Criminalizing Sex At The Margins

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> Legal constructions of sexuality often abnegate the ineffable and pluralistic nature of pleasure. By dismissing the aberrant 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. What may be unnevering about S/M is its unabashed cynicism. S/M makes clear — it is indeed central to its praxis — that power and social presumptions govern intimate relationships. The designation of S/M sex as only violence speaks to a discomfort with this bluntness. The criminalization of S/M pleasure may underscore the threat of this honesty.[1]

Notwithstanding Pierre Trudeau's famous quote from 1967 that the "state has no business in the bedrooms of the nation,"[2] *adults* who engage in certain kinds of *consensual* sexual activity *in private* continue to face the stigma of criminalization and, in some cases, the very real possibility of imprisonment. This comment examines two such situations: (i) section 159 of the *Criminal Code* and anal intercourse; and (ii) the judicial nullification of consent in cases involving S/M and other sexual practices, like erotic asphyxiation, as evidenced most recently in the case of *R. v. A. (J.)*.[3]

Criminalizing Anal Intercourse

While tremendous strides have been made in addressing sexual orientation discrimination in Canada, including the recognition and celebration of same-sex marriage, gay men still face the threat of being arrested for having anal sex. While consensual sex between men was decriminalized in 1969 with the repeal

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[1]Monica Pa, "Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochisitic Sex" (2001), 11 *Tex. J. Women & Law* 51 at 92.

[2]See "Trudeau's Omnibus Bill: Challenging Canadian Taboos," online: CBC Digital Archives, *http://archives.cbc.ca/politics/rights_freedoms/topics/538/* (date accessed: 16 May 2010).

[3]Reported *ante* at p. 51.

of our sodomy law,[4] anal intercourse with an individual who is not their married spouse or who is under the age of eighteen or which occurs in the presence of more than two people remains a crime in our *Criminal Code*. In other words, if three men are in a bedroom during which anal sex is occurring, they are, according to section 159(3)(a), committing a crime. While it is true that section 159 was declared unconstitutional in 1995 in Ontario based on age discrimination,[5] not every province has ruled on the issue.[6] In Alberta, for example, prosecutors were not conceding the unconstitutionality of section 159 as late as 2002.[7] Moreover, even after 1995 in Ontario, the police continued to charge individuals with anal intercourse.[8]

Perhaps most significantly, the very fact that the offence remains in the *Code* serves to further stigmize and marginalize the gay community in Canada. One individual who was unjustly arrested for anal intercourse brought a civil action seeking to force Parliament to remove section 159 from the *Code* in 2001. His action failed, as the Court held that the government could not be held liable in tort for failing to amend a statute.[9] And so, homosexuality remains, at the very least, symbolically criminalized in Canada.

Judicial Nullification of Consent in S/M Cases

Sexual minorities who engage in sexual practices that cause bodily harm also face criminalization and imprisonment. A series of cases in Ontario, including *A. (J.)*, hold that, as a matter of policy, consent is vitiated for sexual practices, like sadomasochism (hereinafter "S/M")[10] or erotic asphyxiation (the sexual practice

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[4]See *Criminal Law Amendment Act, 1968-69* (S.C. 1968-69, c. 38). It received royal assent on June 27, 1969.

[5]*R. v. M. (C.)* (1995), 41 C.R. (4th) 134 (Ont. C.A.). In her concurring opinion, Justice Abella concluded that section 159 discriminated based on sexual orientation. See also a finding of unconstitutionality in the extradition case of *Halm v. Canada (Minister of Employment & Immigration)*, [1995] 2 F.C. 331 (Fed. T.D.).

[6]Section 159 has only been struck down in B.C., Alberta, Quebec and Nova Scotia. See *R. v. B. (M.D.)*, [2003] B.C.J. No. 2381 (B.C. C.A.); *R. v. Roth*, 2002 ABQB 145 (Alta. Q.B.); *R. c. Roy* (1998), 125 C.C.C. (3d) 442 (Que. C.A.); and *R. v. Farler* (2006), 38 C.R. (6th) 135, 212 C.C.C. (3d) 134 (N.S. C.A.).

[7]See *Roth*, *supra*, at para. 18. Although, as noted by the trial judge, the failure to make submissions was interpreted as a recognition that a declaration of unconstitutionality was inevitable. See further the discussion at paras. 24-25.

[8]See, for example, *Lucas v. Toronto Police Services Board* (2001), 54 O.R. (3d) 715 (Ont. Div. Ct.); and *R. v. K. (C.P.)*, [2002] O.J. No. 4929, 7 C.R. (6th) 16 (Ont. C.A.).

