

# A Polyvocal (Re)Modelling of The Jurisprudence of Sadomasochism

THEODORE BENNETT\*

*Ever since R v Brown [1994] 1 AC 212, the jurisprudence of sadomasochism has been characterised by a reductive, monovocal focus on assault law as providing the definitive account of the legal position of sadomasochism. By engaging with the treatment of sadomasochism within other legal areas, such as manslaughter law, discrimination law and censorship law, this Article argues for the adoption of a broader, polyvocal approach that recognises sadomasochism as having multiple, inconsistent legal positions across different areas of law.*

## INTRODUCTION

Contemporary jurisprudence on sadomasochism has been dominated by the case of *R v Brown* [1994] 1 AC 212, wherein five gay men received prison terms for engaging in consensual sadomasochistic activities.<sup>1</sup> In the aftermath of the decision, legal commentators rushed to publish their thoughts on the newly declared ‘illegality’ of sadomasochism. A variety of reactions were evinced: from the liberal democratic decial of governmental interference in private

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\* PhD Candidate and Staff Member of the University of Western Australia. I would like to acknowledge the financial assistance provided to me in the course of my research by the University of Western Australian through the Baillieu Research Scholarship.

1 ‘Sadomasochism’ is a portmanteau noun created by conflating the words ‘sadism’, meaning the taking of sexual pleasure in inflicting pain, and ‘masochism’, meaning the taking of sexual pleasure in receiving pain. It is intrinsically linked in both popular consciousness and subcultural practice to a broader set of sexual activities including physical restraint (bondage) and role-played power imbalance dynamics (domination/submission). This broader signification of sadomasochism is neatly encapsulated in the widely-used conflationary acronym ‘BDSM’, which stands for bondage and domination, submission and submission, sadism and masochism. The use of ‘sadomasochism’ in this Article always imports consensuality, which, in the same way that consent distinguishes sex from rape, distinguishes sadomasochism from violent assault. Sadomasochism is also referred to in other sources variously as ‘SM’, ‘S/M’, ‘S&M’, and ‘sado-masochism’, but I have not altered quotes which use these alternate references.

affairs,<sup>2</sup> to the sex-negative feminist-inspired apologies that the sexuality of adults is just *too risky* without strict legal oversight,<sup>3</sup> and to the quasi-activist opinion pieces railing against the legal normativisation of ‘transgressive’ sexual minorities.<sup>4</sup> Highlighting the centrality of this decision to jurisprudential thought on sadomasochism, *R v Brown* [1994] 1 AC 212 has recently been described as ‘perhaps the most important and most cited case’ on the topic.<sup>5</sup>

The underlying commonality to the seemingly disparate strands of legal discourse that have picked up on *R v Brown* [1994] 1 AC 212 lies not just in the shared conception that it contained a definitive ruling about the legal status of engaging in sadomasochistic activities, but also in the implicit assumption that it provided a definitive account of the intersection between sadomasochism and the law. By deciding that the consent of an assaultee (masochist) will not shield an assaulter (sadist) from criminal liability for injuries caused during a sadomasochist assault, the majority judges in *R v Brown* [1994] 1 AC 212 not only condemned the sadists in their case to serve out multi-year prison sentences, they also fixed a reductive focus on the common law formulation of consensual assault at the heart of the jurisprudence of sadomasochism. Thus, we find a preponderance of legal articles on sadomasochism with titles such as ‘The Role of Consent in Sado-Masochistic Practices’,<sup>6</sup> ‘Consent to Assault and the Dangers to Women’,<sup>7</sup> and ‘Consent and Assault’,<sup>8</sup> but, historically, a marked absence of academic consideration of sadomasochism’s imbrication within other areas of the law.

However, some writers have recently begun to venture outside the traditional fixation on the common law of consensual assault. Ridinger discusses what he sees as sadomasochism’s ‘related legal issues’, such as child custody,

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2 See, eg, Nafsika Athanassoulis ‘The Role of Consent in Sado-Masochistic Practices’ (2002) 8.4 *Res Publica* 141; Michael J Allen, ‘Consent and Assault’ (1994) 58.2 *Journal of Criminal Law* 183; Kelly Egan ‘Morality-Based Legislation is Alive and Well: Why the Law Permits Consent to Body Modification but not Sadomasochistic Sex’ (2007) 70 *Albany Law Review* 1615.

3 See, eg, Julie Bradwell ‘Consent to Assault and the Dangers to Women’ (1996) 146 *New Law Journal* 1682; Cheryl Hanna ‘Sex is Not a Sport: Consent and Violence in Criminal Law’ (2001) 42 *Boston College Law Review* 239; Sheila Jeffreys ‘Consent and the Politics of Sexuality’ (1993-1994) 5.2 *Current Issues in Criminal Justice* 173.

4 See, eg, David Fraser ‘Father Knows Best: Transgressive Sexualities (?) and the Rule of Law’ (1995) 7.1 *Current Issues in Criminal Justice* 82; Matthew Weait, ‘Sadomasochism and the Law’ in Darren Langdrige and Meg Barker (eds), *Safe, Sane and Consensual: Contemporary Perspectives on Sadomasochism* (Palgrave MacMillan, New York, 2007) 63.

5 Anil Aggrawal, Anil, *Forensic and Medico-legal Aspects of Sexual Crimes and Unusual Sexual Practices* (Boca Raton, CRC Press, 2009), 158.

6 Athanassoulis, above n 2.

7 Bradwell, above n 3.

8 Allen, above n 2.

employment discrimination and the right to privacy,<sup>9</sup> and Weait recognises that zoning law, prostitution regulation and censorship issues are also key points in discussing the legal position of sadomasochism.<sup>10</sup> Building on this basis, this Article seeks to delve deeper into the multiple intersections between sadomasochism and the law in order to move away from conceiving of the common law of consensual assault as definitively settling the legality of sadomasochism, and towards unpacking how various areas of law differentially construct the legal response to sadomasochism. It argues that this shift from a monovocal to polyvocal modelling of the jurisprudence of sadomasochism reveals inconsistencies between the multiple ways that the law ‘speaks’ about sadomasochistic practice and identity, to the effect that the ‘il/legality’ of sadomasochism should be understood instead as a series of unsettled, inconsistent ‘il/legalities’. This Article works through this argument by setting out and critically analysing previously un(der)worked areas of intersection between sadomasochism and the law, such as Code jurisdiction formulations of consensual assault law, manslaughter law, discrimination law and censorship law.

## INTERSECTIONS BETWEEN SADMASOCHISM AND THE LAW

Conceiving of the criminality of engaging in sadomasochistic activities under assault law as being an exhaustive statement of sadomasochism’s legal position fails to appreciate the multi-layered imbrication of sadomasochism within the law. To draw a parallel between sadomasochism and homosexuality,<sup>11</sup> this would be akin to defining the ‘legality’ of homosexuality as simply being determined by whether or not homosexual sexual activity was prohibited by the criminal law, such as through anti-sodomy laws. Whilst it may be a convenient starting point for an analysis of how the law responds to homosexuality, it is clearly insufficient if used as a sole criterion. Such an analysis surely also has to consider other intersections between the two, such as those that occur within the areas of anti-discrimination

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9 Robert Ridinger ‘Negotiating Limits: The Legal Status of SM in the United States’ in Peggy Kleinplatz and Charles Moser (eds), *Sadomasochism: Powerful Pleasures* (Harrington Park Press, New York, 2006) 189, 201-210. Indeed, time has proven true his identification of privacy law as an important legal area for sadomasochism, see, for example, the Max Mosley scandal: *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB); ‘Mosley Wins Court Case Over Orgy’ *BBC News* (online), 24 July 2008 <<http://news.bbc.co.uk/2/hi/7523034.stm>>.

