tas: *Criminal Code* s.164; WA: *Health Act 1911* s.334. The other jurisdictions rely on the general criminal law defence of necessity.

The feminist advocate would be in something of a quandary. On the one hand the notion of a "woman's right to choose" is common within feminist arguments,[99] and the ability to terminate a pregnancy allows women the opportunity to choose whether to accept motherhood. However there is also a strong feminist argument which sees abortion as anti-motherhood and consequently an expression of power against women.[100]

Final arguments

Before Eunomia retires to consider her decision, each advocate should be given a final opportunity to argue that their principle fits the laws of sexuality as a whole. To this point, fit has been considered in a piecemeal way, but the assessment of fit should be a qualitative process and not merely a matter of tallying those areas of sexuality consistent with each principle.

The Liberal Summation

The liberal advocate, on behalf of the appellants, argues that the only purpose for which power can be rightfully exercised over any member of a civilised community, against their will, is to prevent harm to others. This liberal principle would explain the state of our law in relation to adultery, rape, the age of consent, homosexuality, prostitution, pornography, sexual servitude, sex by persons with infectious diseases, and sex by persons in a position of trust. The liberal principle also provides force to the pro-choice side of the abortion debate. While, as noted above, the test of fit cannot simply become

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[99] There is an overwhelming amount of scholarship on this question. The author found Hendricks J (2009) "Body and Soul: Equality, Pregnancy and the Unitary Right to Abortion" *Harvard Civil Rights – Civil Liberties Law Review* Vol 45, pp. 329 – 374 to be useful.

[100] This school of thought is referred to as "pro life feminism." See, as an example, Callahan S (1986) "Abortion and the Sexual Agenda: A Case for Prolife Feminism" in Soble A (ed) *The Philosophy of Sex : Contemporary Readings*, Rowman & Littlefield, NY, pp. 177 – 190.

a quantitative process, the sheer number of aspects of the laws of sexuality consistent with the liberal principle is impressive.

The liberal advocate could strengthen this argument by pointing out that in almost all of the cases where the law has evolved in the past century, the law has become more liberal. Laws have changed to remove the legal implications of adultery; to decriminalise homosexuality; to decriminalise and regulate prostitution and pornography. And where the laws have imposed new boundaries, these have been imposed in order to prevent harm against young people, vulnerable people, or non-consenting people.

The liberal advocate could also mount arguments from a moral perspective, by arguing that liberalism itself, and the current state of the laws, respect a plurality of moral conceptions and an individual right to act according to their own moral conscience. It is consistent with the liberal principle, for instance, for a person with conservative, traditional moral values to decline to have sex until they are married; nobody may make them do so. Yet at the same time, this moral view is not imposed on those who do not hold it; those whose consciences place less moral value on monogamy, and those who see no lack of virtue in promiscuity, are entitled to act as they wish. They may, if they wish, have nonmarital sex; they may watch pornography; they may hire, or become prostitutes. In a morally plural society, laws which permit citizens to follow their own moral strictures, might themselves be described as moral.

The only two grounds upon which the liberal might face serious criticism are those relating to incest and bestiality. If consent is present and contraception is practiced, the liberal principle can offer no real reason why incest should be outlawed. Similarly, the liberal principle struggles to explain why bestiality, if practiced in a manner not causing

harm to the animal, should be outlawed. There is no harm to others arising from bestiality. The liberal may struggle to rebut these criticisms. The best counterargument seems to be to point to the progressive liberalisation of sexual laws in the past century, and to suggest that these might be areas for future reform. However one suspects that liberals might, nevertheless, shy away from the view that their principle requires them to support incest and bestiality. The criticism seems to have merit.

The liberal advocate could conclude their case confident that the liberal principle has a very strong fit against the vast majority of our laws of sexuality; and particularly those which regulate the overwhelming majority of sexual conduct in our society.

The Feminist Summation

The principle urged by the feminist in this case is that it is valid for law to mitigate against the use of sexuality as a mechanism for the expression of power against women.

The feminist may contest the claim that liberalism has been the driving force behind the reform of sexual laws in the past century. Feminism, as much as liberalism, has profoundly changed the way people think about, and practice, sex in society. Feminists might claim, for instance, that the introduction of no-fault divorce was a significant step in reducing the use of sex as an expression of power against women; they might claim that the end of the marital rape immunity was more a victory for feminism than for liberalism. Decriminalisation of homosexuality attacks the gendered conception of sex. The regulation of prostitution, to the extent that it prevents women from being used by criminals running unregulated brothels, reduces the sexual use of power against women. Similarly, the ban on sexual servitude protects women. The effective availability of

abortion in all jurisdictions means that women who become pregnant still have choices regarding their future. Taking all of this into account, the feminist advocate might well claim that the current state of our laws of sexuality simply cannot be properly understood without due deference to the feminist principles.

Against this, there are a number of areas of law in which feminist principles have little explanatory capacity. The feminist principle would not, for instance, support permissive pornography laws. Similarly, the feminist principle would refuse to allow the commoditization of women for the purposes of prostitution. Finally, while rape is a crime, feminists themselves consistently criticise rape laws for the insufficiency of their protection for women.[101]

The feminist advocate could also raise moral arguments, by arguing that the use of sexuality as a means of power against women is inherently immoral, and that past codes of morality which allowed such use of power, are now anachronistic. Implementation of laws which mitigate against the use of sexual power against women, are inherently moral on this argument.

While the rebuttals of the feminist position have merit, they do not erase the impact of the feminist principle. It does seem that our sexual laws cannot be properly understood without appropriate respect for the feminist principle.

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[101] For a single example from a very broad field, see Stephen K (1994) "The Legal Language of RAPE" *Alternative Law Journal* Vol 19, p. 224.

The Conservative Summation

The conservative principle is that the true purpose of sexuality is to reinforce and support important social institutions and values, most notably that of marriage. The conservative advocate, it is clear, has the most difficult job of the three parties. There are a range of areas of law where the conservative principle has an extremely poor fit with our laws of sexuality. The legal irrelevance of adultery flies in the very face of the conservative principle. Permissive laws relating to pornography, prostitution and homosexuality are also inconsistent with the conservative position.

However the task of the conservative advocate is not impossible. The conservative's strongest arguments would be made on moral grounds. The conservative could argue that even if the liberal or feminist principle has a greater fit with our laws of sexuality, sexual conduct is bound up as much by moral as by legal norms. Consequently any attempt by Eunomia to establish sexual principles in a moral vacuum would be flawed.

The conservative could then argue that the moral codes of conduct regulating sexuality in Australia remain much closer to the conservative ideal. The advocate could argue that the conservative ideal of sex undertaken by married, monogamous couples is still the "gold standard" for sexual conduct in society. The further conduct is, conceptually, from the gold standard, the less likely it is to be both morally and legally sanctioned.[102] For instance, adultery remains generally regarded as immoral conduct – if an outsider were to judge our society on its laws alone, they might expect adultery to be unremarkable, yet the reality is quite different. Similarly, while prostitution is lawful, it has hardly been normalised to the point where a precocious teenaged schoolgirl might

[102] This argument reflects, to a significant degree, the views of Foucault: see fn 27 above.

nominate it as a career ambition. Homosexuality may not be criminal, but the law still forbids homosexual people from marrying – this legally sanctioned discrimination can only realistically be explained by a conservative moral principle about the idealised nature of heterosexual marriage.

The moral argument from conservatism also explains the prohibition of incest and bestiality, which are difficult to explain from a liberal or feminist perspective. The conservative can argue that forms of sexuality which are especially morally repugnant, such as incest and bestiality,[103] are forbidden on essentially moral grounds. If this is the case, then BDSM, which the conservative might argue is also morally repugnant, ought also to be forbidden. This would take Lord Templeman's dictum that "society is entitled and bound to protect itself against a cult of violence" and place it on a more sound theoretical footing.

The counterargument would be to deny that BDSM is morally repulsive, most likely by an appeal to moral plurality, which would lead back to the liberal argument discussed above.

In the end, the conservative advocate must acknowledge a lesser fit than can be claimed by the liberal or feminist. However the conservative may still argue that there are strong relevant moral imperatives. Consequently the law should not implement the dominant liberal or feminist principles, on moral grounds – just as the law has arguably continued to prohibit incest and bestiality on moral grounds.

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[103] One could add necrophilia to this list, which is unlawful by virtue of being an indecent or improper interference with a corpse.

At this point, Eunomia may retire to consider her verdict. Before doing so, it is appropriate to reflect again on the importance of advocacy in the Dworkinian process. The exercise undertaken above shows how competing, opposed philosophical perspectives might be brought before a Dworkinian court to argue a hard case. Eunomia's task, at this point, seems quite different to that prescribed for Dworkin's Hercules. Eunomia is not required to develop a "theory of law" at the constitutional level. Neither is she required to begin with consent-to-sadomasochism as a lacuna in the law, and work alone in an inquisitorial way to find principles. Rather, she has been presented with arguments by advocates. Those arguments can influence her in the determination of an appropriate principle for this case.

This process repositions the rebuttals raised by CLS scholars against Dworkin. The CLS contention that the law is characterised by opposed and irreconcilable political forces is admitted, but is not fatal. At the current point in the process – once the case has been argued – each of the three theoretical/ideological positions remains distinct. Yet while they are contradictory (in CLS terms) they are also competitive (in Dworkin's term). The process of advocacy allows – even requires – disparate viewpoints to flourish in the courtroom.

