

# When “No” Means “Yes” and “Yes” Means Harm: HIV Risk, Consent and Sadoomasochism Case Law

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*This Article examines how criminal law treats sadoomasochism (s/m) and sexuality with particular reference to the legal construction of consent to violence and HIV risk. It will outline how Other<sup>1</sup> sexual bodies have been criminalised through offences against the person and how the notion of consent has been given different meanings within various cases of s/m. Heterosexual men have often been exculpated from violence committed against women during sex. Furthermore, penetrative vaginal intercourse has been legally validated over Other sexualities in several ways. Generally, heterosexual males have been afforded protection from criminal punishment because they were engaging in what the common law, rather narrowly, defines as penetrative vaginal heterosex. Yet, same-sex desiring men have been subjected to rather extreme punishment because their sadoomasochism desires were placed outside of these definitional boundaries of sex, blending male same-sex sadoomasochism with assault. In addition, HIV risks have been used to compound the notion of sexual harm between same-sex desiring bodies, even though the risks of HIV infection were minimal.*

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1. Other is a term that is used to indicate a difference from the self. Within discourses of sexuality, the Other is same-sex, bi-sex and queer desiring, where heterosexual bodies imply the self. It also implies social exclusion and those who may be viewed as outsiders. The term is used within philosophy, especially by theorists such as Hegel, Husserl, Sartre, Lacan, Levinas, Foucault, and Derrida.

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## I. PRELUDE

Well, I got me a harness! I got my boy straddled! In some jurisdictions, I could get “done” with a paddle, law ain’t nothing but a funny, funny riddle . . . . Thank God, I’m not a positive leather queen!

## II. INTRODUCTION

There are marked differences in the crimino-legal treatment of sadomasochism (s/m) from that of other sexualities, especially the heteronormative and procreative. This Article will demonstrate how Other sexual bodies have been criminalised through offences against the person, regardless of sexual consent. Heterosexual men have often been exculpated from violence committed against women during sex. Further to this, penetrative vaginal intercourse has been legally validated over Other sexualities. Generally, heterosexual males are afforded protection from crimino-legal punishment because they are engaging in what the common law, rather narrowly, defines as “sex” (i.e., penetrative vaginal heterosex). Yet, same-sex desiring men are subjected to rather extreme punishment because their s/m desires are placed outside of these definitional boundaries of sex, blending male same-sex s/m with assault.

Criminal law mostly speaks about sexuality as aberrance, through interpretations and translations of a moralistic jurisprudential model of socio-sexuality which is heteronormative and procreative.<sup>2</sup> When criminal law speaks of desires and pleasures, they most often represent deviance, anomaly, and difference. Current and historical criminal laws proscribe consensual sexuality through such offences as those associated with homosexuality, HIV-infectious sexual activity and sadomasochistic same-sexuality.

While sadomasochism is not a specific offence, sadomasochism may be prosecuted as an offence against the person (such as assault) within common law jurisdictions. Sadomasochism between men is codified as a type of violence where sexuality is discounted or removed.

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2. For a discussion of social and legal constructions of heteronormativity, see Derek Dalton, *Genealogy of the Australian Homocriminal Subject: A Study of Two Explanatory Models of Deviance*, 16 L. GRIFFITH L. REV. 83, 83-104 (2007). See also Phil Hubbard, *Sex Zones: Intimacy, Citizenship and Public Space*, 4 SEXUALITIES 51, 51-67 (2001).

This has also occurred in cases of heterosex which fall outside the boundaries of penetrative vaginal sex. As a type of sexual violence, case law contrasts s/m against heteronormative notions of desire. The s/m case law also defines legally-acceptable socio-sexual “violence” between men and women. This Article compares the illegality of violence that is categorically pleasurable and mutually consensual (with legally-sanctioned violent activity which is harmful and goes beyond the consensual bounds of sexual play (e.g., where death or serious injury occurs)).

This Article focuses primarily on the case of *R v. Brown*,<sup>3</sup> a now infamous English case relating to same-sex desire and sadomasochism. *Brown* brought together themes of criminality and same-sex desire; the case was a significant development for legal academics because it emphasised panics towards HIV infection and same-sex desire expressed through criminal justice.<sup>4</sup> The case showed how the court chose to handle same-sex desire as a type of criminality because HIV was seen as a problem of homosexuality,<sup>5</sup> especially sadomasochistic homosexuality. The court in *Brown* deemed homosexual s/m too harmful to allow for individual consent.<sup>6</sup> That was because both same-sex desire and same-sex s/m became metaphors of disease and harm (i.e., HIV).<sup>7</sup> The criminal justice system, through the judgments in *Brown*, sent the message that s/m between men should be seen as a violent activity where there is a danger of HIV infection. As well, the court sought to protect heteronormative male interests by pathologising the Other.

The concept of violence, however, is an arbitrary and fluid notion: how society understands situations as violent or nonviolent is variable and individual. Criminal offences and case law dictate what constitutes criminal “violence.” This Article will explore how the concept of violence has been applied to some sexual bodies and not others. Further, I propose that the same HIV infectivity risks, which are associated with

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3. [1994] 1 A.C. 212; [1992] Q.B. 491 (Eng.).

4. *Id.*

5. Within socio-legality, ‘homosexuality’ is a discrete and absolute category of sex as opposed to the normative and naturalised category of heterosexuality. “Sex” as presented through crimino-legal doctrine has a more limited space. Within criminal law, sex is primarily heterosex. Sex is seen as insertive phallic/anal sex when it is presented as something other than heterosex. See LESLIE MORAN, *THE HOMOSEXUALITY OF LAW* 66-90 (1996).

6. The issue of consent can be confusing within s/m, because although the exchange involves activities which most people would describe as painful and harmful, the purpose and receipt of these activities is associated with desire and pleasure. See, e.g., Darren Langdrige, *Safe, Sane and Consensual: Contemporary Perspectives on Sadomasochism* 89-90 (Langdrige & Barker eds., 2008).

7. See MORAN, *supra* note 5.

same-sex male sadomasochism, are not associated with heteronormative sadomasochism.

The concept of violence in this Article, and in *Brown*, relates to the permeation of the body/skin through blows, whips, branding, beating or piercing. This is a broad definition of violence, which is formulated upon homosexual and heterosexual s/m case law. Within criminal case law, comparisons of homosexual and heterosexual acts show how this definition of s/m shifts the assessment of criminal responsibility from one of whether the actions are violent or nonviolent to one that is focused on gender and sexuality.

Criminal law produces meta-narratives about gender, heterosexuality, and homosexuality. In doing so, law creates discrete and absolute identities and behaviours. This glosses over the meanings and perceptions of individual sexual pleasures to create crimino-legal pro/prescriptions of sexuality. This Article will examine how criminal law marks same-sex desiring male bodies as abnormal and heterosexual male/female bodies as normal by comparing *Brown* with cases involving heterosexual bodies. In particular, it will explore the cases of *R v Donovan*,<sup>8</sup> *R v Slingsby*,<sup>9</sup> *R v Wilson*<sup>10</sup> and *R v Emmett*.<sup>11</sup>

### III. THE CASE OF SAME-SEX S/M: *R v. BROWN*

*Brown*, or the “Spanner” case as it is sometimes called, involved the prosecution and subsequent appeals of a group of sixteen same-sex desiring men who engaged in various sadomasochistic activities.<sup>12</sup> The prosecutions were initiated solely from police intervention.<sup>13</sup> The arrests resulted from a police investigation in the English city of Manchester in 1987 called “Operation Spanner.”<sup>14</sup> The men used video cameras to record some of their activities.<sup>15</sup> These videotapes formed a significant component of the evidence.<sup>16</sup> Much of the initial hysteria surrounding the case stemmed from the police officers’ incorrect assumptions that the activities were nonconsensual and involved torture and murder.<sup>17</sup>

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8. [1934] 2 K.B. 498.

9. [1995] Crim. L.R. 570.

10. [1997] Q.B. 47.

11. [1999] EWCA (Crim.) 1710.

12. [1994] 1 A.C. 212; [1992] Q.B. 491.

13. *Brown*, [1992] Q.B. 491.

14. *Id.*

15. *Id.* at 495.