10 Weait, above n 4, 65-66; 74-78.

11 This is not a very long bow to draw, given that the comparison has been made before: Chris White, ‘The Spanner Trials and the Changing Law on Sadomasochism in the UK’ in Peggy Kleinplatz and Charles Moser (eds), *Sadomasochism: Powerful Pleasures* (Harrington Park Press, New York, 2006), 167, 185; and that homosexuals make up a distinct proportion of the sadomasochistic subculture: Niklas Nordling, N Kenneth Sandnabba, Pekka Santtila and Laurence Alison, ‘Differences and Similarities Between Gay and Straight Individuals Involved in the Sadomasochistic Subculture’ in Peggy Kleinplatz and Charles Moser (eds), *Sadomasochism: Powerful Pleasures* (Harrington Park Press, New York, 2006), 41.

law, marriage law, and censorship law. Similarly, although the common law of consensual assault may be a convenient starting point for an analysis of how the

law responds to sadomasochism, it is also insufficient if used as a sole criterion. Intersections between sadomasochism and other areas of law also need to be considered. To this end, this Section will begin by setting out assault law as the traditional site of academic investigation into the sadomasochism and the law, establishing how this legal area ‘speaks’ about sadomasochism as a reference point against which its treatment in other legal areas can be compared and contrasted.

## ASSAULT LAW

Under assault law, to use section 222 of the *Criminal Code* (WA) as an example, an offence is committed if a person: ‘strikes, touches, or moves, or otherwise applies force of any kind to the person of another, either directly or indirectly, without his consent’. This consent proviso *prima facie* seems to make engaging in sadomasochistic activity lawful. However, a lengthy tradition of English case law, that deals with the similar common law definition of assault, holds that where someone factually consents to being assaulted that consent will have no legal effect if the assault caused bodily harm, wounding or serious bodily harm to the consenting party and the assault did not occur within particular circumstances.<sup>12</sup> The particular circumstances in which you can legally consent to such harm are set out in Lord Templeman’s majority judgment in *R v Brown*, and include surgery, ‘[r]itual circumcision, tattooing, ear-piercing and violent sports including boxing’.<sup>13</sup> To this list can be added those additional circumstances set out in *Attorney-General’s Reference (No 6 of 1980)* [1981] 1 QB 715, which recognises factual consent to assault as being legally effective in the course of ‘properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc’.<sup>14</sup> Sadomasochism was excluded from this list by a majority decision in *R v Brown* [1994] 1 AC 212, wherein it was held that sadomasochism’s lack of social utility provided a sufficient basis to exclude it as a matter of policy. As a result, in the UK the consent of a masochist to an injurious assault by a sadist will not prevent the sadist from being successfully prosecuted for an offence on the basis of that assault.

The authority of the decision in *R v Brown* [1994] 1 AC 212 has been reinforced by subsequent cases, such as *R v Emmett* [1999] EWCA Crim 1710, and it has been accepted as an accurate statement of Australian law for common law jurisdictions,<sup>15</sup> such as in *R v McIntosh* [1999] VSC 358 and in *R v Stein*

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12 See especially *R v Donovan* [1934] 2 KB 498; *Attorney-General’s Reference (No 6 of 1980)* [1981] 1 QB 715.

13 [1994] 1 AC 212, 231.

14 At 719, per Lane CJ, Phillips and Drake JJ.

15 The common law jurisdictions are the Australian Capital Territory, New South Wales, South Australia and Victoria.

(2007) 18 VR 376.<sup>16</sup> In these common law jurisdictions sadomasochistic activities are criminal, despite their consensuality, where they cause bodily harm, wounding or grievous bodily harm. To translate this general legal conclusion into real-life examples of specific sadomasochistic activities:

- it is criminal to engage in slapping, spanking, caning, whipping or flogging that cuts the skin (which would constitute wounding) or that causes noticeable bruising (which would constitute bodily harm);<sup>17</sup>
- it is criminal to engage in cutting, branding or piercing (as these would constitute wounding and/or bodily harm);<sup>18</sup> and
- it is criminal to engage in fire play or erotic asphyxiation that causes burns or internal bleeding (which would constitute bodily harm).<sup>19</sup>

In Australian Code jurisdictions the legal position is more complex.<sup>20</sup> There has not yet been any specific, authoritative judicial statement about the il/legality of sadomasochistic activities under assault law in any Code jurisdiction. It is possible, however, to extrapolate sadomasochism's hypothetical legal position from the ways in which the relevant statutory provisions have been interpreted and applied in relation to other, similar circumstances. In cases concerned with consensual fighting, Kneipp, Sheperdson and Cooper JJ in *Lergesner v Carroll*<sup>21</sup> and Derrington J in *R v Raabe*<sup>22</sup> held that because consent is included in the statutory definition of 'assault' within Code jurisdictions, proving an offence of which assault is an element, such as common assault or assault occasioning bodily harm,<sup>23</sup> requires negating consent beyond a reasonable doubt. Because lack of consent is an element of these Code offences, but not their equivalent common law offences, the Code position 'in relation to consent to violence is quite different to the position at common law'.<sup>24</sup> Unlike the common law, legally effective consent in Code jurisdictions is not 'limited by law to a consent which

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16 However, the Court in *Neal v R* [2011] VSCA 172, at paragraphs [54-63], favourably discussed Lord Slynn's minority judgment from *R v Brown* [1994] 1 AC 212 as part of their *obiter dicta*. It is too early to say whether or not this marks a change in legal direction for the common law in Australia.

17 'Bodily harm' is defined under s 1(1) of the *Criminal Code* (WA) as 'any bodily injury which interferes with health or comfort'.

18 But only if performed in a sadomasochistic context, see *R v Wilson* [1996] 2 Cr. App. R. 241.

19 *R v Emmett* [1999] EWCA Crim 1710.

20 The Code jurisdictions are the Northern Territory, Queensland, Tasmania and Western Australia.

21 [1991] 1 Qd R 206.

22 [1985] 1 Qd R 115

23 See, eg, the *Criminal Code* (WA) ss 313, 317

24 The Law Reform Commission of Western Australia, *Aboriginal Customary Law: Criminal Responsibility*, Discussion Paper on Project 94 (2005), 163. This comment was made in reference to the position under WA Code, which the authors assumed would follow the Queensland case law.

is itself limited to an application of force which does not cause bodily harm'.<sup>25</sup> The limit of legally effective consent lies where the injury is sufficiently severe so as to constitute wounding or grievous bodily harm, whereupon consent becomes irrelevant because assault is not an element of either of these offences.<sup>26</sup>

These Queensland authorities on consensual fighting provide a guide on how sadomasochism could be dealt with under Code jurisdictions.<sup>27</sup> If sadomasochistic activities were treated the same way as consensual fights then the consent of the masochist would prevent the sadist from being liable for common assault or for causing injuries to the masochist that amounted to bodily harm, but the sadist would still be liable if the injuries to the masochist amounted to wounding or grievous bodily harm. The divergence, then, between the Code and common law jurisdictions is quite narrow; it is clear in all jurisdictions that engaging in sadomasochistic activities that cause no harm is lawful, whereas engaging in sadomasochistic activities that cause wounding or grievous bodily harm is criminal. The only difference between Code and common law jurisdictions is whether or not it is criminal to engage in sadomasochistic activities that cause injuries that meet the requirements for bodily harm but that do not reach the level of wounding or grievous bodily harm.