[9]See *Lucas*, *supra*.

[10]S/M is varied and so it is not easy to provide a comprehensive definition. See Monica Pa, "Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic

in *A. (J.)*), that intentionally cause non-trivial bodily harm. The leading authority is the Ontario Court of Appeal decision in *R. v. Welch*[11] where the Court held:

> Although the law must recognize individual freedom and autonomy, when the 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.[12]

Although *Welch* did not identify the "compelling societal interests," it relied on the immorality of intentionally inflicting harm, and the Supreme Court of Canada decision in *R. v. Jobidon*,[13] a case involving a consent fist fight that resulted in the death of one of the participants. In that case, the Supreme Court held that, in the context of fist fights or brawls, consent does not render assaultive behaviour legal where there is an intention to cause bodily harm and bodily harm

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Sex" (2001), 11 *Texas Journal of Women and the Law* 51 at 58-64 [hereinafter *Beyond the Pleasure Principle*]. Pa identifies four major categories of S/M behaviour (at 58):

> (1) infliction of physical pain, usually by means of whipping, slapping or the application of heat and cold; (2) verbal or psychological stimulation such as threats and insults; (3) dominance and submission, for example, where one individual orders the other to do his or her bidding; (4) bondage and discipline, involving restraints such as rope and chains and/or punishment for real or fabricated transgressions.

[11](1995), 101 C.C.C. (3d) 216 (Ont. C.A.). See also, *R. v. Quashie* (2005), 198 C.C.C. (3d) 337 (Ont. C.A.) at paras. 51-60; *R. v. Robinson* (2001), 53 O.R. (3d) 448 (Ont. C.A.) at paras. 59-62; and *R. v. Amos* (1998), [1998] O.J. No. 3047 (Ont. C.A.). *Amos* involved a case of anal intercourse where the trial judge had convicted because the intercourse caused injuries. The Court of Appeal entered an acquittal distinguishing anal intercourse from S/M. It held:

> In *Welch*, the court was concerned with sado-masochistic sexual activity involving the deliberate infliction of pain and injury, conduct which the court described as being "inherently degrading and dehumanizing." The same cannot be said about the sexual conduct engaged in by the appellant. There is no suggestion in the evidence that the appellant deliberately inflicted injury or pain to the complainant. Moreover, it cannot be said that anal intercourse is inherently degrading and dehumanizing or that it constitutes socially unacceptable conduct, particularly in view of s. 159(2) of the *Criminal Code* which excepts from criminal liability anal intercourse between consenting adults in private.

[12]*Ibid.* at 239.

[13][1991] 2 S.C.R. 714 (S.C.C.)

results.[14] The decision was grounded in policy and respect for the sanctity of the human body.

The Supreme Court did, however, recognize that consent to serious bodily harm will not always be vitiated. Justice Gonthier, for the majority, recognized that the question will turn on factors like whether the underlying conduct is likely to lead to a breach of the peace,[15] or exploitation of the vulnerable;[16] whether the conduct is deemed to have "positive social value,"[17] or is a "socially valuable cultural product."[18] For the Court, that test was met for sporting events, surgeons and stuntmen. It has also been met in the United States for body manipulations such as piercings and tattooing.[19]

It is unlikely that Parliament is going to address the issue of whether, and to what extent, consent should be vitiated for sexual practices that cause bodily harm. For example, despite the fact that our anal intercourse offence was declared unconstitutional in 1995, Parliament has not removed the section from the *Code*. These issues are simply not on their radar. Hopefully, the Supreme Court of Canada will address this issue if *A. (J.)* is appealed further, because consenting adults need to be aware of the breadth of their sexual autonomy. The question of whether S/M or similar practices should, as a matter of policy, be exempt from criminal liability is a complex one, as is evidenced by the thoughtful feminist debate surrounding the issue.[20] Indeed, in *Welch*, Justice Griffiths

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[14]Bodily harm is defined in section 2 of the *Code* as ". . . any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature." It is this level of harm that *Jobidon*, refers to as vitiating consent. Minor or trivial harm does not vitiate consent even if intended and caused. See *Jobidon*, *supra*, at 767.

[15]*Ibid.*, at 763.

[16]*Ibid.*, at 763.

[17]*Ibid.*, at 762.

[18]*Ibid.*, at 767.

[19]See the discussion in Kelly Egan, "Morality-Based Legislation is Alive and Well: Why The Law Permits Consent to Body Modification But Not Sadomasochistic Sex" (2007), 70 *Alb. L. Rev.* 1615 at 1627-1629 [hereinafter *Morality-Based Legislation*].