16. *Id.*

17. For more information about Operation Spanner and the subsequent trials, see *The History of the Case*, THE SPANNER TRUST, <http://www.spannertrust.org/documents/spannerhistory.asp#thecase> (last visited Jan. 9, 2011); see also *Spanner Timeline*, DANO BARUSDALE,

However, no permanent injury was suffered by any of those involved.<sup>18</sup> The police nevertheless decided to charge those involved, after viewing the tapes and conducting a costly investigation proving no one had died.<sup>19</sup>

The appellants received various sentences.<sup>20</sup> Joseph Brown received a sentence of two years and nine months for five counts of assault occasioning actual bodily harm and one count of aiding and abetting assault occasioning actual bodily harm.<sup>21</sup> Colin Laskey was sentenced to four years and six months imprisonment for aiding and abetting keeping a disorderly house,<sup>22</sup> four counts of assault occasioning actual bodily harm, two counts of aiding and abetting assault occasioning actual bodily harm, three counts of publishing an obscene article and unlawful wounding.<sup>23</sup> Roland Jaggard received a three-year sentence for aiding and abetting unlawful wounding, two counts of assault occasioning actual bodily harm, one count of aiding and abetting assault occasioning actual bodily harm and one count of unlawful wounding.<sup>24</sup> Saxon Lucas was sentenced to three years for unlawful wounding and assault occasioning actual bodily harm.<sup>25</sup> Christopher Carter was sentenced to twelve months, suspended for two years, for assault occasioning actual bodily harm and aiding and abetting assault occasioning actual bodily harm.<sup>26</sup>

The men appealed their convictions and sentences on the grounds that “a person could not be guilty of assault occasioning actual bodily harm or wounding in respect of acts carried out in private with the consent of the victim.”<sup>27</sup> The House of Lords appeal was lost on the grounds that a person may be culpable for certain “harmful” acts carried out in private even with the consent of the “victim.”<sup>28</sup> In other words, the level of harm described in the case cannot be consented to, even though it occurred in private.

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<http://www.barnsdle.demon.co.uk/span/sp-timel.html> (last visited Jan. 9, 2011); *Spannerman*, BME NEWS, <http://www.news.bmezone.com/wp-content/uploads/2008/09/pubring/people/A10101/spanner/index.html> (last visited Jan. 9, 2011).

18. *R v. Brown*, [1992] Q.B. 491, 497.

19. David Bell, *Pleasure and Danger: The Paradoxical Spaces of Sexual Citizenship*, 14 POL. GEOG. 139, 144-45 (1995).

20. *Brown*, [1992] Q.B. at 494.

21. *Id.*

22. *Id.* (defining disorderly house as a brothel or place of prostitution).

23. *Id.*

24. *Id.*

25. *Brown*, [1992] Q.B. at 494.

26. *Id.*

27. *R v. Brown & Other Appeals*, [1992] 2 All E.R. 552 (CA) 552.

28. *R v. Brown*, [1994] 1 A.C. 212, 256.

In the appeal, the appellants were described as middle-aged men whose age positioned them against younger members who were described as “[t]he victims . . . some of whom were introduced to sadomasochism before they attained the age of 21.”<sup>29</sup> The men were charged under § 20 (unlawful wounding) and § 47 (unlawful assault occasioning actual bodily harm) of the *Offences Against the Persons Act 1861*.<sup>30</sup>

The appellants belonged to a group of sado-masochistic homosexuals who willingly participated in the commission of acts of violence against each other, for the sexual pleasure which it engendered in the giving and receiving of pain. The activities took place at a number of different locations, including rooms equipped as torture chambers at the homes of three of the appellants.<sup>31</sup>

This summary of the case detailed the activities as consensual acts, which occurred in private and without permanent harm.<sup>32</sup> But, the judgments in the *Brown* cases imply that there were public risks of harm involved in homosexual s/m.<sup>33</sup> For the purpose of conviction, homosexual s/m was construed as a harmful activity.<sup>34</sup> The private activities of the men in the *Brown* case became a public harm for (passive) victims who needed to be policed by the criminal justice system.<sup>35</sup> This shifted the legal focus of s/m from consent to violation. The men were positioned as consenting (“willing participants” committing violence “against each other” and who “gave and received” pain) and abusive (“passive victims” who were at risk of “suffering” from the “commission” of violent acts).<sup>36</sup>

The Court of Appeal judgment provided a detailed description of the acts, emphasising their extreme and exceptional nature, figuring the participants (specifically the defendants) as peculiar.<sup>37</sup> The court translated s/m as undesirable and something that should be restrained through punitive criminal justice.<sup>38</sup> Lord Lane suggested that he spoke

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29. *Id.* at 235.

30. *R v. Brown & Other Appeals*, [1992] 2 ALL E.R. 552 (CA) 552.

31. *Id.*

32. *Id.*

33. See Matthew Weait, *Criminal Law and the Sexual Transmission of HIV: R v. Dica*, 68 MOD. L. REV. 121, 125 (2005).

34. *Brown*, [1992] Q.B. 491.

35. The term “private” is highly problematic, especially in relation to *R v. Brown*. For more discussion of the issue of legal intervention in private spheres, see Matthew Weait, *Harm, Consent and the Limits of Privacy*, FEMINIST L. STUDS. 97, 97-122 (2005).

36. See *R v. Brown*, [1994] 1 A.C. 212 (outlining the terms of the judgment).

37. See *R v. Brown*, [1992] Q.B. 491, 495-97 (describing the counts involved in the case).

38. *Id.*

about the acts only to denounce their evilness.<sup>39</sup> “It is, unhappily, necessary to go into a little detail about the activities which resulted in the various counts being laid against these men.”<sup>40</sup> He described many of the acts, including branding, whipping, genital torture, biting, and nailing genitals to a bench.<sup>41</sup> The purpose of his description was to uncover the hidden danger of homosexual s/m as a perilous sexuality lurking within society. These comments suggested that the gaze of criminal law was only fixed upon homosexual s/m to warn society about and exemplify this concealed surreptitious problem.

*Brown* made the private acts of s/m and same-sex desire a public statement about the legal limits of morality.<sup>42</sup> In doing so, it demonstrated the reach of law within the personal when the personal is Other. This was justified by the danger of HIV/AIDS and the HIV status of some of the defendants; in the House of Lords, for example, Lord Templeton noted that “Prosecuting counsel informed the trial judge against the protests of defence counsel, that although the appellants had not contracted [AIDS], two members of the group had died from [AIDS] and one other had contracted an [HIV] infection although not necessarily from the practices of the group.”<sup>43</sup> The Law Lords made numerous references to AIDS, which their Lordships substituted for HIV. For example, Lord Jauncey made this statement:

Wounds can easily become septic if not properly treated, the free flow of blood from a person who is [HIV] positive or who has [AIDS] can infect another and an inflicter who is carried away by sexual excitement or by drink or drugs could very easily inflict pain and injury beyond the level to which the receiver had consented.<sup>44</sup>

Statements such as these directed the focus away from the consensual, pleasurable, and private, towards imagined public health risks. Further to this, their Lordships amalgamated same-sex desire with pathology. Lord Lowry made these comments:

[S]ome sado-masochistic activity, under the powerful influence of the sexual instinct, will get out of hand and result in serious physical damage to the participants and that some activity will involve a danger of infection such as these particular exponents do not contemplate for themselves. When considering the danger of infection, with its inevitable threat of

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39. *Id.*

40. *Id.* at 495.

41. *Id.* at 495-97.

42. *R v. Brown*, [1992] Q.B. 491.

43. *See R v. Brown*, [1994] 1 A.C. at 236.

44. *Id.* at 246.

[AIDS], I am not impressed by the argument that this threat can be discounted on the ground that, as long ago as 1967, Parliament, subject to conditions, legalised buggery, now a well-known vehicle for the transmission of [AIDS].<sup>45</sup>

This statement made an explicit link between AIDS, anal sex, deviance, and social disorder. In doing so, Lord Lowry justified an intertextual pathologising of same-sex desire through criminal law and public health threats.

*Brown* brought the gaze of criminal law into the hidden and the consensual. The symbolic limits of criminal law were not constrained by mutual and consensual desires or the private. The judgments in *Brown* suggest that the same-sex desiring male s/m body should be hidden (if not erased). *Brown* reached into the hidden and the personal to censure sexual transgression. Typically, s/m is hidden or invisible and only viewed by those who are doing it (esoteric exotericism).<sup>46</sup> The law made s/m hyper-visible and public to legally devalue and demonise it; the law did not understand the(ir) pleasure and therefore confused s/m with torture, murder, and HIV transmission.

