

***When "No" Means "Yes" and "Yes" Means Harm: HIV Risk, Consent and Sadoomasochism Case Law*, Annette Houlihan,\* 20 *Law & Sex.* 31 (2011).**

Law & Sexuality: A Review of Lesbian, Gay, Bisexual, and Transgender Legal Issues

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## **I. Prelude**

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

## **II. Introduction**

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

Criminal law mostly speaks about sexuality as aberrance, through interpretations and translations of a moralistic jurisprudential model of socio-sexuality which is heteronormative and procreative. <sup>n2</sup> When criminal law speaks of desires and pleasures, they most often represent deviance, anomaly, and difference. Current and historical criminal laws proscribe consensual sexuality through such offences as those associated with homosexuality, HIV-infectious sexual activity and sadoomasochistic same-sexuality.

While sadoomasochism is not a specific offence, sadoomasochism may be prosecuted as an offence against the person (such as assault) within common law jurisdictions. Sadoomasochism between men is codified as a type of violence where sexuality is discounted or removed. [<sup>\*33</sup>] This has also occurred in cases of heterosexual which fall outside the boundaries of penetrative vaginal sex. As a type of sexual violence, case law contrasts s/m against heteronormative notions of desire. The s/m case law also defines legally-acceptable socio-sexual "violence" between men and women. This Article compares the illegality of violence that is categorically pleasurable and mutually consensual (with legally-sanctioned violent activity which is harmful and goes beyond the consensual bounds of sexual play (e.g., where death or serious injury occurs)).

This Article focuses primarily on the case of *R v. Brown*, <sup>n3</sup> a now infamous English case relating to same-sex desire and sadoomasochism. *Brown* brought together themes of criminality and same-sex desire; the case was a significant development for legal academics because it emphasised panics towards HIV infection and same-sex desire expressed through criminal justice. <sup>n4</sup> The case showed how the court chose to handle same-sex desire as a type of criminality because HIV was seen as a problem of homosexuality, <sup>n5</sup> especially sadoomasochistic homosexuality. The court in *Brown* deemed homosexual s/m too harmful to allow for individual consent. <sup>n6</sup> That was because both same-sex desire and same-sex s/m became metaphors of disease and harm (i.e., HIV). <sup>n7</sup> The criminal justice system, through the judgments in *Brown*, sent the message that s/m between men should be seen as a violent activity where there is a danger of HIV infection. As well, the court sought to protect heteronormative male interests by pathologising the Other.

The concept of violence, however, is an arbitrary and fluid notion: how society understands situations as violent or non-violent is variable and individual. Criminal offences and case law dictate what constitutes criminal "violence." This Article will explore how the concept of violence has been applied to some sexual bodies and not others. Further, I propose

that the same HIV infectivity risks, which are associated with [\*34] same-sex male sadomasochism, are not associated with heteronormative sadomasochism.

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

Criminal law produces meta-narratives about gender, heterosexuality, and homosexuality. In doing so, law creates discrete and absolute identities and behaviours. This glosses over the meanings and perceptions of individual sexual pleasures to create crimino-legal pro/prescriptions of sexuality. This Article will examine how criminal law marks same-sex desiring male bodies as abnormal and heterosexual male/female bodies as normal by comparing Brown with cases involving heterosexual bodies. In particular, it will explore the cases of R v. Donovan, n8 R v. Slingsby, n9 R v. Wilson n10 and R v. Emmett. n11

### **III. The Case of Same-Sex S/M: R v. Brown**

Brown, or the "Spanner" case as it is sometimes called, involved the prosecution and subsequent appeals of a group of sixteen same-sex desiring men who engaged in various sadomasochistic activities. n12 The prosecutions were initiated solely from police intervention. n13 The arrests resulted from a police investigation in the English city of Manchester in 1987 called "Operation Spanner." n14 The men used video cameras to record some of their activities. n15 These videotapes formed a significant component of the evidence. n16 Much of the initial hysteria surrounding the case stemmed from the police officers' incorrect assumptions that the activities were nonconsensual and involved torture and murder. n17 [\*35] However, no permanent injury was suffered by any of those involved. n18 The police nevertheless decided to charge those involved, after viewing the tapes and conducting a costly investigation proving no one had died. n19

The appellants received various sentences. n20 Joseph Brown received a sentence of two years and nine months for five counts of assault occasioning actual bodily harm and one count of aiding and abetting assault occasioning actual bodily harm. n21 Colin Laskey was sentenced to four years and six months imprisonment for aiding and abetting keeping a disorderly house, n22 four counts of assault occasioning actual bodily harm, two counts of aiding and abetting assault occasioning actual bodily harm, three counts of publishing an obscene article and unlawful wounding. n23 Roland Jaggard received a three-year sentence for aiding and abetting unlawful wounding, two counts of assault occasioning actual bodily harm, one count of aiding and abetting assault occasioning actual bodily harm and one count of unlawful wounding. n24 Saxon Lucas was sentenced to three years for unlawful wounding and assault occasioning actual bodily harm. n25 Christopher Carter was sentenced to twelve months, suspended for two years, for assault occasioning actual bodily harm and aiding and abetting assault occasioning actual bodily harm. n26

The men appealed their convictions and sentences on the grounds that "a person could not be guilty of assault occasioning actual bodily harm or wounding in respect of acts carried out in private with the consent of the victim." n27 The House of Lords appeal was lost on the grounds that a person may be culpable for certain "harmful" acts carried out in private even with the consent of the "victim." n28 In other words, the level of harm described in the case cannot be consented to, even though it occurred in private.

[\*36] In the appeal, the appellants were described as middle-aged men whose age positioned them against younger members who were described as "the victims ... some of whom were introduced to sadomasochism before they attained the age of 21." n29 The men were charged under § 20 (unlawful wounding) and § 47 (unlawful assault occasioning actual bodily harm) of the Offences Against the Persons Act 1861. n30

The appellants belonged to a group of sado-masochistic homosexuals who willingly participated in the commission of acts of violence against each other, for the sexual pleasure which it engendered in the giving and receiving of pain. The activities took place at a number of different locations, including rooms equipped as torture chambers at the homes of three of the appellants. n31

This summary of the case detailed the activities as consensual acts, which occurred in private and without permanent harm. n32 But, the judgments in the Brown cases imply that there were public risks of harm involved in homosexual s/m. n33 For the purpose of conviction, homosexual s/m was construed as a harmful activity. n34 The private activities of the men in the Brown case became a public harm for (passive) victims who needed to be policed by the criminal jus-

tice system. n35 This shifted the legal focus of s/m from consent to violation. The men were positioned as consenting ("willing participants" committing violence "against each other" and who "gave and received" pain) and abusive ("passive victims" who were at risk of "suffering" from the "commission" of violent acts). n36

The Court of Appeal judgment provided a detailed description of the acts, emphasising their extreme and exceptional nature, figuring the participants (specifically the defendants) as peculiar. n37 The court translated s/m as undesirable and something that should be restrained through punitive criminal justice. n38 Lord Lane suggested that he spoke [\*37] about the acts only to denounce their evilness. n39 "It is, unhappily, necessary to go into a little detail about the activities which resulted in the various counts being laid against these men." n40 He described many of the acts, including branding, whipping, genital torture, biting, and nailing genitals to a bench. n41 The purpose of his description was to uncover the hidden danger of homosexual s/m as a perilous sexuality lurking within society. These comments suggested that the gaze of criminal law was only fixed upon homosexual s/m to warn society about and exemplify this concealed surreptitious problem.

