

MORALITY-BASED LEGISLATION IS ALIVE AND WELL: WHY  
THE LAW PERMITS CONSENT TO BODY MODIFICATION BUT  
NOT SADOMASOCHISTIC SEX

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I. INTRODUCTION

In 1993 the U.K. House of Lords held that consent of the participants was no defense to charges of assault arising from consensual sadomasochistic (SM) sex, even though the participants sustained no serious, permanent injuries and testified that the activities had been consensual.<sup>1</sup> This case fueled the debate about whether a defense of consent should be available to defendants when charges of assault arise out of consensual SM activity. The Supreme Court's recent holding in *Lawrence v. Texas*, that morality alone is not a sufficient justification to infringe on an individual's right to privacy,<sup>2</sup> adds a new wrinkle to the analysis. While commentators and statutes are split on the issue, no comparable American case has yet risen to the appellate level.

This Comment will explore the reasoning behind prohibiting a consent defense in SM, while making exceptions for other "assaultative" activities such as body modifications.<sup>3</sup> This Comment

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<sup>1</sup> *Regina v. Brown*, [1994] 1 A.C. 212, 219 (H.L.) (appeal taken from Eng.). While some jurisdictions use the term "battery," for the purpose of this note, the term "assault" will be used to refer to offenses that involve infliction of physical injury.

<sup>2</sup> 539 U.S. 558, 578 (2003).

<sup>3</sup> The term "body modification" refers to piercings, brandings, scarification, splitting, and tattooing. Other authors, such as Cheryl Hanna, have compared SM activity to sports. See generally Cheryl Hanna, *Sex is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239 (2001). I have decided to focus on body modification because of the facts of *Regina v. Brown*, and because body modification is not susceptible to the same level of social acceptance as sports. Body modification is also of a more personal nature, involving issues of personal autonomy and self-expression that are more comparable to sex than those implicated in sports.

will argue that for reasons of personal autonomy and privacy, a consent defense should be permitted in cases of consensual SM sex, as long as serious bodily injury is not sustained. Parts II, III, and IV will provide background information about the nature of SM sex and the concepts of legal consent. Part V will review existing cases that discuss consent to SM sex. The rationale for permitting consent to body modifications will be compared to the rationale for forbidding consent to sadomasochistic sex in Part VI. The Comment will close with a proposed framework for permitting legal consent to SM sex while maintaining practical limits on this consent.

## II. DYNAMICS OF SM SEX

### A. *What Is SM Sex?*

It is not always clear exactly what constitutes SM sex. The line between SM and “normal” sex is fuzzy, and many people who would not identify themselves as sadomasochists enjoy sexual acts that involve some level of pain.<sup>4</sup> “[T]here’s an element of domination or submission or pain involved in almost any sexual interaction. What sadomasochism does is take these elements of eroticism further toward their extreme.”<sup>5</sup> There are many definitions of SM, none completely comprehensive. One SM practitioner has defined SM as “the knowing use of psychological dominance and submission, and/or physical bondage, and/or pain, and/or related practices in a safe, legal, consensual manner in order for the participants to experience erotic arousal and/or personal growth.”<sup>6</sup> Another definition emphasizes that the ultimate goal of SM is not the infliction of pain, but control:

[S]adomasochism involves a highly unbalanced power relationship established through role-playing, bondage, and/or the infliction of pain. The essential component is not the pain or bondage itself, but rather the knowledge that one

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<sup>4</sup> See JAY WISEMAN, *SM 101: A REALISTIC INTRODUCTION* 13 (2d ed. 1996); Marianne Apostolides, *The Pleasure of the Pain: Why Some People Need S & M*, *PSYCHOL. TODAY*, Sept./Oct. 1999, at 60, 65. As far back as the 1950s, one study found that at least 50% of both the male and female participants experienced at least some “erotic response” to being bitten. ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 678 (1953).

<sup>5</sup> John Cloud, *Bondage Unbound: Growing Numbers of Americans are Experimenting with Sadomasochistic Sex. But is it Always Safe and Sane?*, *TIME*, Jan. 19, 2004, at 104 (quoting Eli Coleman, director of the Program in Human Sexuality at the University of Minnesota).

<sup>6</sup> WISEMAN, *supra* note 4, at 10.

person has complete control over the other, deciding what that person will hear, do, taste, touch, smell, and feel.<sup>7</sup>

While there is no “typical” SM interaction, frequently one participant will take on the role of the sadist or dominant (hereinafter “dominant”), who inflicts pain and/or exerts control, and another participant will act as the masochist or submissive (hereinafter “submissive”), who receives pain and/or is controlled. Some individuals will “switch” roles, while others identify themselves solely as dominant or submissive.<sup>8</sup> An SM encounter may involve a wide range of activities, including bondage, domination, flogging/whipping, humiliation, clamping, piercing, cutting, and “breath control play.”<sup>9</sup> The majority of SM participants also engage in non-SM sex.<sup>10</sup>

### B. SM and Consent

Consent is a cornerstone of SM; “Safe, Sane, and Consensual” is a popular phrase in the SM community.<sup>11</sup> Participants usually negotiate ahead of time what activities will be permitted, what activities are off limits, who will fill what role, and how long the scene will last.<sup>12</sup> Frequently a “silent alarm” or “safeword” is used.<sup>13</sup> A silent alarm involves telling a trusted person where and with whom the participant will be “playing.”<sup>14</sup> A time is arranged to contact this person to let him or her know all is well, and if no contact is made within the designated time period, the contact person is to call the police.<sup>15</sup> A “safeword” is an agreed upon word that the submissive would not be likely to spontaneously utter during the scene, which tells the dominant to slow down or stop the activity.<sup>16</sup> Ironically, the use of a safe word puts the ultimate

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<sup>7</sup> Apostolides, *supra* note 4, at 61.

<sup>8</sup> WISEMAN, *supra* note 4, at 46.

<sup>9</sup> See *id.* at 61, 387. “Breath control play” refers to erotic strangulation. *Id.* at 387.

<sup>10</sup> N. Kenneth Sandnabba et al., *Demographics, Sexual Behaviour, Family Background and Abuse Experiences of Practitioners of Sadomasochistic Sex: A Review of Recent Research*, SEXUAL & RELATIONSHIP THERAPY, Feb. 2002, at 39, 43.

<sup>11</sup> GLORIA G. BRAME ET AL., DIFFERENT LOVING: AN EXPLORATION OF THE WORLD OF SEXUAL DOMINANCE AND SUBMISSION 49 (1993) (internal quotation marks omitted).

<sup>12</sup> WISEMAN, *supra* note 4, at 57–62.

<sup>13</sup> *Id.* at 49, 52.

<sup>14</sup> *Id.* at 49.

<sup>15</sup> *Id.* at 50.

<sup>16</sup> *Id.* at 52. Often two safe words are used, such as “red” and “yellow.” “Red” means stop the activity or the scene completely, and “yellow” means decrease the level of pain, but not to stop altogether. *Id.* at 52–53.

control of the scene in the hands of the submissive.<sup>17</sup> A safe word gives the submissive a way to revoke his or her consent. In non-SM sex, this could be accomplished in many ways, including simply saying “stop.” Because the control dynamic in SM may make it desirable for the submissive to be able to say words such as “stop” and “no” as part of his or her role within the scene, it is vital that an alternative means of revoking consent is employed.

In contrast, the negotiation of consent in non-SM sex frequently does not occur in advance, but proceeds in stages during the sexual encounter with one person “advancing” interaction to another level, and assuming that lack of resistance indicates consent.<sup>18</sup> The means to revoke consent are generally not agreed upon in advance. In response to the growing problem of acquaintance rape on campus, Antioch College students designed a procedure for verbally obtaining consent in advance for each new level of sexual interaction.<sup>19</sup> The procedure was generally mocked and criticized for being unrealistic and unnatural.<sup>20</sup> The “traditional” method of negotiating consent, however, often leads to miscommunication.<sup>21</sup> In one study of how women communicate consent and non-consent to sexual intercourse, 91% of men and women surveyed had had an experience where “[t]he [m]an was [s]urprised [w]hen the [w]oman [b]ecame [a]ngry or [u]pset or [t]ried to [r]esist [h]im in a [p]hysical or [v]erbal [w]ay.”<sup>22</sup> For approximately 50% of those surveyed, this experience occurred when the man tried to initiate intercourse.<sup>23</sup>

The potential legal relevance of the differences between the methods of communicating consent to SM sex versus non-SM sex will become clearer when reading the next section.

### III. CONCEPTS OF CONSENT

As background to the analysis of a consent defense in the context

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<sup>17</sup> *Id.* at 54–55.