#### IV. S/M AS A PRIVATE AND PUBLIC HARM

Socio-sexuality is heterogeneous and complex. Yet criminal case law, such as *Brown*, tries to conceal diversity by masking Other bodies (i.e., HIV-positive, same-sex desiring, s/m desiring) as pathological and deviant. In *Brown*, s/m between men was positioned as violent violence as well as dangerous to morality and public health; s/m between men was viewed as an external threat to an assumed healthy, homogenous society.<sup>47</sup> Marianne Giles notes judicial tensions between personal “harms” and public interest within the case.<sup>48</sup> She examines the premise of “public interest” which underlies crimino-legal definitions of illegality: “The basic issue which presents itself to the House of Lords, therefore, is the question of whether one looks to the public interest in order to legalise *prima facie* illegal behaviour (the paternalistic approach) or whether one uses public interest to criminalise potentially lawful

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45. *Id.* at 255-56.

46. As will be discussed below, the terms “public” and “private” are problematic. S/m sometimes occupies public and semi-public space through art, fashion, film, pornography, and sex clubs, however, the practice is largely a private pleasure.

47. *Brown*, [1994] 1 A.C. at 272-73.

48. Marianne Giles, R v. Brown: *Consensual Harm and the Public Interest*, 57 MOD. L. REV. 101, 102 (1994).



behaviour (the civil libertarian approach).<sup>49</sup> Giles says the concept of public interest is slippery and often defined through policy.<sup>50</sup> She also outlines that the foundations of the term “public” are bureaucratic and political, if not unstable and incomplete.<sup>51</sup> Criminality is formulated around contests of individual freedom and a theoretical notion of community welfare.<sup>52</sup> These formulations are based upon socially constructed “truths” about harm and morality, rather than “substantive criminology.”<sup>53</sup>

In *Brown*, sadomasochism was positioned as dangerous on multiple levels, through the multiplication and coordination of personal and public harms.<sup>54</sup> In other words, legal injuries are portrayed as conceptual harms which are reflexive, circular, and inconsistent. It is unclear exactly what was meant by the terms “personal” and “public” referred to in *Brown*.<sup>55</sup> The “personal” is a fraction of the “community” in the same way that the community is the conglomeration of “personal.” Yet, the contest or the contrasts of these harms were staged upon the incompatibility of these two supposedly discrete categories, of individual/personal and community/public.<sup>56</sup>

Perhaps there are no community and no personal interests at stake in the debate about the illegality of sadomasochistic sexuality, in the sense that sexuality is not a personal or public interest, but rather an incarnation of mutual desires (something in between personal and public). Can something that is part reification (both the actuality of s/m fantasy by the participants and the imagination of s/m by its detractors), somewhat transcendental, and performed with others, actually involve a contest of personal and community? S/m is not solely definable as personal, because there are various s/m “communities” within the “community,” making s/m a heteroglossia within the public.<sup>57</sup> Sadomasochism may be regarded as a personal sexual preference, and

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49. *Id.* at 105.

50. *Id.* at 107.

51. *Id.* at 105.

52. *Id.*

53. *Id.*

54. *R v. Brown*, [1994] 1 A.C. at 272-73.

55. *Id.* at 212-73.

56. *Id.*

57. Heteroglossia is a term coined by the Russian linguist Mikhail Bakhtin in his 1934 essay *Discourse in the Novel*. M.M. Bakhtin, *Discourse in the Novel*, in *THE DIALOGIC IMAGINATION: FOUR ESSAYS BY MIKHAIL BAKHTIN* 259, 259-422 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., Univ. of Tex. Press 1981) (1934). It is a term of reference to celebrate the multiplicity of voices and intra-dynamics and diversity of these voices within a space. *Id.* It is literally translated from the Russian word “raznorecie” which means multilingualness or different-speech-ness.

will in that sense be “personal” (or capable of being practiced in isolation). Yet, the crimino-legal dissection of this issue as one of individual liberty against the community interests is questionable. The concept of community and public, as it was utilised in *Brown*, is an abstraction of hegemony in which there are dominant community values. The individual (personal) is the embodiment of the transgression of these values. However, there is no singular individual, rather many individuals with multiple and diverse values and sexualities.<sup>58</sup> There is also not a coherent community, but fragmented and heterogeneous communities. Within criminal law, same-sex desiring male s/m appeared as outsiders. Yet, the possibility of s/m participants represents the heterogeneity of society.

The case marginalised people who threatened the public good with their own desires. It also negated or denied agency between s/m partners. A speculated and personified “public” was created. This public had interests, that was inherently good. But most important to this judicial argument was the idea that the public could be harmed. Even though sadomasochism should essentially be a liberty between sexual participants, the question of consent was made ancillary to public interests which are afforded more value and rights. “[T]heir Lordships’ attitude is that society has a right to protect itself against a cult of violence, and such a right takes precedence over individuals’ freedom of action.”<sup>59</sup>

*Brown* represented a disjuncture of the unitary and simplistic notions of (hetero)sexuality and homogenous society within the imaged text of criminal law. Through the policing of these transgressive desires, the case of *Brown* actually highlighted the multiple possibilities of sexuality in (relation to) criminal justice. The necessity to police desire cancelled out the notion that society needs to be protected from outsiders, because the outsiders are members of society, who symbolise the diversity of sexual desire.

## V. S/M AND CONSENT

Within criminal law, consent is seen as irrelevant to any injury that is nonpermanent, but is more than “transient and trifling.”<sup>60</sup> The

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58. *See id.*

59. Lord Templeman specifically rejected the defence of consent in *Brown*, proposing that society should be afforded legal protection from what he referred to as a “cult of violence.” For an analysis of Lord Templeman’s statements, see *Weait, supra* note 35, at 106-09 (analysing Lord Templeman’s statements).

60. *R v. Brown*, [1994] 1 A.C. at 230.

exceptions to this rule include such activities as reasonable surgery, ritual circumcision, tattooing, body piercing, organised sports, parental chastisement, dangerous exhibitions and bravado, rough and undisciplined horseplay, and religious flagellation.<sup>61</sup>

The court in *Brown* marginalised consent.<sup>62</sup> The legal defence of consent could have limited the appellants’ culpability by defining s/m as a lawful activity. According to this view, s/m is still posited as harmful, but given that the participants consented to the harm, it then becomes a lawful harm, similar to boxing.<sup>63</sup> If criminal law deems causing harm *prima facie* unlawful, then the argument in defence of the appellants in *Brown* should have questioned whether sadomasochism was an exception to this rule based on the consensual (and victimless) nature of s/m sexuality.<sup>64</sup>

In *Brown*, the majority marginalised consent,<sup>65</sup> although the minority indicated that consent was an important reason why the harmful acts were not unlawful.<sup>66</sup> By depicting the activities in *Brown* as assaults, the issues of liberty, consensuality, sexuality, and culpability for harm were relegated as policy issues, rather than issues for lawmaking. By designating s/m as an assault, the courts bypassed the issue of consent (or lack thereof).

Questioning the validity of sadomasochistic consent and construing s/m as unlawful created a rampant public sexual dangerousness. A paradox was created by questioning the lawfulness of consensual sexuality. The *ratio decidendi* of the case has a continuing socio-legal discursive function. Removing the defence of consent and replacing consensual pleasure with violence recreated desires as violation. The decision created a lack of legal consent for consensual pleasures. Consent took on a new meaning within crimino-legal landscapes; one that depended on the (peculiar) sexuality of those consenting. Lord Templeman made the following comments that illustrate this point:

In principle there is a difference between violence which is incidental and violence which is inflicted for the indulgence of cruelty. The violence of [sadomasochistic] encounters involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the

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61. See MICHAEL J. ALLEN, TEXTBOOK ON CRIMINAL LAW 325 (9th ed. 2009).

62. *Brown*, [1994] 1 A.C. at 212; see also Weait, *supra* note 35, at 109; *id.* at 106-09.

63. *Id.*

64. The term “victimless” is a contentious concept. I use the term here to refer to the lack of complainants. Victimless is the sense that the complaints were made by the police, rather than by individuals who were investigated in the Spanner case.

65. *Brown*, [1994] 1 A.C. at 223.

66. *Id.* at 231.

participants and unpredictably dangerous. I am not prepared to invent a defense of consent for [sodomasochistic] encounters which breed and glorify cruelty and result in offences under §§ 47 and 20 of the [1861 Act].<sup>67</sup>

By applying the legal rules relating to assault to (s/m) sexuality, *Brown* made consensual sexuality a crime (of violence).

Consensual sexuality (between men) became a form of (sexual) assault because of the erosion of sexuality and consent. Furthermore, as will be discussed below, s/m in *Brown* was legally positioned as Other than sexuality because of the lack of vaginal penetration. In *Brown*, s/m between men was a violation of innocence through the appearance of (passive) victim bodies and the denial of (socio-sexual) consent.<sup>68</sup> It is legal testimony about the crimino-legal limits of sexual consent.