Brown made the private acts of s/m and same-sex desire a public statement about the legal limits of morality. n42 In doing so, it demonstrated the reach of law within the personal when the personal is Other. This was justified by the danger of HIV/AIDS and the HIV status of some of the defendants; in the House of Lords, for example, Lord Templeton noted that "Prosecuting counsel informed the trial judge against the protests of defence counsel, that although the appellants had not contracted [AIDS], two members of the group had died from [AIDS] and one other had contracted an [HIV] infection although not necessarily from the practices of the group." n43 The Law Lords made numerous references to AIDS, which their Lordships substituted for HIV. For example, Lord Jauncey made this statement:

*Wounds can easily become septic if not properly treated, the free flow of blood from a person who is [HIV] positive or who has [AIDS] can infect another and an inflicter who is carried away by sexual excitement or by drink or drugs could very easily inflict pain and injury beyond the level to which the receiver had consented.* n44

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

*Some sado-masochistic activity, under the powerful influence of the sexual instinct, will get out of hand and result in serious physical damage to the participants and that some activity will involve a danger of infection such as these particular exponents do not contemplate for themselves. When considering the danger of infection, with its inevitable threat of [\*38] [AIDS], I am not impressed by the argument that this threat can be discounted on the ground that, as long ago as 1967, Parliament, subject to conditions, legalised buggery, now a well-known vehicle for the transmission of [AIDS].* n45

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

Brown brought the gaze of criminal law into the hidden and the consensual. The symbolic limits of criminal law were not constrained by mutual and consensual desires or the private. The judgments in Brown suggest that the same-sex desiring male s/m body should be hidden (if not erased). Brown reached into the hidden and the personal to censure sexual transgression. Typically, s/m is hidden or invisible and only viewed by those who are doing it (esoteric exotericism). n46 The law made s/m hyper-visible and public to legally devalue and demonise it; the law did not understand the(ir) pleasure and therefore confused s/m with torture, murder, and HIV transmission.

#### **IV. S/M as a Private and Public Harm**

Socio-sexuality is heterogeneous and complex. Yet criminal case law, such as Brown, tries to conceal diversity by masking Other bodies (i.e., HIV-positive, same-sex desiring, s/m desiring) as pathological and deviant. In Brown, s/m between men was positioned as violent violence as well as dangerous to morality and public health; s/m between men was viewed as an external threat to an assumed healthy, homogenous society. n47 Marianne Giles notes judicial tensions between personal "harms" and public interest within the case. n48 She examines the premise of "public interest" which underlies crimino-legal definitions of illegality: "The basic issue which presents itself to the House of Lords, therefore, is the question of whether one looks to the public interest in order to legalise prima facie illegal behaviour (the paternalistic approach) or whether one uses public interest to criminalise potentially lawful [\*39] behaviour (the

civil libertarian approach)." n49 Giles says the concept of public interest is slippery and often defined through policy. n50 She also outlines that the foundations of the term "public" are bureaucratic and political, if not unstable and incomplete. n51 Criminality is formulated around contests of individual freedom and a theoretical notion of community welfare. n52 These formulations are based upon socially constructed "truths" about harm and morality, rather than "substantive criminology." n53

In Brown, sadomasochism was positioned as dangerous on multiple levels, through the multiplication and coordination of personal and public harms. n54 In other words, legal injuries are portrayed as conceptual harms which are reflexive, circular, and inconsistent. It is unclear exactly what was meant by the terms "personal" and "public" referred to in Brown. n55 The "personal" is a fraction of the "community" in the same way that the community is the conglomeration of "personal." Yet, the contest or the contrasts of these harms were staged upon the incompatibility of these two supposedly discrete categories, of individual/personal and community/public. n56

Perhaps there are no community and no personal interests at stake in the debate about the illegality of sadomasochistic sexuality, in the sense that sexuality is not a personal or public interest, but rather an incarnation of mutual desires (something in between personal and public). Can something that is part reification (both the actuality of s/m fantasy by the participants and the imagination of s/m by its detractors), somewhat transcendental, and performed with others, actually involve a contest of personal and community? S/m is not solely definable as personal, because there are various s/m "communities" within the "community," making s/m a heteroglossia within the public. n57 Sadomasochism may be regarded as a personal sexual preference, and [\*40] will in that sense be "personal" (or capable of being practiced in isolation). Yet, the crimino-legal dissection of this issue as one of individual liberty against the community interests is questionable. The concept of community and public, as it was utilised in Brown, is an abstraction of hegemony in which there are dominant community values. The individual (personal) is the embodiment of the transgression of these values. However, there is no singular individual, rather many individuals with multiple and diverse values and sexualities. n58 There is also not a coherent community, but fragmented and heterogeneous communities. Within criminal law, same-sex desiring male s/m appeared as outsiders. Yet, the possibility of s/m participants represents the heterogeneity of society.

The case marginalised people who threatened the public good with their own desires. It also negated or denied agency between s/m partners. A speculated and personified "public" was created. This public had interests, that was inherently good. But most important to this judicial argument was the idea that the public could be harmed. Even though sadomasochism should essentially be a liberty between sexual participants, the question of consent was made ancillary to public interests which are afforded more value and rights. "Their Lordships' attitude is that society has a right to protect itself against a cult of violence, and such a right takes precedence over individuals' freedom of action." n59

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

## **V. S/M and Consent**

Within criminal law, consent is seen as irrelevant to any injury that is nonpermanent, but is more than "transient and trifling." n60 The [\*41] exceptions to this rule include such activities as reasonable surgery, ritual circumcision, tattooing, body piercing, organised sports, parental chastisement, dangerous exhibitions and bravado, rough and undisciplined horseplay, and religious flagellation. n61

The court in Brown marginalised consent. n62 The legal defence of consent could have limited the appellants' culpability by defining s/m as a lawful activity. According to this view, s/m is still posited as harmful, but given that the participants consented to the harm, it then becomes a lawful harm, similar to boxing. n63 If criminal law deems causing harm prima facie unlawful, then the argument in defence of the appellants in Brown should have questioned whether sadomasochism was an exception to this rule based on the consensual (and victimless) nature of s/m sexuality. n64

In Brown, the majority marginalised consent, n65 although the minority indicated that consent was an important reason why the harmful acts were not unlawful. n66 By depicting the activities in Brown as assaults, the issues of liberty, consensuality, sexuality, and culpability for harm were relegated as policy issues, rather than issues for lawmaking. By designating s/m as an assault, the courts bypassed the issue of consent (or lack thereof).