Second, it seems much harder to sustain the CLS contention that the law has been a "random walk." Each of the three advocates has been able to present a separate, coherent principles-based account of our laws of sexuality. It remains possible to argue that each advocate was being creative rather than interpretive, but the fact remains that coherent principles-based accounts could be found, and may be useful in analogical reasoning.

Third, CLS scholars might still argue that Eunomia, being a judge in a superior court, will not be ideologically neutral. However at this point her specific task must be considered. She does not have an entirely open hand to determine the way forward. Unlike a Hartian judge, she is not merely entitled to deploy a discretion to fill the lacuna. Instead, she has been presented with alternative principled accounts of the law, and her judgment must deal with these. Any ideological predisposition she might bring to the task will be tempered first by the fact that she must consider the arguments put to her; and second by the fact that she must record her reasoning in writing, for the later judgment of history. None of this, of course, provides an ironclad guarantee of strict neutrality – but the deck, so to speak, is far from stacked.

Consequently, the effect of advocacy upon the process of determining a hard case, has placed our judge in a position far less susceptible to CLS criticisms than Dworkin's judge Hercules.[104] The next chapter follows Eunomia into her chambers as she determines the outcome.

[104] Care should be taken here, lest the conclusion be overstated. A CLS critic of my argument could claim that all this paper has done is move the goalposts; that the CLS criticisms of Dworkin remain valid, because I have had to substantially modify Dworkin's method to account for the CLS criticisms. I would be happy to accept such a charge, if the result was that the modification of Dworkin's method allowed for a satisfactory new way to consider *R v Brown*. The purpose of this thesis is to explore the legal position of sadomasochism, not to offer an unqualified defence of Dworkin.

CHAPTER EIGHT – EUNOMIA'S JUDGMENT

Delimitation is always difficult. The world is one, life is one. The sweetest and most heavenly of activities partake in some measure of violence – the act of love, for instance; music, for instance.[1]

At this point, Eunomia has been presented with three competing theoretical principles, each of which is claimed by its proponents as suitable to guide a decision in *Brown*.

Eunomia would quickly realise that none of the three presents an ideal fit, and each has at least *some* strong claims as to fit. Consequently, none of the three can be wholeheartedly endorsed, or completely disregarded. Under these circumstances, the best course for Eunomia would be to commence with the best of the three, and then to seek to modify the principle to give due deference to the strengths exhibited by the other parties.

It was apparent in the previous chapter that the liberal principle has the strongest overall fit with our laws of sexuality. Consequently, the starting-point for Eunomia would be the Millsian principle that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against [their] will, is to prevent harm to others"[2] but at the same time she would note the inadequacies of this principle in certain areas of the law. How might it be adjusted?

First, Eunomia might note that Mill's principle is essentially in two parts. First, the principle states, as a general rule, that people ought to be able to do as they wish, unconstrained by law. Second, the principle states those limited circumstances under

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[1] Burgess, A (1962) *A Clockwork Orange*, Penguin, London, pp. 91-92.
[2] *ibid* p. 271

which law might be validly imposed - to prevent harm to others. These two "limbs" of the liberal principle might be usefully considered separately.

The first limb of the liberal principle

The first limb of the principle would find its greatest criticism from the conservative perspective, which would argue that certain forms of conduct *cannot* be validly undertaken, regardless of whether they cause harm to others, because they are morally outrageous. Eunomia would recognise that this is why the conservative principle is able to adequately explain incest and bestiality laws, while the liberal principle cannot - the liberal principle is unable to accept this moral constraint.

Let Eunomia provisionally accept the strength of the conservative principle in this area. The liberal principle might be modified, to now read "A member of a civilised community is entitled to engage in any conduct which is not morally outrageous, and the only purpose for which power can be rightfully exercised against him/her, against his/her will, in relation to such conduct, is to prevent harm to others." Would this principle fit the law more closely than the liberal principle? Both sides of this question might be argued.

On the one hand, it could be argued that the modification leaves the liberal principle intact, but allows it to cleave closer to the law in relation to incest and bestiality. On the other hand, however, it could be argued that adultery now represents a problem for the modified principle. If adultery is morally outrageous, as the conservative would presumably argue, then according to this modified principle it too ought to be outlawed.

To give the conservative argument its best chance of success, let us assume that the former explanation prevails in Eunomia's mind, and that the modified principle is regarded as an improvement. The challenge presented by adultery could be rationalised by recognising that there is a threshold of moral outrageousness. In Australia, it appears incest and bestiality are sufficiently morally outrageous to trigger the need for legislative intervention; adultery is not. If this application of the threshold test is accepted, the modified principle quite clearly has a stronger fit than the liberal or conservative principle alone.

If Eunomia accepts this argument, she must then consider whether BDSM is sufficiently morally outrageous that it should not be possible to consent to harm during BDSM activities.

To do this, she must first consider how to *measure* moral outrage. How might Eunomia tell when a practice is sufficiently morally outrageous? It is tempting to try to establish specific mechanisms for measuring degrees of moral outrage, but it is very difficult to identify a suitably *practical* method. For instance, while Eunomia is likely to consider the moral consensus of society as a whole, it is unlikely that opinion polling will be considered a satisfactory tool. Similarly, it would be difficult to identify an appropriate *expert* to guide the court on levels of moral outrage. In the end, however, it is unnecessary to prescribe a specific measure of this threshold. For current purposes it is sufficient to identify "moral outrageousness" as a question of fact. Once a *Brown* defence has been raised, each party should be able to present such evidence as it wishes on this point. The judge can then apply the evidence to an objective legal test: Is the conduct under review is so morally outrageous that it should not be permitted, even if the conduct would otherwise be supported by principle?

To return to the case at hand, as Chapter 2 of this thesis indicated, BDSM includes a very wide variety of sexual practices, from the mild to the extreme. These might potentially each trigger different moral responses. And yet, strangely, some of the practices most likely to trigger moral outrage - toilet play, for instance - are not outlawed, because they do not cause actual or grievous bodily harm. Reduced to manageable concepts, the question would be "Are BDSM practices which cause ABH or GBH so morally outrageous that they should not be allowed, even if relevant principles would permit them?"

Clearly, Lord Tullichettle would answer this question in the affirmative. And yet, beyond his description of BDSM as a "cult of evil", no moral argument against BDSM was effectively articulated in *Brown*. Clearly BDSM cannot have been considered immoral simply because of the bodily harm (because this would be impossible to reconcile with the other permissible forms of bodily harm); and provided consent is present, it is difficult to identify anything in the *sexual* content of the practices which ought to produce moral outrage.

Finally, the liberal could defend the liberal principle from conservative moral criticism by arguing that morality is contested and that in a morally plural community, the argument from morality becomes more difficult to sustain. The liberal would be supported in this argument by reflecting upon the fact that the UK Law Commission did not even endeavour to finalise its report into consent and sadomasochism, on the basis that a consensus would be very difficult to establish.

Ultimately, Eunomia would conclude that if the argument from conservatism could

demonstrate that BDSM, or specific BDSM practices, were so morally outrageous that they could be classified alongside bestiality and incest, then there may be a case for positive prohibition of those practices; however this case has not been effectively made, either in the House of Lords judgment itself, or in the subsequent academic debates. Consequently even if the conservative amendment is accepted, it would not be sufficient to prohibit BDSM.

The second limb of the liberal principle

The second limb is that the only valid reason for law to constrain liberty is to prevent harm to others. This principle, in the context of sexual law, is open to attack from both the feminist and the conservative perspectives, essentially on the same ground: that the liberal principle represents too narrow a view of "harm".

The feminist principle, that the intervention of law is justified in order to prevent sex being used as a tool of power to subjugate women, has been shown to have a sound fit with our laws of sexuality. Following this principle, a feminist critic of liberalism would argue that private acts of sexuality may have broader consequences; that when one woman is manipulated, coerced, or otherwise subject to power arising from sexual relations, the consequences are felt more broadly, by all women, who suffer under the power relationships perpetuated by an endless number of such individual acts. Such a feminist critic would argue that any conception of "harm" which ignored these broader impacts would be flawed.

A conservative might make a similar argument, somewhat less convincingly, by claiming that individual actions may have a detrimental effect on important social institutions, and

that this social harm may justify legislative or judicial intervention. The obvious example is the argument that allowing homosexual people to marry would somehow weaken the institution of marriage, with negative consequences for all married couples. In this conception the individual gay couple's decision to marry may cause harm to a broader group.

If Eunomia were persuaded by one or both of these arguments, she could accept, as a general principle, that individual acts of sexuality may have broader impacts for others. In other words, a broader class of persons may be vulnerable in relation to private acts of sexuality. If this is accepted, the liberal principle could be amended slightly to state that the only purpose for which power can be rightfully exercised over any member of a civilised community, against [their] will, is to protect the interests of those who are vulnerable to harm arising from the regulated conduct. Such a modification would bring the principle closer to an ideal fit with our laws of sexuality, because the amendment accommodates the strong feminist arguments without sacrificing the liberal principle.

Thus, after considering criticism of both limbs of the liberal principle, Eunomia can identify a modified liberal principle, focussed on sexuality, in the following terms: *freedom of sexual self-expression should be extended to all adults, to the maximum extent consistent with the protection of vulnerable people and interests, unless that self-expression can be shown to be morally outrageous.*

This principle will be referred to as "the principle of sexual self-expression."

To test the veracity of this principle, Eunomia must now measure it for fit, against the areas of sexuality discussed above.

The principle explains our lack of adultery laws, by indicating that adults are free to have nonmarital and extramarital sex, because there is no vulnerable party requiring *legal* protection and, in fact, the institution of no-fault divorce was in itself an act to reduce the use of sex as a form of power against women, and thus an effort to protect the vulnerable. The principle might accept that adultery remains contrary to common moral codes, yet is no longer regarded as so outrageous that it crosses the principle's "moral outrage" test.