<sup>18</sup> See E. Sandra Byers, *Female Communication of Consent and Nonconsent to Sexual Intercourse*, 5 J. NEW BRUNSWICK PSYCHOL. ASS'N 12, 17–18 (1980).

<sup>19</sup> See DAVID ARCHARD, SEXUAL CONSENT 12–13 (1998).

<sup>20</sup> *Id.* at 23.

<sup>21</sup> Byers, *supra* note 18, at 17–18.

<sup>22</sup> *Id.* at 16 tbl.3 (internal quotation marks omitted).

<sup>23</sup> *Id.* It is interesting to note that despite the high incident of miscommunication between the sexes, men and women generally agreed as to what verbal or non-verbal cues indicated consent or non-consent. Some 31% of both sexes agreed the woman would fondle the man's genitals as a clear indicator of consent to intercourse, while 44% of men and 48% of women believed that a woman would say “no” to clearly signal non-consent. *Id.* at 14 tbl.1, 15 tbl.2.

of SM sex, it is useful to review the concepts of legal and factual consent.<sup>24</sup> There are circumstances in which behavior that looks like consent will not be accepted as consent for legal purposes. The theories of consent also provide insight as to why consent is important, what goals are served by requiring consent, and the relation of consent to personal autonomy.

### A. *Factual Versus Legal Consent*

When laypeople talk about consent, they are likely referring to factual consent. When an individual (hereinafter “S” for subject) agrees to something subjectively in his or her mind, or expresses agreement in an objective way, S can be said to have given factual consent.<sup>25</sup> Factual consent constitutes legal consent when it is given under circumstances that would provide a “complete or partial criminal defense[]” to another individual (hereinafter “A” for actor) having done some act to S.<sup>26</sup> Legal consent may be “imputed” to S in certain situations through the creation of legal fictions, even when S has not actually expressed consent.<sup>27</sup> “[C]onstructive consent,’ ‘informed consent,’ and ‘hypothetical consent,’” are forms of imputed consent.<sup>28</sup> When an assumption is made that S consents to one act, because S consented to another, different act, S is said to have constructively consented to the act in question.<sup>29</sup> When S is informed of the risks associated with consenting to an act, and proceeds aware of the risks, S is deemed to have given informed consent to the risk if it in fact occurs.<sup>30</sup> When it is believed that S would consent to some act were S competent to do so, S is presumed to have hypothetically consented to that act.<sup>31</sup>

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<sup>24</sup> While there is some disagreement among authors regarding terminology and the outer limits of certain concepts, the core concepts are generally agreed upon. For example, Peter Westen includes subjective, mental agreement in his definition of factual consent, while David Archard distinguishes “consent,” the behavioral expression of agreement, from “assent,” which “can be both an act and a state of mind.” Compare PETER WESTEN, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT 107 (2004), with ARCHARD, *supra* note 19, at 4–5.

<sup>25</sup> WESTEN, *supra* note 24, at 107. Objective expressions of consent can be verbal or physical. *See id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 108.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

*B. Legally Defective Consent*

Consent is legally defective when it is obtained under circumstances that render it insufficient to form a criminal defense to the act in question.<sup>32</sup> The primary defects in consent that will be discussed here are coercion, deception, and incompetence.

Consent is coerced when it is given in response to a persuasive offer or threat, and therefore cannot be said to be truly voluntary.<sup>33</sup> A “coercive threat” involves an implicit or explicit threat of a result that would leave S worse off than before.<sup>34</sup> Consent obtained by coercive threat is generally not legally sufficient when it is reasonable for S to consent rather than suffer the consequences, or when it would not be reasonable for S to consent, but it is “seriously wrong for A to proceed in the face of [S’s] unreasonable behavior.”<sup>35</sup> A “coercive offer” is a proposition used to bargain for consent that, while possibly immoral, will not leave S worse off than before if S does not accept the offer.<sup>36</sup> Consent obtained through a coercive offer is usually legally sufficient, unless the offeror deliberately placed S in a disadvantageous situation with the intent to make the coercive offer within that situation, or the offeror has an independent duty to perform the act being used as a bargaining chip.<sup>37</sup>

Consent obtained by deception may or may not be legally sufficient, depending on the nature of the deception.<sup>38</sup> The law typically distinguishes between “fraud in the factum” and “fraud in the inducement.”<sup>39</sup> Fraud in the factum refers to the deception of S as to the nature of the act that is done.<sup>40</sup> Fraud in the inducement occurs when S is deceived as to the purpose of the act, the identity of A, or the characteristics of A.<sup>41</sup> Consent induced by fraud in the

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<sup>32</sup> *Id.* at 107.

<sup>33</sup> JOEL FEINBERG, HARM TO SELF 189 (1986); ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 171 (2003). While consent obtained through coercion is not legal consent, the term consent will be used in this section to refer to factual consent.

<sup>34</sup> WERTHEIMER, *supra* note 33, at 164–65.

<sup>35</sup> *Id.* at 165–66.

<sup>36</sup> *Id.* at 166–67.

<sup>37</sup> *See id.* at 167–68; FEINBERG, *supra* note 33, at 249–50.

<sup>38</sup> FEINBERG, *supra* note 33, at 291–92.

<sup>39</sup> *Id.*; *cf.* WERTHEIMER, *supra* note 33, at 195.

<sup>40</sup> WERTHEIMER, *supra* note 33, at 196. For example, if a patient consents to allowing a doctor to insert a speculum into her vagina during a gynecological exam, but the doctor instead penetrates her with his penis, the act that was performed is not the act to which the patient consented. *See id.* at 195.

<sup>41</sup> *See id.* at 196. If a patient consents to having sexual intercourse with her doctor because

factum is generally not legally sufficient, because the act that was done is not the act for which consent was given.<sup>42</sup> Since fraud in the inducement deceives only with respect to collateral issues, and the act consented to is the act performed, consent is usually legally valid.<sup>43</sup>

S may not be deemed competent to legally consent for several reasons: age, mental infirmity, intoxication, or unconsciousness.<sup>44</sup> If S is considered incompetent to legally consent, A will generally have no defense to having done some act to S, even if S clearly communicated factual consent.<sup>45</sup> Some states permit a “mistake-of-fact” defense, which allows A to claim that he or she was reasonably unaware that S was not competent to consent.<sup>46</sup>

The age of legal consent has fluctuated throughout history, and still differs among the states.<sup>47</sup> While at one time it was common to treat children over the age of ten as legally competent to consent, the age of consent now ranges from fourteen to eighteen, and any one state may permit individuals of a specific age to consent to some acts, but not to others.<sup>48</sup> Many states also have an “absolute age requirement” as well as an “age-span limitation” for sexual assault statutes.<sup>49</sup> This approach prohibits S from legally consenting to sex under any circumstances until S has reached a certain age, but once S has reached that age S will be able to consent to sex with individuals within a certain age range.<sup>50</sup>

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the doctor told her it would cure her, the patient has been deceived as to the purpose of the act, but not as to the nature of the act itself. *See id.*

<sup>42</sup> ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 1079 (3d ed. 1982).

<sup>43</sup> *Id.*

<sup>44</sup> *See* WERTHEIMER, *supra* note 33, at 215.

<sup>45</sup> *See id.*

<sup>46</sup> *See, e.g.*, State v. Fremgen, 914 P.2d 1244, 1246 (Alaska 1996) (holding that prohibiting a defendant from presenting a mistake-of-age defense violated the state constitution); Perez v. State, 803 P.2d 249, 251 (N.M. 1990) (holding that the defendant should have been permitted to raise a mistake-of-fact defense regarding the victim’s age in a case of criminal sexual penetration where the age of the victim was an element of the offense); State v. Ballinger, 93 S.W.3d 881, 891 (Tenn. Crim. App. 2001) (holding that the trial court erred in failing to instruct “the jury to consider mistake of fact as a defense to statutory rape”).

<sup>47</sup> WERTHEIMER, *supra* note 33, at 216.

<sup>48</sup> *Id.* For statutes pertaining to the age of consent to sex, see, for example, IOWA CODE ANN. § 709.4(2)(b), (c) (West 2006); N.Y. PENAL LAW § 130.05(3)(a) (McKinney 2006); VA. CODE ANN. § 18.2-63 (West 2006). For laws on the age of consent to marry, see, for example, N.Y. DOM. REL. LAW § 15-a (McKinney 2006); TENN. CODE ANN. § 36-3-105 (West 2006). For a law that demonstrates the arbitrariness of the age of consent, see VA. CODE ANN. § 18.2-66 (2004) (permitting redemption of an individual accused of “carnal knowledge . . . with the consent of [a] child” over 14 years of age if the individual subsequently marries the child).