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

*In principle there is a difference between violence which is incidental and violence which is inflicted for the indulgence of cruelty. The violence of [sadomasochistic] encounters involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the [\*42] participants and unpredictably dangerous. I am not prepared to invent a defense of consent for [sadomasochistic] encounters which breed and glorify cruelty and result in offences underß47 and 20 of the [1861 Act]. n67*

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

Consensual sexuality (between men) became a form of (sexual) assault because of the erosion of sexuality and consent. Furthermore, as will be discussed below, s/m in Brown was legally positioned as Other than sexuality because of the lack of vaginal penetration. In Brown, s/m between men was a violation of innocence through the appearance of (passive) victim bodies and the denial of (socio-sexual) consent. n68 It is legal testimony about the crimino-legal limits of sexual consent.

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

Criminal law continues to situate same-sex desires and transgressive sexualities as social pathologies and as antithetical to the reasonable man of law. n69 While sexual assault was an offence against the person (of the female or male body as a complainant), s/m was an offence against the person with the "person" being the reasonable man of law. n70 This textual man became a template for all bodies to become victims of s/m, projecting collective harms upon the individual. Same-sex and transgressive desires were contrasted against the crimino-legally-defined masculine and patriarchal, heterosexual, familial man (of law, and hence society). n71 Criminal judicial professionals, as the voice of criminal law, [\*43] condemned and denounced sexual bodies in conflict with theoretic notions of socio-sexual normativity.

## **VI. Criminal Law's Same-Sex S/M: Violent or Repulsive?**

In Brown, n72 the criminally constructed s/m body signaled homosexual bodies as weak or vulnerable, yet infectious and dangerous. These bodies were weak and vulnerable because they were susceptible vessels to the immorality of transgressive desire, a desire punishable by the "plague" of a "disease" (read: HIV) that most often supposes homosexuality as pathology. The s/m body was dangerous because it represented a diversion from social constructs of health and morality towards illness and hedonistic pleasures.

Transgressive bodies were also weak because they had succumbed to the dangerous pleasures of homosex and s/m. It was this vulnerability that was crimino-legally dangerous, rather than the pleasure of s/m itself. Transgression is the bridge between the normal and the abnormal, the crossing of the sanctioned by the possibility of its Other. Criminal law spoke through this transgressive bridge to announce and denounce the abnormal from the normal and to try to eliminate transgression. n73 Crimino-legally, to transgress is to realise the danger of moral weakness and to make corporeal the risk of s/m as socio-sexual pathology. Within the case, the translation of s/m participants as victims enabled a discursive translation of risk as harm. Harm was achieved through the projected bodies of s/m "victims" by suggesting that s/m posed a risk of victimisation of the "innocent" by the predatory perpetrators (of evil). n74 Criminal law was concerned with the protection of moral weakness and, in Brown, the law voiced its concern by labelling s/m as dangerous.

The problem for criminal law is this weakness - the possibility for Other desires to seep into normativity. Lord Lowry commented during the appeal: "[Sadomasochistic] homosexual activity cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society." n75 Lord Templeman reinforced this conception of heteronormativity: "It is some comfort at least to be told ... that "k" has now it seems settled into a normal

heterosexual relationship." n76 "K" was introduced to the reader as one of "the victims" [\*44] who "were youths." n77 He was given to the reader as a symbol of innocence, family values and (corrupted) youth, n78 and to create the perversity and immorality of the appellants.

Their Lordships separated the "group of homosexual sado-masochists" into two sub-groups, the victims and appellants, or the innocent and guilty. n79 The victims were (innocent) youths. The middle-aged (perverted) men who procured their innocent bodies were guilty offenders. n80 The middle-aged men were "responsible in part" n81 for the corruption of youth and the destruction of heteronorms. Socio-legal doctrines have a purpose in presenting sexually, legally and socially transgressive bodies as distasteful and repulsive, yet potent and appealing. Sexy sadists, luscious masochists and "healthy-looking" HIV positives are all too perilous, because instead of repelling these bodies, they entice and invite "the innocent." There is an implicit assumption within crimino-legal texts and especially within Brown, that s/m is a contest of power and im/morality, in which predatory sexual deviants recruit and convert the sexually innocent and moral. n82

The Brown decisions remain unchallenged despite an exhaustive appeal process. n83 This creates a continuing discursive and textual crimino-legal definition of same-sex s/m as a vulnerability of human weakness that must be controlled through crimino-legal sanctions. n84 This [\*45] textual crime of s/m between men is not so much in the harm to the self, but in the harm to others, in the sense that law places a greater emphasis on the contamination of the "community" by the exoteric and by unknowable, public health risks. n85 Criminality and dangerousness lie in the harm to others (as the self) and extends to imagined "innocent victims." These created and imagined crimino-legally constructed narratives invent offenders and victims. The HIV-positive and the sadists are offenders, while their partners, the masochists and those "at-risk" of infection, are victims. It is not so much a crime or transgression to be HIV-positive, but rather to "transmit" or to "infect" another body. Similarly, in Brown, the sadist is the criminal and the masochist is the victim. The same-sex desiring Other body represents the seepage of the Other (HIV-positive, same-sex desiring) into the self (imagined as HIV-negative, heterosexual victims).

## VII. Cult(ivating) Desires

Law interprets s/m as violence through normative crimino-legal and judicial narratives. Yet, some authors view the law as a form of violence. Leslie Moran applies Rene Girard's description of violence and sacrifice to Brown. n86 Moran says that within society there is a duality of violence (violent illegitimacy): violence that presents in society (illegitimate or illegitimised violence) that must be prevented and controlled by society (legitimate and legitimised violence). n87 By impinging on people's rights, criminal justice occupies a position of legitimised violence. Moran's argument centres on the idea that social violence (such as s/m within Brown) may be positioned as a contagious harm at risk of escalation. The sovereign, authorized, and codified violence of law must control this proposed unrestrained harm. From the position of criminal justice, the violence of law has a supposed inoculating social function. n88

What is problematic about many critiques of Brown, such as Moran's, is the construction of the binaries of good/bad and illegitimate/legitimate violence. n89 These critiques define s/m as violent, reinforcing crimino-legal definitions of s/m as bad or illegitimate violence. These concepts, however, are more complex than a contest of [\*46] authority and power. While there is a presence of polarised prescriptions/proscriptions of sexuality and socially acceptable violence within the criminal legal texts, it is important not to reproduce these absolutes to reinforce binary constructions of socio-sexuality. The dynamics and intricacies of these concepts are anything but oppositional. n90

Destabilizing socio-legal meanings is important for critical legal analysis of Brown. For example, the application of violence to homosexual s/m produced a consensual sexual interaction as a type of sexual violence and violation. S/m is known in law, and to a lesser extent by society, as a type of sexual violence. It is both sex (desirable) and violence (undesirable), an antithesis, perhaps, and even a paradox. n91 The paradox of Brown is the criminal punishment for (sexual) punishment as pleasure.