[20]See the excellent discussion in Maneesha Deckha, "Pain, Pleasure, and Consenting Women: Exploring Feminist Responses to S/M and Its Legal Regulation in Canada Through Jelinek's The Piano Teacher" (2007), 30 *Harv. J.L. & Gender* 425 at 429-431 [hereinafter *Pain, Pleasure and Consenting Women*]; and Brenda Cossman, "Sexuality, Queer Theory, and 'Feminism After': Reading and Rereading the Sexual Subject" (2004), 49 *McGill L.J.* 847. See also, *Beyond the Pleasure Principle*, *supra*; and Cheryl Hanna, "Sex is Not a Sport: Consent and Violence in Criminal Law" (2001), 42 *B.C. L. Rev.* 239 at 287, 246, 290 [hereinafter *Sex is Not a Sport*]. Professor Deckha identifies the two extremes as the "pro-sex feminists" or "sex radicals" that see S/M and other sexual practices as empowering of women. On the other side of the fence are "dominance femi-

was clearly troubled by his decision, noting that he reached it "[n]ot without some hesitation."[21] In deciding whether the criminal law should create a risk-free zone for some S/M practices, a number of relevant policy interests need to be factored into the analysis.

Sexual Autonomy

As a matter of first principles, adult individuals who engage in consenting sexual behaviour in private have the right to be granted considerable sexual autonomy. Indeed, in the assisted suicide case of *Rodriguez v. British Columbia (Attorney General)*,[22] the Supreme Court of Canada recognized that the right to make choices about what happens to one's own body triggers the security of the person interest in section 7 of the *Canadian Charter of Rights and Freedoms*:

> There is no question . . . that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.[23]

This constitutionally protected right is not absolute. However, it should only give rise to criminal sanctions where there is a compelling principle of fundamental justice that constitutes a reasonable limit on the right to personal and sexual autonomy.

Promoting Tolerance and Non-Discrimination

Canada's sodomy laws and criminalization of homosexuality is evidence of a history of intolerance and overt discrimination of sexual minorities. To what extent is the failure of the courts to recognize the right of S/M practitioners to consent to sexual activity that produces bodily harm grounded in discrimination? There is evidence to support an affirmative answer to this question at least with respect to its treatment in the United States and the United Kingdom.[24] In the

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nists" who view S/M as "the most acute instances of institutional sexism and modern day patriarchy." She also correctly observes that the more recent writings, like those of Pa and Hanna take a "less dichotomous and more complicated reading." [*Ibid.*, at 440].

[21]*Welch*, *supra*, at 238.

[22](1993), 24 C.R. (4th) 281 (S.C.C.).

[23]*Ibid.*, at para. 21.

[24]See *Beyond the Pleasure Principle*, *supra*, at 56-58 (noting discrimination against S/M practitioners in the United States) and 71-76 (discussing manifestations of intolerance in the jurisprudence). See also, the discussion in Sangeetha Chandra-Shekeran, "Theorizing the Limits of the 'Sadomaschistic Homosexual' Identity in *R. v. Brown*" (1997), 21 *Melb.*

United Kingdom, the leading authority is *R. v. Brown*,[25] a case involving S/M and gay men. The House of Lords refused to recognize consent as a defence to the charges despite the fact that there was no complainant and no medical attention was required. The accused were charged when a videotape depicting their activities came into the possession of the police. The investigation into the activities on the videotape was known as "Operation Spanner." The homophobic underpinnings of the decision can be seen most vividly in repeated reference to the Court of Appeal decision wherein that Court observed that one of the participants "has settled into a normal heterosexual relationship."[26] In addition, Lord Jauncey expressed concern regarding the "corruption of young men" if the conduct were legalized.[27] It is, therefore, essential that any approach taken with respect to this issue ensure that it will not result in perpetuating inequality.

The Nature of the Activity: Sex or Violence?

In *Jobidon*, the majority drew a distinction between the violence associated with street fights and sporting events noting that in the former, the "*sole objective* [is] to strike . . . as hard as he physically could, until his opponent either gave up or retreated."[28] Is S/M primarily about sex or violence? This is one of the central issues debated in the academic literature.[29] Monica Pa compellingly argues that S/M is not primarily about violence because its essential elements of negotiation and consent remove the "core features of violence." She further notes that "the motivation is not hostility but mutual excitement."[30] In addition, much like in sports, there are rules that are agreed upon by the parties. As Pa observes, "S/M is highly negotiated and mutually satisfying. The credo of S/M is 'Safe, Sane and Consensual.'"[31]

U. L. Rev. 584; and Carl Stychin, "Un(manly) Diversions: The Construction of the Homosexual Body (Politic) in English Law" (1994), 32 *Osgoode Hall L.J.* 503.