<sup>49</sup> WERTHEIMER, *supra* note 33, at 216.

<sup>50</sup> *Id.* *See* GA. CODE ANN. § 16-6-3 (West 2006); KY. REV. STAT. ANN. tit. L, ch. 510 (West

Mentally retarded individuals are generally considered incompetent to legally consent.<sup>51</sup>

Intoxication, even when voluntary, is frequently sufficient to render consent invalid.<sup>52</sup> Unconscious individuals are also usually deemed incapable of consent, although it is at least theoretically possible for S to legally consent in advance to an act that will be performed while S is unconscious.<sup>53</sup> Some states permit a spouse to presume that their unconscious spouse has consented to sex.<sup>54</sup>

### C. *Relativity of Legal Consent*

The legality of consent is relative to the actor(s) involved. If A convinces S to participate in an act with a third party (A2) through coercive threat, S's consent may be legal as to A2 if A2 was unaware of the coercion, and it was reasonable for A2 to interpret S's behavior as indicative of consent.<sup>55</sup> This situation is illustrated in *People v. Burnham*.<sup>56</sup> Burnham beat his wife and threatened her with further violence unless she agreed to seduce motorists passing in front of their house and have sex with them while Burnham photographed her.<sup>57</sup> Burnham was convicted of spousal rape for forcing his wife to have intercourse by causing her to fear physical injury.<sup>58</sup> The motorists were not prosecuted, even though the wife's consent was coerced, because they were not aware of the coercion and she had objectively expressed a desire to have sex with them.<sup>59</sup> The converse of *Burnham* is seen in *People v. Bink*.<sup>60</sup> In *Bink*, A young inmate had been coerced by threats of physical injury into

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2006); TENN. CODE ANN. § 39-13-506 (2006).

<sup>51</sup> See WERTHEIMER, *supra* note 33, at 226.

<sup>52</sup> See *id.* at 235–39.

<sup>53</sup> See *id.* at 234.

<sup>54</sup> See IDAHO CODE ANN. § 18-6107 (2004); MD. CODE ANN., CRIM. LAW § 3-318 (West 2006). In Idaho, for example, section 18-6107 provides that “[n]o person shall be convicted of rape for any act or acts with that person's spouse, except under the circumstances cited in paragraphs 3 and 4 of section 18-6101, Idaho Code,” where paragraphs 3 and 4 of Idaho Code Ann. § 18-6101 (West 2006) pertain to rape by force and incapacity to resist because of intoxication. Paragraph 5(a) prohibits sex with a sleeping person, but under section 18-6107 is not applicable if the parties are married. §§ 18-6101(5)(a), 18-6107.

<sup>55</sup> WESTEN, *supra* note 24, at 142.

<sup>56</sup> 222 Cal. Rptr. 630 (Ct. App. 1986).

<sup>57</sup> WESTEN, *supra* note 24, at 139–40 (discussing *Burnham*, 222 Cal. Rptr. 630). The facts of the case are cited to Westen because they are not included in the Court of Appeals opinion.

<sup>58</sup> *Id.* at 140.

<sup>59</sup> *Id.*

<sup>60</sup> 444 N.Y.S.2d 237 (N.Y. App. Div. 1981).

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participating in sodomy with Bink, a fellow inmate.<sup>61</sup> After reporting the incident to prison authorities, the young inmate decided to help them catch Bink rather than be isolated from him.<sup>62</sup> The young inmate engaged in sodomy with Bink under a pretense of fear while prison authorities observed through a one-way mirror.<sup>63</sup> Bink's conviction for forcible sodomy was reversed on appeal because the young inmate had subjectively consented and was not in fear of physical injury, even though he objectively expressed the opposite.<sup>64</sup>

#### IV. CONSENT AS A DEFENSE

Depending on the circumstances, consent can “transfer[] at least part of the responsibility for one person's act to the shoulders of the consenter.”<sup>65</sup> “Legal consent. . .transmutes what would otherwise be ‘larceny’. . .into charity; ‘kidnapping’ into companionship; ‘trespass’ into hospitality; ‘assault’ into sport; ‘maiming’ into surgery; and ‘rape’ into intimacy.”<sup>66</sup> However, even though S's consent to the acts of A may theoretically forfeit S's right to complain that A's act wronged him or her, A is not necessarily relieved of all moral and/or legal responsibility for the consequences of his or her actions.<sup>67</sup>

The primary distinction between offenses to which consent is a defense and those to which it is not is the harm sought to be prevented. Certain offenses, such as rape, are defined by the absence of the victim's consent.<sup>68</sup> “When people say that consent is a ‘defense’ to rape, they do not mean that consent is an issue on which [the] defendant[] bear[s] the burden of proof.”<sup>69</sup> They mean that S's consent, if legally sufficient, negates an element of rape.<sup>70</sup> This is so because the harm of rape lies not in sexual intercourse itself, but in S being subjected to nonconsensual intercourse.<sup>71</sup> Similarly, larceny is not just taking someone's property; it is taking

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<sup>61</sup> *Id.* at 238.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> FEINBERG, *supra* note 33, at 176.

<sup>66</sup> WESTEN, *supra* note 24, at 112.

<sup>67</sup> FEINBERG, *supra* note 33, at 177–78.

<sup>68</sup> PERKINS & BOYCE, *supra* note 42, at 1074.

<sup>69</sup> WESTEN, *supra* note 24, at 111.

<sup>70</sup> *Id.*

<sup>71</sup> PERKINS & BOYCE, *supra* note 42, at 1074–75.

someone's property without his or her consent.<sup>72</sup> Kidnapping is "the forcible removal or confinement of [someone] without his [or her] consent."<sup>73</sup> The harm of these offenses lies in the act being done against the will of S.

The criminal law generally does not allow individuals to consent to the infliction of certain harms, "regardless of how much they consciously desire them."<sup>74</sup> Consent is not a defense to offenses that seek to prevent harm to third parties, or to offenses where the act is deemed harmful regardless of the individual's consent.<sup>75</sup> The fact that both parties consented to intercourse is no defense to the charge of adultery, because the harm to be prevented is the harm done to the spouse(s), the institution of marriage, or both.<sup>76</sup> Individuals cannot consent to homicide,<sup>77</sup> nor can minors legally consent to sex when the State has deemed sex to be harmful to them based on their immaturity.<sup>78</sup>

For some offenses, consent is only a defense under certain circumstances.<sup>79</sup> Identical assaults may be legally consented to in one situation but not in another.<sup>80</sup> It is not always clear whether specific conduct is prohibited because it is believed to be harmful, or because it is deemed to be immoral.<sup>81</sup>

The relationship between legal consent and social policy is reflected by the class of individuals who are permitted to consent to certain types of conduct at certain times.<sup>82</sup> William Eskridge has commented that, at least in its origins, "[t]he law of sexual consent is primarily a law responsive to Victorian male fantasies."<sup>83</sup>

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<sup>72</sup> WESTEN, *supra* note 24, at 111.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 129.

<sup>75</sup> *See id.* at 112.

<sup>76</sup> *Id.* at 113.

<sup>77</sup> *Id.* at 112. There are rare exceptions, like the Netherlands, which permit voluntary euthanasia. *Id.*

<sup>78</sup> *Id.* at 115.

<sup>79</sup> PERKINS & BOYCE, *supra* note 42, at 1075.

<sup>80</sup> For example, an individual may not consent to a burn inflicted by candle wax during an SM encounter, while that same individual could consent to a burn inflicted to achieve a decorative brand. *See People v. Jovanovic*, 700 N.Y.S.2d 156, 162 (App. Div. 1999).

<sup>81</sup> WESTEN, *supra* note 24, at 113.

<sup>82</sup> William N. Eskridge, Jr., Essay, *The Many Faces of Sexual Consent*, 37 WM. & MARY L. REV. 47, 57-58 (1995).

<sup>83</sup> *Id.* at 58 (referring to "traditional" concepts of sexual consent that have been embodied in our laws, such as the criminalization of consensual sodomy, incest, adultery, fornication, and the marital rape exemption, designed to protect the status of the heterosexual, married man).

Changes in social policy are the catalyst for changes in the law.<sup>84</sup> The *Griswold* line of cases shows how the boundaries of sexual consent have changed as society places less emphasis on the patriarchal institution of procreative marriage while expanding the right to privacy.<sup>85</sup> The most recent change occurred when the Supreme Court held in *Lawrence v. Texas* that laws prohibiting consensual sodomy unconstitutionally infringed on the right to privacy in intimate relations.<sup>86</sup> This holding reflects the increasing societal acceptance of homosexuality as a legitimate sexual orientation, and in turn the laws of sexual consent have shifted.