Although the legal distinctions between Code and common law jurisdictions may be legally narrow, they are jurisprudentially quite profound. If the law relating to consensual assault in Code jurisdictions turns solely on the peculiarities of the statutory construction of the relevant Codes and not on the lengthy tradition of common law UK authorities, then *R v Brown*<sup>28</sup> has minimal, if any, relevance to the legal position of sadomasochism within Code jurisdictions. Far from being the premier, authoritative precedent on the il/legality of sadomasochism, in these jurisdictions it becomes at best an easily distinguishable citation the persuasiveness of which is hamstrung by the markedly different statutory framework that needs to be applied. Furthermore, the air of judicial disapproval and condemnation of sadomasochistic activities that *R v Brown* attaches to the common law tradition is missing from the Code position. Sadomasochism's legal position is not contingent upon the application of policy arguments about its lack of social utility in comparison to other similar activities such as surgery or tattooing, its legal position is decided by recourse to general Code provisions that level out the common law differences between such activities.

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25 *Lergesner v Carroll* [1991] 1 Qd R 206, 219, per Cooper J.

26 See, eg, the *Criminal Code* (WA) ss 301, 297.

27 At least within Western Australia and Queensland; Wright J's judgment in the Tasmanian case of *R v Holmes* (1993) 2 Tas R 232 suggests that the Tasmanian Code should be interpreted in order to bring it in line with the English and common law conceptions of consensual assault.

28 [1994] 1 AC 212.

Cutting across all Australian jurisdictions, however, is the notion that sadomasochistic activities become criminal if and when they cause a certain level of injury. Determining whether or not a sadomasochistic assault is lawful, under both Code and common law, requires an assessment of the injuries caused to the masochist and an indexation of such injuries to a sliding legal scale (to determine whether they constitute bodily harm, wounding or grievous bodily harm). Although the legal effects of this indexation may vary between common law and Code jurisdictions, and even possibly between different Code jurisdictions, there is an underlying consensus that when a particular level of severity is reached in the injuries caused by sadomasochistic activities, those activities become indefensible by claims as to consensuality. For common law jurisdictions, this level is bodily harm. For Code jurisdictions, this level arguably shifts to wounding.

Sadomasochism doesn't hold a bright-line, clear-cut legal position within assault law. Whilst the criminal law here carves out a space of legitimacy for some sadomasochistic activities, it also delegitimises and criminalises other activities. This division is based on the physical criteria of the injuries caused from such activities. Thus, it is lawful to perform some types of sadomasochistic activities, namely those that do not cause legally cognizable physical harm, but it is criminal to perform other types of sadomasochistic activities, namely those that do cause some level of legally cognizable physical harm (either bodily harm or wounding). However, by dividing up the legality of sadomasochistic activities according to the basis of resultant physical injury, large swathes of sadomasochism, in terms of both practice and identity, are omitted from consideration. Other non-painful erotic activities that are intrinsically linked with sadomasochism, such as bondage (i.e. physical restraint) and role-played power imbalance dynamics (i.e. master/slave, doctor/patient fantasies), are left lawful by their elision. This is what prompts Weait to claim that:

[A]lthough there are dimensions, or aspects of S/M that may provoke a criminal law response, there is no 'law against' being a sadist or a masochist or what might be thought of as the core elements of S/M relationships (domination, submission, ritualized humiliation, the eroticization of the giving and receiving of pain).<sup>29</sup>

Assault law turns a blind eye to a sadist who simply ties up or barks orders at a masochist, but it may intervene when the sadist goes a step 'too far' by using a scalpel or a cane. As Weait notes, under common law the target of judicial disapprobation here appears not to be the eroticization of the giving and receiving of pain *per se*, as this in itself is not specifically 'criminalised'. Rather, the target appears to be the infliction of some level of bodily injury in the course of erotically giving and receiving pain. This leaves legal space, albeit limited, for the infliction of non-injurious pain as an expression of sadomasochism, such as through pinching, slapping or light spanking, and for other non-injurious sadomasochistic practices,

such as tying up and role-playing. But although there is consistency in the way in which assault law locates the criminal ‘wrong’ of sadomasochistic activities in the injuries it can cause, even within assault law there is a split in the way sadomasochism is spoken about by legal discourse. The common law condemns any form of injury occurring within a sadomasochistic context as criminal because it lacks social utility, whereas Code jurisdictions arguably fold sadomasochism into their blanket criminalisation of activities that cause wounding or grievous bodily harm.

## MANSLAUGHTER LAW

There is some scant Australian case law dealing with accidental deaths that occur in the course of sadomasochistic activities, most notably *Q v Jean Margaret Q v Q.v Meiers*<sup>30</sup>, *R v McIntosh*<sup>31</sup> and *R v Stein*<sup>32</sup>. These cases represent the intersection of the law with the practice of sadomasochistic activities where something unintentionally ‘goes wrong’ during the course of these activities.<sup>33</sup> In *Q v Meiers*<sup>34</sup> a man suffocated after being bound to a veranda pole with rope and tape by his wife, in *R v McIntosh* a man was asphyxiated by his lover who pulled too hard (and for too long) on a cord wrapped around his neck,<sup>35</sup> and in *R v Stein* a tied-up client was suffocated by a handkerchief gag applied by a pimp during the course of a commercially-negotiated encounter with a prostitute. In all three cases, the person playing the sadistic role was convicted of manslaughter and received a multi-year sentence of immediate imprisonment. Manslaughter law is complex and varies in its precise formulation from jurisdiction to jurisdiction and as such it is not my intention to engage with every legal issue regarding manslaughter law in each of these three cases. Rather, I want to focus on and unpack two particular legal issues that cut across both these cases and jurisdictional boundaries: the requirement for ‘unlawfulness’ and the role of deterrence in sentencing.

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30 Unreported, Supreme Court of Queensland Trial Division, Lyons J, 8 August 2008.,

31 [1999] VSC 358.

32 (2007) 18 VR 376

33 As such, the factual situations and outcomes in these cases should not be taken as being representative of sadomasochistic activities in general as they suffer from severe selection bias.

34 Above N.30.

35 It was accepted in this case that the lover was not actually tried to kill the man by doing this, but rather was trying to limit his breathing in order to heighten his sexual pleasure, a practice known as ‘erotic asphyxiation’.



## UNLAWFULNESS

In both *R v McIntosh*<sup>36</sup> and *R v Stein*<sup>37</sup>, judicial attention was paid to whether or not the sadomasochistic activities that caused the accidental deaths should be considered ‘unlawful’ under manslaughter law. Such unlawfulness is a requirement for one of the common law formulations of the manslaughter offence, that is, death caused by an ‘unlawful and dangerous act’.<sup>38</sup> In deciding that both the pulling on the cord in *R v McIntosh* and the gagging in *R v Stein* constituted unlawful acts, the judges in these cases held that the consent of the masochist did not excuse the sadist from criminal liability. Both courts found that whilst the masochistic parties factually consented to participating in some sadomasochistic activities, they did not consent to the degree of force actually used or offer specific consent for the exact activities which took place.<sup>39</sup> Despite this, both courts still went on to consider whether the presence of factual consent would have had any effect on the lawfulness of the sadomasochistic activities anyway.

Both manslaughter cases purport to adopt the statement of law in *R v Brown*<sup>40</sup> but end up deviating from the legal position set out there. These two cases seem to extend the principle in *R v Brown* to also cover assaults where no injury is actually inflicted, but which carry with them a ‘reckless acceptance of the risk’ that such an injury will occur,<sup>41</sup> or which carry a ‘risk of serious physical injury’.<sup>42</sup> The result of this extension is that whilst the court in *R v Stein* was anxious to point out that the tying up of the client was not in itself unlawful, the gagging of the client (even with his consent) should still be considered an unlawful act because it ‘involved exposure to the risk of serious physical injury’.<sup>43</sup> The scope of the meaning of

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36 [1999] VSC 358.

37 (2007) 18 VR 376.