The principle explains our laws of sexual assault. These laws protect the vulnerable victim, and recognise the morally outrageous nature of rape. Similarly, the principle explains the absence of a marital immunity to sexual assault by reference to these factors, and also by reference to the fact that this legal reform was a deliberate effort to protect the vulnerable spouse.

The principle explains our laws relating to the age of consent. Young people are regarded as vulnerable – particularly where they are being preyed on sexually by those who have other forms of authority over them. The law protects this vulnerability. Further, sex with children is morally outrageous, and the law reflects this moral outrage.

The principle has a close fit to our liberalisation of law in relation to homosexuality. This liberalisation can be explained because homosexuality, previously considered to be morally outrageous, gradually came to be considered acceptable. As the moral context of homosexuality changed, the justification for anti-homosexual laws became more tenuous. There is no vulnerable interest to protect, and declining moral outrage – hence there is no law against homosexuality.

The principle can explain our laws relating to prostitution. Prostitution is no longer outlawed, for a number of reasons; first it arguably is no longer regarded as morally outrageous, even though prostitutes and their clients might not precisely be regarded as virtuous; second, the law protects the prostitute as a vulnerable party (by regulating brothel operators and by forbidding sexual servitude); third, the law protects the *client* as a vulnerable party (by registering prostitutes and by requiring regular health checks); finally, the law protects the *community* as a vulnerable party by, for instance, regulating the areas in which brothels may operate and the manner in which they may advertise.

The principle can clearly explain our laws relating to pornography. The use of pornography is no longer morally outrageous, although the moral views of the community are considered in the process of classifying broadcast and published material. The vulnerable, including young people and people whose moral codes are offended by pornography, are protected by regulation of the manner in which pornography may be displayed and sold.

The laws relating to sex by persons with infectious diseases fits the principle, although the fit is not exact. Arguably *any* sexual contact between a person with a sexually transmitted infection (STI) and another person exposes the sexual participants, and the wider society, to risk. Any sex by a person with an STI risks the release of that infection into the community. Arguably, it should not be open to an individual person to consent to this risk, if it involves potential community-wide consequences. However, despite this, the declaration requirement does protect the STI carrier's immediate partners, and does prevent them from spreading the STI by having sex with uninformed sexual partners.

The laws relating to incest and bestiality both meet the principle, because they meet the required threshold of moral outrageousness, and thus are prohibited. It is at least plausible that in other cultural traditions, or even in the evolution of our own cultural traditions, these powerful moral taboos might change, in which case it would be anticipated that the law may change as a result.

Finally, the legal status of abortion, while clearly not yet settled, can be explained in terms of the proposed principle. On one side of the debate, pro-life interests argue that the foetus is a vulnerable party which should be protected by the law; they argue further, that all human life is cheapened when a foetus is destroyed, and that the whole community is vulnerable as a result. They argue that abortion is morally outrageous, and for these reasons should be prohibited.

On the other side of the debate, pro-choice interests argue that the pregnant woman is vulnerable, due to the unwanted changes to her life arising from unplanned pregnancy; they may also argue that an early-term foetus has not yet acquired the character of being human, and is therefore not a vulnerable interest. They may also argue that a woman's right to choose is in itself a moral virtue.

This debate is far from resolved, but the proposed principle of sexual self-expression can be seen as a useful tool to frame the debate itself.

At this point it is clear that the principle of sexual self-expression has a closer fit to the state of the law than does the liberal principle, which in turn has a closer fit than either feminism or conservatism.

Combining the principles – a decision in the Brown *appeal*

At this point, Eunomia can finally return to the case at hand. She has established key principles relevant to *Brown*, but now must combine them to produce a judgment which is coherent with all of these principles.

The starting point remains the principle of bodily inviolability. The law regards each person's physical body as inviolable, and will protect it against the slightest hurt or insult. This principle has been seen to concede to countervailing legal principles, but only to the minimum extent necessary to allow that countervailing principle to operate.

Eunomia has now identified another principle, that freedom of sexual self-expression should be extended to all adults, to the maximum extent consistent with the protection of vulnerable people and interests, unless that self-expression can be shown to be morally outrageous. This principle meets Dworkin's requirements to be regarded as convincing. It is institutional in nature – it arises from the state as an institution and may be claimed by any person within that institution. It is concrete, because the claimed right is not an abstract 'grand principle' but relates closely to actual conduct. Finally, the principle is consistent with other 'local' principles within the law, having been developed from a broad assessment of the laws of sexuality. As a result, there is a strong case to suggest that the principle of bodily inviolability would (and should) adjust, in order to allow this countervailing principle to operate.

The adjustment required would not be dramatic. The principle of bodily inviolability and the principle of sexual self-expression can be brought together to present a *composite* sadomasochism principle in the following terms:

The bodily inviolability of those who are sexually vulnerable shall be protected absolutely. Those who have no relevant vulnerability shall be free to consent to actual or grievous bodily harm, in order to express their sexual self-determination.

This composite principle preserves the core of both constituent principles. Those who are vulnerable, and those who do not consent, will be protected by the law. Yet those who are not vulnerable do not require this protection. They should be permitted to express themselves sexually, even where this involves bodily harm.

It is not stated in the principle itself, but the principle would be limited by one further moral factor – the conduct consented to must fall short of being morally outrageous. This issue is discussed further below.

Finally, it can be seen that the composite principle represents the *minimum* concession by the bodily integrity principle. It is virtually the same concession which is made in relation to the "health" and "religion" principles noted in the previous chapter: that is, the activity which would otherwise be unlawful, may be undertaken by consent where it is done in the furtherance of the countervailing principle.

At this point, an outcome in *Brown* can be reached. The question stated by the Court of Appeal was:

> Where A wounds or assaults B occasioning him actual bodily harm in the course of a sadomasochistic encounter, does the prosecution have to prove lack of consent

> on the part of B before they can establish A's guilt under section 20 and section 47 of the 1861 Offences Against the Person Act?[3]

Integrity of law would lead Eunomia to quash the House of Lords decision and answer as follows:

> No. Lack of consent is not an element of the offence and need not be proven by the prosecution. However if the defence can establish that the sadomasochistic encounter was consensual, representing the free expression of the sexuality of the participants, and if none of the participants was under a vulnerability which made the sexual conduct otherwise unlawful, then the defendant should be considered to have established an absolute defence.

Such an answer to the stated question would reaffirm the principle of sexual self-expression which underlies the rest of the body of laws of sexuality, without unduly sacrificing the principle of bodily inviolability. The defendants would, on this analysis likely be acquitted.[4]

The final moral screen: a challenge from feminism

The above analysis does not close this dispute. There remains one further line of argument which might be put by the feminist intervener.

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[3] *R v Brown* [1993] 2 All ER 75, 77.

[4] The author is desperately tempted to more firmly claim an acquittal. However, the judgment in *Brown* contains hints suggesting that the consent of some participants may have been coerced. If this were so, then of course the relevant convictions may stand. Ultimately, this would have to be tested on the facts, not all of which have been preserved on the record.

Integrity of Law has led Eunomia to the sadomasochism principle outlined above, but it remains necessary for Eunomia to apply a final moral "screen" to the decision. She must examine the principle she has identified and ask whether it is "too immoral to enforce."[5] The feminist intervener might argue that the principle *is* too immoral to enforce, for the reasons articulated by Hanna and discussed in Chapter 5:

> The law is intended to prevent the powerful from hurting the powerless; by criminalizing S/M that results in injury, the law arguably protects masochistic women from sadistic men who injure them in the course of non-consensual sexual relations, effectively eliminating the "she likes it rough" defense.[6]

If a BDSM consent regime consistent with the sadomasochism principle were to provide camouflage for rapists and perpetrators of domestic violence, there would be good reasons for Eunomia to consider the principle, in this application at least, too immoral to enforce. Consequently, the critical feminist argument must be carefully considered.

The feminist advocate might note that the sadomasochism principle begins "the bodily inviolability of those who are sexually vulnerable shall be protected absolutely." The advocate might ask: Who counts as vulnerable? If women are especially vulnerable to rape and domestic violence, then surely they are sexually vulnerable, and they should be protected absolutely? This would not have affected the outcome in *Brown*, because there were no female participants. But if the proposed principle is to allow *heterosexual* BDSM,[7] how are women to be protected?

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[5] Dworkin, R (1986) *Law's Empire*, Hart Publishing, Oxford, p. 262.
[6] Hanna, C (2001) "Sex is Not a Sport: Consent and Violence in Criminal Law", *Boston College Law Review*, vol. 42, p. 269.
[7] BDSM between women is, of course, a third category. The arguments presented by critical feminism focus on rape and domestic violence perpetrated within heterosexual couples, almost inevitably by men against women.

The answer lies in the definition of consent.

The application of the concept of consent, particularly in sexual assault cases, has been heavily criticised by feminist scholars.[8] In sexual assault, the absence of consent is an element of the crime. This implies first, that consent must be negatived by the prosecution; second, the defendant can secure an acquittal merely by raising reasonable doubt as to nonconsent; and third, the concept of *mens rea* becomes crucial because it means that there may be no liability where there is a *mistake* as to consent.[9]

The result has, historically, become a procedural imbalance against women making rape allegations. Even worse, it has led to a situation where defence lawyers recognise that the most likely means of obtaining an acquittal are to allege that the victim is promiscuous, and that they gave consent but 'changed their mind' after the event. This has resulted in devastating experiences for victims giving evidence in rape trials, and has almost certainly resulted in rapists being acquitted.[10] In some jurisdictions (including all Australian jurisdictions[11]), this in turn has resulted in 'rape shield' laws which forbid defendants from adducing evidence relating to the prior sexual conduct of alleged victims.[12]

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[8] Many examples could be given; two are Waye V (1992) "Rape and the Unconscionable Bargain" *Criminal Law Journal* vol 16(2), pp. 94-105, and Heath M & Naffine N (1994) "Men's Needs and Women's Desires: Feminist Dilemmas About Rape Law Reform" *Australian Feminist Law Journal* vol. 3, pp. 30-52.