### A. Prohibition of Consent to Assault

While it may seem that an individual should be able to do what they want with their own body as long as they do not harm others, the law generally does not agree.<sup>87</sup> Most jurisdictions hold that consent is not a defense to assault, but carve out exceptions for assaults resulting in little or no injury, sports, medical treatment, and body modification.<sup>88</sup> The primary justifications given for prohibiting consent to assault are the State's interests in preventing violence against its citizens and maintaining the public peace.<sup>89</sup>

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<sup>84</sup> See *id.*

<sup>85</sup> *Id.* at 56–57. The *Griswold* line of cases includes *Griswold v. Connecticut*, *Eisenstadt v. Baird*, *Roe v. Wade*, and *Lawrence v. Texas*. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding that a Connecticut law that banned the use of contraceptives unconstitutionally infringed on the right to marital privacy); *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972) (holding that a Massachusetts law that prohibited distributing contraceptives to unmarried people, but not to married people, violated the equal protection clause); *Roe v. Wade*, 410 U.S. 113, 166 (1973) (holding that Texas statutes that criminalized all abortions were unconstitutional); *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (holding that a Texas law criminalizing consensual sodomy unconstitutionally infringed on the right to privacy).

<sup>86</sup> *Lawrence*, 539 U.S. at 578. See *infra* Part VI.D for a more detailed discussion of the *Lawrence* decision.

<sup>87</sup> See Eskridge, *supra* note 82, at 49, 51 (noting that “[w]hether sexual intercourse is legal in the state of Virginia depends surprising little on whether the parties both say ‘yes.’ It depends more critically on other considerations, especially the identities of the parties, their relationship, and precisely what form their intercourse takes,” and providing as examples “prostitution, sodomy, sodomasochism, pedophilia, bestiality, sex with the mentally disabled, fornication, adultery, and incest” (footnotes omitted)).

<sup>88</sup> See, e.g., ALA. CODE § 13A-2-7(b)(2) (LexisNexis 2005) (permitting a defense of consent to bodily harm if “[t]he conduct and the harm are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport”); IOWA CODE ANN. § 708.1 (West 2003) (stating that there is no assault when individuals “are voluntary participants in a sport, social or other activity, not in itself criminal, and such act is a reasonably foreseeable incident of such sport or activity, and does not create an unreasonable risk of serious injury or breach of the peace”).

<sup>89</sup> See *State v. Van*, 688 N.W.2d 600, 614 (Neb. 2004); *People v. Jovanovic*, 700 N.Y.S.2d

The Supreme Court of Nebraska has held that “all attempts to do physical violence which amount to a statutory assault are unlawful and a breach of the peace, and a person cannot consent to an unlawful assault.”<sup>90</sup> In *People v. Jovanovic*, the First Department of the Appellate Division of the New York Supreme Court stated that “as a matter of public policy, a person cannot avoid criminal responsibility for an assault that causes injury or carries a risk of serious harm, even if the victim asked for or consented to the act.”<sup>91</sup> In *Commonwealth v. Appleby*, the Supreme Judicial Court of Massachusetts explained that “as a matter of public policy, . . . one may not consent to become a victim of an assault and battery with a dangerous weapon.”<sup>92</sup> Forbidding consent to assault has also been justified based on morality and social acceptance.<sup>93</sup> The Court of Appeals of Iowa, in holding that sadomasochistic sex was not a “sport, social or other activity” under an Iowa law permitting consent to assault in certain situations, stated that it was “obvious. . . that the legislature did not intend the term to include an activity which has been repeatedly disapproved by other jurisdictions and considered to be in conflict with *the general moral principles of our society*.”<sup>94</sup> The commentary to Alabama’s Criminal Code for section 13A-2-7 explains that “consent may be a defense to criminal liability. . . in cases of more serious injury only where there is public acceptance of the type of transaction and consent to the risk involved.”<sup>95</sup> Interestingly, Texas has permitted a defense of consent to assault since 1973, unless the assault resulted in “serious bodily injury.”<sup>96</sup>

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156, 168 n.5 (App. Div. 1999); *Commonwealth v. Appleby*, 402 N.E.2d 1051, 1060 (Mass. 1980).

<sup>90</sup> *Van*, 688 N.W.2d at 614 (quoting *State v. Hatfield*, 356 N.W.2d 872, 876 (Neb. 1984)).

<sup>91</sup> 700 N.Y.S.2d at 168 n.5.

<sup>92</sup> 402 N.E.2d at 1060.

<sup>93</sup> See *State v. Collier*, 372 N.W.2d 303, 307 (Iowa Ct. App. 1985).

<sup>94</sup> *Id.* at 307 (referring to IOWA CODE ANN. § 708.1 (West 2003)) (emphasis added).

<sup>95</sup> ALA. CODE § 13A-2-7 commentary (LexisNexis 2005).

<sup>96</sup> The Texas Penal Code states that:

The victim’s effective consent or the actor’s reasonable belief that the victim consented to the actor’s conduct is a defense to prosecution under Section 22.01 (Assault), 22.02 (Aggravated Assault), or 22.05 (Deadly Conduct) if:

- (1) the conduct did not threaten or inflict serious bodily injury; or
- (2) the victim knew the conduct was a risk of:

(A) his occupation;

(B) recognized medical treatment; or

(C) a scientific experiment conducted by recognized methods.

TEX. PENAL CODE ANN. § 22.06 (Vernon 2003). “Serious bodily injury” is defined as “bodily injury that creates a substantial risk of death or that causes death, serious permanent

### *B. Assaultative Acts to Which the Law Permits Consent*

#### 1. Sports and Surgery

Allowing consent to injuries sustained during sports or surgery is usually justified based on the highly regulated nature of these activities, and their perceived social utility.<sup>97</sup> The commentary to Alabama's Criminal Code explains that consent to bodily harm incident to "mutual wrestling, football and participation in other accepted athletic sports" is allowed because these activities involved "established rules," unlike "private fist fight[ing]," to which consent is not permitted.<sup>98</sup> However, these justifications are not as easily applied to body modification.

#### 2. Body Modification

Many people react with disgust to the more extreme forms of body modification, which are gaining in popularity, and view them as self-mutilation instead of adornment.<sup>99</sup> While some body modifications entail only slight injury, such as ear or navel piercings, the practices of scarification, branding, stretching, tongue and glans splitting,<sup>100</sup> and insertion of nodules under the skin result in more severe injuries. Several recent studies revealed that approximately 33% of young adults, age eighteen to twenty-five, had body piercings.<sup>101</sup> Body modification can result in severe medical complications. Allergies to the metals used in body jewelry are commonly reported, as are bacterial and viral infections.<sup>102</sup> In one case, a necrotizing infection led to extensive skin loss, and in

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disfigurement, or protracted loss or impairment of the function of any bodily member or organ." *Id.* § 1.07.

<sup>97</sup> See Hanna, *supra* note 3, at 248–50 ("[I]n practice, the law should not allow consensual violence that results in *actual serious* physical injury outside of highly regulated contexts.").

<sup>98</sup> ALA. CODE § 13A-2-7 commentary.

<sup>99</sup> See Judie Schwartz & Evelinda Urman, *Piercings, Tattoos Not the Best Way to Make Your Mark*, SCRIPPS HOWARD NEWS SERV., May 4, 2004, [http://www.shns.com/shns/g\\_index2.cfm?action=detail&pk=STYLEMATTERS-FASH-05-04-04](http://www.shns.com/shns/g_index2.cfm?action=detail&pk=STYLEMATTERS-FASH-05-04-04).

<sup>100</sup> "Glans splitting" refers to splitting the head of the penis.

<sup>101</sup> Myrna L. Armstrong, *Tattooing, Body Piercing, and Permanent Cosmetics: A Historical and Current View of State Regulations, with Continuing Concerns*, J. ENVTL. HEALTH, Apr. 2005, at 38, 38.