38 See, eg, *Wilson v R* (1992) 107 ALR 257.

39 Vincent J in *R v McIntosh* [1999] VSC 358, [17]-[18], noted that:

[T]he prosecutor then submitted that the inference could be safely drawn that the deceased did not consent to the kind of violent treatment to which he was, in fact, subjected. There is, I consider, considerable force in this contention. It is reasonable to infer that the deceased did not agree to be strangled with the application of sufficient force that the horns of the thyroid cartilage were fractured and for what has been vaguely described by the pathologist as ‘a period of time’, or that the deceased even contemplated that force of such severity would be used. Nor do I consider that there is any suggestion in the material that you may have been under the mistaken perception that he had. In *R v Stein* (2007) 18 VR 376, [18], per Vincent, Neave and Kellam JA, it was acknowledged that: [T]he jury were entitled to conclude from the evidence before them that the deceased had consented to engage in sexual activity by which he would be dressed in women’s clothing and restrained by the ankles and wrists. There was, however, no evidence implied or otherwise before them, that the deceased had consented to having a gag tied around his mouth. Certainly there was no evidence that he had consented to not having it removed when he suffered distress.

[1994] 1 AC 212.

41 *R v McIntosh* [1999] VSC 358, [14].

42 *R v Stein* (2007) 18 VR 376, [22].

43 *Ibid.*

‘unlawful’ under these manslaughter law cases is much broader than it is under the orthodox principles of assault law, as it includes not only *injurious assaults* but also *assaults which merely carry the risk of injury* that take place in the course of sadomasochistic activities.

Consideration of the ‘unlawful’ component of manslaughter law adds additional complexity to the legal position of sadomasochism under the common law of consensual assault. In addition to the lawful, non-injurious sadomasochistic assaults and the criminal, injurious sadomasochistic assaults recognised in *R v Brown*, manslaughter law also seems to create another category: sadomasochistic assaults that become ‘unlawful’ if they carry the risk of injury (and, perhaps, are somehow involved in an accidental death). It is no longer enough for a sadomasochistic activity to be assessed as simply having caused or not caused an injury, here the activity itself must be scrutinised to determine whether or not it is ‘risky’.

Consideration of manslaughter law reveals a shift not only in the legal rules to be applied to sadomasochism cases, but also in a turning away from bodily injury as the site of legal concern and focusing back onto sadomasochistic activities themselves. Assault law conceives of the criminality of sadomasochistic activities in strict consequentialist terms, that is, as a product of the physically harmful results they lead to. Manslaughter law, in contrast, also conceives the criminality of sadomasochistic activities in deontological term as inherent in the acts themselves. Under this approach, sadomasochistic activities that do not cause harm in all or most cases are still considered ‘unlawful acts’ because they could possibly cause harm in some cases— and have done so in the instant case. Although manslaughter law and assault law are closely legally linked (they both consider the ‘lawfulness’ of sadomasochistic activities under assault provisions) they ‘speak’ about sadomasochism differently by utilising different analytical approaches when dealing with the same object of scrutiny. Manslaughter law broadens the scope of the criminalisation of sadomasochism by considering even non-injurious sadomasochistic activities as ‘unlawful acts’.

There appears to be some element of strategic convenience in this shift between settled assault law principles and the extended approach taken within these manslaughter cases. Because the judges in manslaughter cases are working backwards from the death of an individual who participated in sadomasochistic activities to determine the lawfulness of those activities, it is difficult to escape the intimation that this departure from the common law of consensual assault is geared towards generating a particular result for the instant case rather than extending the law more generally. This argument is supported by the lack of

reasoned consideration about this extension of the relevant legal principles,<sup>44</sup> and the fact that it is misleadingly couched in terms of simply following the precedent in *R v Brown*. Thus, not only does the law ‘speak’ about sadomasochism differently in manslaughter law than it does in assault law, in deontological rather than consequential terms, what it has to say is also informed by different considerations.

## DETERRENCE

In the comments regarding sentencing for *Q v Meiers*<sup>45</sup> and *R v McIntosh*<sup>46</sup> deterrence was specifically addressed in both cases. In *R v McIntosh*, Vincent J identified ‘the societal need to deter engagement in unlawful physically violent and life threatening acts’, but also took pains to point out that this was:

[N]ot based upon any moralistic response to the sexual predilections of those involved in bondage or sadomasochistic activities ... but rests solely upon the reasoning underlying the attribution of criminal responsibility on the basis of the relevant formulation.<sup>47</sup>

This apologetic caveat is quite disingenuous. Given that he had cited and adopted *R v Brown* only a few paragraphs earlier, it is inconceivable that Vincent J was not aware that the relevant legal formulation for the attribution of criminal responsibility in sadomasochistic circumstances was itself already based upon just such a moralistic response. For example, in *R v Brown* Lord Templeman stated that ‘[p]leasure derived from the infliction of pain is an evil thing’,<sup>48</sup> and Lord Lowry opined that masochists ‘suffer from a ‘perverted and depraved sexual desire’.<sup>49</sup> Both Law Lords wrote strong majority judgments criminalising injurious sadomasochistic activities under the common law of consensual assault. Vincent J’s attempt to evacuate the normative content of his deterrence of sadomasochistic activities relies on the blatant disavowal of the moralistic response of this key precedent. As such, Vincent J is not insulated from the criticism that he pre-emptively seeks to thwart with this comment.

At least Lyons J was more straightforward in admitting the negative conception of sadomasochism within legal discourse here, stating in her sentencing remarks that she wants to ‘make it clear to the community that the Court does denounce the

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44 Indeed, the notion that it is unlawful to simply gag someone else, even with their consent, is an unwarrantedly broad extension of the law with somewhat bizarre consequences. Take, for example, the practice of protestors to place tape over their mouths to demonstrate that their voice is not being heard. Or would this legal limitation on gagging only apply to sadomasochists?

45 Above N.30.

46 [1999] VSC 358.

47 [1999] VSC 358, [22].

48 *R v Brown* [1994] 1 AC 212, 237.

49 *Ibid* 255.

conduct that [Meiers was] involved in'.<sup>50</sup> To understand exactly what this conduct comprised of, it is necessary to go into some of the factual details of the case. In 2004, Meiers, a then 54 year-old mother of two, bound her husband of 17 years to a post on their house's veranda with both rope and tape, placing a rope around his neck but leaving his mouth uncovered so that he could breathe. The evidence was that she had done this at his request and that they had engaged in that type of activity for at least 10 years. Meiers then left her husband there for at least half an hour, and on her return found that he had asphyxiated to death. She immediately called the emergency services and co-operated fully with the police. So is the conduct that Lyons J wants to legally denounce here Meiers participation in sadomasochistic activities? Or is it specifically Meiers' reckless method of participation in such activities? The wording of her denouncement is sufficiently ambiguous that it could be taken to encompass both.

In imposing an immediate term of three years imprisonment on Meiers, Lyons J cited the requirement for both specific and general deterrence.<sup>51</sup> On the facts given in the sentencing remarks it is difficult to see the need for specific deterrence in Meiers' case: it was accepted that her participation in such activities had been 'really for [her late husband's] gratification'<sup>52</sup> and that she 'clearly did not intend to kill [her] husband'.<sup>53</sup> However, the acknowledgement of the need for general deterrence meshes with the reading of Lyons J as explicitly denouncing participation in sadomasochistic activities generally, because there was no evidence before the court that reckless participation in sadomasochistic activities was a widespread, significant or even commonplace social problem that required deterrence. (Indeed, there is no such evidence for such a claim at all.) The application of general deterrence principles to sadomasochistic activities is also somewhat legally nonsensical, because whilst it is unlawful to engage in some types of sadomasochistic practice it is lawful to engage in other types (as discussed above under assault law). Lyons J's lack of specificity results in the sentencing remarks being open to being read as attempting to deter the general public from participating in otherwise lawful activities.