*They were parodying punishment and torture. They were doing to each other for pleasure what the criminal courts had formerly done in order to manifest the authority of law. If there is to be humiliation and submission, let it be done in the pillory, in public-in order that it serve the law's purposes; if corporeal injury be inflicted such that blood is shed, let that be on the streets at the "cart's tail" so that it may invoke terror rather than sensual exhilaration. For if it is possible to derive pleasure from pain, which the law has assumed people wish at all costs to avoid, what is left for the law to use? The only legitimate dominant/submissive relationship is that which exists between the law and the legal subject. n92*

Matthew Weait highlights the interplays and subversions of pleasure and pain within law and society, especially as contained in Brown. He reveals the diversity of pleasures within society and deflates the theory of criminal law as a totalising policing agent or as a legitimate force beyond rebellion. n93 The law does not have a monopoly over the body's experiences of pain, pleasure, sensuality and performance. Bodies play out many experiences with and without criminal law's influence. The very existence of s/m between men demonstrates the ability of the body to parody crimino-legal prescriptions about transgression. n94

[\*47] The activities in Brown, as a celebration of sadomasochistic desire, created a pleasurable and sensual interpretation of the punitive symbolism of the criminal law. Corporeal domination and regulation is not owned and governed by the state. S/m demonstrates this through socio-sexual roles of domination. Yet, the activities in Brown were used to condemn the practice of (governmental) subversion. There was an underlying intensity about transgression within the case, in such a way that the criminal law punished s/m bodies because the appellants made a mockery of punishment by making it sensual and pleasurable.

In Brown, transgression was represented, not just through sexuality, but through other concepts such as health. The bodies in Brown provided "safe" interactions of s/m, yet the case was defined around lines of HIV transmission, as discussed above. The use of metaphor by the courts highlights the inadequacies of criminal law to understand the complexity of HIV and same-sex desire. In Brown, s/m as a homosexual "violence" took on the sign (or metaphor) of death, illness, and danger, in addition to the abnormalities that these concepts represent; this was done by replacing s/m with the sign of HIV, as [a channel of pathology]. n95 HIV was often interchanged with the symbols of disease, death, and suffering. n96 The s/m male body signified HIV and symbolised blood as an infectious and contaminating agent. S/m was particularly dangerous for criminal law because of the assumed presence of blood and the esoteric of homosex. In the case, s/m was referred to as a "cult of violence" that society should be protected from. n97 S/m became a sign of something other than pleasure through their Lordships' voices. S/m was a sign of the exoteric and foreign through the metaphor of the "cult."

Blood was an important aspect of membership within the cult of (homosexual) s/m. Blood was interchangeable with (homosexual) s/m bodies. "Their" blood became an absolute, or perhaps pledge, of infection and membership, yet "their" blood was tainted. Blood was seen as a carrier of illness, as a vector of danger and disease. Homosexual bodies who engage in s/m become highly infectious bodies, perhaps even more so than "homosexual" bodies, n98 because these bodies are engaged in blood-spreading that is axiomatically infectious/infected: "bloodletting [\*48] and smearing of human blood produced excitement. There were obvious dangers of serious personal injury and blood infection." n99

HIV was seen as an (absolute) outcome of s/m even though none of the participants contracted HIV during the encounters contained in the case. n100 The discourse of Brown overlooked the probability of these events as "safe" and the HIV-avoidance-knowledge and skills of those s/m practitioners. If the possibility of HIV infection was so high, as suggested by this quote, then maybe it was the safety of the activities and expertise of the participants that precluded/prevented infection. Nevertheless, the bodies in Brown were presented as distasteful and risky, not as experienced practitioners, despite their age and their implied history within s/m culture. n101

The participants in Brown were represented as lacking knowledge, rather than as having specific knowledge and skills about HIV avoidance and risk minimisation, in favour of creating deviant, repellent, corrupt, perverted, predatory, infectious and dangerous bodies. n102 Lord Lowry made this assessment of the appellants: "... one cannot overlook the physical danger to those who may engage in sado-masochism ... it is idle for the appellants to claim they are educated exponents of a "civilised cruelty." n103 Before the court, the appellants were dangerous to themselves and others and foolishly ignorant of (that) danger, increasing their irresponsibility and threat.

Following the case, same-sex s/m between men acquired specific meanings within crimino-legal discourse. These meanings positioned s/m between men as a metaphor of many things including danger, HIV, blood, violence, illness, deviance, pain and social pathology, but s/m is not the absolute of these metaphors. For those who engage in s/m, it is also a metaphor of pleasure, desire, sexual identity, intimacy, sexual safety, "safe(r)-sex," and trust. This was problematic for criminal law. S/m appeared within a simulacrum of the (healthy) self. n104 The (crimino-legally) undesirable space of s/m (as a potential site of HIV transmission) potentially had the visage of the desirable. Brown hinted, while simultaneously denying, that the self may be lured into s/m. The case had the dual legal function of acknowledging s/m only to condemn it. [\*49] Criminal law has a different socio-legal discursive role than sexual discursivity, which is to separate and diffuse the consensual bodies as innocent, vulnerable victims of the transgression that is (perverse) pleasure.

## VIII. Straight-Acting Gaze: The Gay and the Straight of S/m Case Law

In many ways, the construction of victim and offender within Brown was specific to the same-sexuality of the defendants. The legal proscription of homosexual s/m is apparent when we consider that the defendants unsuccessfully challenged those charges to the European Court of Human Rights. n105 This meant that there was considerable legal agreement that homosexual s/m was unlawful and crimino-legally dangerous. However, the classification of sadist same-sex desiring male bodies as offenders and masochistic male bodies as victims is incongruent with much of the case law dealing with heterosexual s/m. R v. Donovan, n106 R v. Wilson, n107 and R v. Slingsby n108 were three cases which dealt with the issues of heterosexual s/m. All of these appeals were allowed, implying the lawfulness of (masculine heterosexual) s/m. Yet, s/m was crimino-legally defined as harmful when done by men to men (as in Brown). n109 There was another case, R v Emmett, n110 in which an appeal was dismissed based upon the legal principles of Brown. But the categorisation of that case with Brown was based upon the Otherness of the activities involved, as will be discussed below.