<sup>102</sup> See, e.g., Lena Ekelius et al., *Fournier's Gangrene After Genital Piercing*, 36 SCANDINAVIAN J. INFECTIOUS DISEASES 610, 610–11 (2004) (documenting a case of necrotizing infection attributed to a genital self-piercing that resulted in the removal of the skin of the penis, scrotum, and part of the abdomen).

another case a teenager died from blood poisoning that was blamed on a recent piercing.<sup>103</sup>

Despite the risk of complications, body modification has been largely unregulated. States have only recently begun enacting regulations; since 1998, approximately thirty-six states have changed their “body art legislation.”<sup>104</sup> Some states passed their first body art legislation as recently as 2003, and as of 2005, two jurisdictions have no regulations for body modification.<sup>105</sup> Even though regulations exist, most states do not require a “specific curriculum, training, or mandatory continuing-education [programs]” to perform body modification.<sup>106</sup> “Anyone with \$300 can purchase a kit from a trade journal, complete with the equipment and procedural videos needed to get started, and become an artist.”<sup>107</sup>

Proponents of body modification argue that it is a fundamental “right because in some ways it is analogous to the right to have an abortion or use contraception; it is a private decision based on personal autonomy,”<sup>108</sup> and that consent to body modification is justified because it serves as a rite of passage, an expression of ideas, an aspect of spirituality, and an art form.<sup>109</sup> Despite disagreement as to whether there is a fundamental right to body modification,<sup>110</sup> every state permits consent in this context to

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<sup>103</sup> *Id.*; Andrew Norfolk, *Coroner Warns of Body-Piercing Risks*, TIMES (London), Nov. 12, 2005, Home News, at 7.

<sup>104</sup> Armstrong, *supra* note 101, at 40.

<sup>105</sup> *Id.* Michigan, New Jersey, Oklahoma, Massachusetts, and Mississippi enacted legislation in 2003; Kentucky did so in 2004. *Id.* Idaho and the District of Columbia have no regulations for any form of body modification. *Id.* Additionally, Illinois, Nebraska, New Mexico, North Dakota, Pennsylvania, Virginia, and Wyoming choose to use city or county ordinances instead of statewide regulation. *Id.*

<sup>106</sup> *Id.* at 41.

<sup>107</sup> *Id.*

<sup>108</sup> Jeanine deGagne, *Tattoos and Body Piercing: Can Regulations Prevent Health Risks?*, 29 MCGEORGE L. REV. 695, 700 (1998).

<sup>109</sup> See *Difeo v. Town of Plaistow*, No. 00-E-0218, 2002 WL 31059361, at \*2–\*3 (N.H. Super. Ct. Mar. 7, 2002) (unpublished opinion); *Commonwealth v. Meuse*, No. 9877CR2644, 1999 WL 1203793, at \*3 (Mass. Super. Ct. Nov. 29, 1999).

<sup>110</sup> For cases holding that there is no fundamental right to body modification, see *People v. O’Sullivan*, 409 N.Y.S.2d 332, 333 (App. Term 1978) (holding that tattooing is not protected by the First Amendment because it is not speech “or even symbolic speech”); *Riggs v. City of Forth Worth*, 229 F. Supp. 2d 572, 580–81 (N.D. Tex. 2002) (denying strict scrutiny to a claim of discrimination based on tattoos “[b]ecause tattoos are not protected expressions under the fundamental First Amendment right of free speech”). For cases holding that body modification is a constitutionally protected activity, see *Meuse*, 1999 WL 1203793, at \*3–\*4 (holding that a prohibition on tattooing, unless performed by a licensed physician, imposed more than an incidental regulation on a “kind[] of expression . . . steadfastly protected by [the] Federal and State Constitutions,” and was therefore unconstitutional); *Difeo*, 2002 WL

activities that could otherwise constitute assault.<sup>111</sup>

## V. CRIMINAL PROSECUTION OF SM

While the risk of consensual SM activity coming to the attention of authorities and resulting in criminal prosecution is small, it does occur.<sup>112</sup> In the absence of a complaining victim, authorities may become aware of SM activity if an injury is inflicted that requires medical treatment and the doctor reports the injury as suspicious, or if the participants had recorded their activity, and the recording subsequently falls into the hands of law enforcement. The latter scenario is what led to prosecution in the English case, *Regina v. Brown*.

### A. Regina v. Brown

In *Regina v. Brown*, five dominants who had participated in homosexual SM sex were convicted on guilty pleas of assault, despite the testimony of the submissives that the acts were consensual.<sup>113</sup> The activities had occurred in private, but came to attention of authorities when videotapes of the encounters were discovered during a “police investigation into other matters.”<sup>114</sup> The activities in question were relatively shocking, including penile piercing with sterilized fish hooks, but none of the injuries sustained required medical attention.<sup>115</sup> The conviction was appealed on the basis that all the participants were of the age of consent and had consented, the activities were conducted in private, and no serious injuries had resulted.<sup>116</sup> The statute that dominants were convicted under reads “[w]hosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of [an offence],. . .and shall be liable. . .[to a

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31059361, at \*3, \*6 (holding that a town law prohibiting body piercing was unconstitutional because body piercing is symbolic speech protected by the First Amendment).

<sup>111</sup> Oklahoma appears to have been the only state with an absolute prohibition on tattooing until 2006, although it allowed body piercing. OKLA. STAT. ANN. tit. 21, § 841 (West 2004) (repealed 2006). Oklahoma now allows both tattooing and body piercing. OKLA. STAT. ANN. tit. 21, § 842.3 (West 2006).

<sup>112</sup> See *Regina v. Brown*, [1994] 1 A.C. 212 (H.L.) (appeal taken from Eng.).

<sup>113</sup> *Id.* at 237–38.

<sup>114</sup> *Id.* at 238.

<sup>115</sup> *Id.* at 215, 238.

<sup>116</sup> *Id.* at 215.

maximum penalty of five years imprisonment].”<sup>117</sup> The dominants argued that the consent of the submissives negated the element of unlawfulness.<sup>118</sup> Lord Templeman stated that in certain instances intentional violence would not be punishable as criminal, such as when bodily harm did not result, or, if actual injury did result, the injury was “a foreseeable incident of a lawful activity in which the person injured was participating.”<sup>119</sup> Surgery, ritual circumcision, tattooing, ear-piercing, and violent sports were given examples of lawful activity.<sup>120</sup> In affirming the conviction, Lord Templeman explained that in his view,

[S]ado-masochism is not only concerned with sex. [It] is also concerned with violence. The evidence discloses that the practices of the [dominants] were unpredictably dangerous and degrading to the body and mind . . . .

. . . .

. . . I am not prepared to invent a defence of consent for sado-masochistic encounters which breed and glorify cruelty. . . .<sup>121</sup>

Two Lords would have quashed the convictions because no grievous harm was done.<sup>122</sup> Lord Mustill noted that once “repugnance and moral objection” were eliminated as justifications for the convictions, the possible remaining reasons were not sufficient to justify the result.<sup>123</sup>

### B. *The American Cases*

Several American cases have also dealt with the subject of whether consent to assault is permissible, although in all of these cases there was a complaining victim. A case, involving a submissive who testified that he or she consented to the assault, has yet to be adjudicated at the appellate level.

An early case on this topic is *People v. Samuels*, a California case from 1967.<sup>124</sup> Marvin Samuels was convicted, among other things,

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<sup>117</sup> *Id.* at 230 (internal quotation marks omitted) (first alteration added).

<sup>118</sup> *Id.* at 217.

<sup>119</sup> *Id.* at 231.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 235–36.

<sup>122</sup> *Id.* at 275, 283.

<sup>123</sup> *Id.* at 274–75. The remaining reasons were the risk of genito-urinary infection, the “possibility that matters might get out of hand,” risk of AIDS, and the risk of the “corruption of youth.” *Id.*

<sup>124</sup> 58 Cal. Rptr. 439 (Ct. App. 1967).

on a charge of aggravated assault which stemmed from the production of a film depicting an unidentified naked man, bound and gagged, being whipped by Samuels.<sup>125</sup> Samuels appealed his conviction based on the argument that “consent of the victim is an absolute defense to the charge of aggravated assault.”<sup>126</sup> The court affirmed, reasoning that “[a]n aggravated assault, like any other assault, may be committed without the infliction of . . . injury,”<sup>127</sup> and stated that Samuels’ contention that the submissive’s consent was an absolute defense was without merit, because the “consent of the victim is not generally a defense to assault or battery, except in a situation involving ordinary physical contact or blows incident to [contact] sports.”<sup>128</sup>

Massachusetts examined this issue in 1980 in *Commonwealth v. Appleby*.<sup>129</sup> Kenneth Appleby was convicted of assault and battery with a dangerous weapon (a riding crop) by a Superior Court jury in 1978.<sup>130</sup> Appleby had been engaged in “a homosexual, sadoomasochistic relationship for over two years” with Steven Cromer.<sup>131</sup> The two lived together, with Cromer acting as Appleby’s servant; Appleby beat Cromer frequently.<sup>132</sup> Appleby was tried for three specific instances of assault and battery.<sup>133</sup> In October of 1975 Appleby had beaten Cromer with a bullwhip and a baseball bat, fracturing Cromer’s kneecap, and in February of 1976 Appleby again beat Cromer with a bullwhip.<sup>134</sup> Cromer continued to live with Appleby after each of these incidents.<sup>135</sup> In August of 1976, an enraged Appleby hit Cromer lightly with a riding crop, and Cromer finally left him.<sup>136</sup> The jury only convicted on the indictment based on the third incident.<sup>137</sup> At trial, Cromer had testified that Appleby was a sadist, but denied that he was involved in a consensual SM relationship with Appleby.<sup>138</sup> He claimed he stayed with Appleby out of fear that “Appleby would harm him or members of his family

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<sup>125</sup> *Id.* at 442–43, 449.