[25][1993] 2 All E.R. 75 (U.K. H.L.). The decision was upheld by the European Court of Human Rights. See *Laskey, Jaggard & Brown v. United Kingdom*, [1997] 2 EHRR 39.

[26]*Brown*, *supra*, at 83, 91.

[27]*Ibid.*, at 92.

[28]*Jobidon*, *supra*, at 767.

[29]Thoughtful arguments have been made on both sides of this question. See, in particular, *Beyond the Pleasure Principle*, *supra*, at 76-79; and Sex is Not a Sport, *supra*. See also, the discussion in *Pain, Pleasure and Consenting Women*, *supra*, at 440-450.

[30]See *Beyond the Pleasure Principle*, *supra*, at 77.

[31]*Ibid.*, at 61.

Ensuring Non-Discriminatory and Just Verdicts

If S/M is decriminalized, will it make sexual assault or domestic violence prosecutions involving S/M more difficult because triers of fact may apply stereotypical assumptions associated with S/M or sexual orientation? For example, is there a danger that triers of fact will turn "no" into "yes" in these cases? Or, will it encourage the accused to lie and commit perjury about the nature of the negotiations?[32] These are serious concerns, as they are in all sexual assault consent cases, but they can be addressed through judicial instructions, the ethical obligations of defence counsel to not lead false or bad faith defences and expert evidence on the nature of S/M practices.[33] It is also possible that decriminalization will lead to greater protection of those who do not consent. As Kelly Egan has observed:

> De-criminalizing SM would not demean the intensely personal nature of sex. Rather, it would permit individuals to further explore their sexuality without fear of legal repercussion if all does not go as planned. It would decrease the social stigma associated with participating in SM, which undoubtedly influences practitioners' decisions to seek medical help and/or advice about SM related issues. It would also promote a greater societal understanding of misunderstood sexual behaviour, and allow finer legal distinctions to be made between consenual SM relationships and abusive relationships. As the law expands to encompass society's growing acceptance of alternate sexual expression, it should find a place to include SM.[34]

Harm and the Proper Functioning of Society

There is a significant jurisprudential and policy development post-*Welch* that requires a fresh consideration of the S/M question. In the "swinging club" case of *R. c. Labaye*,[35] the Supreme Court rejected the persuasive force of sexual morality arguments in the determination of offences grounded in sexual conduct (in that case committing an indecent act) in order to ensure that the practices of sexual minorities are not criminalized absent objective evidence from the Crown about the harm caused.[36] As for the impact of *Labaye* on the criminalization of sex at the margins, Elanie Craig has observed that:

> *Labaye* represents a shift in the relationship between law and sexuality, and it illuminates the possible emergence of a new approach by the Supreme Court of Canada to the regulation of sex- an approach which allows for the

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[32]See the discussion in *Sex is Not a Sport*, *supra*, at 285-286.

[33]See *Beyond the Pleasure Principle*, *supra*, at 86-87.

[34]*Morality-Based Legislation*, *supra*, at 1642.

[35][2005] 3 S.C.R. 728, 34 C.R. (6th) 1 (S.C.C.)

[36]*Ibid.* at para. 14.

> legal recognition of pleasure behind, beyond, or outside of legal claims regarding identity, antisubordination, relationship equality, and conventional privacy rights. On a theoretical level, *Labaye* suggests the possibility of an approach to the legal regulation of sexuality which recognizes the importance of challenging mainstream beliefs about sexuality or subverting certain dominant sexual norms, while maintaining an analysis firmly grounded in principles of liberalism.[37]

On both a theoretical and practical level, *Labaye* provides us with an approach in deciding the circumstances under which S/M should be criminalized. The majority approach does not focus only on the question of whether the conduct causes harm (which can include physical or psychological harm),[38] but, most importantly for our analysis, on whether that harm is of a degree that is incompatible with the proper functioning of society.

The appeal of this objective approach, in the *Jobidon* context, is to protect against privileged assessments of determinations of social or cultural value. This was the same problem with the community tolerance test for indecency. In thinking about whether the harm, in the S/M context, is incompatible with the proper functioning of society, recognition of the importance of tolerance and sexual autonomy, the private nature of the activity, the presence of real consent, as well as the nature of the harm caused are all relevant factors to take into account. The contested issue turns on what degree of harm should be deemed to trump autonomy, privacy and consent?