These two sexual episodes (s/m and sexual assault) are entirely different. Yet, they appear in the same crimino-legal space as offences against the person and as assaults that have a sexual element. This is because the court interpreted the activities of *Brown* as a group of people gathering together to harm each other. The court was unwilling to even contemplate that *Brown* was about sexuality and pleasure. *Brown* created a paradoxical reimagination of s/m sexuality, which was redefined as nonsexual assault.

Criminal law continues to situate same-sex desires and transgressive sexualities as social pathologies and as antithetical to the reasonable man of law.<sup>69</sup> While sexual assault was an offence against the person (of the female or male body as a complainant), s/m was an offence against the person with the “person” being the reasonable man of law.<sup>70</sup> This textual man became a template for all bodies to become victims of s/m, projecting collective harms upon the individual. Same-sex and transgressive desires were contrasted against the crimino-legally-defined masculine and patriarchal, heterosexual, familial man (of law, and hence society).<sup>71</sup> Criminal judicial professionals, as the voice of criminal law,

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67. *Id.* at 236.

68. *Id.* at 235.

69. This reasonable man of law represents the middle-class, Caucasian, heterosexist, patriarchal investments of western legal practices. This discursive character became the implicit test of legal reasoning and social tolerance. See generally LAW AND THE POSTMODERN MIND: ESSAYS ON PSYCHOANALYSIS AND JURISPRUDENCE (Peter Goodrich & David Gray Carlson eds., 1998).

70. What is troubling about the treatment of s/m in this way is that charges were brought against the defendants by the state/the police, bypassing the need for an individual to make an initial complaint. It extended the generality of crimes against the person.

71. See generally CARL STYCHIN, LAW'S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE 120 (1995).

condemned and denounced sexual bodies in conflict with theoretic notions of socio-sexual normativity.

#### VI. CRIMINAL LAW’S SAME-SEX S/M: VIOLENT OR REPULSIVE?

In *Brown*,<sup>72</sup> the criminally constructed s/m body signaled homosexual bodies as weak or vulnerable, yet infectious and dangerous. These bodies were weak and vulnerable because they were susceptible vessels to the immorality of transgressive desire, a desire punishable by the “plague” of a “disease” (read: HIV) that most often supposes homosexuality as pathology. The s/m body was dangerous because it represented a diversion from social constructs of health and morality towards illness and hedonistic pleasures.

Transgressive bodies were also weak because they had succumbed to the dangerous pleasures of homosex and s/m. It was this vulnerability that was crimino-legally dangerous, rather than the pleasure of s/m itself. Transgression is the bridge between the normal and the abnormal, the crossing of the sanctioned by the possibility of its Other. Criminal law spoke through this transgressive bridge to announce and denounce the abnormal from the normal and to try to eliminate transgression.<sup>73</sup> Crimino-legally, to transgress is to realise the danger of moral weakness and to make corporeal the risk of s/m as socio-sexual pathology. Within the case, the translation of s/m participants as victims enabled a discursive translation of risk as harm. Harm was achieved through the projected bodies of s/m “victims” by suggesting that s/m posed a risk of victimisation of the “innocent” by the predatory perpetrators (of evil).<sup>74</sup> Criminal law was concerned with the protection of moral weakness and, in *Brown*, the law voiced its concern by labelling s/m as dangerous.

The problem for criminal law is this weakness—the possibility for Other desires to seep into normativity. Lord Lowry commented during the appeal: “[Sadomasochistic] homosexual activity cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society.”<sup>75</sup> Lord Templeman reinforced this conception of heteronormativity: “It is some comfort at least to be told . . . that “k” has now it seems settled into a normal heterosexual relationship.”<sup>76</sup> “K” was introduced to the reader as one of “the victims”

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72. *R v. Brown*, [1994] 1 A.C. 212, 234.

73. In a sense, the criminal law attempts to destroy the bridge (or transgressive crossing from the normal to the abnormal) by encouraging sameness and eliminating Otherness.

74. *Id.* at 236.

75. *Id.* at 255.

76. *Id.* at 235.

who “were youths.”<sup>77</sup> He was given to the reader as a symbol of innocence, family values and (corrupted) youth,<sup>78</sup> and to create the perversity and immorality of the appellants.

Their Lordships separated the “group of homosexual sado-masochists” into two sub-groups, the victims and appellants, or the innocent and guilty.<sup>79</sup> The victims were (innocent) youths. The middle-aged (perverted) men who procured their innocent bodies were guilty offenders.<sup>80</sup> The middle-aged men were “responsible in part”<sup>81</sup> for the corruption of youth and the destruction of heteronorms. Socio-legal doctrines have a purpose in presenting sexually, legally and socially transgressive bodies as distasteful and repulsive, yet potent and appealing. Sexy sadists, luscious masochists and “healthy-looking” HIV positives are all too perilous, because instead of repelling these bodies, they entice and invite “the innocent.” There is an implicit assumption within crimino-legal texts and especially within *Brown*, that s/m is a contest of power and im/morality, in which predatory sexual deviants recruit and convert the sexually innocent and moral.<sup>82</sup>

The *Brown* decisions remain unchallenged despite an exhaustive appeal process.<sup>83</sup> This creates a continuing discursive and textual crimino-legal definition of same-sex s/m as a vulnerability of human weakness that must be controlled through crimino-legal sanctions.<sup>84</sup> This

77. *Id.*

78. “K” was particularly poignant for this construction because he represented many things that were central to the imagination of the family as the idealised norm. He represented the bridge between the naiveties of being a child/young, but he also represented the start of adulthood and the prospect of becoming a new (heterosexual) family member, the replenishment of heteronormativity.

79. *Brown*, [1994] 1. A.C. at 235.

80. *Id.* at 235-36.

81. *Id.* at 235.

82. In her book about sadomasochism and desire, Linda Hart suggests that the space of lesbian s/m is particularly important in illustrating the affixation of power and morality within the fable of transgressive sexualities as predatory. Lesbian s/m is in disagreement with both “mainstream feminism” and with conservative rightwing politics because it attempts to separate and destabilise these two concepts. Lesbian s/m creates fusions by confusing supposed binaries, such as dominance/submission, power/weakness; lesbian s/m creates the “impossible real.” See LINDA HART, BETWEEN THE BODY AND THE FLESH 49 (1998).

83. The case was appealed to the Court of Appeal and the House of Lords in the United Kingdom as well as the European Court of Human Rights in Strasbourg. See Matthew Weait, *Sadomasochism and the Law*, in SAFE, SANE AND CONSENSUAL: CONTEMPORARY PERSPECTIVES ON SADMASOCHISM 63, 76-78 (Darren Langdridge & Meg Barker eds., 2008).

84. I want to acknowledge that even though the case is taught and read by queer and critical legal scholars, it still carries and transports conservative and heteronormative ideals in its outcome. The main point I wish to make here is that a successful appeal would have given a more productive and louder message to support those who work to problematise the decisions in *Brown*.

textual crime of s/m between men is not so much in the harm to the self, but in the harm to others, in the sense that law places a greater emphasis on the contamination of the “community” by the exoteric and by unknowable, public health risks.<sup>85</sup> Criminality and dangerousness lie in the harm to others (as the self) and extends to imagined “innocent victims.” These created and imagined crimino-legally constructed narratives invent offenders and victims. The HIV-positive and the sadists are offenders, while their partners, the masochists and those “at-risk” of infection, are victims. It is not so much a crime or transgression to be HIV-positive, but rather to “transmit” or to “infect” another body. Similarly, in *Brown*, the sadist is the criminal and the masochist is the victim. The same-sex desiring Other body represents the seepage of the Other (HIV-positive, same-sex desiring) into the self (imagined as HIV-negative, heterosexual victims).

#### VII. CULT(IVATING) DESIRES

Law interprets s/m as violence through normative crimino-legal and judicial narratives. Yet, some authors view the law as a form of violence. Leslie Moran applies Rene Girard’s description of violence and sacrifice to *Brown*.<sup>86</sup> Moran says that within society there is a duality of violence (violent illegitimacy): violence that presents in society (illegitimate or illegitimised violence) that must be prevented and controlled by society (legitimate and legitimised violence).<sup>87</sup> By impinging on people’s rights, criminal justice occupies a position of legitimised violence. Moran’s argument centres on the idea that social violence (such as s/m within *Brown*) may be positioned as a contagious harm at risk of escalation. The sovereign, authorized, and codified violence of law must control this proposed unrestrained harm. From the position of criminal justice, the violence of law has a supposed inoculating social function.<sup>88</sup>

What is problematic about many critiques of *Brown*, such as Moran’s, is the construction of the binaries of good/bad and illegitimate/legitimate violence.<sup>89</sup> These critiques define s/m as violent, reinforcing crimino-legal definitions of s/m as bad or illegitimate violence. These concepts, however, are more complex than a contest of

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85. Criminal law tries to make risk known, visible and controllable by placing s/m as risky and criminal.