[9] This was ultimately the *ratio decidendi* of *DPP v Morgan* [1975] 2 All ER 347. Recent years have seen rape law reforms in a number of Australian states, criminalising conduct where the accused knew the victim "might not" be consenting, or where the victim was unconscious and thus unable to render or refuse consent. These reforms are discussed below.

[10] This argument was made in quite harrowing fashion, using examples of cross-examination transcripts, in Young A (1998) "The Waste Land of the Law, The Wordless Song of the Rape Victim" *Melbourne University Law Review* Vol 22(2), p.442. See, in a similar vein, the chapter "Credibility" in NSW Department for Women (1996) *Heroines of Fortitude – The Experiences of Women in Court as Victims of Sexual Assault*, pp. 149-181.

[11] See, for instance, s.15YB of the *Crimes Act 1914* (Cth).

[12] The application of such laws was the central issue in the *Jovanovich* case discussed in Chapter 4.

Under these circumstances there is, surely, no question as to why a feminist critic is unlikely to be satisfied with the mere fact that the proposed principle requires consent. Consent proven a flimsy shield for women in the past.

Is it possible to outline a consent regime which would still permit BDSM, but which would protect the nonconsenting? If so, the sadomasochism principle may still be capable of implementation, while meeting the feminist concerns.

First element: A defence, not an element of the offence

The first characteristic of a proposed consent regime flows from the sadomasochism principle itself. If consent to BDSM were to be permitted, it would be a defence, not an element of the offence. There is no proposal to change the offence of assault. This immediately distinguishes the current proposal from sexual assault laws, where nonconsent is an element of the offence.

Second element: Defendant to bear the legal burden of proof

In criminal law, where a statute allows for a specific defence to a specific criminal act[13], the defendant bears the onus of proving the elements of that defence on the balance of probabilities.[14] If a consent-to-BDSM defence had to be raised and proven by the defendant, on the balance of probabilities, then a genuine defendant would have a workable defence, while a spurious defendant would struggle to meet the burden.

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[13] As opposed to the general defences such as duress or necessity which apply across criminal law generally.

[14] *Sodeman v R* [1936] HCA 75, see especially the judgment of Dixon J.

There are, in essence, four evidential circumstances in which the proposed defence might be raised: first, where the alleged victim gives evidence in favour of an innocent accused (the *Brown* situation); second, where the alleged victim gives no evidence (recall *People v Samuels*); third, where the alleged victim gives evidence against an innocent accused, and finally where a guilty accused is raising the defence groundlessly (as the prosecution would have argued in *Jovanovich*).

In the first of these situations, the defence would almost certainly work. If a consent defence were available and the alleged victim gave police a statement in favour of the accused, one can barely imagine a prosecution proceeding.

In the second situation, the defendant would have to rely on evidence other than testimony from the alleged victim. This does not seem insurmountable. The defendant could testify, or external evidence might be adduced. Either way, the question is one of sufficiency of evidence, not the form of the defence itself.

In the third situation, where the alleged victim gives evidence against an innocent accused, the finder of fact would have to weigh the evidence on the balance of probabilities.[15] The defendant would, no doubt, face a difficult task in adducing sufficiently compelling contrary evidence, but in the end the decision would be made by the finder of fact in a manner which is customary – indeed central – to our court system.

In the final situation, the guilty accused would have to raise sufficient evidence (based on spurious grounds) to meet the legal burden of proof, on the balance of probabilities.

[15] No doubt the exact level of the 'balance' would be affected by factors such as those discussed in *Briginshaw v Briginshaw* (1938) 60 CLR 336, and this would be part of the judge's directions where the jury was the finder of fact. Fulsome discussion on this point is not required for the current argument.

This would require the 'manufacture' of a considerable body of evidence, and would require this evidence to withstand attack by the prosecution, who could often call upon the victim for testimony. It is possible that some defendants in this situation might secure an acquittal, but the defence itself does not seem to facilitate this.

On balance, a proposal to require a defendant to prove consent to BDSM, on the balance of probabilities, would seem to meet the criticisms leveled by Hanna and by critical feminism.[16]

Third element: Affirmative consent

The consent regime for sexual assault at common law did not require defendants to affirmatively establish that the other party consents to sexual intercourse. It was sufficient for the defendant to show that they completely failed to advert to the consent of the other party or that they had a genuine belief in the consent of the other party, even if that belief was unreasonable.[17]

This position has been significantly modified by statute. In the ACT and Northern Territory, it is an offence to sexually penetrate another person while being reckless as to their consent.[18] Other jurisdictions have gone further, including recklessness in the definition of the offence, but also requiring mistakes as to consent to be reasonable.[19] In Queensland and Western Australia the question is not directly addressed in relation to

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[16] This conclusion may be overstated somewhat. Feminist writers could still, no doubt, level criticisms against the adversarial courtroom process which has traumatised rape victims in the past, and which has not been entirely resolved by reforms such as rape shield laws. This criticism is important and acknowledged, but is not endemic to BDSM, and is beyond the scope of this thesis.

[17] *DPP v Morgan* [1975] 2 All ER 347

[18] *Crimes Act 1900* (ACT) s.54; *Criminal Code* (NT) s.192.

[19] *Crimes Act 1900* (NSW) s.61HA; *Criminal Law Consolidation Act 1935* (SA) s.47; *Criminal Code* (Tas) s.14A; *Crimes Act 1958* (Vic) ss. 37AA, 38.

sexual assault; however consent is a relevant fact, and the code provides exceptions for *reasonable* mistakes as to a fact.[20]

In relation to BDSM, consent is proposed as an element of a defence. The relevant *mens rea* – the intention to inflict harm amounting to assault – will already have been proven by the prosecution, and is in fact unlikely to be contested by the defence. Thus the way is open to place the burden of proof upon the defendant to show that they took affirmative steps to establish the consent of the other party. A failure to advert to consent, or a mistake as to consent, will not be sufficient to establish a consent defence.

Fourth element: The content of consent

The next question relates to the actual content of consent. Chapter 2 above indicated the extraordinary breadth of activities described as 'BDSM.' Clearly, consent to have 'BDSM sex' would be essentially meaningless.

The consent regime for sex in general, is cast in broad terms. When two people go to bed together, there may be consent (usually implied from conduct) but the limits of that consent are ill-defined. In the context of 'vanilla' sex, where the practices fall within a narrow range, and where either party can easily withdraw consent and end the encounter, this ambiguity is acceptable. A consent regime resting on mere consent to participate in 'BDSM' would provide submissive participants with no protection at all. Thus, the consent regime must define the *content* of the consent.

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[20] *Criminal Code* (Qld) s.24; *Criminal Code* (WA) s.24.

Chapter 2 (supported by Appendices A and B) indicates that the BDSM community has developed tools and negotiation processes (such as checklists, contracts, and limits) which allow potential partners to clearly understand one another's interests and desires. If such practices were undertaken universally by BDSM participants, then the 'content' issue would be self-resolving. However, a BDSM-consent defence cannot presume that BDSM participants will have any connection to the BDSM community. Such a defence must be equally applicable by a relatively innocent couple experimenting with little knowledge or experience; and by an experienced BDSM practitioner.

On this basis, it is proposed that for a consent defence to be argued, two 'content' elements must be met. First, the defendant must be able to show (on the balance of probabilities) that the conduct which caused the harm fell within the affirmative consent of the other party. So, if the harm was inflicted by a riding crop, the defendant must be able to show that percussive play involving a riding crop was within the consent affirmatively obtained from the alleged victim.

Second, the defendant must be able to show that the *extent* of the harm was *reasonable* in relation to the consent affirmatively obtained from the victim. This second aspect is less well defined, because allowance must be made for reasonable mistakes. BDSM guidelines make it clear that certain practices require considerable skill on the part of the dominant.[21] Under these circumstances, it is inevitable that mistakes may be made. If, for instance, a couple agrees that a dominant may whip her submissive's buttocks, but not hard enough to break the skin, and through inexperience or miscalculation she breaks the skin, this in itself ought not to be sufficient to negative the defence. The controversy before the court will be whether this was reasonable in relation to the

[21] For instance, Wiseman, J (1996) *SM101: A Realistic Introduction*, 2nd ed, Greenery Press, San Francisco, p. vii. However, virtually every online or hard-copy BDSM 'how to' guide is underpinned by this notion.

consent: that is, was she deliberately stepping outside the consent of the other party, or was she in fact endeavouring to observe that consent?[22]

This latter aspect may raise critical feminist objections, as it may allow a 'mistake' defence. However, this is a very limited aspect of the proposed consent regime, and in any event the defendant would still be required to prove, on the balance of probabilities, that the consent applies. As a final safeguard, if a dominant negligently causes harm to a submissive, *and* if the infliction of harm during BDSM is no longer unlawful, the submissive might plausibly have a cause of action in negligence available to them.