<sup>126</sup> *Id.* at 447.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> 402 N.E.2d 1051 (Mass. 1980).

<sup>130</sup> *Id.* at 1053.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 1054.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

if he did not continue [the] relationship.”<sup>139</sup> Appleby appealed, arguing that Cromer had consented to the beatings, and that “as a matter of law Cromer could consent to their sadomasochistic relationship.”<sup>140</sup> The court held that even if Cromer had consented, it was not a valid defense to the charge of assault and battery with a dangerous weapon.<sup>141</sup>

Any right to sexual privacy that citizens enjoy, and we do not here decide what the basis for such a right would be if it exists, would be outweighed in the constitutional balancing scheme by the State’s interest in preventing violence by the use of dangerous weapons upon its citizens under the claimed cloak of privacy in sexual relations.<sup>142</sup>

In *State v. Collier* the Court of Appeals of Iowa held that SM sex was not “protected activity” under an Iowa statute that read:

Provided, that where the person doing any of the above enumerated acts, and such other person, *are voluntary participants in a sport, social or other activity, not in itself criminal, and such act is a reasonably foreseeable incident of such sport or activity, and does not create an unreasonable risk of serious injury or breach of the peace*, the act shall not be an assault.<sup>143</sup>

Edward Collier had appealed his conviction for “assault resulting in serious injury,” arguing that he had been entitled to a jury instruction on “the defense of consent on the charges of assault.”<sup>144</sup> Collier claimed that Leanne Steele, a model he employed, had consented to being tied spread eagle to a bed, blindfolded, and whipped with a belt.<sup>145</sup> Steele testified that these activities were not consensual, that she cried and begged Collier to stop, and that she “suffered a swollen lip, large welts on her ankles, wrists, hips,

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 1060.

<sup>141</sup> *Id.* at 1061.

<sup>142</sup> *Id.* at 1060.

<sup>143</sup> 372 N.W.2d 303, 305, 307 (Iowa Ct. App. 1985) (quoting IOWA CODE § 708.1 (1983)). The “above enumerated acts” the statute refers to are “[a]ny act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act;” “[a]ny act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act;” and the “[i]ntentional[] point[ing] [of] any firearm toward another, or display[ing] in a threatening manner any dangerous weapon toward another.” *Id.* at 305 (quoting IOWA CODE § 708.1).

<sup>144</sup> *Id.* at 304.

<sup>145</sup> *Id.* at 304–05.

buttocks, and severe bruises on her thighs” as a result.<sup>146</sup> Collier’s theory at trial was that the incident “was a social activity within the meaning of Iowa Code section 708.1.”<sup>147</sup> Looking to cases from Massachusetts, California, and New Jersey for guidance, the court decided that “the legislature did not intend sodomasochistic activity to be a ‘sport, social or other activity’ under section 708.1.”<sup>148</sup> One judge dissented, stating that “the legislature’s choice of the words ‘sport, social or other activity,’—especially the nonspecific word ‘other’—show[ed] an intent to make this exception applicable to a broad range of activities.”<sup>149</sup> Since “[w]hipping a person with a belt. . . is not ‘itself illegal,’” and the injuries Steele sustained did not rise to the level of serious injury, the dissent reasoned that “the acts of the defendant [were] not, as a matter of law, outside of the protection of the statutory defense of consent.”<sup>150</sup>

In *People v. Jovanovic*, the First Department of the Appellate Division of the Supreme Court of New York stated that there is no defense of consent to a charge of assault, but reversed and remanded Jovanovic’s convictions for kidnapping, sexual abuse, and assault based on other grounds.<sup>151</sup> The complainant testified that Jovanovic tied her to a futon, burned her with candle wax, blindfolded and gagged her, bit her nipples and collarbone, sodomized her and hit her with a baton while she screamed and told him to stop.<sup>152</sup> The complainant had met Jovanovic in a chat room, and they engaged in a series of emails about their mutual interests in SM, snuff films, and pagan rituals.<sup>153</sup> In these emails, the complainant indicated that she was, among other things, involved in a SM relationship, and referred to herself as a “pushy bottom.”<sup>154</sup> The trial court redacted sections of the emails because “they constituted evidence of the complainant’s prior sexual conduct,

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<sup>146</sup> *Id.* at 304.

<sup>147</sup> *Id.* at 305.

<sup>148</sup> *Id.* at 306–07 (examining *Commonwealth v. Appleby*, 402 N.E.2d 1051 (Mass. 1980); *People v. Samuels*, 58 Cal. Rptr. 439 (Ct. App. 1967); and *State v. Brown*, 364 A.2d 27 (N.J. Super. Ct. Law Div. 1976)).

<sup>149</sup> *Id.* at 309 (Schlegel, J., dissenting).

<sup>150</sup> *Id.*

<sup>151</sup> 700 N.Y.S.2d 156, 159, 168 n.5, 171 (App. Div. 1999).

<sup>152</sup> *Id.* at 162. The complainant stated that she did not initially protest when Jovanovic tied her to the futon because “she did not know what to think.” *Id.* She claimed that she began protesting when Jovanovic lit a candle while sitting between her legs, and began screaming once he poured molten wax on her. *Id.*

<sup>153</sup> *Id.* at 159–60. A snuff film is a film “in which a person is killed.” *Id.* at 160.

<sup>154</sup> *Id.* at 164. “[A] ‘pushy bottom’ is a submissive partner who pushes the dominant partner to inflict greater pain.” *Id.* at 164 n.4.

having the effect of demonstrating her ‘unchastity.’”<sup>155</sup> The Appellate Division held this to be reversible error, as the emails were not “evidence of the sexual *conduct* of the complainant. . . . [T]hey were merely evidence of *statements* made by the complainant about herself,” and as such were not subject to exclusion under the rape shield law.<sup>156</sup> Redaction of the emails precluded Jovanovic from presenting a defense of consent, depicted him as a “monstrous sadist” in the eyes of the jury, and prevented him from “challenging the complainant’s reliability and credibility” regarding her testimony as to the assault charges by the exclusion of evidence of the complainant’s prior SM activities.<sup>157</sup> The dissent argued that reversal of the assault conviction was not necessary, since the complainant’s testimony as to the assault was sufficiently corroborated by other evidence.<sup>158</sup>

In *State v. Van*, the Supreme Court of Nebraska held that Nebraska’s assault statutes did not unconstitutionally violate Van’s right to privacy under the Due Processes Clauses.<sup>159</sup> Van had entered into a consensual SM relationship with J.G.C., but they had defined the relationship to be “permanent” and “without limits.”<sup>160</sup> Under these arrangements, J.G.C., the submissive, had no way to withdraw his consent and end the relationship.<sup>161</sup> They did not use a safe word, and J.G.C. testified at trial that “he expected to be tortured, humiliated, and to eventually die as a result of his relationship with Van.”<sup>162</sup> J.G.C. changed his mind during the course of the relationship, but Van, who kept J.G.C. locked in a “dungeon room,” refused to allow him to leave, referring to emails from J.G.C. that had specifically directed Van not to allow him to escape.<sup>163</sup> J.G.C. eventually freed himself from Van by enlisting the help of another man who was also a submissive of Van’s.<sup>164</sup> Van was tried and convicted of “sexual assault in the first degree,

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<sup>155</sup> *Id.* at 164.

<sup>156</sup> *Id.* at 165–66.

<sup>157</sup> *Id.* at 170–71.

<sup>158</sup> *Id.* at 174–75 (Mazzarelli, J., dissenting).

<sup>159</sup> 688 N.W.2d 600, 615 (Neb. 2004).

<sup>160</sup> *Id.* at 608–09.

<sup>161</sup> *Id.* at 609.

<sup>162</sup> *Id.* During a period of email correspondence prior to the beginning of the relationship, J.G.C. had specified that he wanted to be “flogged, whipped, beaten, restrained, gagged, shaved, tattooed, pierced, blindfolded, injected with saline, and locked in a cell.” *Id.* at 609. In one email to Van he wrote “[t]he ‘rules’ shouldn’t apply to true Masters; they should be allowed to do whatever they want whenever they want . . . .” *Id.* at 610.