86. See Leslie Moran, *Violence and the Law: The Case of Sado-masochism*, 4 SOC. & LEG. STUD. 225, 234-35 (1995).

87. *Id.*

88. *Id.* at 226.

89. See Sangeetha Chandra-Shekeran, Comment, *Theorising the Limits of the ‘Sado-masochistic Homosexual’ Identity in R v. Brown*, 21 MELB. U. L. REV. 584, 589 (1997).

authority and power. While there is a presence of polarised prescriptions/proscriptions of sexuality and socially acceptable violence within the criminal legal texts, it is important not to reproduce these absolutes to reinforce binary constructions of socio-sexuality. The dynamics and intricacies of these concepts are anything but oppositional.<sup>90</sup>

Destabilizing socio-legal meanings is important for critical legal analysis of *Brown*. For example, the application of violence to *homosexual s/m* produced a consensual sexual interaction as a type of sexual violence and violation. S/m is known in law, and to a lesser extent by society, as a type of sexual violence. It is both sex (desirable) and violence (undesirable), an antithesis, perhaps, and even a paradox.<sup>91</sup> The paradox of *Brown* is the criminal punishment for (sexual) punishment as pleasure.

[T]hey were parodying punishment and torture. They were doing to each other for pleasure what the criminal courts had formerly done in order to manifest the authority of law. If there is to be humiliation and submission, let it be done in the pillory, in public- in order that it serve the law's purposes; if corporeal injury be inflicted such that blood is shed, let that be on the streets at the 'cart's tail' so that it may invoke terror rather than sensual exhilaration. For if it is possible to derive pleasure from pain, which the law has assumed people wish at all costs to avoid, what is left for the law to use? The only legitimate dominant/submissive relationship is that which exists between the law and the legal subject.<sup>92</sup>

Matthew Weait highlights the interplays and subversions of pleasure and pain within law and society, especially as contained in *Brown*. He reveals the diversity of pleasures within society and deflates the theory of criminal law as a totalising policing agent or as a legitimate force beyond rebellion.<sup>93</sup> The law does not have a monopoly over the body's experiences of pain, pleasure, sensuality and performance. Bodies play out many experiences with and without criminal law's influence. The very existence of s/m between men demonstrates the ability of the body to parody crimino-legal prescriptions about transgression.<sup>94</sup>

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90. Especially considering the case law regarding heterosexual s/m. Heterosexual s/m is examined below.

91. However it is important to note that sex and violence may occupy many different associations other than the ones used here.

92. Matthew Weait, *Fleshing It Out, in LAW AND THE SENSES: SENSATIONAL JURISPRUDENCE* 169, 170 (Bentley Lionel & Flynn Leo eds., 1996).

93. *Id.*

94. And *Brown* makes possible the policing of desires, but it does not restrict, remove or eliminate the practice of these desires.



The activities in *Brown*, as a celebration of sadomasochistic desire, created a pleasurable and sensual interpretation of the punitive symbolism of the criminal law. Corporeal domination and regulation is not owned and governed by the state. S/m demonstrates this through socio-sexual roles of domination. Yet, the activities in *Brown* were used to condemn the practice of (governmental) subversion. There was an underlying intensity about transgression within the case, in such a way that the criminal law punished s/m bodies because the appellants made a mockery of punishment by making it sensual and pleasurable.

In *Brown*, transgression was represented, not just through sexuality, but through other concepts such as health. The bodies in *Brown* provided “safe” interactions of s/m, yet the case was defined around lines of HIV transmission, as discussed above. The use of metaphor by the courts highlights the inadequacies of criminal law to understand the complexity of HIV and same-sex desire. In *Brown*, s/m as a homosexual “violence” took on the sign (or metaphor) of death, illness, and danger, in addition to the abnormalities that these concepts represent; this was done by replacing s/m with the sign of HIV, as [a channel of pathology].<sup>95</sup> HIV was often interchanged with the symbols of disease, death, and suffering.<sup>96</sup> The s/m male body signified HIV and symbolised blood as an infectious and contaminating agent. S/m was particularly dangerous for criminal law because of the assumed presence of blood and the esoteric of homosex. In the case, s/m was referred to as a “cult of violence” that society should be protected from.<sup>97</sup> S/m became a sign of something other than pleasure through their Lordships’ voices. S/m was a sign of the exoteric and foreign through the metaphor of the “cult.”

Blood was an important aspect of membership within the cult of (homosexual) s/m. Blood was interchangeable with (homosexual) s/m bodies. “Their” blood became an absolute, or perhaps pledge, of infection and membership, yet “their” blood was tainted. Blood was seen as a carrier of illness, as a vector of danger and disease. Homosexual bodies who engage in s/m become highly infectious bodies, perhaps even more so than “homosexual” bodies,<sup>98</sup> because these bodies are engaged in blood-spreading that is axiomatically infectious/infected: “[b]loodletting

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95. Giles, *supra* note 48, at 107.

96. For a more thorough discussion of how HIV has become a metaphor of death and disease, see ALISON YOUNG, IMAGINING CRIME: TEXTUAL OUTLAWS AND CRIMINAL CONVERSATIONS 175-77 (1996). See generally SUSAN SONTAG, ILLNESS AS METAPHOR AND AIDS AND ITS METAPHORS (2001).

97. *R v. Brown* [1994] 1 A.C. 212, 237.

98. I mean rather than those homosexual bodies who do not practice s/m.

and smearing of human blood produced excitement. There were obvious dangers of serious personal injury and blood infection.”<sup>99</sup>

HIV was seen as an (absolute) outcome of s/m even though none of the participants contracted HIV during the encounters contained in the case.<sup>100</sup> The discourse of *Brown* overlooked the probability of these events as “safe” and the HIV-avoidance-knowledge and skills of those s/m practitioners. If the possibility of HIV infection was so high, as suggested by this quote, then maybe it was the safety of the activities and expertise of the participants that precluded/prevented infection. Nevertheless, the bodies in *Brown* were presented as distasteful and risky, not as experienced practitioners, despite their age and their implied history within s/m culture.<sup>101</sup>

The participants in *Brown* were represented as lacking knowledge, rather than as having specific knowledge and skills about HIV avoidance and risk minimisation, in favour of creating deviant, repellent, corrupt, perverted, predatory, infectious and dangerous bodies.<sup>102</sup> Lord Lowry made this assessment of the appellants: “. . . one cannot overlook the physical danger to those who may engage in sado-masochism . . . it is idle for the appellants to claim they are educated exponents of a ‘civilised cruelty.’”<sup>103</sup> Before the court, the appellants were dangerous to themselves and others and foolishly ignorant of (that) danger, increasing their irresponsibility and threat.

Following the case, same-sex s/m between men acquired specific meanings within crimino-legal discourse. These meanings positioned s/m between men as a metaphor of many things including danger, HIV, blood, violence, illness, deviance, pain and social pathology, but s/m is not the absolute of these metaphors. For those who engage in s/m, it is also a metaphor of pleasure, desire, sexual identity, intimacy, sexual safety, “safe(r)-sex,” and trust. This was problematic for criminal law. S/m appeared within a simulacrum of the (healthy) self.<sup>104</sup> The (crimino-legal) undesirable space of s/m (as a potential site of HIV transmission) potentially had the visage of the desirable. *Brown* hinted, while simultaneously denying, that the self may be lured into s/m. The case had the dual legal function of acknowledging s/m only to condemn it.

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99. *Brown*, [1994] 1 A.C. at 236.

100. *Id.*

101. In *Brown* safe sex knowledge and pedagogies were erased from gay male bodies.

102. *Id.*

103. *Id.* at 255.

104. “Simulacrum” is a theory developed by Jean Baudrillard to capture the blurring of reality and simulation in culture and society. See Jean Baudrillard, *Simulacra and Simulations*, in JEAN BAUDRILLARD, SELECTED WRITINGS 166, 166-84 (Mark Poster ed., 1988).

Criminal law has a different socio-legal discursive role than sexual discursivity, which is to separate and diffuse the consensual bodies as innocent, vulnerable victims of the transgression that is (perverse) pleasure.