### A. Wilson

The dynamics of Wilson were different from Brown, but how the court defined s/m was also entirely different. n111 Wilson involved a husband using a hot knife to brand his initials on his wife's buttocks "at [her] instigation." n112 Mrs. Wilson's general practitioner made a complaint to the police after she observed the branding and some associated [\*50] scarring and bruising during a medical examination. n113 Wilson was charged with assault occasioning bodily harm contrary to § 47 of the Offences Against the Person Act 1861. However, the conviction was quashed on appeal. n114 At the trial, the judge said that he was bound to validate the illegality of s/m under § 47 of the Offences Against the Person Act 1861. n115 However, the appeal was allowed because the actions in Wilson fell into one of the recognised exceptions in which an individual can consent to assault. n116 This was because branding was comparable to tattooing. n117

The decision deflected the gaze of law away from the (matrimonial/heteronormative) private. Agency was reversed from the defendant to the complainant, denying culpability of the sadist, heterosexual, male body. Instead, the "victim" was seen to cause the acts. "Mrs. Wilson not only consented to that which the appellant did, she instigated it." n118 This erased the discursive s/m harm implied in the trial via the Brown judgments. In the appeal, this harm was replaced with accountability and agency on behalf of the "so-called victim." n119 This type of s/m behaviour was rendered legal because the court saw the heterosexual branding (of a woman by a man) as fashionable and normal. The case naturalised and conventionalised men branding women, especially sexual, "private" parts of their bodies.

There was no aggressive intent on the part of the appellant. On the contrary, far from wishing to cause injury to his wife, the appellant's desire was to assist her in what she regarded as the acquisition of a desirable piece of personal adornment, perhaps in this day and age no less understandable than the piercing of nostrils or even tongues for the purposes of inserting decorative jewellery. n120

Mr Wilson was made passive, n121 subject to his wife's fantasy. The mens rea of the crime was located within her mind. He was only assisting his wife's desire and fantasy. Comparing the brand with the wearing of [\*51] jewelry suggested she owned the act. n122 This had the effect of locating, not just agency, but any pathology or deviancy within her body/mind. Although such statements suggest that the court accepted branding as a social practice, they also projected any criticism and condemnation of the practice onto the complainant. Mrs. Wilson ("the so-called victim") was then a victim of her own perverse desire, in a similar way to the appellants in Brown. n123

### B. Donovan

This configuration of criminality and victimology was also seen in Donovan where the behaviour of the "victim" questioned (her non) consent and (his) culpability. n124 In Donovan, the defendant beat a seventeen year-old-girl with a cane for sexual gratification. n125 Afterwards, the victim reported Donovan to the police. n126 He was arrested and charged with indecent and common assault. n127 His conviction was quashed on appeal because the jury had not been adequately directed regarding the issue of consent. n128

The court ruled that consent was not a defence where an act is likely or intended to cause bodily harm. n129 However, the question of whether the defendant's act was likely or intended to cause bodily harm to the victim was not presented to the jury. n130 Therefore, the jury was incorrectly instructed on the issue of consent as it applied to the case. n131 On that basis, the Appeal Court deemed that the defendant's conviction had to be quashed. n132 This was due to an absence of proof of the victim's consent and the misdirection on whether the above definition of consent applied. n133

The technical legal aspects which enabled Donovan's acquittal make it difficult to make a critical comparison with Brown. However, I wish to [\*52] address some discursive legal differences between the two judgments. Several com-



ments in Donovan reinforced conceptualisations of heteronormativity. The age of the female complainant was not used in the same way as it was in Brown where youth made the homosexual, male complainants vulnerable and in need of crimino-legal protection. The complainant, Norah Harrison, was referred to as "a girl" and her age seemed to be part of her identity, which was used to identify her several times in the case. n134 In the eyes of the law, Norah Harrison was neither vulnerable nor weak, and ultimately she was not seen as a victim.

There are technical legal differences between the two cases which dislocate male same-sex desiring and female bodies. The complainant's consent was deemed to be an important aspect of the judgment, with the judicial failure to consider consent enabling Donovan's acquittal. n135 Yet, the issue of consent in Brown was deemed to be legally irrelevant. n136 The issue of consent was central to Donovan, but was marginalised in Brown. The issues of gender, sexuality and consensuality have another layer considering it was the complainant in Donovan who instigated the charges. n137 Her decision to seek criminal justice questioned, if not denied, her consent. n138 Alternatively, consent was questioned in Brown even though none of the charges were brought by the complainants. However, this did not influence how the judgments were handled. This implies that female nonconsent is questionable, while homosexual male consent is impossible.

### **C. Slingsby**

To demonstrate the inconsistencies between the crimino-legal treatment of consensual sexualities, another comparison should be made between Brown and Slingsby. n139 In Slingsby, the female victim died as a result of what was said to be consensual vaginal and anal fisting, which the defendant performed whilst he was wearing a signet ring. n140 This caused internal injuries to the victim, leading to septicaemia. n141 The defendant was charged with constructive manslaughter by an unlawful [\*53] and dangerous act. n142 His conviction was quashed on appeal because the act of consensual sexual activity (between a man and woman) was not in itself unlawful. n143 The Court of Appeal ruled that this was "merely vigorous sexual activity" and that neither party considered any actual bodily harm. n144 Essentially, the law defined this as an accidental death. The appellant was found not guilty of manslaughter because harm was not deliberately intended. n145 Slingsby was unlike Brown because of a lack of legally defined intentional injury or harm. Further to this, Slingsby was acquitted because the defence of consent could be applied because the death was the result of sex and not assault. n146

In Slingsby, n147 the acts of vaginal and anal penetration would have constituted indecent assault without the consent of the (female) victim and therefore the rules in Brown and the Offences Against the Person Act 1861 would have applied. However, because the court accepted the victim had consented (or that the defendant honestly believed she had), these activities were seen as lawful acts of sexual penetration governed by the Sexual Offences Act 2003. n148 In Slingsby, the actual presence of blood and death was not seen as illegal because the death occurred within what was technically classified as sex (heterosexual vaginal penetration).

In Brown, the activities were deemed to be illegal because they were not seen as sex, but as unusual and alarming assaults. n149 As a heterosexual male, Slingsby was entitled to inflict any degree of harm, up to and including death, upon the (female) body of his partner because they were engaged in a lawful act of sexual penetration. The starting [\*54] points for the prosecution in Slingsby and Brown were entirely different because the law defined the activities as entirely different. n150 The nonsexual grouping together of men in Brown was seen, from the outset, as violent and illegal, despite the lack of permanent, actual, bodily injury. Yet, the death in Slingsby was explained away because heterosexuality was lawful from the outset to the outcome, even if that outcome was death. n151 It would seem that death is a crimino-legally acceptable risk within heterosex, but homosexual s/m is so risky that it is illegal.

### **D. Emmett**

Another case of heterosexual s/m, Emmett, n152 further explains how legal technicalities can desexualise s/m to create assault. The decision in Brown was used in Emmett to dismiss an appeal against two charges of assault occasioning actual bodily harm. n153 The appellant was charged after his partner presented to her general practitioner with several injuries sustained during s/m activity. n154 The complainant suffered haemorrhages in both eyes and bruising around her neck after suffocating when a plastic bag was tied around her head while the defendant performed oral sex on her. n155 On another occasion, the complainant suffered burns to her chest when the defendant poured and ignited lighter fluid on her chest. n156 The doctor alerted the police and the defendant was subsequently charged under section 47 of the Offences Against the Person Act 1861. n157 He received a sentence of nine months imprisonment to be served consecutively, suspended for two years. n158

Unlike the above heterosexual s/m cases, the incidents of Emmett were held to constitute assault because of their similarity to Brown. n159 It may be assumed that the court viewed Emmett as similar to Brown because the complainant's

injuries were not sustained during the course of penetrative vaginal sex. The law positioned what the defendant and [\*55] victim were doing as something Other than sex because she was not being vaginally and/or anally heterosexually penetrated. The activities in Emmett were seen as assaults in which the defence of consent could not be legally applied.