<sup>163</sup> *Id.* at 610–12.

<sup>164</sup> *Id.* at 612.

assault in the first degree, assault in the second degree, first degree false imprisonment, and terroristic threats.”<sup>165</sup> In challenging his convictions, he argued that SM was a protected activity under *Lawrence v. Texas*.<sup>166</sup> The court affirmed, because *Lawrence* involved consensual activity, while here consent was disputed.<sup>167</sup> The court also noted that *Lawrence* indicated that State regulation of such conduct was inappropriate “absent injury to a person or abuse of an institution the law protects,” and was therefore inapplicable to SM.<sup>168</sup>

## VI. ANALYSIS OF SM AND THE DEFENSE OF CONSENT

Prohibiting a defense of consent in cases of consensual SM activity effectively criminalizes many aspects of SM. Jurisdictions differ as to what level of injury suffices to trigger a charge of assault, and some states define “dangerous weapon” very broadly in the context of aggravated assault.<sup>169</sup> Permitting a defense of consent in these cases is desirable because a significant percentage of the general population already believes that consent to assault mitigates culpability, SM is a legitimate form of sexual expression, prohibiting consent to SM is based on moral disapproval, and criminalizing private sexual behavior because of notions of morality was held unconstitutional in *Lawrence*.<sup>170</sup>

### A. *The Public Already Sees Consent as Potentially Mitigating Culpability for Assault*

A sizeable percentage of the general population already believes that consent mitigates criminal liability for assault. The success of a “rough sex” defense indicates that some juries feel that a defendant should not be culpable if the “victim” consented to the activity, even when it resulted in death.<sup>171</sup> The rough sex defense has been compared to the “she asked for it” defense and described as

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<sup>165</sup> *Id.* at 608.

<sup>166</sup> *Id.* at 613.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

<sup>169</sup> See, e.g., IOWA CODE ANN. § 702.7 (West 2006). In *Appleby*, a Massachusetts case, merely brandishing a riding crop with the intent to strike, and making incidental contact, constituted aggravated assault. See *Commonwealth v. Appleby*, 402 N.E.2d 1051, 1057–58 (Mass. 1980).

<sup>170</sup> *Lawrence*, 539 U.S. at 571.

<sup>171</sup> See George E. Buzash, Comment, *The “Rough Sex” Defense*, 80 J. CRIM. L. & CRIMINOLOGY 557, 560 (1989).

“a formidable obstacle to prosecutors.”<sup>172</sup> In the trial against Robert Chambers, the “rough sex’ element of Chambers’ defense confused the jury to the extent that the prosecution was compelled to plea bargain with Chambers, resulting in a reduced sentence.”<sup>173</sup> In the Joseph Porto case, Porto claimed that his girlfriend had demanded that he strangle her with a rope in order to increase her sexual pleasure, and that she died when he accidentally pulled the rope too tight.<sup>174</sup> Instead of a murder conviction, Porto was sentenced to a maximum of four years for criminally negligent homicide.<sup>175</sup> The misconception that victims of domestic violence implicitly consent to abuse by remaining in the relationship, and the resulting acquittal of defendants because of this misconception, shows the willingness of juries to find no culpable criminal act when the victim has consented.<sup>176</sup>

The verdict in *Appleby* further illustrates juries’ willingness to accept a defense of consent to a charge of assault.<sup>177</sup> Here, the defendant was charged with assault and battery for three separate incidents.<sup>178</sup> The jury convicted on only one indictment, which was based on charges that arose from an incident after which the victim left the relationship.<sup>179</sup> This incident involved no physical injury, while the previous incidents were more severe.<sup>180</sup> The jury may have acquitted on the two more severe incidents based on a belief that the victim consented to those assaults by staying in the relationship.

The doctrine of jury nullification provides a mechanism by which juries can acquit an otherwise guilty defendant if they believe that a conviction would be unjust.<sup>181</sup> Its continued existence indicates that

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<sup>172</sup> *Id.* at 557.

<sup>173</sup> *Id.* at 558. The Robert Chambers case was more popularly known as the “Preppie Murder” case. *Id.* at 557.

<sup>174</sup> *Id.* at 559–60.

<sup>175</sup> *Id.* at 560.

<sup>176</sup> With this statement, I am in no way arguing that a defendant’s claim that a victim of domestic violence consented to being abused by staying in the relationship should mitigate culpability for acts of domestic violence. I would argue that the apparent “consent” to domestic violence is not legally valid because it was obtained after the fact and under duress, and the belief that a victim consented is in fact a misconception. I seek only to point out the public’s willingness to view certain assaultive acts as non-criminal if they believe the acts were consensual.

<sup>177</sup> See *Commonwealth v. Appleby*, 402 N.E.2d 1051, 1053 & n.1 (Mass. 1980).

<sup>178</sup> *Id.* at 1054.

<sup>179</sup> *Id.* at 1053–54 n.1.

<sup>180</sup> *Id.* at 1054.

<sup>181</sup> Mary Claire Mulligan, *Jury Nullification: Its History and Practice*, COLO. LAW., Dec. 2004, at 71, 71.

there is still a need for juries to be able to decide against applying the law in a suitable situation.<sup>182</sup> Jury nullification of the law in cases where a rough sex defense is presented shows that juries, for some reason, believe defendants should not be held liable when the “victim” consented. This reason may be an implicit public recognition that individuals should be allowed to consent to SM activity, or at least that participation in SM should not result in criminal culpability. Allowing a consent defense for SM would provide an opportunity to distinguish the characteristics of cases where an individual consented ahead of time to SM activity, and cases where a defendant is falsely claiming, after-the-fact, that the victim consented to an assault.

*B. SM Is Sexual Expression, Not Psychopathology*

The DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM) no longer defines masochism and sadism as mental disorders unless the behavior, or fantasies about engaging in the “behaviors[,] cause clinically significant distress or impairment in social, occupational, or other important areas of functioning,” or in the case of sadism if “[t]he person has acted on these sexual urges with a nonconsenting person.”<sup>183</sup> In prior editions, sadistic and/or masochistic behavior was listed as a disorder, whether or not it caused any impairment in functioning.<sup>184</sup> Several studies have shown that SM practitioners demonstrate no more pathology than the general public.<sup>185</sup>

The categories of disorders in the DSM reflect societal values as to what behavior is acceptable and what is deemed pathological, and focus on whether the behavior impairs an individual’s ability to function occupationally and socially. Homosexuality was once included in the DSM, but as society began to view homosexuality as a legitimate sexual orientation, and the mental health community became aware that homosexual behavior alone did not cause functional impairment, it was ultimately removed as a disorder.<sup>186</sup>

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<sup>182</sup> *Id.*

<sup>183</sup> DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, DSM-IV-TR 572–74 (4th ed. 2000).

<sup>184</sup> DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, DSM-II 44 (2d ed. 1968) [hereinafter DSM-II].

<sup>185</sup> Sandnabba, *supra* note 10, at 51; Apostolides, *supra* note 4, at 62.

<sup>186</sup> Homosexuality was listed as a disorder along with sadism and masochism in DSM-II. DSM-II, *supra* note 184, at 44.

Sadism and masochism are following a similar course. The mental health community has realized that sadistic and masochistic desires and/or behaviors alone do not constitute mental disorders. Societal acceptance of sadism and masochism can be seen not only in their removal from the DSM, but in popular culture and the media. It is not just that SM is no longer considered a mental illness; SM is beginning to be recognized by society as a legitimate sexual preference, and individuals' right to participate in this form of sexual expression should be given the appropriate legal protection.

*C. Criminalizing SM Is an Expression of Moral Disapproval of  
"Deviant" Sexuality*

Conversely, it is possible that jury verdicts where a "rough sex" defense has succeeded represent a public view that SM is deviant behavior, those who participate consensually get what they deserve, and the full protection of the criminal law should not be available to them. Despite the public fascination with the trappings of the SM lifestyle, many people react with disgust to the actual practice of SM.<sup>187</sup> Disproportionately severe sentences imposed for assault convictions based on SM activity may demonstrate society's disapproval of SM, especially when the level of injury sustained would not support a conviction outside of the SM context. The defendant in *Appleby* received a sentence of eight to ten years for "assault and battery by means of a dangerous weapon," even though no physical injury resulted and the assault consisted of only "[a] glancing blow" from a riding crop that "barely connected with [the victim's] back."<sup>188</sup> The concurrence acknowledged that the sentence may have been "influenced by certain related circumstances which are abhorrent to most persons," since there was "no evidence of visible injury or after effects."<sup>189</sup>

The moral basis of prohibiting a consent defense in SM comes into sharper focus when SM activity that results in physical injury is compared to the physical injury that is permitted for body modification.<sup>190</sup> The rationale that consent to injury is permitted in

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<sup>187</sup> Professor Cheryl Hanna's statement that "[o]ne day . . . , after going over sources on S/M that my research assistant downloaded from the World Wide Web, I put away my files and vowed never to return to this topic again" smacks of distaste. Hanna, *supra* note 3, at 245.