Final element: The withdrawal of consent

Finally, consent must be capable of being withdrawn or else it is no consent at all.[23] Chapter 2 explained the concept of 'safe words.' Applying this principle to a consent-defence, it would be appropriate to place a duty upon the person inflicting harm to ensure that consent is ongoing; that is, to ensure that there is a means of withdrawing consent, and to repeatedly satisfy themselves that the submissive has not sought to withdraw consent.

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[22] A comparison might be made with sport on this point. In a contact game, one player may injure another through misadventure; this is different to deliberately inflicting injury, even though the conduct might be the same. For instance in *McCracken v Melbourne Storm* [2005] NSWSC 107, a negligence case, the judge found that the 'spear tackle' which caused the injury could have been accidental, but on this occasion was done deliberately in order to inflict injury. See para [29] of the judgment.

[23] Extraordinarily, this proposition is far from settled, at least as relates to sexual assault. There is a dearth of caselaw (*R v McLennan* [1997] QCA 174 is a relatively recent case, wherein the judges were not required to rule on the question of withdrawal, but remarked that the law was less than settled). Victoria (*Crimes Act 1958* s.38(2)(b)) and South Australia (*Criminal Law Consolidation Act 1935* s.48(1)(b)) are the only two jurisdictions to clearly specify that continuation after the withdrawal of consent is sexual assault. All other jurisdictions, excepting Queensland, define sexual intercourse to include the continuation of intercourse after penetration, with the implication that continuation would be sexual assault. The Queensland Criminal Code is silent on the question (leading to the judges' remarks in *McLennan*).

This is particularly important in BDSM for two reasons. First, the usual means of withdrawing consent may simply be part of the 'game'. This was explained in Chapter 2.

Second, BDSM involves the fulfillment of sexual fantasies. A person's sexual fantasies may not translate into arousing reality. A person may be stimulated by the thought of being whipped; they may be aroused by pictures of others being whipped; yet the very first strike of the whip on their own body may shatter the fantasy. It is very important that a submissive in this situation have a means to readily communicate the fact that their desire, and their consent, shattered along with the fantasy.

A safe-word or safe-gesture is an ideal way of ensuring that consent can be withdrawn. It is not the only way. However, it is reasonable to require that a defendant, raising a BDSM-consent defence, must show that the submissive had the means of withdrawing consent at any time, and that they did not do so prior to the relevant harm being inflicted.

Consent regime summary

Thus a proposed law which puts into effect the sadomasochism principle might meet the criticisms of critical feminism by requiring that the defendant prove, on the balance of probabilities, that they affirmatively sought and obtained consent to the form of activity which was undertaken. The defendant must also prove that the harm was reasonably within the bounds of the consent obtained. Finally, the defendant must prove that there was a means for the other party to withdraw consent, but that they did not do so.

Such a regime would enable courts to distinguish between genuine BDSM participants and perpetrators of sexual assault or domestic violence. While the former defendant would readily be able to meet the requirements of this defence, those requirements would in all likelihood prove insurmountable to the latter two defendants. Consequently, then, the sadomasochism principle satisfies Eunomia's final moral screen. The court would not be required, in this case, to enforce an inherently immoral principle.

The extent of harm: how far might one go?

The final question is whether one can legitimately draw a boundary around the sadomasochism principle. Is there a point at which harm to the submissive is so severe that it should not be permitted at all?

This question has troubled academics discussing *Brown*. Bergelson, for instance, commences her paper with a discussion of the infamous case of Armin Meiwes, who acted on his fantasies of killing and cannibalising a willing victim. Meiwes was convicted of manslaughter, reports Bergelson, but not of murder because he was following the instructions of his victim.[24] Bergelson is led immediately to the central question for her discussion: "Does one have an unlimited right to authorise another person to hurt him?"[25]

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[24] Bergelson, V (2007) "The Right to be Hurt: Testing the Boundaries of Consent", *The George Washington Law Review*, vol 75, p. 167. It should be noted that under Australian law, Meiwes would certainly have been convicted of murder.

[25] Bergelson, V (2007) "The Right to be Hurt: Testing the Boundaries of Consent", *The George Washington Law Review*, vol 75, p. 167.

Death is different

It is easiest to commence this discussion by referring to BDSM resulting in death. Australian courts have on several occasions considered the implications of deaths caused during BDSM.[26] On these occasions the death was caused accidentally; thus the question was never, whether the submissive could consent to being killed in the course of BDSM.

It is clear that BDSM leading to death is well outside the principles discussed above. Death occupies a special place in our legal system. It changes a person's very legal status. Protection of life is afforded the highest priority. Taking of life is among our most serious crimes.[27]

Further, causing the death of another person is not a form of *assault*. When the victim of an assault dies, the crime changes from assault to homicide. Homicide is not simply 'assault causing death.' It is another crime, beyond assault. Thus, from a legal perspective, it is entirely consistent both with principle and with our current laws to argue that allowing consent to assault causing actual or grievous bodily harm should not, of itself, require us philosophically to allow people to consent to dying in the course of BDSM.

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[26] See, for instance, *R v McIntosh* [1999] VSC 358 and *Boughey v R* (1986) 161 CLR 10, both discussed in Chapter Two.

[27] Blackstone, for instance, described it as "the highest crime against the law of nature, that man is capable of committing." Blackstone, W (1765-9) *Commentaries on the Laws of England* (reprinted) University of Chicago Press, Chicago, Book, 4, Ch. 14, "Of Homicide".

Seriously disabling injury

The more complicated issue relates to the deliberate and consensual infliction of seriously disabling injuries. The UK Law Commission introduced the concept of a seriously disabling injury, and indicated that virtually all participants in the consultation process supported the notion that consent should *not* be permissible for seriously disabling injuries.[28]

Various definitions of 'seriously disabling' were advanced. The Commission adopted the following definition:

> An injury is serious if it (a) causes serious distress, and (b) involves loss of a bodily member or organ, or permanent bodily injury or permanent functional impairment, or serious or permanent disfigurement, or severe and prolonged pain, or serious impairment of mental health, or prolonged unconsciousness; and an effect is permanent whether or not it is remediable by surgery.[29]

In Australia, an appropriate definition might be that which is found in section 4 of the *Disability Discrimination Act 1992*, including "total or partial loss of a part of the body" or "the malfunction, malformation or disfigurement of a part of the person's body."

Can the principles established by Eunomia support a proposal to limit BDSM participants from doing anything which would result in one of the participants becoming, for statutory purposes, disabled?

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[28] UK Law Commission (1994) Discussion Paper 134, *Consent in the Criminal Law*, Discussion Paper 134, HMSO, London, para 4.29ff

[29] UK Law Commission (1994) Discussion Paper 134, *Consent in the Criminal Law*, Discussion Paper 134, HMSO, London, para 4.34. The definition was constructed by Professor Glanville Williams.

Chapter seven noted that the bodily inviolability principle tends to concede to countervailing principles when they clash. This tendency is not absolute. In none of the other exception categories does the bodily inviolability principle allow for an otherwise-healthy person to be deliberately disabled. The bodily inviolability principle simply does not concede so far.

Thus it may be argued that consent to BDSM should be limited to BDSM which does not cause disability. Such an argument is consistent with principle, and does not unduly limit the free sexual self-expression of anyone other than the most extreme BDSM participants.

Summary

None of the three principles advanced by the advocates before Eunomia are sufficient, in themselves, to provide a basis for a satisfactory verdict in *Brown*. However a more defensible position could be reached by commencing with the liberal principle, on account of its stronger fit with surrounding law, and modifying it to take account of the most cogent concerns from feminism and conservatism: the prohibition of morally outrageous conduct, and the extension of the law's protection to a broader group of those with vulnerabilities, rather than a narrower group of those immediately harmed.

The resulting principle, the principle of sexual self-expression, could then be combined with the principle of bodily inviolability to produce a composite principle - the sadomasochism principle.

The challenge from feminism, however, remains significant. For this challenge to be met, a consent regime must be defined, which does not allow consent-to-BDSM to become abused as a 'rough sex' defence for rapists and perpetrators of domestic violence.

Such a consent regime has been advanced. If a defendant is required to prove, on the balance of probabilities, that they adverted to and obtained the consent of the other party, to the infliction of the type and extent of harm caused, and if the submissive party remained able withdraw consent but did not do so, a defendant should be acquitted.

At this point, a final proposal may be made. Appendix C to this thesis contains sample legislative provisions which could be inserted into the criminal statutes of any Australian jurisdiction. These provisions would, it is asserted, satisfy the principle of bodily inviolability, the principle of sexual self-expression, and the sadomasochism principle, without sacrificing the interests of women before the law.

CHAPTER NINE - CONCLUSIONS

She was no longer wearing either a collar or bracelets, and she was alone, her own spectator. And yet never had she felt herself more totally committed to a will which was not her own, more totally a slave, and content to be so.[1]

The Law Lords in *Brown* faced an unenviable task. They were faced with the need to do justice – for both society and the defendants – in a situation where there was no binding precedent, little persuasive precedent, and where the statute itself was ambiguous. Their task was to consider whether to institute a new legal rule for the United Kingdom.

To complicate their task, social delicacy was challenged by the conduct of both the inflictors and receivers of harm in *Brown*. To further complicate the moral landscape, the participants were homosexual at a time when discrimination against homosexual people was still entrenched, and were practicing their activities in groups, thus outside a 'normal' pair-bond relationship.

If a similar case came before the High Court of Australia, the judges would be faced by a similar challenge. Their task would be eased slightly by two facts: first, homosexuality is no longer as confronting as it was considered to be in 1993; and second, the High Court would have the benefit of the academic and judicial ground which has been canvassed in response to *Brown*.