### **IX. Conclusion: "Safety," Gender and the (Dis)Appearance of Blood**

In Brown, s/m appeared as nonsexual assaults between men, insinuating that men were perpetrators and victims of socio-sexual pathology and deviance. Within this domain, consent was denied because the male complainants were victims, not just of criminal assault, but of homosexuality. Brown sent a very clear message that masculinity was violated by s/m between men, perhaps because of the lack of female bodies and their penetration by men. Yet in most of the cases of s/m between men and women, masculine heterosexual bodies were allowed to be violently sexual (i.e., sadistic). n160 Within heterosexual s/m case law, female bodies (who were vaginally penetrated) diminished any indication of pathology, deviance or criminality. Consent was interjected onto these female bodies to remove culpability because of heterosexist desires and entitlement to the female body.

The female bodies in Donovan and Slingsby remained always already penetrated/penetrable and unharmed (perhaps whole). Yet, the bodies in Brown were sexually impenetrable and legally scrutinised. Discursively, blood flowed from the bodies in Brown. There was a presence of moral and health dangers. Blood did not appear at all in Donovan or Wilson. The(ir) skin was left discursively intact and injury (personal or public) was not envisaged. There were no victims, as defined by criminal law, in Donovan, Slingsby and Wilson. Instead, the acts were seen as normal, safe, ordinary and private. "The act complained of is not illegal in itself and the injuries are only the marks of a cane which would appear in administering ordinary corporeal punishment." n161

Criminality within Donovan, Slingsby, and Wilson was also limited by locating the actions as private and consensual. Yet, something else happened in the heterosexual cases, as illustrated in the above quote. The submissive/masochist female body as a possible site of pleasure and desire became a site of legitimised, naturalised, and normalised [\*56] punishment. There was an implication that the female body was subject to and an object of male punishment, rather than a participant in a pleasurable and sensual activity. Perhaps men could not consent to sadomasochism because masculine heterosexual bodies do not need or want to be disciplined (and female bodies could/should be).

It is difficult to overlook the differences in how the criminal law handles s/m. The lack of prosecution for the bulk of heterosexual s/m, despite more serious injuries than in the homosexual s/m case of Brown, suggests a heterosexist character of law. This is also evident in the sentences imposed in Brown and Emmett. Emmett received a suspended sentence, while the sentences handed down in Brown ranged from two years and nine months to four years and six months. n162 It is difficult to provide a coherent reading of s/m case law given the unique judicial treatment of each case. As mentioned above, one of the central arguments in Brown was that the activities were not conducive to family life. There were also implied HIV transmission risks in Brown, yet not in any of the heterosexual cases. Seemingly, criminal law heightened HIV risks amongst same-sex desiring men and exculpated these same risks amongst heterosexual bodies. Perhaps the most concerning aspect of the case law is the categorisation of s/m. In Slingsby, the sexual acts were deadly and noncriminal. Yet, the activities in Brown and Emmett were positioned as nonsexual acts of assault, despite the complainants not seeking charges and the lack of death. These cases highlight the pliability of consent within sex and within s/m, and the reach of the law within sexuality (i.e., because the charges were brought by the state rather than the complainants).

Criminal case law also contains explicit and implicit judicial condemnations of "homosexual sadomasochism." The crime of same-sex male s/m is a metaphor of immorality and hence criminality. n163 Giles argues that the application of violence or harm to the issue of consensual sexuality stretches the acceptable bounds of general deterrence rhetoric within crimino-legal discourse. n164 She highlights the circularity and paradoxes posed within Brown, in which criminal law erased pleasure and applied harm in order to remove consent. Sadomasochism between men is legally risky through imagined HIV/AIDS risks. Brown is very much a hypothetical, it speaks about the "possible," rather than the "actual." It tells a crimino-legal tale about "what might have happened" [\*57] specifically in this case (although it did not) and what might happen more generally in future cases." n165

Brown relied on the deletion of consent because s/m between men was deemed as harmful. Debate about public harm and consensual sex was central to Brown. The main issue in the House of Lords appeal was supposed to be about whether consent to sadomasochism gave that practice lawfulness (i.e., whether consent could be used as a criminal legal defence). Instead, the majority of the Lords took the view that all causing of harm is *prima facie* unlawful, stating that sadomasochism (between men) was unlawful because of a cult of violence and the risk/harm of HIV. n166

So, it is the particular pleasure of homosexual s/m which is socio-legally disturbing. Helen Power says "the 'real' crime of Brown and the others was first, that they were gay and, secondly, that they enjoyed what they were doing." n167 She gives numerous examples that display how the validity of consent to situations where harm may occur is arbitrarily defined and conceived within case law and legislation. n168 Effectively, sadomasochism was made unlawful through the Lords' prescription and proscription of cultural and sexual norms.

Consent was played out through criminal narratives of sadomasochism and same-sex desire, narratives that dislodge consensuality, and insert fictions of dangerousness. This creates a paradox in which the pleasure is the danger, yet the danger is the pleasure. The danger is that sadomasochism may be pleasurable. The locus of this pleasure and danger as Other, outside of heteronormative sexuality, dislocates crimino-legal consent. The legal logic seems to be that an individual can consent to penetrative heterosex because that is a lawful activity. n169 But, an individual cannot consent to sadomasochism (where heterosexual penetration does not occur) because it may be defined as harmful and therefore *prima facie* unlawful. n170 This harm lies in a supposed risk of HIV and the fear of the Other, which is Other desire.

Criminal law affords legitimacy to certain types of "violence," while punishing consensual pleasures. This process is very much gendered and sexualised. Sexuality which more closely fits a normative, traditional [\*58] vision of sex (as men penetrating women) is less likely to be deemed as criminal. Therefore, (transgressive) desires are written as something other than sexuality and vulnerable to prosecution. The moral dangerousness of sexual Otherness represents western society's idealisation of procreative (hetero)sexuality. The role of the family occupies central legal narratives upon which criminal justice is based and administered. The sexually exotic and esoteric (such as sadomasochistic sexualities, same-sex desire) represent a supposed danger to the integrity of this constructed morality (i.e., heteronormativity).

When consensual socio-sexuality is framed as nonsexual and as assault, a contest arises between the collective (public interests) and the Other (individual). Transgressive pleasureseekers are positioned as individual, or as the minority. n171 A question then arises about whether consent may be invalidated through the potential for "public harm," where the action or activity is portrayed as a violation of public interests. n172 Contesting public good against private or semi-private pleasures shifts the legal burdens of sexual consent from lawfulness to unlawfulness. n173 In other words, the criminal justice system analyses sex from a position of criminality rather than legality.