The way deterrence is utilised as a sentencing factor in both *Q v Meiers*<sup>54</sup> and *R v McIntosh*<sup>55</sup> evinces another departure from the way assault law speaks about sadomasochism. Whilst they contain a similar moralising condemnation to the common law majority judgements in *R v Brown*, the focus of their ire is even broader. Building on assault law's sanctioning of injurious sadomasochistic activities, these cases also regulate sadomasochistic activities that are not intended to cause bodily harm or wounding and that normally would not cause

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50 *Q v Meiers* (Unreported, Supreme Court of Queensland Trial Division, Lyons J, 8 August 2008) sentencing remarks, 7.

51 *Ibid.*

52 *Ibid.*, 6.

53 *Ibid.*, 3.

54 Above N.30.

55 [1999] VSC 358.

bodily harm or wounding. This shifts the location of the jurisprudential ‘wrong’ in sadomasochistic activities that renders them criminal. Criminality is no longer located at the point where such activities bruise the flesh or break the skin of the masochist, instead, criminality is located in the sadomasochistic activities themselves. Whilst under assault law such activities become wrongs where they ‘cross the line’ of bodily harm or wounding, manslaughter law speaks about sadomasochism as a wrong in and of itself regardless of injury. Deterrence is not aimed specifically at participation in injurious sadomasochistic activities but at participation in sadomasochistic activities *tout court*, with the potentiality for injuries to result from such activities functioning as rhetorical cover for this extension of the law.

Recognising the extended way manslaughter law speaks about sadomasochism places Weait’s position (discussed above) under pressure. Whilst his argument that the law only criminalises some aspects of sadomasochistic participation and not the core elements of sadomasochistic relationships is cogent in relation to assault law, it begins to buckle when the polyvocality of the law’s response to sadomasochism is recognised. Whereas assault law condemns the sadist with a cane or scalpel in her hand, manslaughter law here also condemns the sadist who carries rope, tape or other less apparently harmful implements (at least insofar as they accidentally result in serious harm by way of their usage). Whereas assault law condemns only those sadomasochistic activities that cause bodily harm or wounding, manslaughter law appears to also condemn ‘risky’ non-injurious sadomasochistic activities specifically and perhaps even participation in sadomasochism generally. Taking a polyvocal view of law here recognises it as encroaching further into these core elements of sadomasochism and sadomasochistic relationships, rather than just regulating the ‘harmful fringes’ of injurious sadomasochistic practice.

## DISCRIMINATION LAW

The National Coalition for Sexual Freedom (NCSF) is a USA-based organisation that advocates for the interests of consenting adults who engage in various sadomasochism, fetish, swinging and polyamory practices. A 2008 study carried out by Susan Wright for the NCSF on the sadomasochistic subculture revealed that 26% of sadomasochists reported experiencing discrimination due to their alternative sexual practices, of which 20% responded that they had lost a job or contract, 18.7% had been refused services, 12.2% responded that they had lost a promotion or been demoted, 8.1% responded that they had been refused membership in an organization, and 2.6% responded that they had been subject to unjustified arrest.<sup>56</sup> Fears about disapproval, negative repercussions and persecution were the dominant reasons why 43% of the surveyed group were not

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56 Susan Wright, *Second National Survey of Violence and Discrimination Against Minorities*, National Coalition for Sexual Freedom, 2008 <[https://ncsfreedom.org/images/stories/pdfs/BDSM\\_Survey/2008\\_bdsm\\_survey\\_anal\\_ysis\\_final.pdf](https://ncsfreedom.org/images/stories/pdfs/BDSM_Survey/2008_bdsm_survey_anal_ysis_final.pdf)>.

‘out’ about their alternative sexual practices.<sup>57</sup> There is little reason to doubt that the results of this predominantly USA-focused survey can be extrapolated to the experiences of sadomasochists within other Western liberal democratic societies. For example, in the UK in 2008 two adults were excluded from using a public transport bus simply because one was wearing a dog collar which was attached to a lead held by the other.<sup>58</sup> Inevitably, Australian-based sadomasochists are also subjected to forms of discrimination due to their alternative sexual practices and such discrimination is mostly lawful under Australian law.

Australian anti-discrimination legislation only prohibits discrimination on certain grounds, for example, the *Equal Opportunity Act 1984* (WA) covers discrimination based on a person’s sex, marital status, pregnancy or breast feeding, gender history, family responsibility or status, sexual orientation, race, religious or political conviction, impairment or disability, or age. ‘Sexual orientation’ is definitionally restricted to covering only heterosexuality, homosexuality, lesbianism and bisexuality, and thus excludes sadomasochism.<sup>59</sup> Laws in other jurisdictions cover much the same areas (give or take a few differences in coverage relating to issues such as HIV/AIDS status and medical/criminal records), protecting an individual from discrimination on the basis of their non-normative sexuality usually only insofar as that sexuality comprises homosexuality or bisexuality.<sup>60</sup>

The jurisdictional exception here is Victoria. Under s 6(g) of the *Equal Opportunity Act 2010* (Vic), discrimination is prohibited on the basis of ‘lawful sexual activity’, a phrase that is defined in s 4 to mean ‘engaging in, not engaging in or refusing to engage in a lawful sexual activity’. As discussed above, it is lawful to engage in some sadomasochistic activities whilst it is criminal to engage in others (though the line between the two becomes blurry when assault law and manslaughter law are read together). Arguably, then, it may be unlawful in Victoria to discriminate against a sadomasochist on the basis of their participation in non-injurious sadomasochistic activities that are not prohibited by assault law. Sadomasochists in other Australian jurisdictions, and those Victorian sadomasochists who engage in injurious sadomasochistic activities, cannot rely on anti-discrimination legislation to provide them with legal protection from the types of discrimination reported in the NCSF survey.

Even where specific anti-discrimination legislation does not operate to protect sadomasochists, more general legal protections still remain in force. Thus, a sadomasochist who is dismissed from their employment on the basis of their sexual identity may still be protected from unfair dismissal under the *Fair Work Act 2009* (Cth). The effect of such general legal protections for sadomasochists,

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57 Ibid.

58 ‘Dog Lead Goths “Hounded off Bus”’, *BBC News* (online), 23 January 2008 <[http://news.bbc.co.uk/2/hi/uk\\_news/england/bradford/7204543.stm](http://news.bbc.co.uk/2/hi/uk_news/england/bradford/7204543.stm)>.

59 *Equal Opportunity Act 1984* (WA), s 4.

60 See, eg, *Equal Opportunity Act 1984* (Vic), *Anti-Discrimination Act 1977* (NSW), *Anti-Discrimination Act* (NT), *Equal Opportunity Act 1984* (SA).

however, may be tempered by the practical possibility that such laws will be differentially employed against sadomasochists to deny them coverage. In the English case of *Pay v UK*<sup>61</sup> a parole officer with 17 years of experience was stood down after an anonymous fax was sent to his superiors that contained information about his involvement in the sadomasochistic subculture, including details about internet websites that contained photographs of him engaging in soft-core sadomasochistic performances and about a sadomasochistic equipment supply business that he was involved in running. Although the Panel of the Personnel Hearings Sub-Committee acknowledged that his activities were not contrary to criminal law, they formally dismissed him from his employment on the basis that this material being ‘in the public domain was incompatible with his position as a probation officer’,<sup>62</sup> despite the fact that in the material he employed a pseudonym and only appeared whilst masked. Under UK unfair dismissal protections, his subsequent appeals to the same Panel (differently constituted), the Employment Tribunal and the Employment Appeal Tribunal were all denied, as were multiple applications to the Court of Appeal.