This thesis has sought to discover how a court, given such a case, should decide. Should *Brown* be followed in Australia?

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[1] Réage, P (1965) *Story of O*, tr. de Estrée, S, Ballantyne, New York, p. 58.

The Spanner Debate

Brown has been the subject of considerable academic (and some political) attention. It has been the subject of relatively little *judicial* reconsideration because such cases seldom come before the courts.

This thesis has followed the academic debate and, in Chapter Five, identified three distinctive viewpoints. The liberal position argued that the law has no place intervening in the private sex lives of individuals such as those in *Brown*, and that the consent of the victims should result in an acquittal. Paternal conservatives support the notion that sometimes people must be protected from themselves, and that "society is entitled and bound to protect itself against a cult of violence." [2] They consequently support the outcome in *Brown*.

Feminists accept that freedom of sexual self-expression should be restricted in the case of BDSM, because of the risk that a BDSM consent defence could become a convenient defence for rapists and perpetrators of domestic violence. The loss of freedom to consent to BDSM is an acceptable price to protect women from rape and domestic violence.

How did the judges decide?

Faced with a lacuna in the law, the judges in *Brown* deployed what Hart would describe as a discretion, to fill in this gap as they felt best. In retrospect, one can see that they each

[2] R *v Brown* [1994] 1 AC 212, 237

did so by adopting one of the theoretical positions discussed above. Lords Templeman, Jauncey and Lowry took as their 'test' the proposition that consent to bodily harm should only be permitted when it provided social benefits. In order to assess whether such benefits were provided, they adopted a conservative paternalist viewpoint. Once they adopted this position, their outcome (ruling against consent) was clear.

Lord Slynn of Hadley also adopted an essentially paternalist viewpoint, although in his view the individual only needed protection from *grievous*, not actual, bodily harm. Lord Mustill, on the other hand adopted a liberal perspective, leading to a dissenting view.

There is no reason why any of these judges might not, had they been so inclined, have selected another theoretical viewpoint. Had, for instance, Lord Jauncey been personally inclined towards critical feminism, he might have arrived at the same decision via a different argument. The key decision made by each judge, albeit unconsciously, was which theoretical position to adopt. Once they had made that decision, based on their personal predilections, the outcome emerged almost as a matter of logic.

How might the judges have decided?

Dworkin suggests the judges in *Brown* could have avoided the need to rely on their own idiosyncratic viewpoints by searching, within the body of established law, for the principles which underlie our laws of violence and our laws of sexuality. By bringing those principles together and applying them to the facts at hand, the judges could have arrived at a decision which emerged from the law, not from their personal discretion.

This thesis has attempted that task under Australian law. The legal history traced by the judges in *Brown* itself readily yields two principles related to violence. These were identified as:

> The law regards each person's physical body as inviolable, and will protect it against the slightest hurt or insult.

> The principle of bodily inviolability readily concedes precedence when it conflicts with another underlying legal principle, but only to the minimum extent necessary to allow the other principle to operate.

These two principles, taken together, explain the range of exceptions to the laws of assault presented by the judges in *Brown*.

The search for a principle explaining our laws of sexuality was more exhaustive, partly because the judges in *Brown* made little attempt to examine the case from this perspective. Chapter 7 of this thesis examined a broad range of areas in which the law regulates sexual conduct, and distilled the following principle:

> Freedom of sexual self-expression should be extended to all adults, to the maximum extent consistent with the protection of vulnerable people and interests, unless that self-expression can be shown to be morally outrageous.

Combining the three principles noted above, this thesis proposed a composite principle:

> The bodily inviolability of those who are sexually vulnerable shall be protected absolutely. Those who have no relevant vulnerability shall be free to consent to violation of their bodily integrity in order to express their sexual self-determination.

This principle emerges from existing law. It does not rest upon the personal views of any judge or theorist, and any decision made in accordance with this principle will be consistent both with our laws of violence and our laws of sexuality.

Application of this principle provides a defensible means of resolving the dilemma in *Brown*: if valid consent could be shown, the defendants should have been acquitted. Thus, the answer to the research question for this thesis is: "Yes. It should be permissible under Australian law for participants in sadomasochistic sexual activity to consent to having actual or grievous bodily harm inflicted upon them."

A further question remains. If the proposed principle is to be adopted, can it be implemented in a way which provides adequate protection for those who do not consent - in particular, victims of rape and domestic violence?

A means of doing so has been proposed. A consent regime in which the defendant is required to prove, on the balance of probabilities, that they affirmatively sought and obtained consent to cause specified forms of harm in a specified manner; and that the other party had a means of withdrawing consent but did not do so, would meet this requirement. Legislative provisions which would accomplish this outcome have been drafted and offered.

The proposed law would be preferable to adopting *Brown* as the law in Australia. It is consistent with the legal principles which underlie our laws of sex and of violence, and implements those principles in a manner which does not invite perpetrators of sexual assault or domestic violence to take advantage of them.

Final Word

This thesis began with Anthony Brown. Shortly after he was interviewed by the *Guardian* newspaper, the House of Lords ruled against his appeal and he returned to prison to complete his sentence. Brown died in 2002, shortly before he would have turned 67. Following his death, a spokesperson for a group called 'SM Pride' stated:

> After the Law Lords decision in 1992, Tony [Brown] and Roland [Jaggard] had to return to prison to serve out their sentences in solitary confinement. They received many cards from well-wishers and supporters from across the world, [with] which they covered the walls of their cells, and at one point, their mail accounted for three quarters of the mail for the whole wing. I know both Tony and Roland found this of great support and both of them kept these cards after their release.
>
> Brown was one of my personal heroes, his courage in the face of clear injustice and having to spend to spend two periods of time in prison for his consensual BDSM activities was deeply affecting.[3]

[3] Kellan Farshea, in "Operation Spanner Gay Dies" *Rainbow Network News*, 10 May 2002, http://www.rainbownetwork.com/UserPortal/Article/Detail.aspx?ID=9241&sid=5&gnbox_cn=0&gnbox_ca=2 (Accessed 10 June 2010).

This thesis respectfully maintains that no Australian should be required to make a similar sacrifice of their privacy and liberty in order to express a BDSM focused sexuality with a consenting partner.

APPENDIX A

A Sample BDSM Checklist

The checklist below was obtained from the *Latches* website, at (http://latches.webslaves.com/checklist.htm). It is reproduced in its entirety but has been reformatted for consistency with this paper. All material from Latches is in a different font, to differentiate it from the author's material.

Two observations should be made in relation to this checklist. First, it includes a wide range of quite extreme practices, which would be likely to be beyond the limits of an overwhelming majority of BDSM practitioners. This enables those with extreme interests to find others with whom they are compatible; perhaps more importantly, it allows more moderate 'players' to clearly mark such practices as being out of bounds.

Second, as noted in Chapters Two and Eight, the purpose of a BDSM checklist is to enable a very clear and precise negotiation of consent. Consequently it spares nobody their blushes. Quite explicit language is used to make very clear the practices being discussed. Readers who may find such language distasteful or offensive may wish to bear this in mind. For those readers, a cursory glance will give an indication of what a checklist is, and how it works.

Checklist

This checklist can be filled out by a Sub and provided to their Dom/Top before playing with them. This will provide a quick "head-start" to identifying limits, negotiating and finding common ground for play. Dominants may wish to work through the checklist, to get a better handle on their specific interests. Switches should go through the checklist twice; one persons Dom and Sub interests may be very different.

For each item, you need to provide two answers:

Experience

Have you had real time experience with the activity? Indicate YES or NO next to each item. Write N/A if it does not apply to your gender.

Willingness

Are you willing/open to try an activity?

For each item, indicate the degree to which you are willing to try that particular activity by rating it on a scale of NO or 0-5 (see rating scale below).

If you write "no", it means you will not do that item under any circumstance (a hard limit). There is nothing wrong with indicating 'no' on an item. However, if you write 'no' next to every item, you should probably find another interest to pursue.... like knitting or basket weaving. *grin*

If you do not understand what an activity is, mark that item with a "?".

Mark with an asterisk (*) those items which you are willing to do only with your current sex partner(s), but not with casual play partners

Rating Scale

0	Utterly no desire to do that activity and don't like doing it (in fact, may loath it) and ordinarily would object to doing it, but you would permit the Dominant to do it if they really wanted it (sometimes called a soft limit)
1	Don't want to do or like to do this activity, but wouldn't object it if was asked of you
2	Willing to do this activity, but it has no special appeal for you
3	Usually like doing this activity, at least on an irregular/occasional basis
4	You like doing this activity and would like to experience it on a regular basis
5	Is a wild turn-on for you and you would like it as often as possible

Note any additional information or nuances which might be important for your Dom to know in the comments section.

There is intentionally some overlap between categories. Unless otherwise stated, the sub is the recipient/target of the activity.