#### VIII. STRAIGHT-ACTING GAZE: THE GAY AND THE STRAIGHT OF S/M CASE LAW

In many ways, the construction of victim and offender within *Brown* was specific to the same-sexuality of the defendants. The legal proscription of homosexual s/m is apparent when we consider that the defendants unsuccessfully challenged those charges to the European Court of Human Rights.<sup>105</sup> This meant that there was considerable legal agreement that homosexual s/m was unlawful and crimino-legally dangerous. However, the classification of sadist same-sex desiring male bodies as offenders and masochistic male bodies as victims is incongruent with much of the case law dealing with heterosexual s/m. *R v. Donovan*,<sup>106</sup> *R v. Wilson*,<sup>107</sup> and *R v. Slingsby*<sup>108</sup> were three cases which dealt with the issues of heterosexual s/m. All of these appeals were allowed, implying the lawfulness of (masculine heterosexual) s/m. Yet, s/m was crimino-legally defined as harmful when done by men to men (as in *Brown*).<sup>109</sup> There was another case, *R v. Emmett*,<sup>110</sup> in which an appeal was dismissed based upon the legal principles of *Brown*. But the categorisation of that case with *Brown* was based upon the Otherness of the activities involved, as will be discussed below.

##### A. *Wilson*

The dynamics of *Wilson* were different from *Brown*, but how the court defined s/m was also entirely different.<sup>111</sup> *Wilson* involved a husband using a hot knife to brand his initials on his wife’s buttocks “at [her] instigation.”<sup>112</sup> Mrs. Wilson’s general practitioner made a complaint to the police after she observed the branding and some associated

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105. Lashey, Jaggard, and *Brown v. U.K.*, 24 Eur. H.R. Rep. 39 (1997).

106. [1934] 2 K.B. 498.

107. [1997] Q.B. 47.

108. [1995] Crim. L.R. 570.

109. *R v. Brown*, [1994] 1 A.C. 212, 233.

110. [1999] EWCA (Crim.) 1710 (unreported, Court of Appeal, Criminal Division, Rose LJ (VP), Wright, Kay JJ, 18 June 1999).

111. For a brief discussion of the inconsistencies between heterosexual and homosexual case law, see Weait, *supra* note 35, at 125; Weait *supra* note 83, at 72-73, 78.

112. [1997] Q.B. 47.

scarring and bruising during a medical examination.<sup>113</sup> Wilson was charged with assault occasioning bodily harm contrary to § 47 of the *Offences Against the Person Act 1861*. However, the conviction was quashed on appeal.<sup>114</sup> At the trial, the judge said that he was bound to validate the illegality of s/m under § 47 of the *Offences Against the Person Act 1861*.<sup>115</sup> However, the appeal was allowed because the actions in *Wilson* fell into one of the recognised exceptions in which an individual can consent to assault.<sup>116</sup> This was because branding was comparable to tattooing.<sup>117</sup>

The decision deflected the gaze of law away from the (matrimonial/heteronormative) private. Agency was reversed from the defendant to the complainant, denying culpability of the sadist, heterosexual, male body. Instead, the “victim” was seen to cause the acts. “Mrs. Wilson not only consented to that which the appellant did, she instigated it.”<sup>118</sup> This erased the discursive s/m harm implied in the trial via the *Brown* judgments. In the appeal, this harm was replaced with accountability and agency on behalf of the “so-called victim.”<sup>119</sup> This type of s/m behaviour was rendered legal because the court saw the heterosexual branding (of a woman by a man) as fashionable and normal. The case naturalised and conventionalised men branding women, especially sexual, “private” parts of their bodies.

There was no aggressive intent on the part of the appellant. On the contrary, far from wishing to cause injury to his wife, the appellant’s desire was to assist her in what she regarded as the acquisition of a desirable piece of personal adornment, perhaps in this day and age no less understandable than the piercing of nostrils or even tongues for the purposes of inserting decorative jewellery.<sup>120</sup>

Mr Wilson was made passive,<sup>121</sup> subject to his wife’s fantasy. The *mens rea* of the crime was located within her mind. He was only assisting his wife’s desire and fantasy. Comparing the brand with the wearing of

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113. *Id.*

114. For a discussion of consent in *Wilson*, see Mitchell Davies, Comment, R v. Dica: *Lessons in Practising Unsafe Sex*, 68 J. OF CRIM. L. 498, 498, 502 (2004).

115. *Wilson*, [1997] Q.B. at 47.

116. It should be noted that the House of Lords specifically declined to make an exception for homosexual s/m. For a more thorough discussion of this point, see Stanley Christopher, *Sins and Passion*, 4 LAW & CRITIQUE 207, 220-21 (1993).

117. *Wilson* at 47.

118. *Id.* at 50.

119. *Id.* at 48.

120. *Id.* at 50.

121. Passivity was used to create victims within *Brown* and *Wilson*. Mr. Wilson may even be read as the victim.

jewellery suggested she owned the act.<sup>122</sup> This had the effect of locating, not just agency, but any pathology or deviancy within her body/mind. Although such statements suggest that the court accepted branding as a social practice, they also projected any criticism and condemnation of the practice onto the complainant. Mrs. Wilson (“the so-called victim”) was then a victim of her own perverse desire, in a similar way to the appellants in *Brown*.<sup>123</sup>

### B. *Donovan*

This configuration of criminality and victimology was also seen in *Donovan* where the behaviour of the “victim” questioned (her non) consent and (his) culpability.<sup>124</sup> In *Donovan*, the defendant beat a seventeen year-old-girl with a cane for sexual gratification.<sup>125</sup> Afterwards, the victim reported Donovan to the police.<sup>126</sup> He was arrested and charged with indecent and common assault.<sup>127</sup> His conviction was quashed on appeal because the jury had not been adequately directed regarding the issue of consent.<sup>128</sup>

The court ruled that consent was not a defence where an act is likely or intended to cause bodily harm.<sup>129</sup> However, the question of whether the defendant’s act was likely or intended to cause bodily harm to the victim was not presented to the jury.<sup>130</sup> Therefore, the jury was incorrectly instructed on the issue of consent as it applied to the case.<sup>131</sup> On that basis, the Appeal Court deemed that the defendant’s conviction had to be quashed.<sup>132</sup> This was due to an absence of proof of the victim’s consent and the misdirection on whether the above definition of consent applied.<sup>133</sup>

The technical legal aspects which enabled Donovan’s acquittal make it difficult to make a critical comparison with *Brown*. However, I wish to

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122. The judge made the analogy between branding and jewellery, something that is worn voluntarily and can be removed. *Id.*

123. Another reading of the statement may be that a man branding his sign, name, or reference onto the body of a woman is seen as acceptable because of patriarchal ideology inferring “his” ownership of “her” body, see Weait, *supra* note 35, at 111-12.

124. *R v. Donovan*, [1934] 2 K.B. 498, 503.

125. *Id.* at 502.

126. *Id.* at 503.

127. *Id.* at 502.

128. *Id.* at 498.

129. *Id.*

130. *Donovan*, [1924] 2 K.B. at 498.

131. *Id.*

132. *Id.*

133. *Id.*

address some discursive legal differences between the two judgments. Several comments in *Donovan* reinforced conceptualisations of heteronormativity. The age of the female complainant was not used in the same way as it was in *Brown* where youth made the homosexual, male complainants vulnerable and in need of crimino-legal protection. The complainant, Norah Harrison, was referred to as “a girl” and her age seemed to be part of her identity, which was used to identify her several times in the case.<sup>134</sup> In the eyes of the law, Norah Harrison was neither vulnerable nor weak, and ultimately she was not seen as a victim.

There are technical legal differences between the two cases which dislocate male same-sex desiring and female bodies. The complainant’s consent was deemed to be an important aspect of the judgment, with the judicial failure to consider consent enabling Donovan’s acquittal.<sup>135</sup> Yet, the issue of consent in *Brown* was deemed to be legally irrelevant.<sup>136</sup> The issue of consent was central to *Donovan*, but was marginalised in *Brown*. The issues of gender, sexuality and consensuality have another layer considering it was the complainant in *Donovan* who instigated the charges.<sup>137</sup> Her decision to seek criminal justice questioned, if not denied, her consent.<sup>138</sup> Alternatively, consent was questioned in *Brown* even though none of the charges were brought by the complainants. However, this did not influence how the judgments were handled. This implies that female nonconsent is questionable, while homosexual male consent is impossible.

### C. *Slingsby*

To demonstrate the inconsistencies between the crimino-legal treatment of consensual sexualities, another comparison should be made between *Brown* and *Slingsby*.<sup>139</sup> In *Slingsby*, the female victim died as a result of what was said to be consensual vaginal and anal fisting, which the defendant performed whilst he was wearing a signet ring.<sup>140</sup> This caused internal injuries to the victim, leading to septicaemia.<sup>141</sup> The defendant was charged with constructive manslaughter by an unlawful

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134. *Id.* at 502-03.