One of the grounds of his unsuccessful appeal to the European Court of Human Rights was that he had been unfairly discriminated against on the basis of his sexual identity. Even though the Court recognised that this ground of appeal could be utilised by sadomasochists, his claim was held to be unsuccessful because of a distinction the Court drew:

The applicant in the present case was not dismissed because of his sexual orientation as such, but because of concerns that knowledge of his participation in BDSM nightclub performances would come more fully into the knowledge of the general public and hinder the effectiveness of his work.<sup>63</sup>

In other words, he was apparently dismissed not because of his involvement in sadomasochism but because other people might find out about it. The problematic issue was not that he had adopted a sadomasochistic identity/lifestyle *per se*, but rather that this identity/lifestyle might possibly become public. For these reasons his dismissal was held to be lawful.

The way discrimination law speaks about sadomasochism adds further dissonance to the inconsistencies that already exist within legal discourse on sadomasochism. Here, the lines drawn within assault law and manslaughter law between criminal and lawful sadomasochistic activities fail to carry over into the way that sadomasochism is dealt with under discrimination law. For example, the legal freedom a sadomasochist enjoys under criminal law to engage in non-injurious (and non-risky?) sadomasochistic activities is distinctly tempered by the capacity of their employer to lawfully fire them for doing so. Whilst the scope of this as

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61 (2009) 48 E.H.R.R. SE 2.

62 *Pay v UK* (2009) 48 E.H.R.R. SE 2, 16.

63 *Ibid.*, 28.

a practical problem for sadomasochists may be hard to assess, it is not difficult to envisage the rationale for the firing of the probation officer in *Pay v UK* (2009) 48 E.H.R.R. SE 2 as also covering other public officials tasked with the administration of law and order, such as police officers and magistrates/judges, or being extended to any company or business that trades on public confidence or a particular kind of public image. Similarly, although it may be lawful for a sadomasochist to physically perform some of the non-normative sexual activities that their inclinations lead them to, this criminal law conclusion is undercut by the civil law position that others may then discriminate against that sadomasochist for doing so. Thus, whilst it may be lawful for the UK dog collar-and-lead couple to utilise such apparel in Australia, it would also probably be lawful in Australia to refuse them services on the basis of their overt display of sadomasochistic identity.

Underpinning the intersection between sadomasochism and discrimination law is a departure from the criminal law conception that injurious or 'risky' sadomasochistic activities should be sanctioned, to the broader proposition that sadomasochism should neither be encouraged nor tolerated socially. Sadomasochism, as a sexual identity, apparently does not warrant the same legal protections that heterosexuality, homosexuality and bisexuality are afforded, and general society is legally entitled to treat sadomasochists unfavourably as a result of their sexual identification. The focus of the law here is not on assessing or condemning the specific activities performed by sadomasochists, but rather on facilitating the general marginalisation of sadomasochists as 'deviant' and 'undesirable'. The case of *Pay v UK*<sup>64</sup> is egregious in this regard, explicitly forcing sadomasochists to remain 'in the closet' about their sexual identities with the threat of having their employment lawfully terminated if there is even the possibility of them 'coming out'.

To return once more to Weait's claim that there is no law against 'being a sadomasochist', this may be true under a monovocal approach that only models the legality of sadomasochism on the basis of how assault law speaks about sadomasochism,<sup>65</sup> but discrimination law speaks differently about sadomasochism. An appreciation of the polyvocality of the law's response to sadomasochism supplements Weait's position with the recognition that whilst simply adopting a sadomasochistic identity might be lawful, the law actively discourages the open adoption of just such an identity by facilitating the societal marginalisation of sadomasochists. The subjective adoption of a sadomasochistic identity within one's own mind is certainly lawful, but discrimination law fails to extend to sadomasochists the same basic protections it extends to other sexual identities when it comes to manifesting or communicating their sexual identity in public.

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64 (2009) 48 E.H.R.R. SE 2

65 Weait, above n 4, 64.



## CENSORSHIP LAW

Under the Australian national classificatory schema contained in the *Classifications (Publications, Films and Computer Games) Act 1995* (Cth) there are different legal regimes covering three different types of material: publications (defined as written and pictorial material),<sup>66</sup> films, and computer games.<sup>67</sup> These materials are graded into various legal classifications depending on their content. The classification of material is made according to the criteria set out in the National Classification Code, and the classification guidelines set up under s 12 of the *Classifications (Publications, Films and Computer Games) Act 1995* (Cth),<sup>68</sup> and is carried out by the Classification Board.<sup>69</sup> Here I want to discuss how Australian censorship law prohibits and restricts sadomasochistic themes, expression and depictions in films. I have chosen not to address the censorship of publications or computer games simply for considerations of brevity and clarity, though analyses of these areas may yield similar results.

Following the *Guidelines for the Classification of Films and Computer Games* (the '*Guidelines*'),<sup>70</sup> the Classification Board rates the 'impact' of a publication by addressing a variety of factors, assigning a classification of 'G' (General) to films whose impact is very mild, 'PG' (Parental Guidance) for mild impact, 'M' (Mature) for moderate impact, 'MA 15+' (Mature Accompanied) for strong impact, 'R 18+' (Restricted) for high impact, and 'RC' (Refused Classification) for very high impact.<sup>71</sup> The classification of 'X 18+' (Restricted) only applies to films that contain sexually explicit material.<sup>72</sup> Impact is measured not simply in terms of the type of material in the film but also the manner of its presentation, such as the use of film techniques, the degree of realism and the cumulative effect of the entire presentation. Another key classificatory component is context: whether classifiable elements are 'justified by the story-line or themes' and whether 'important social issues are dealt with ... [from] a mature or adult perspective'.<sup>73</sup> The classifiable elements are separated into the categories of themes, violence, sex, language, drug use and nudity. Publications containing sadomasochistic

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66 But not including a film, computer or an advertisement for a publication, film or computer game: *Classifications (Publications, Films and Computer Games) Act 1995* (Cth), s 5.

67 *Ibid*, s 7.

68 *Ibid*, s 9.

69 *Ibid*, pt 6.

70 Commonwealth, *Gazette: Special*, No S 57, 26 March 2008.

71 *Ibid*, 5.

72 *Ibid*, 12.

73 *Ibid*, 5.

material squarely raise considerations pertaining to the categories of violence, sex and themes.<sup>74</sup>

A division opens up here in the classificatory scheme, dividing my analysis across two types of sadomasochistic films: sexually explicit films that could possibly qualify for the X 18+ classification and non-sexually explicit films that are excluded by definition from that classification. Regarding the former type of film, the X 18+ classification is a unique, film-only category that solely covers sexually explicit material containing real (non-simulated) ‘depictions of actual sexual intercourse and other sexual activity between consenting adults.’<sup>75</sup> Sexually explicit films that contain sadomasochistic themes and activities are specifically excluded from this classification. The *Guidelines* prohibit X 18+ films from containing any depictions of ‘violence, sexual violence,<sup>76</sup> sexualised violence<sup>77</sup> or coercion’ as well as all fetish material, including ‘body piercing, application of substances such as candle wax, “golden showers”, bondage, spanking or fisting’. ‘Fetish’ material is defined as that which involves an ‘object, an action or a non-sexual part of the body which gives sexual gratification’,<sup>78</sup> and this exclusion would clearly cover the use of common sadomasochistic equipment such as restraints, whips, floggers and canes. As a result of these strict exclusions, all sexually explicit films that contain even a hint of sadomasochism would automatically be categorised as RC.