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

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

[\*59] Throughout society, illicit desires are presented as infectious, contagious and harmful, yet presumably desirable. n174 The symbiosis of the illegal and the abnormal are intended to produce symbolic and paradigmatic deterrent messages. Transgressive desires are so abhorrent and repulsive that even if they do appeal this is an illegitimate and illegal appeal. The abnormal appears with the illegal to refute the desirability of transgressive pleasures.

Sex is a space that separates and binds bodies. The pleasures and intimacies of sexuality bind the s/m "offender" and the "victim." However, sex creates a boundary which divides Other sexual bodies as immoral and/or illegal. Sex implicates and demarcates these bodies as risky (to each other and to a supposed socio-sexual norm). Moments of sexual pleasure become socially dangerous, accumulative pleasures (homosexual, transgressive, HIV), which become solid and condensing tales of criminally sexual relationships. n175 S/m represents this paradox through complainant-less sex crimes where consent/pleasure/desire/ mutuality are removed, interpolating harm. The dangerousness of sadomasochistic (homosexual) bodies is in their imagined HIV risk, who may be harmful and a risk to the innocent purity of sexual health and (hetero)sexual norms. That which makes socio-sexual bodies dangerous is that which makes them legally visible, (the gaze of law upon) sex. Bodies proximal and touching, caressing and copulating are subject to legal review.

Brown created a dual notion of injury in homosexual s/m, whereby the masochists and also the community could be victims. S/m danger presents as an abstract danger. All s/m participants could occupy the identity of victims or offenders at some point, although Brown marked specific bodies as offenders. All bodies are vulnerable within the narrative of s/m crime; bodies become victims of the destructive appeal of s/m. However, it is the sadomasochist identity who is

most criminal, especially when attached to the HIV sero-positive Other sexual body. This suggests that this body may become absolved by removing (somasochist or Other sexual) desire.

#### NOTES:

n1. Other is a term that is used to indicate a difference from the self. Within discourses of sexuality, the Other is same-sex, bi-sex and queer desiring, where heterosexual bodies imply the self. It also implies social exclusion and those who may be viewed as outsiders. The term is used within philosophy, especially by theorists such as Hegel, Husserl, Sartre, Lacan, Levinas, Foucault, and Derrida.

n2. For a discussion of social and legal constructions of heteronormativity, see Derek Dalton, *Genealogy of the Australian Homocriminal Subject: A Study of Two Explanatory Models of Deviance*, 16 *L. Griffith L. Rev.* 83, 83-104 (2007). See also Phil Hubbard, *Sex Zones: Intimacy, Citizenship and Public Space*, 4 *Sexualities* 51, 51-67 (2001).

n3. [1994] 1 A.C. 212; [1992] *Q.B.* 491 (Eng.).

n4. *Id.*

n5. Within socio-legality, 'homosexuality' is a discrete and absolute category of sex as opposed to the normative and naturalised category of heterosexuality. "Sex" as presented through crimino-legal doctrine has a more limited space. Within criminal law, sex is primarily heterosex. Sex is seen as insertive phallic/anal sex when it is presented as something other than heterosex. See Leslie Moran, *The Homosexuality of Law* 66-90 (1996).

n6. The issue of consent can be confusing within s/m, because although the exchange involves activities which most people would describe as painful and harmful, the purpose and receipt of these activities is associated with desire and pleasure. See, e.g., Darren Langdridge, *Safe, Sane and Consensual: Contemporary Perspectives on Sadomasochism* 89-90 (Langdridge & Barker eds., 2008).

n7. See Moran, *supra* note 5.

n8. [1934] 2 *K.B.* 498.

n9. [1995] *Crim. L.R.* 570.

n10. [1997] *Q.B.* 47.

n11. [1999] *EWCA (Crim.)* 1710.

n12. [1994] 1 A.C. 212; [1992] *Q.B.* 491.

n13. *Brown*, [1992] *Q.B.* 491.

n14. *Id.*

n15. *Id.* at 495.

n16. *Id.*

n17. For more information about Operation Spanner and the subsequent trials, see *The History of the Case*, The Spanner Trust, <http://www.spannertrust.org/documents/spannerhistory.asp#thecase> (last visited Jan. 9, 2011); see also *Spanner Timeline*, Dano Barusdale, <http://www.barnsdle.demon.co.uk/span/sp-timel.html> (last visited Jan. 9, 2011); *Spannerman*, *BME News*, [http://www.news.bmezone.com/wp-content/uploads/2008/09/pubring/people/A101\\_01/spanner/index.html](http://www.news.bmezone.com/wp-content/uploads/2008/09/pubring/people/A101_01/spanner/index.html) (last visited Jan. 9, 2011).

n18. *R v. Brown*, [1992] *Q.B.* 491, 497.

n19. David Bell, *Pleasure and Danger: The Paradoxical Spaces of Sexual Citizenship*, 14 *Pol. Geog.* 139, 144-45 (1995).

n20. *Brown*, [1992] *Q.B.* at 494.

n21. *Id.*

n22. *Id.* (defining disorderly house as a brothel or place of prostitution).

n23. *Id.*

n24. *Id.*

n25. *Brown*, [1992] *Q.B.* at 494.

n26. *Id.*

n27. *R v. Brown & Other Appeals*, [1992] 2 *All E.R.* 552 (CA) 552.

n28. *R v. Brown*, [1994] 1 A.C. 212, 256.

n29. *Id.* at 235.

n30. *R v. Brown & Other Appeals*, [1992] 2 *ALL E.R.* 552 (CA) 552.

n31. *Id.*

n32. *Id.*

n33. See Matthew Weait, Criminal Law and the Sexual Transmission of HIV: *R v. Dica*, 68 *Mod. L. Rev.* 121, 125 (2005).

n34. *Brown*, [1992] *Q.B.* 491.

n35. The term "private" is highly problematic, especially in relation to *R v. Brown*. For more discussion of the issue of legal intervention in private spheres, see Matthew Weait, Harm, Consent and the Limits of Privacy, *Feminist L. Stud.* 97, 97-122 (2005).

n36. See *R. v. Brown*, [1994] 1 A.C. 212 (outlining the terms of the judgment).

n37. See *R v. Brown*, [1992] *Q.B.* 491, 495-97 (describing the counts involved in the case).

n38. *Id.*

n39. *Id.*

n40. *Id.* at 495.

n41. *Id.* at 495-97.

n42. *R v. Brown*, [1992] *Q.B.* 491.

n43. See *R v. Brown*, [1994] 1 A.C. at 236.

n44. *Id.* at 246.

n45. *Id.* at 255-56.

n46. As will be discussed below, the terms "public" and "private" are problematic. S/m sometimes occupies public and semi-public space through art, fashion, film, pornography, and sex clubs, however, the practice is largely a private pleasure.

n47. *Brown*, [1994] 1 A.C. at 272-73.