135. *Id.* at 498.

136. [1934] 1 A.C. 212, 213.

137. *Donovan*, [1994] 2 K.B. at 502.

138. This issue was obliterated because of mishandling of consent by the trial judge. Harrison’s consent may have been more adequately addressed if the law had been followed in the trial and an appeal allowed. *Id.* at 498.

139. [1995] Crim. L.R. 570.

140. *Id.*

141. *Id.*

and dangerous act.<sup>142</sup> His conviction was quashed on appeal because the act of consensual sexual activity (between a man and woman) was not in itself unlawful.<sup>143</sup> The Court of Appeal ruled that this was “merely vigorous sexual activity” and that neither party considered any actual bodily harm.<sup>144</sup> Essentially, the law defined this as an accidental death. The appellant was found not guilty of manslaughter because harm was not deliberately intended.<sup>145</sup> *Slingsby* was unlike *Brown* because of a lack of legally defined intentional injury or harm. Further to this, *Slingsby* was acquitted because the defence of consent could be applied because the death was the result of sex and not assault.<sup>146</sup>

In *Slingsby*,<sup>147</sup> the acts of vaginal and anal penetration would have constituted indecent assault without the consent of the (female) victim and therefore the rules in *Brown* and the *Offences Against the Person Act 1861* would have applied. However, because the court accepted the victim had consented (or that the defendant honestly believed she had), these activities were seen as lawful acts of sexual penetration governed by the *Sexual Offences Act 2003*.<sup>148</sup> In *Slingsby*, the actual presence of blood and death was not seen as illegal because the death occurred within what was technically classified as sex (heterosexual vaginal penetration).

In *Brown*, the activities were deemed to be illegal because they were not seen as sex, but as unusual and alarming assaults.<sup>149</sup> As a heterosexual male, *Slingsby* was entitled to inflict any degree of harm, up to and including death, upon the (female) body of his partner because they were engaged in a lawful act of sexual penetration. The starting

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142. This offence is also known as involuntary manslaughter. For more information about the definition of this particular type of manslaughter, see REED ALAN & FITZPATRICK BEN, CRIMINAL LAW 321-28 (2006).

143. Another similar case is *R v. Boyea*, [1992] CRIM. L.R. 574, where the complainant met the defendant at a bar and upon arriving at her residence he forced her into the house and indecently assaulted her. The defendant pinned the victim to her bed and forced his hand inside her vagina, resulting in internal and external vaginal injuries. *Id.* He was sentenced to six years imprisonment. *Id.* The judge was guided by the rule in *Donovan*, [1934] 2 K.B. 498, which states that an individual cannot consent to an injury that is nonpermanent, but more than “transient and trifling.” It should be noted that the defendant and complainant were not involved in a relationship and the sex was nonconsensual, so it bears similar characteristics to the ideal conceptualisation of crime and is markedly different to the particulars of *Brown*, [1994] 1 A.C. 212. Yet, both cases are defined as assaults by the criminal law.

144. See *Spanner Trust Submission to the Home Office Review Board on Sexual Offences*, THE SPANNER TRUST, <http://www.spannertrust.org/documents/sexualoffencesreview> (last visited Jan. 18, 2011).

145. [1995] Crim. L.R. 570, 571.

146. *Id.*

147. *Id.*

148. Previous to this act, these offences were governed by the Sexual Offences Act 1956.

149. [1994] 1 A.C. 121.

points for the prosecution in *Slingsby* and *Brown* were entirely different because the law defined the activities as entirely different.<sup>150</sup> The nonsexual grouping together of men in *Brown* was seen, from the outset, as violent and illegal, despite the lack of permanent, actual, bodily injury. Yet, the death in *Slingsby* was explained away because heterosexuality was lawful from the outset to the outcome, even if that outcome was death.<sup>151</sup> It would seem that death is a crimino-legally acceptable risk within heterosexual, but homosexual s/m is so risky that it is illegal.

#### D. *Emmett*

Another case of heterosexual s/m, *Emmett*,<sup>152</sup> further explains how legal technicalities can desexualise s/m to create assault. The decision in *Brown* was used in *Emmett* to dismiss an appeal against two charges of assault occasioning actual bodily harm.<sup>153</sup> The appellant was charged after his partner presented to her general practitioner with several injuries sustained during s/m activity.<sup>154</sup> The complainant suffered haemorrhages in both eyes and bruising around her neck after suffocating when a plastic bag was tied around her head while the defendant performed oral sex on her.<sup>155</sup> On another occasion, the complainant suffered burns to her chest when the defendant poured and ignited lighter fluid on her chest.<sup>156</sup> The doctor alerted the police and the defendant was subsequently charged under section 47 of the *Offences Against the Person Act 1861*.<sup>157</sup> He received a sentence of nine months imprisonment to be served consecutively, suspended for two years.<sup>158</sup>

Unlike the above heterosexual s/m cases, the incidents of *Emmett* were held to constitute assault because of their similarity to *Brown*.<sup>159</sup> It may be assumed that the court viewed *Emmett* as similar to *Brown* because the complainant's injuries were not sustained during the course of penetrative vaginal sex. The law positioned what the defendant and

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150. Another important aspect of this case was the complainant was unable to speak about the incident because she was dead. Therefore, she was spoken for by the court. In *Brown* the complainants were alive and present, yet their voices were silenced and ignored.

151. See also Paul Lehane, *Assault, Consent and Body Art: A Review of the Law Relating To Assault and Consent in UK and the Practice of Body Art*, 4 J. OF ENVTL. HEALTH RES. 41, 45-46 (2005).

152. [1999] EWCA (Crim.) 1710.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*



victim were doing as something Other than sex because she was not being vaginally and/or anally heterosexually penetrated. The activities in *Emmett* were seen as assaults in which the defence of consent could not be legally applied.

IX. CONCLUSION: “SAFETY,” GENDER AND THE (DIS)APPEARANCE OF BLOOD

In *Brown*, s/m appeared as nonsexual assaults between men, insinuating that men were perpetrators and victims of socio-sexual pathology and deviance. Within this domain, consent was denied because the male complainants were victims, not just of criminal assault, but of homosexuality. *Brown* sent a very clear message that masculinity was violated by s/m between men, perhaps because of the lack of female bodies and their penetration by men. Yet in most of the cases of s/m between men and women, masculine heterosexual bodies were allowed to be violently sexual (i.e., sadistic).<sup>160</sup> Within heterosexual s/m case law, female bodies (who were vaginally penetrated) diminished any indication of pathology, deviance or criminality. Consent was interjected onto these female bodies to remove culpability because of heterosexist desires and entitlement to the female body.

The female bodies in *Donovan* and *Slingsby* remained always already penetrated/penetrable and unharmed (perhaps whole). Yet, the bodies in *Brown* were sexually impenetrable and legally scrutinised. Discursively, blood flowed from the bodies in *Brown*. There was a presence of moral and health dangers. Blood did not appear at all in *Donovan* or *Wilson*. The(ir) skin was left discursively intact and injury (personal or public) was not envisaged. There were no victims, as defined by criminal law, in *Donovan*, *Slingsby* and *Wilson*. Instead, the acts were seen as normal, safe, ordinary and private. “The act complained of is not illegal in itself and the injuries are only the marks of a cane which would appear in administering ordinary corporeal punishment.”<sup>161</sup>

Criminality within *Donovan*, *Slingsby*, and *Wilson* was also limited by locating the actions as private and consensual. Yet, something else happened in the heterosexual cases, as illustrated in the above quote. The submissive/masochist female body as a possible site of pleasure and desire became a site of legitimised, naturalised, and normalised

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160. I am not suggesting that any of these acts are violations or nonconsensual, rather that the criminal justice system imposes this concept within male same-sex s/m and then removes the same concept within heterosex s/m.

161. *Donovan*, [1934] 2 K.B. at 500.

punishment. There was an implication that the female body was subject to and an object of male punishment, rather than a participant in a pleasurable and sensual activity. Perhaps men could not consent to sadomasochism because masculine heterosexual bodies do not need or want to be disciplined (and female bodies could/should be).