The RC categorisation of sexually explicit films with sadomasochistic themes is important because of the regulatory frameworks that surround certain classification categories. Whilst classification decisions are federally administered, the effect of a classification category is largely determined by the individual States and territories. Selling, possessing, copying or publishing X 18+ and RC films is a criminal offence in most Australian jurisdictions. To take the Western Australian *Classification (Publications, Film and Computer Games) Enforcement Act 1996* as an example, it is an offence punishable by a fine of \$15 000 or imprisonment for

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74            Though there is an ongoing legal debate as to whether sadomasochism should be considered as a form of violence, (See, eg, Sangeetha Chandra-Shekeran, ‘Theorising the Limits of the Sadomasochistic Homosexual Identity’ (1997) 21*Melbourne University Law Review* 584, 588; Note, ‘Assault and Battery. Consent. Consent of Masochist to Beating by Sadist Is No Defense to Prosecution for Aggravated Assault. *People v. Samuels*, 58 Cal. Rptr. 439 (Ct. App., 1st Dist. 1967)’ (1968) 81.6 *Harvard Law Review* 1339, 1340) or as a form of sex. (See, eg, Simon Bronitt, ‘The Right to Sexual Privacy, Sado-masochism and the Human Rights (Sexual Conduct) Act 1994 (Cth)’ [1995] *Australian Journal of Human Rights* 59, 67; Egan, above n 2, 1642; David Kell, ‘Bodily Harm in the Court of Appeal’ (1993) 109 *Law Quarterly Review* 199) The authoritative legal opinion of the majority in *R v Brown* [1994] 1 AC 212, however, is that it is a form of violence.

75            Commonwealth, *Gazette: Special*, No S 57, 26 March 2008, 12 (emphasis removed).

76            Defined as ‘[s]exual assault or aggression, in which the victim does not consent’: *Ibid* 14. This would prohibit films containing sadomasochist role-play scenarios where non-consent is performatively acted out.

77            Defined as ‘[w]here sex and violence are connected in the story, although sexual violence may not necessarily occur’: *Ibid* 12.

78            *Ibid*.

18 months for a person to sell an X 18+ or RC film.<sup>79</sup> Furthermore, it is an offence, punishable by a fine of \$10 000, for a person to simply possess an RC film, or an unclassified film that would be rated RC.<sup>80</sup>

The differential here in WA law is important to note. Whilst it may be criminal to sell X 18+ films, it is lawful to possess them. In contrast, it is criminal to either sell or possess RC films. This differential is even more exaggerated as the WA police have recently admitted that policing the sale of X 18+ films is a 'low priority' that will only be investigated if 'there is evidence of tangible links to organised crime'.<sup>81</sup> Taking the broader Australian picture into account, in both the Northern Territory and the Australian Capital Territory it is lawful to sell X 18+ rated films,<sup>82</sup> and such films are sold and then shipped across jurisdictional lines to the Australian jurisdictions within which they cannot be lawfully sold.<sup>83</sup> The effect of this is a two-speed economy of filmic pornography; non-sadomasochistic pornography (rated X 18+) is readily and easily obtained and, once obtained, mere possession is legally unobjectionable, whereas it is criminal to either sell or possess sadomasochistic pornography (rated RC).

The classification of non-sexually explicit films containing sadomasochistic themes or activities clearly depends on the extent of the sadomasochistic themes. Such films could be still classified as RC if they are taken to contain gratuitous, exploitative or offensive depictions of:

- 'violence with a very high degree of impact or which are excessively frequent, prolonged or detailed'; or
- 'activity accompanied by fetishes or practices which are offensive or abhorrent'.<sup>84</sup>

They could also still be classified as RC if, given the criminality of sadomasochistic activities that cause bodily harm or wounding (as discussed above), they are

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79 s 73 *Classification (Publications, Film and Computer Games) Enforcement Act 1996* (WA).

80 s 81(1) *Classification (Publications, Film and Computer Games) Enforcement Act 1996* (WA).

81 Kent Acott, 'Porn DVDs "Low Priority" for Police', *The West Australian* (online), 18 June 2011 <<http://au.news.yahoo.com/thewest/a/-/wa/9663080/porn-dvds-low-priority-for-police/>>.

82 *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (ACT); *Classification of Publications, Films and Computer Games Act* (NT), except in certain areas of the NT due to the operation of *Classifications (Publications, Films and Computer Games) Act 1995* (Cth), pt 10. Though in both of these jurisdictions it is also not an offence to simply possess an RC film, unless it is kept at a premises which sells X 18+ films: *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (ACT) s 20; *Classification of Publications, Films and Computer Games Act* (NT) s 48.

83 As of 2003, apparently some 640,000 Australians were on adult mailing lists to legally order X 18+ pornography from Canberra: 'X-Rated? Outdated', *The Age* (online), 20 September 2003 <<http://www.theage.com.au/articles/2003/09/19/1063625202157.html>>.

84 Commonwealth, *Gazette: Special*, No S 57, 26 March 2008, 12, 13.

considered to promote a matter of 'crime or violence'.<sup>85</sup> Non-sexually explicit films with subtler sadomasochistic themes, or which present sadomasochistic activities in lower impact or more discrete ways, may avoid the RC categorisation. Given the *Guidelines*' strong stance against depictions of fetish material and of sex and violence, classifications of R 18+ or MA 15+ are likely. Indeed, the rather innocuous sadomasochistic material presented in the 2002 Golden Globe-nominated film *Secretary* was still sufficient for it to garner an R 18+ classification.<sup>86</sup> Other considerations, such as a lack of realism in the depiction of sadomasochism,<sup>87</sup> or a film's artistic merit or dated presentation dulling the impact of its' sexualised violence,<sup>88</sup> may allow for an R 18+ classification to be given rather than RC.

The rating of non-pornographic films containing sadomasochism in higher classificatory categories, such as MA 15+ or R 18+, places differential restrictions on such films. There are legal restrictions placed on the exhibition conditions of MA 15+ and R 18+ materials, such as to ensure that such films cannot be seen from a public place outside where it is exhibited,<sup>89</sup> and about who can view MA 15+ and R 18+ materials, in order to prevent minors from viewing such material.<sup>90</sup> Such restrictions clearly limit the capacity for consumers to access and engage with sadomasochistic filmic content, and this in turn makes the production of such material less likely to be commercial viable. The effect of the classificatory schema in relation to non-pornographic sadomasochistic films is to limit public exposure to, and discourse about, sadomasochism. The implicit message of the law here is that sadomasochism is dangerous, deviant and potentially corrupting, such that the sociocultural exposure of sadomasochism should be limited.

The analytical issue here is not simply that censorship law regulates the free exchange and exhibition of material with sadomasochistic content. The regulation of contentious material is, after all, the entire purpose of censorship law (whether

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85 Ibid.

86 See Ummni Khan, 'A Woman's Right to be Spanked: Testing the Limits of Tolerance of SM in the Socio-Legal Imaginary' (2009) 18 *Law & Sexuality: Rev. Lesbian, Gay, Bisexual & Transgender Legal Issues* 79 for a sociolegal analysis explaining how *Secretary* presents a normativised, whitewashed version of sadomasochistic sexuality designed to reduce the negativity of cultural and legal responses to the film. That *Secretary*'s representation of sadomasochism can still receive a classification of R 18+ despite this gloss of acceptable 'normativity' is testament to the restrictive nature of the censorship of sadomasochistic materials.

87 See the *Classification Review of 'Bondage House'* [2008] Classification Review Board (6 August 2008), where the Board specifically noted that the film may have been more restrictively classified if it were live action rather than animated.

88 See the *Classification Review of 'Salo'* [2010] Classification Review Board (6 May 2010). Previously, this film had been classified RC by the Classification Review Board and had thus been effectively banned in Australia.

89 s 70 *Classification (Publications, Film and Computer Games) Enforcement Act 1996* (WA).