Activity	**Experience** Respond YES/NO	**Willingness**	**Comments**
Abrasion			
Age Play			
Anal Sex			
Anal Plugs (small)			
Anal Plugs (large)			
Anal Plug (public under clothes)			
Animal Roles			
Arm & leg sleeves (armbinders)			
Aromas			
Asphyxiation			
Auctioned for charity			
Ball Stretching			
Bathroom use control			
Beating (soft)			
Beating (hard)			
Blindfolding			
Being Serviced (sexual)			
Being bitten			
Breast/chest bondage			
Breath control			
Branding			
Boot Worship			
Bondage (light)			
Bondage (heavy)			
Bondage (multi-day)			
Bondage (public under clothing)			
Breast whipping			
Brown showers (scat)			
Cages (locked inside)			
Caning			
Castration fantasy			
Catheterization			

Cattle prod (electrical toy)			
Cells/Closets (locked inside of)			
Chains			
Chamber pot use			
Chastity belts			
Chauffeuring			
Choking			
Chores (domestic service)			
Clothespins			
Cock rings/straps			
Cock worship			
Collars (worn in private)			
Collars (worn in public)			
Competitions (with other subs)			
Corsets (wearing casually)			
Corsets (trained waist reduction)			
Cuffs (leather)			
Cuffs (metal)			
Cutting			
Diapers (wearing)			
Diapers (wetting)			
Diapers (soiling)			
Dilation			
Dildos			
Double Penetration			
Electricity			
Enemas (for cleansing)			
Enemas (retention/punishment)			
Enforced chastity			
Erotic Dance (for audience)			
Examinations (physical)			
Exercise (forced/required)			
Exhibitionism (friends)			
Exhibitionism (strangers)			
Eye contact restrictions			
Face Slapping			
Fantasy Abandonment			
Fantasy rape			
Fantasy gang rape			
Fear (being scared)			
Fisting (anal)			
Fisting (vaginal)			
Flame play			
Following orders			
Foot worship			
Forced bedwetting			
Forced dressing			
Forced eating			
Forced homosexuality			
Forced heterosexuality			
Forced masturbation			
Forced nudity (private)			
Forced nudity (around others)			
Forced Servitude			
Forced smoking			
Full head hoods			
Gags (cloth)			
Gags (inflatable)			
Gags (phallic)			
Gags (rubber)			

Gags (tape)			
Gas masks			
Gates of Hell (male)			
Genital sex			
Given away to another Dom (temp)			
Given away to another Dom (perm)			
Golden Showers			
Gun play			
Hair brush spankings			
Hair pulling			
Hand Jobs (giving)			
Hand Jobs (receiving)			
Harems (serving w/other subs)			
Harnessing (leather)			
Harnessing (rope)			
Having food chosen for you			
Having clothing chosen for you			
Head (give fellatio/cunnilingus)			
Head (receive fellatio/cunnilingus)			
High Heel Wearing			
High Heel Worship			
Homage with tongue (non-sexual)			
Hoods			
Hot oils (on genitals)			
Hot waxing			
Housework (doing)			
Human puppy dog			
Humiliation (private)			
Humiliation (public)			
Hypnotism			
Ice cubes			
Immobilization			
Infantilism			
Initiation rites			
Injections			
Intricate (Japanese) rope bondage			
Interrogations			
Kidnapping			
Kneeling			
Knife play			
Leather Clothing			
Leather restraints			
Lectures for misbehavior			
Licking (non-sexual)			
Lingerie (wearing)			
Manacles and Irons			
Manicures (giving)			
Massage (giving)			
Massage (receiving)			
Medical scenes			
Modeling for erotic photos			
Mouth bits			
Mummification			
Name change (for scene)			
Nipple clamps			
Nipple rings (piercing)			
Nipple weights			
Oral/anal play (rimming)			
Over the knee spanking			
Orgasm denial			

Orgasm control			
Outdoor scenes			
Pain (severe)			
Pain (mild)			
Persona training (in scene)			
Personal modification (rl)			
Phone sex (serving Dom)			
Phone sex (serving Dom's friends)			
Phone sex (commercial provider)			
Piercing (temporary, play-pierce)			
Piercing (permanent)			
Plastic surgery			
Prison scenes			
Prostitution (public pretense)			
Prostitution (actual)			
Pony slave			
Public exposure			
Punishment scene			
Pussy/cock whipping			
Pussy worship			
Riding crops			
Riding the "horse" (crotch torture)			
Rituals			
Religious scenes			
Restrictive rules on behavior			
Rubber/latex clothing			
Rope body harness			
Saran wrap			
Scarification			
Scratching - getting			
Scratching - giving			
Sensory deprivation			
Serving			
Serving as art			
Serving as ashtray			
Serving as furniture			
Serving as a maid			
Serving as a toilet (urine)			
Serving as a toilet (feces)			
Serving as waitress/waiter			
Serving orally (sexual)			
Serving other Doms (supervised)			
Serving other Doms (unsupervised)			
Sexual deprivation (short term)			
Sexual deprivation (long term)			
Shaving (body hair)			
Shaving (head hair)			
Skinny dipping			
Sleep deprivation			
Sleep sacks			
Slutty clothing (private)			
Slutty clothing (public)			
Spandex clothing			
Spanking			
Speech restrictions (when/what)			
Speculums (anal)			
Speculums (vaginal)			
Spitting			
Spreader bars			
Standing in corner			

Stocks			
Straight jackets			
Strap-on-dildos (sucking on)			
Strap-on-dildos (penetrated by)			
Strap-on-dildos (wearing)			
Strapping (full body beating)			
Suspension (upright)			
Suspension (inverted)			
Supplying new partners for Dom			
Swallowing feces			
Swallowing semen			
Swallowing urine			
Swapping (with one other couple)			
Swinging (multiple couples)			
Tampon training (in ass)			
Tattooing			
Teasing			
TENS unit (electrical toy)			
Thumb cuffs (metal)			
Tickling			
Triple Penetration			
Urethral Sounds (metal rods)			
Uniforms			
Vaginal dildo			
Verbal humiliation			
Vibrator on genitals			
Violet wand (electrical toy)			
Voyeurism (watching others)			
Voyeurism (your Dom w/others)			
Video (watching others)			
Video (recordings of you)			
Water torture			
Waxing (hair removal)			
Wearing symbolic jewelry			
Weight gain (forced)			
Weight loss (forced)			
Whipping			
Wooden paddles			
Wrestling			

APPENDIX B

A Sample BDSM Contract

The contract below is selected as one of the better and more detailed examples of freely available BDSM contracts. Such contracts are anything but "standard form" and will be heavily amended by any specific couple. It is notable that the syntax of the contract makes an attempt at legal form. This is, in all likelihood, an attempt to underscore the serious gravity with which the contract is invested by its signatories. BDSM websites commonly make the point that contracts such as this are not enforceable at law. This contract is from the Collar n Cuffs website, at http://collarncuffs.com/resources/doku.php?id=contract_sample_2.

CONTRACT

1. I agree and accept willingly that, once I enter into the this Contract, I agree to please my Master to the best of my ability, and I understand and accept that I now exist solely for the pleasure of my Master, to be trained, disciplined and punished if and when my Master deems it necessary.

2. My Master has agreed to not inflict any physical harm upon my body that would require the attention of anyone outside of our relationship, and has thoughtfully agreed that no discipline, training or punishment shall take place if he has consumed any alcohol or any drug which would thus impair his ability to keep me from any physical or mental or emotional harm.

3. My Master and I understand and agree that I hold veto power over any command given by my Master, at which time I may rightfully refuse to obey that command, but only under these specific circumstances which my Master and I have agreed upon:

- **a.** Where a command conflicts with any existing laws and may lead to fines, arrest, or prosecution.
- **b.** Where said command may cause extreme damage to my life, such as losing my job, causing family stress, etc.
- **c.** Where said command may cause permanent bodily harm.
- **d.** Where said command may cause psychological trauma.
- **e.** Where said command is issued in a public place that was not agreed upon beforehand, and reveals to anyone else our relationship.
- **f.** Where said command is issued during a time that my Master has consumed any drug or alcohol, thus impairing his ability to keep me from harm.

4. I agree to accept any punishment, discipline or training regimen my master decides to inflict upon me, whether earned or not, whether physical or mental or emotional, without hesitation.

5. My Master and I have agreed beforehand that punishment, discipline, and/or training, shall not involve any of the following, defined hereby as "Abuse":

- **a**. Drawing or release of blood.
- **b**. Burning or mutilation of my body in any way.

c. Drastic loss of circulation.

d. Internal bleeding or complications.

e. Loss of consciousness, hearing, sight, smell, touch or taste.

f. Withholding of any necessary materials, such as food, water, sunlight and/or warmth, for extended periods of time.

g. Forcing the consumption of any illegal drug in any form at any time.

6. My Master and I have also agreed that because my body now belongs to my Master, he shall immediately undertake the responsibility of protecting my body not only from temporary harm as stated directly above, but also permanent bodily harm.

7. My Master and I have agreed beforehand that punishment, discipline and/or training shall not involve any of the following, hereby defined as “Permanent Bodily Harm”:

a. Death

b. Any damage that involves loss of mobility or function, including broken bones.

c. Any permanent marks on the skin, including scars, burns, or tattoos, unless accepted by the slave.

d. Any loss of hair, unless accepted by the slave.

e. Any piercing of the flesh which leaves a permanent hole, unless accepted by the slave.

f. Any diseases that could result in any of the above results, including sexually transmitted diseases.

8. My Master and I have also agreed that because my mind now belongs to my Master, he shall immediately undertake the responsibility of protecting my mind from permanent harm.

9. My Master and I have agreed beforehand that punishment, discipline, and/or training, shall not involve any of the following, hereby defined as “Permanent Mental Harm”:

a. Formal brainwashing or hypnosis sessions, unless expressly agreed upon by the slave, and then only by a third party trained professional.

b. Electric shock to temples or any other mind altering application of force or energy.

c. Any mind altering drugs of any kind.

d. Sleep, food, sunlight or other forms of deprivation or neglect specifically designed to break down my mental capacity in any way.

10. I am aware that as a slave, I will be required to maintain a positive outlook and have correct thinking as such, and my Master may assist me with that in any way he sees fit.