It is difficult to overlook the differences in how the criminal law handles s/m. The lack of prosecution for the bulk of heterosexual s/m, despite more serious injuries than in the homosexual s/m case of *Brown*, suggests a heterosexist character of law. This is also evident in the sentences imposed in *Brown* and *Emmett*. Emmett received a suspended sentence, while the sentences handed down in *Brown* ranged from two years and nine months to four years and six months.<sup>162</sup> It is difficult to provide a coherent reading of s/m case law given the unique judicial treatment of each case. As mentioned above, one of the central arguments in *Brown* was that the activities were not conducive to family life. There were also implied HIV transmission risks in *Brown*, yet not in any of the heterosexual cases. Seemingly, criminal law heightened HIV risks amongst same-sex desiring men and exculpated these same risks amongst heterosexual bodies. Perhaps the most concerning aspect of the case law is the categorisation of s/m. In *Slingsby*, the sexual acts were deadly and noncriminal. Yet, the activities in *Brown* and *Emmett* were positioned as nonsexual acts of assault, despite the complainants not seeking charges and the lack of death. These cases highlight the pliability of consent within sex and within s/m, and the reach of the law within sexuality (i.e., because the charges were brought by the state rather than the complainants).

Criminal case law also contains explicit and implicit judicial condemnations of “homosexual sadomasochism.” The crime of same-sex male s/m is a metaphor of immorality and hence criminality.<sup>163</sup> Giles argues that the application of violence or harm to the issue of consensual sexuality stretches the acceptable bounds of general deterrence rhetoric within crimino-legal discourse.<sup>164</sup> She highlights the circularity and paradoxes posed within *Brown*, in which criminal law erased pleasure and applied harm in order to remove consent. Sadomasochism between men is legally risky through imagined HIV/AIDS risks. *Brown* is very much a hypothetical, it speaks about the “possible,” rather than the “actual.” It tells a crimino-legal tale about “what might have happened

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162. It should be noted that Christopher Carter’s sentence of twelve months was suspended.

163. See Giles, *supra* note 48, at 102.

164. *Id.* at 106-07.

specifically in this case (although it did not) and what might happen more generally in future cases.”<sup>165</sup>

*Brown* relied on the deletion of consent because s/m between men was deemed as harmful. Debate about public harm and consensual sex was central to *Brown*. The main issue in the House of Lords appeal was supposed to be about whether consent to sadomasochism gave that practice lawfulness (i.e., whether consent could be used as a criminal legal defence). Instead, the majority of the Lords took the view that all causing of harm is *prima facie* unlawful, stating that sadomasochism (between men) was unlawful because of a cult of violence and the risk/harm of HIV.<sup>166</sup>

So, it is the particular pleasure of homosexual s/m which is socio-legally disturbing. Helen Power says “the ‘real’ crime of Brown and the others was first, that they were gay and, secondly, that they enjoyed what they were doing.”<sup>167</sup> She gives numerous examples that display how the validity of consent to situations where harm may occur is arbitrarily defined and conceived within case law and legislation.<sup>168</sup> Effectively, sadomasochism was made unlawful through the Lords’ prescription and proscription of cultural and sexual norms.

Consent was played out through criminal narratives of sadomasochism and same-sex desire, narratives that dislodge consensuality, and insert fictions of dangerousness. This creates a paradox in which the pleasure is the danger, yet the danger is the pleasure. The danger is that sadomasochism may be pleasurable. The locus of this pleasure and danger as Other, outside of heteronormative sexuality, dislocates crimino-legal consent. The legal logic seems to be that an individual can consent to penetrative heterosex because that is a lawful activity.<sup>169</sup> But, an individual cannot consent to sadomasochism (where heterosexual penetration does not occur) because it may be defined as harmful and therefore *prima facie* unlawful.<sup>170</sup> This harm lies in a supposed risk of HIV and the fear of the Other, which is Other desire.

Criminal law affords legitimacy to certain types of “violence,” while punishing consensual pleasures. This process is very much gendered and sexualised. Sexuality which more closely fits a normative, traditional

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165. *Id.*

166. *Id.*

167. Helen Power, *Consensual Sex, Disease and the Criminal Law*, 60 J. CRIM. L. 412, 420 (1996).

168. *Id.*

169. *See, e.g.*, *R v. Clarence*, (1888) 22 Q.B.D.

170. Power, *supra* note 167, at 416.

vision of sex (as men penetrating women) is less likely to be deemed as criminal. Therefore, (transgressive) desires are written as something other than sexuality and vulnerable to prosecution. The moral dangerousness of sexual Otherness represents western society's idealisation of procreative (hetero)sexuality. The role of the family occupies central legal narratives upon which criminal justice is based and administered. The sexually exotic and esoteric (such as sadomasochistic sexualities, same-sex desire) represent a supposed danger to the integrity of this constructed morality (i.e., heteronormativity).

When consensual socio-sexuality is framed as nonsexual and as assault, a contest arises between the collective (public interests) and the Other (individual). Transgressive pleasureseekers are positioned as individual, or as the minority.<sup>171</sup> A question then arises about whether consent may be invalidated through the potential for "public harm," where the action or activity is portrayed as a violation of public interests.<sup>172</sup> Contesting public good against private or semi-private pleasures shifts the legal burdens of sexual consent from lawfulness to unlawfulness.<sup>173</sup> In other words, the criminal justice system analyses sex from a position of criminality rather than legality.

Before *Brown*, same-sex s/m was largely unknown to legal discourse. Homosexual s/m was made public to send a message about the medical, social, sexual, and criminal pathology of Other desires. Criminal law's reach into s/m between men was more than a contest of origin and right (of good and bad). For the purpose of criminal law, s/m between men was seen as lacking social utility (nonprocreative and sexually abnormal). It was categorised as esoteric and exoteric sex, naughty or nought-y sex, sex which lacks social (heteronormative) functionality.

Transgressive sexualities (the exotic, the erotic, the foreign and the unknown) occupy problematic legal spaces. Transgressive desires are made legally impossible or indeterminate to deny their own pleasure. Exoteric pleasures are made unpleasant and dangerous through their abnormality. In criminal law, they are not understood as pleasure per se, but as unusual and unknowable. The Other is not a legitimate (legal) pleasure.

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171. *Id.* at 417; see also Alan Turner, *Criminal Liability and AIDS*, 7 AUCKLAND U. L. REV. 875, 881 (1995).

172. Winifred Holland, *HIV/AIDS and the Criminal Law*, CRIM. L.Q. 279, 287 (1994); see also Power, *supra* note 167, at 416-17; Turner, *supra* note 171, at 881.

173. Giles, *supra* note 48, at 104.

Throughout society, illicit desires are presented as infectious, contagious and harmful, yet presumably desirable.<sup>174</sup> The symbiosis of the illegal and the abnormal are intended to produce symbolic and paradigmatic deterrent messages. Transgressive desires are so abhorrent and repulsive that even if they do appeal this is an illegitimate and illegal appeal. The abnormal appears with the illegal to refute the desirability of transgressive pleasures.

Sex is a space that separates and binds bodies. The pleasures and intimacies of sexuality bind the s/m “offender” and the “victim.” However, sex creates a boundary which divides Other sexual bodies as immoral and/or illegal. Sex implicates and demarcates these bodies as risky (to each other and to a supposed socio-sexual norm). Moments of sexual pleasure become socially dangerous, accumulative pleasures (homosexual, transgressive, HIV), which become solid and condensing tales of criminally sexual relationships.<sup>175</sup> S/m represents this paradox through complainant-less sex crimes where consent/pleasure/desire/mutuality are removed, interpolating harm. The dangerousness of sadomasochistic (homosexual) bodies is in their imagined HIV risk, who may be harmful and a risk to the innocent purity of sexual health and (hetero)sexual norms. That which makes socio-sexual bodies dangerous is that which makes them legally visible, (the gaze of law upon) sex. Bodies proximal and touching, caressing and copulating are subject to legal review.

*Brown* created a dual notion of injury in homosexual s/m, whereby the masochists and also the community could be victims. S/m danger presents as an abstract danger. All s/m participants could occupy the identity of victims or offenders at some point, although *Brown* marked specific bodies as offenders. All bodies are vulnerable within the narrative of s/m crime; bodies become victims of the destructive appeal of s/m. However, it is the sadomasochist identity who is most criminal, especially when attached to the HIV sero-positive Other sexual body. This suggests that this body may become absolved by removing (sadomasochist or Other sexual) desire.

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174. Moran, *supra* note 86, at 186-87. Lynda Hart gives some excellent examples of these reproductions within feminist and lesbian feminist discourses. She explains the unsettling nature of s/m relies on the contagion/possession panic, that s/m might “somehow seep into the fantasies of women who do not prefer it.” Hart, *supra* note 82, at 47.

175. Moran, *supra* note 86, at 238.