<sup>188</sup> Commonwealth v. Appleby, 402 N.E.2d 1051, 1053-54 (Mass. 1980).

<sup>189</sup> *Id.* at 1061-62 (Hennessey, C.J., concurring).

<sup>190</sup> See *supra* Part IV.B.2.

activities that are highly regulated and that have social utility fails to explain permitting consent to body modification.<sup>191</sup> For years, body modification was practiced with little or no regulation, despite the risk of serious injury that could result from complications such as infection.<sup>192</sup> The debated social value of body modification is derived from its role in self expression as an aspect of personal autonomy.<sup>193</sup> However, sexual relationships are also vital to self expression and personal autonomy. Moral disapproval of SM is the remaining explanation for permitting consent to body modification while prohibiting consent to SM.

#### *D. Infringement on Privacy Based on Morality Is Unconstitutional*

In *Lawrence v. Texas*, the Supreme Court held that morality alone was not a sufficient reason to impose criminal liability on private, consensual sexual conduct.<sup>194</sup> The Court explained that the “intimacies of [a] physical relationship,” which encompass consensual homosexual sodomy, are a form of liberty protected by the Due Process Clause of the Fourteenth Amendment, and “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”<sup>195</sup> While the Court noted that *Lawrence* did not involve “persons who might be injured,” they did not elaborate on what they defined as “injury.”<sup>196</sup> In the context of criminal offenses, physical injury often refers to relatively serious impairment,<sup>197</sup> and the Court may have had this in mind when they included this phrase in the opinion. Whether or not this is the case,

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<sup>191</sup> See Hanna, *supra* note 3, at 242–43, 248.

<sup>192</sup> See *supra* Part IV.B.2.

<sup>193</sup> See deGagne, *supra* note 108, at 700.

<sup>194</sup> 539 U.S. 558, 577–78 (2003).

<sup>195</sup> *Id.* (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)). In 1986, the Court had addressed the constitutionality of laws banning sodomy in *Bowers v. Hardwick*. 478 U.S. at 187–88. By narrowly framing the issue as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy,” the *Bowers* Court was able to hold that sodomy laws were constitutional based on the “Nation’s history and tradition” of criminalizing consensual sodomy, as well as the tradition of criminalizing conduct deemed immoral by the governing majority. *Id.* at 190, 194, 196.

<sup>196</sup> *Lawrence*, 539 U.S. at 578.

<sup>197</sup> For example, New York’s penal law defines physical injury as “impairment of physical condition or substantial pain.” N.Y. PENAL LAW § 10.00(9) (McKinney Supp. 2007). Case law has determined that bruises, bumps, abrasions, or superficial cuts alone are not sufficient. *E.g.*, *People v. Jimenez*, 433 N.E.2d 1270, 1270 (N.Y. 1982); *In re Ortiz*, 768 N.Y.S.2d 858, 859 (App. Div. 2003); *People v. DiStefano*, 677 N.Y.S.2d 578, 579 (App. Div. 1998); *People v. Langford*, 545 N.Y.S.2d 610, 611 (App. Div. 1989).

the rationale for protecting private sexual behavior between consenting adults from government intrusion and potential criminal liability is as applicable to SM as it is to homosexual sodomy.

SM is a form of sexual intimacy between consenting partners. The primary purpose of SM is sexual, not violent, despite the risk of injury. The fact that most states permit individuals to consent to physical injury for the sake of body modification, which is not protected as a fundamental right, illustrates that morality is the primary reason for criminalizing SM. Since *Lawrence* held that morality is not a valid reason for infringing on private sexual behavior between consenting partners, and morality is the primary reason that consent to SM is prohibited, the protection afforded to an individual's choice to engage in sodomy that emerged from *Lawrence* should be extended to include an individual's choice to engage in SM activities that do not result in serious physical injury.

#### VII. PROPOSED FRAMEWORK FOR A CONSENT DEFENSE IN SM CASES

I propose that a consent defense should be available when assault charges stem from consensual SM activity, with certain limitations.<sup>198</sup> Consent should not be available as a defense in cases involving serious physical injury;<sup>199</sup> it should only be permitted for cases of lesser injury. This limitation would safely balance the state's interest in protecting the welfare of its citizens against the individual's right to personal autonomy and sexual expression.<sup>200</sup>

To protect the otherwise responsible practitioner of SM from accusations stemming from "next morning regrets," the defense should be permitted in limited circumstances if the submissive refuses to testify, or if the submissive is the complainant. In these cases a heavy burden of proof should be imposed on the defendant to show that the victim had manifested consent in circumstances in which a reasonable person would believe that consent was actually

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<sup>198</sup> Other authors have also recommended permitting a consent defense to assault, but with different parameters than the proposal in this Comment. See Monica Pa, *Beyond the Pleasure Principle: The Criminalization of Consensual Sadoomasochistic Sex*, 11 TEX. J. WOMEN & L. 51, 81–88 (2001).

<sup>199</sup> I would adopt New York's definition of serious physical injury as physical injury that "creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." N.Y. PENAL LAW § 10.00(10).

<sup>200</sup> I choose to draw the line at serious physical injury because the complications of injury of this level, such as impaired ability to work, attend school, or care for a family, have a societal impact great enough to implicate the state's interest in maintaining the public peace.

given. The jury would have to be educated as to the methods of communication of consent within an SM relationship. The defense should not be extended to cases where irrevocable consent has been negotiated, like *State v. Van*. There would have to be pre-arranged means for the submissive to revoke consent.

Where death occurred during an SM encounter, but not as the direct result of the SM activity, a defense of consent should be permitted. The defendant would have to overcome a presumption of non-consent by showing that the cause of death was not a foreseeable consequence of SM but was the result of some other health condition such as a heart attack or a stroke. If the cause of death was a foreseeable consequence of SM, such as strangulation<sup>201</sup> or severe beating, then it should be presumed that the victim did not consent to these activities.

To guard against abuse of this defense in the context of domestic violence, a presumption of non-consent should exist if the victim calls the police during or immediately after the incident. If there is a history of prior domestic violence, the presumption should be non-rebuttable. This is justifiable based on the dynamics of power and control that are inherent in domestic violence. The threatening atmosphere the abuser intentionally created renders the consent of the victim legally insufficient, because the victim's consent is coerced if he or she believes that the only choice is between consenting or being beaten.<sup>202</sup>

De-criminalizing SM would lead to greater understanding of SM practices, and would provide more information that could allow medical personnel to distinguish between injuries sustained due to domestic violence and SM (such as the presence of defensive injuries). It would likely be possible to discern different patterns of behavior in submissives and victims of domestic violence, such as the manner in which these groups report injuries, or the presence of psychological disorders such as Post Traumatic Stress Disorder.

## VIII. CONCLUSION

To use Cheryl Hanna's words, "[s]ex is not a sport."<sup>203</sup> It is a much more personal, private, and fundamental aspect of self-

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<sup>201</sup> I believe "breath control play," or erotic strangulation, carries too high of a risk of death or permanent injury to be legally consensual.

<sup>202</sup> See *supra* Part III.B for a discussion of coercion.

<sup>203</sup> Hanna, *supra* note 3, at 242.

expression than sports. But for the infliction of injury, SM would be protected under the right to privacy articulated in *Lawrence*. There is no fundamental right to engage in body modification, yet the law permits consent to infliction of injuries during body modification which may be greater than those sustained during SM. The justification for permitting consent to bodily harm in sports and surgery does not exist with body modification; body modification is not highly regulated, nor is there a societal consensus that it is useful activity. One logical explanation for permitting consent to body modification but not to SM is that there is greater moral disapproval of SM. However, *Lawrence* held that morality alone is not an important enough state interest to justify criminalizing activity protected by the right to privacy. Once moral disapproval is eliminated as a justification, it becomes difficult to rationalize prohibiting consent to injury, up to a certain level of harm, during a sexual encounter. It would be logically consistent to permit consent to injury sustained during an activity that is constitutionally protected, especially when individuals are allowed to consent to similar injuries during non-protected activities.

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 behavior, and allow finer legal distinctions to be made between consensual 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.