In *A. (J.)*, the conduct involved erotic asphyxiation, which involves choking the person into a state of unconsciousness. Notwithstanding that the Court of Appeal had to spend some time determining whether this constitutes bodily harm, this would seem to cross the harm threshold absent expert evidence that would rebut the inherent dangerousness associated with this conduct. The state interest in protecting individuals from conduct which endangers life is self-evident and clearly outweighs individual autonomy.[39] Although that consent was vitiated, it nevertheless acquitted the accused of sexual assault. Unfortunately, the Court of

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[37]See "Laws of Desire: The Political Morality of Public Sex" (2009), 54 McGill L.J. 355 at 359-360.

[38]There are three branches to the *Labaye* harm test: (1) the harm of loss of autonomy and liberty through public confrontation; (2) the harm of predisposing others to anti-social acts or attitudes; and (3) harm to participating individuals (*Labaye*, *supra*, at para. 36). In assessing the third branch, which is most relevant in this context, the majority notes that "[t]he consent of the participant will generally be significant in considering whether this type of harm is established." (*Ibid*., at para. 49).

[39]See *R. v. Hancock* (2000), 2000 CarswellBC 2703, 2000 BCSC 1581 (B.C. S.C.), where the accused tried to argue consent in the context of a sadistic beating of the deceased, who was described as a masochist and who wrote out how he wanted to be assaulted.

Appeal seemed to get distracted by the nature of the charge as opposed to the legal effect of vitiated consent. Once that consent is deemed vitiated, any offence, like assaust, which relies on the absence of consent as part of the *actus reus* is made out regardless of whether it includes bodily harm. Indeed, the entire analysis in *Jobidon* is on the relationship of consent for assault, not assault causing bodily harm. In this case, the fact that the accused was not charged with sexual assault causing bodily harm was, therefore, irrelevant. The Court concluded that consent was vitiated and the accused should have been convicted of sexual assault.

Returning back to the central issue of identifying a zone of risk, a number of commentators and the Law Reform Commissions of Canada and England have advocated permitting bodily harm that is less than grievous or serious bodily harm.[40] This seems to be a reasonable solution to a difficult issue. Although what this means in the context of sex will have to be determined on a case-by-case basis, consenting sexual conduct that occurs in private and that does not require serious medical attention, that does not threaten death or leave permanent injury should not be caught by our assault provisions.

Conclusion

Professor Hanna, who thoughtfully opposes decriminalizing S/M,[41] takes comfort in the fact that those cases at the low end of the violence spectrum will never get prosecuted because both parties are consenting and no one will complain to the police or testify against their partner.[42] She is probably right, but that does not address the bigger issues of tolerance and certainty. It is akin, to

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[40]See *Beyond the Pleasure Principle*, *supra*, at 81-82; and *Morality Based Legislation*, *supra*, at 1640-1641. See also, Law Reform Commission of Canada, *Working Paper 38 (Assault)* (Ottawa: Ministry of Supply and Services, 1984); and The Law Commission, Consultation Paper No. 134, *Criminal Law-Consent and Offences against the Person* (London: H.M.S.O., 1994). These Commission reports are discussed in *Welch*, *supra*, at 234-236.

[41]As she puts it, "[i]n no way should this argument be construed as a moral judgment on those who practice safe and consensual S/M and are careful and communicate with their partners." Indeed, she observes that ". . . when I began this project, I anticipated arriving at the opposite conclusion, for to suggest that people cannot consent to private sexual matters seems unnecessarily paternalistic (or maternalistic, as the case may be)." After studying the issue, Hanna concluded that that without "safeguards and protections and rules and referees intrinsic to sport," there is too great a danger "to veer off into an area where power imbalance between the parties, be it physical or economic or social, is far too common" and is "to travel dangerously close to violating notions of fundamental freedom and human rights. To follow the path of violence is to travel backwards." See *Sex is Not a Sport*, *supra*, at 287, 246, 290.

[42]*Ibid.* at 287-290.

some extent, with simply leaving section 159 and the prohibition against anal intercourse on the books. Assuming we can agree on a bodily harm threshold that does not impair the proper functioning of society, those who engage in the practice should not feel stigmatized, be deterred or criminalized. S/M practitioners should not have to worry that the police will raid their establishment or come across a videotape or respond to a complaint by a neighbour. Moreover, they should be entitled, and indeed encouraged, to speak to a lawyer or doctor to find out the outer limits that the law will permit. As the Supreme Court observed in *Labaye*, "crimes should be defined in a way that affords citizens, police and courts a clear idea of what acts are prohibited."[43]

[43] *Labaye*, *supra*, at para. 2.