90 ss 71-72 *Classification (Publications, Film and Computer Games) Enforcement Act 1996* (WA).

one agrees with it or not). Rather, the point here is to highlight the differential restriction of sadomasochistic material in comparison to non-sadomasochistic material and to reveal how this disparity runs counter to the way that law ‘speaks’ about sadomasochism under assault law. As discussed above, both sexually explicit and non-sexually explicit sadomasochistic material is subject to a tough censorial approach, with specific exclusions and wordings built into the regulatory framework in order to guarantee that such material receives higher classification ratings and consequently receives less sociocultural exposure. In contrast to sexually explicit films that do not contain sadomasochistic elements, and to non-sexually explicit films that deal with non-sadomasochistic sexuality, sadomasochism is deliberately and differentially subjected to legal sanction.

As this Article has progressed through assault law, manslaughter law and discrimination law, the focus of legal restrictions on sadomasochism has shifted further and further away from the bodily harm or wounding caused by a sadomasochistic assault and has turned more generally towards sadomasochistic identity and sadomasochistic activities generally, whether injurious or not. If assault law speaks about the wrong of sadomasochism being specifically locatable in the injuries caused to the masochist, then censorship law completes this turn towards sadomasochism being a wrong in itself; censorship restrictions for the X 18+ category are not necessarily indexed to the level of harm caused by the sadist to the masochist, but are responsive simply to the presence of any sadomasochistic behaviour. That the censorial restrictions brought to bear are intended to function in blanketing ways is evident from the language utilised, lest it was unclear not only is the presence of ‘violence’ a censorial target in sexually explicit films, but so is ‘sexualised violence’ and ‘sexual violence’.<sup>91</sup> Regardless of the presentation style of the material involved, or the extent or aim of such ‘violence’, the mere presence of anything remotely connecting violence and sex is sufficient for a sexually explicit film to become illegal to sell or possess in WA. The inconsistency between assault law and censorship law here is clear; whilst it may be lawful for a sadist to flog their partner during sex (as long as no wounding is caused), it is criminal for that same couple to even possess a film with such content.

Censorship law builds upon discrimination law’s failure to protect expressions of sadomasochistic sexual identity by actively working to restrict such expression. If we return once again to Weait’s position that there is no law against core elements of sadomasochism and sadomasochistic relationship, whilst assault law may countenance the physical performance of ritualized submission, humiliation and the eroticization of pain, censorship law delimits the social circulation of such themes within the broader society. There may be no law against participating in such non-injurious sadomasochistic activities privately, but there certainly are laws against freely and openly expressing and working through such activities on film.

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91 One almost wonders why ‘violent sex’ and the ‘violently sexual’ were not also included, just to ensure that the whole field was completely terminologically covered.

## CONCLUSION

Whilst *R v Brown*<sup>92</sup> remains an important milestone in the development of the jurisprudence of sadomasochism, it provides neither a definitive nor an exhaustive account of the multi-layered imbrication of sadomasochism and the law. The monovocal model of the jurisprudence of sadomasochism that has resulted from this case is reductive in scope, as sadomasochism intersects with not one but various legal areas. Opening up legal discourse on sadomasochism to the polyvocal approach I have utilised here accounts for the multiple ways in which the law responds to sadomasochism. This polyvocal approach also undermines any claims to consistency within the law's response to sadomasochism, demonstrating that not only do different areas of law 'speak' differently about sadomasochistic identity and practice but that also, in the case of assault law within common law and Code jurisdictions, a single area of law can 'speak' differently about sadomasochistic activities. Thus, whilst assault law may specifically locate the criminal 'wrong' of sadomasochism consequentially in the bodily harm (for common law jurisdictions) or wounding (for Code jurisdictions) caused by the sadist to the masochist during injurious sadomasochistic activities, manslaughter law locates this 'wrong' deontologically in the 'riskiness' of a broader range of such activities. In turn, discrimination law does not directly condemn sadomasochistic activities, but instead discourages the open adoption of a sadomasochistic sexual identity by failing to extend to it the protections available to other sexual identities. Finally, censorship law specifically condemns both sadomasochistic activities and identity by differentially imposing restrictions on filmic depictions of sadomasochism that other legal areas have declared lawful, and by restricting the circulation of sadomasochistic themes within social discourse.

It is not problematic for this Article that these areas of law exist for different purposes and function with respect to different goals. Neither is the fact that the doctrinal content of manslaughter law, for example, is fundamentally distinct from the doctrinal content of discrimination law. It is not the contention of this Article that there should be, or even that there can be, consistent, coherent and equivalent legal treatment of sadomasochism across different areas of law. Rather, it is the contention of this Article that it should be acknowledged that these different areas of law respond to sadomasochism in fundamentally different ways, perhaps due to these very differences in purpose, function and doctrine. The value in recognising this differential legal treatment comes with the correlative recognition that sadomasochism's legal treatment within the common law of consensual assault cannot then be taken to be representative of, or even indicative of, its broader legal treatment. The common law of consensual assault does not possess the only 'voice' in the legal discussion of the jurisprudence of sadomasochism, and what it 'says' about sadomasochism is fundamentally different from what other legal areas 'say'.

The effect of acknowledging the polyvocality of law's response to sadomasochism is the recognition that sadomasochism holds an unsettled position at law. Different aspects of sadomasochistic activities and identity are differentially and variedly exposed to multiple sets of legal regulations that go unacknowledged when legal discourse is restricted by a monovocal focus. The legality of sadomasochism should not be understood as being neatly encapsulated by the majority judgments in *R v Brown*, but as being the incoherent effect of the multiple layers of sadomasochism's complex enmeshment within variegated systems of law and legal speaking. The key implication of this for the jurisprudence of sadomasochism is a broadening of scope. It is no longer enough simply to engage with the common law of consensual assault as if it definitively and exhaustively constitutes the 'legality' of sadomasochism, rather, sadomasochism should be recognised as having multiple and differing 'legalities' depending upon the legal areas involved and how they individually 'speak' about sadomasochism.

By arguing here for this polyvocal (re)modelling of the jurisprudence of sadomasochism, I am not advocating that every subsequent legal commentator on sadomasochism should automatically delve into obscure, un(der)worked areas of the law that are only tangentially related to sadomasochism.<sup>93</sup> Nor am I derogating the historically ubiquitous monovocal analyses of the common law of consensual assault as lacking analytic insight or academic value. Rather, if we recognise the law as speaking about sadomasochism in more than one way, then the jurisprudence of sadomasochism simply becomes much richer. Commentary on the law and sadomasochism becomes free to engage at multiple sites with the different 'legalities' of sadomasochism, and analytical avenues open up to unpack and critique how and why legal areas 'speak' differently about sadomasochism. The discursive limitations of particular 'voices' or 'legalities' can be mapped and charted, and no one voice can be passed off as an authoritative account of the legal position of sadomasochism. Under this approach, *R v Brown* [1994] 1 AC 212 loses its predominance: its key importance to the common law of consensual assault can no longer transliterate into a monopolistic hold over the jurisprudence of sadomasochism. If the legal response to sadomasochism is recognised as being polyvocal rather than being monovocal, there is not just more being said there is also much more to discuss. This Article, by building on the work of those commentators who have already shifted their attention outside these restrictive boundaries,<sup>94</sup> constitutes a preliminary attempt to engage in this broader discussion.

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93        Though there is material available to delve into the issues of sadomasochism's interrelations with both defamation law and privacy law at least, see *Kelly v John Fairfax Publications Pty Ltd* [2003] NSWSC 586 and *Mosley v News Groups Newspapers Ltd* [2008] EWHC 1777 (QB), respectively.

94        Ridinger, above n 9; Weait, above n 4.