11. My Master and I have agreed that at any time I may utilize a “Safe Word”, and that whatever punishment, discipline, or training that is happening at that time shall immediately and without hesitation cease, and that time shall be called a “Safe Period”, wherein the following rules shall apply:

a. During any Safe Period, my Master and I shall resolve any issues before continuing any punishment, discipline or training.

b. I cannot use a Safe Word for no reason, and must supply a specific reason each time.

c. No punishments, discipline or training will take place during a Safe Period and I shall be free to express my concerns, and speak freely without fear of harm or punishment.

d. I understand and willingly accept, however, that the I will continue to address my Master with respect and love at all times and that deviations from this rule are subject to punishment at a later time.

e. There is no limit to the amount of times during any given period the Safe Word may be utilized, and thusly, Safe Periods.

12. My Master and I have agreed that I may ask for a “Free Period” to express my concerns, to speak freely and without fear of harm or punishment. The following rules shall apply at all times:

a. These shall occur only once per day, and only if requested by Master or I.

b. They shall never last more than one hour, unless my Master wishes it to continue past that time.

c. They are not cumulative.

d. My Master has complete control over when these Free Periods shall take place, but has agreed that they shall take place on the same day that I request it.

e. There will be no punishment, discipline or training applied during Free Periods.

13. I understand and willingly accept, however, that I will continue to address my Master with respect and love at all times and that deviations from this rule are subject to punishment at a later time.

14. For clarification purposes only, the Safe Period is a time that I request to cease all actions immediately, and the Free Period is a time that I request that my Master schedules when he sees fit at some point at his discretion during that same day.

15. I accept and agree to not take any other Master or lover, or to be sexual or submissive to any other person, without the express and explicit direction and command of my Master, and I understand to do so would result in extreme punishment and possible termination of this contract.

16. My Master has agreed that he shall take no other slave, without considering my emotional response to such actions first, and acting accordingly.

17. My Master has agreed that he will not upset my emotional balance or ignore me over another slave at any time.

18. My Master and I have agreed that he shall never under any circumstances, give me to another master, for any reason whatsoever, unless the guidelines of this contract are wholeheartedly followed by that master at all times and without exception, and it will be my Master's sole responsibility to determine if this is the case, and I agree and will accept my Master's decision in all respects to this and trust his decisions unwaveringly, as my Master has agreed that a breach in contract of any other master would also be considered a breach in contract of my Master as well.

19. My Master and I have agreed that all physical evidence of my slavery to my Master shall be kept in strictest secrecy, except where my Master and I have agreed otherwise.

20. My Master and I have agreed that any alterations to this contract will be printed and signed and attached as addendum to this original contract before said addendum is

enforced, and that it will not be necessary to include any edicts or commands or rules, etc, put forth by my Master into this contract.

21. I agree to give all of my worldly possessions to my Master, to give my physical body to my Master completely and without exception, and to pleasure my Master as he requests and as often as he requests.

22. I understand and accept willingly that my Master may punish me, command me, train me, and love me how my Master sees fit, at any time, any place, under any circumstance.

23. My Master and I have agreed that Private Rules of Conduct shall be created and posted in the house which we reside, in a private place not for display to the public or unannounced visitors, and that it will be my responsibility to always know any changes to any rules of conduct set forth and follow them explicitly and without exception, that my Master may change these rules of conduct at any time, without notice, and does not need to post them in order for me to follow them, and that these rules are to govern my actions within the confines of my Master's house.

24. My Master and I have agreed that publicly, we shall both conduct ourselves in such a manner as to not call attention to our Master and slave relationship, that I will defer to my Master at all times in public, and shall call him by his proper name when appropriate, and that my Master has agreed that only persons we have both agreed upon shall know about our relationship and/or contract.

25. Parties or gatherings specifically created for other Masters and slaves shall not be considered public places, our participation in such parties will be voluntary to both parties beforehand, during these gatherings I shall abide by all rules, edicts, and commands of my Master, just as if we were in private, with no exceptions.

26. If, during a party or gathering specifically created for other Masters and slaves, my Master wishes me to participate in any way, with another slave or Master, he has graciously agreed to discuss this with me beforehand and make such requests in these situations with my acceptance beforehand.

27. I agree and willingly accept my duties as slave.

28. I shall speak of my Master in terms of love, respect, and adoration at all times, I will address him at all times as “Sir” or “Master”, or however else he sees fit, and I shall abide by all items set forth in this contract, as well as any future edicts, commands or orders to the best of my ability, and understand there may be adverse consequences should I not carry out my Master's requests or follow his rules to his satisfaction.

29. My Master has granted me the freedom to engage in any and all activities not actively forbidden by this contract, or by later edict of my Master, and all rights and privileges not otherwise noted in this contract belong to my Master, and He may exercise them as He chooses.

30. My Master and I have agreed that no part of this contract is intended to interfere with my career, my Master wishes me to work hard and honestly, in general, and to conduct myself in a manner calculated to bring honor and respect to both of us.

31. My Master has graciously agreed, during periods of work, that I am permitted to schedule appointments, to dress in a manner appropriate to work, and to leave the house when necessary for work, and during periods of work, or if at home, I may answer the telephone, if necessary, and discuss business without the express permission of my Master.

32. My Master and I have agreed that for these reasons only do I have the right to terminate this contract immediately, and with no recourse to myself:

- **a.** Abuse, as outlined above in section 5a-g, either intentional or accidental, or as a direct result from consuming alcohol or drugs.

b. Permanent bodily harm, either intentional or accidental, or as a direct result from consuming alcohol or drugs, as outlined above in section 7a-f.

c. Permanent mental harm, either intentional or accidental, or as a direct result from consuming alcohol or drugs, as outlined above in section 9a-d.

d. Breach of this contract by another Master, by charge of my Master, or as a direct result from consuming alcohol or drugs, as outlined above in section 18.

e. Exposed evidence of my slavery as outlined above in section 19.

f. Any addendums further agreed upon by my Master and I that are attached to this contract and signed by both parties will be considered as part of this contract as well.

33. Should any situations occur as outlined in section 32a-f, and I should still continue to want to uphold this contract in full, my Master and I shall put in writing what occurred as well as my decision to continue this contract, and that will be attached to this contract and signed by both of us, unless my Master wishes the contract ended at that time, because of said situation.

34. My Master and I have agreed that my Master may choose to end this contract at any time, and for any reason, without explanation.

35. This contract has no preset time limit and shall not end, except due to a specific reason noted in Section

36. I have read and fully understand this contract, and am entering into this contract under my own free will.

37. I have not been coerced in any way to enter into this contract.

38. By signing below, I agree to accept and obey all preceding rules without question, as well as any rules my Master may choose to issue at a later date, and I gratefully and willingly consign my body, mind, soul and worldly possessions to my Master, for His pleasure and use any way he sees fit.

I humbly request his acceptance of this contract in full.

Slave:
Date:

I have read and fully understand this contract in its entirety. I agree to accept this slave as my property, including her body, mind, soul, and worldly possessions, and to care for her to the best of my ability. I shall provide for her security and well-being and command her, train her, and punish her as a slave, soberly, and as I see fit. I understand the responsibility implicit in this arrangement, and agree that no harm shall ever come to her as long as she is mine, and this contract is in effect. I accept My slave's desire to serve Me more fully, and take responsibility for her well-being, training, and discipline, to more perfectly serve My will.

Master:
Date:

I hereby witness this contract, that both parties have entered into such contract willingly and lovingly, and free of coercion or fear.

Witness:
Date:

APPENDIX C

Suggested Legislative Provisions

These proposed provisions are drafted so as to allow their insertion into the *Crimes Act 1900* (NSW). They would require little amendment, and no substantive amendment, to be used in other jurisdictions.

PART 11 – Criminal Responsibility – Defences

Division 4 – Consent to Assault

423A Consent to bodily harm – sexual self-expression

(1) In criminal proceedings brought against a person ('the defendant') for common assault under section 61 of this Act, or for assault occasioning actual bodily harm under section 59 of this Act, or for assault occasioning grievous bodily harm, or wounding, under sections 33, 35 or 54 of this Act, it is a defence if the defendant proves, on the balance of probabilities:

(a) that the harm was caused in the course of sexual conduct; and

(b) that the defendant took steps to obtain and understand:

(i) the consent of the person upon whom harm was inflicted (the 'other participant') to participate in the type of conduct which caused the harm; and

(ii) the consent of the other participant to experience the type of harm caused;

and

(c) that the other participant consented to the defendant inflicting harm upon him or her; and

(d) that the harm was caused by the type of conduct consented to; and

(e) that the extent of the harm caused was reasonably within the extent of harm contemplated by the other participant's consent; and

(f) that the other participant had, at all relevant times, an agreed means by which the other participant could withdraw consent; and

(g) that the other participant did not withdraw consent before the act which caused the harm was undertaken.

(2) This section does not apply if the harm results in:

(a) the death of the other participant, or

(b) the other participant suffering a disability.

(3) In this section:

(a) *disability* takes its meaning from section 4 of the Commonwealth *Disability Discrimination Act 1992*.

(b) *sexual conduct* means any conduct undertaken for the purpose of sexual gratification, whether or not this involves sexual intercourse.

423B Saving – unwritten law in relation to consent

(1) This Division does not affect the validity of any unwritten law whereby the Court has recognised consent as providing a defence to common assault, assault occasioning actual bodily harm, assault occasioning grievous bodily harm, or wounding.

(2) This Division does not affect the capacity of the Courts to recognise new circumstances in which consent provides a defence to common assault, assault occasioning actual bodily harm, assault occasioning grievous bodily harm, or wounding.

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