n48. Marianne Giles, *R v. Brown? Consensual Harm and the Public Interest*, 57 *Mod. L. Rev.* 101, 102 ?1994?.

n49. *Id.* at 105.

n50. *Id.* at 107.

n51. *Id.* at 105.

n52. *Id.*

n53. *Id.*

n54. *R v. Brown*, [1994] 1 A.C. at 272-73.

n55. *Id.* at 212-73.

n56. *Id.*

n57. Heteroglossia is a term coined by the Russian linguist Mikhail Bakhtin in his 1934 essay *Discourse in the Novel*. M.M. Bakhtin, *Discourse in the Novel*, in *The Dialogic Imagination: Four Essays by Mikhail Bakhtin* 259, 259-422 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., Univ. of Tex. Press 1981) (1934)). It is a term of reference to celebrate the multiplicity of voices and intra-dynamics and diversity of these voices within a space. *Id.* It is literally translated from the Russian word "raznorecie" which means multilingualness or different-speech-ness.

n58. See *id.*

n59. Lord Templeman specifically rejected the defence of consent in *Brown*, proposing that society should be afforded legal protection from what he referred to as a "cult of violence." For an analysis of Lord Templeman's statements, see Weait, *supra* note 35, at 106-09 (analysing Lord Templeman's statements).

n60. *R v. Brown*, [1994] 1 A.C. at 230.

n61. See Michael J. Allen, *Textbook on Criminal Law* 325 (9th ed. 2009).

n62. *Brown*, [1994] 1 A.C. at 212; see also Weait, *supra* note 35, at 109; *id.* at 106-09.

n63. *Id.*

n64. The term "victimless" is a contentious concept. I use the term here to refer to the lack of complainants. Victimless is the sense that the complaints were made by the police, rather than by individuals who were investigated in the *Spanner* case.

n65. *Brown*, [1994] 1 A.C. at 223.

n66. *Id.* at 231.

n67. *Id.* at 236.

n68. *Id.* at 235.

n69. This reasonable man of law represents the middle-class, Caucasian, heterosexual, patriarchal investments of western legal practices. This discursive character became the implicit test of legal reasoning and social tolerance. See generally *Law and the Postmodern Mind: Essays on Psychoanalysis and Jurisprudence* (Peter Goodrich & David Gray Carlson eds., 1998).

n70. What is troubling about the treatment of s/m in this way is that charges were brought against the defendants by the state/the police, bypassing the need for an individual to make an initial complaint. It extended the generality of crimes against the person.

n71. See generally Carl Stychin, *Law's Desire: Sexuality and the Limits of Justice* 120 (1995).

n72. *R v. Brown*, [1994] 1 A.C. 212, 234.

n73. In a sense, the criminal law attempts to destroy the bridge (or transgressive crossing from the normal to the abnormal) by encouraging sameness and eliminating Otherness.

n74. *Id.* at 236.

n75. *Id.* at 255.

n76. *Id.* at 235.

n77. *Id.*

n78. "K" was particularly poignant for this construction because he represented many things that were central to the imagination of the family as the idealised norm. He represented the bridge between the naiveties of being a child/young, but he also represented the start of adulthood and the prospect of becoming a new (heterosexual) family member, the replenishment of heteronormativity.

n79. *Brown*, [1994] 1 A.C. at 235.

n80. *Id.* at 235-36.

N81. *Id.* at 235.

n82. In her book about sadomasochism and desire, Linda Hart suggests that the space of lesbian s/m is particularly important in illustrating the affixation of power and morality within the fable of transgressive sexualities as predatory. Lesbian s/m is in disagreement with both "mainstream feminism" and with conservative rightwing politics because it attempts to separate and destabilise these two concepts. Lesbian s/m creates fusions by confusing supposed binaries, such as dominance/submission, power/weakness; lesbian s/m creates the "impossible real." See Linda Hart, *Between the Body and the Flesh* 49 (1998).

n83. The case was appealed to the Court of Appeal and the House of Lords in the United Kingdom as well as the European Court of Human Rights in Strasbourg. See Matthew Weait, *Sadomasochism and the Law*, in *Safe, Sane and Consensual: Contemporary Perspectives on Sadomasochism* 63, 76-78 (Darren Langdrige & Meg Barker eds., 2008).

n84. I want to acknowledge that even though the case is taught and read by queer and critical legal scholars, it still carries and transports conservative and heteronormative ideals in its outcome. The main point I wish to make here is that a suc-

cessful appeal would have given a more productive and louder message to support those who work to problematise the decisions in Brown.

n85. Criminal law tries to make risk known, visible and controllable by placing s/m as risky and criminal.

n86. See Leslie Moran, Violence and the Law: The Case of Sadomasochism, 4 Soc. & Leg. Stud. 225, 234-35 (1995).

n87. Id.

n88. Id. at 226.

n89. See Sangeetha Chandra-Shekeran, Comment, Theorising the Limits of the "Sadomasochistic Homosexual" Identity in R v. Brown, 21 *Melb. U. L. Rev.* 584, 589 (1997).

n90. Especially considering the case law regarding heterosexual s/m. Heterosexual s/m is examined below.

n91. However it is important to note that sex and violence may occupy many different associations other than the ones used here.

n92. Matthew Weait, *Fleshing It Out*, in *Law and the Senses: Sensational Jurisprudence* 169, 170 (Bentley Lionel & Flynn Leo eds., 1996).

n93. Id.

n94. And Brown makes possible the policing of desires, but it does not restrict, remove or eliminate the practice of these desires.

n95. Giles, *supra* note 48, at 107.

n96. For a more thorough discussion of how HIV has become a metaphor of death and disease, see Alison Young, *Imagining Crime: Textual Outlaws and Criminal Conversations* 175-77 (1996). See generally Susan Sontag, *Illness as Metaphor and AIDS and Its Metaphors* (2001).

n97. R v. Brown [1994] 1 A.C. 212, 237.

n98. I mean rather than those homosexual bodies who do not practice s/m.

n99. Brown, [1994] 1 A.C. at 236.

n100. Id.

n101. In Brown safe sex knowledge and pedagogies were erased from gay male bodies.

n102. Id.

n103. Id. at 255.

n104. "Simulacrum" is a theory developed by Jean Baudrillard to capture the blurring of reality and simulation in culture and society. See Jean Baudrillard, *Simulacra and Simulations*, in Jean Baudrillard, *Selected Writings* 166, 166-84 (Mark Poster ed., 1988).

n105. Lashey, Jaggard, and Brown v. U.K., 24 Eur. H.R. Rep. 39 (1997).

n106. [1934] 2 K.B. 498.

n107. [1997] Q.B. 47.

n108. [1995] *Crim. L.R.* 570.

n109. R v. Brown, [1994] 1 A.C. 212, 233.

n110. [1999] EWCA (Crim.) 1710 (unreported, Court of Appeal, Criminal Division, Rose LJ (VP), Wright, Kay JJ, 18 June 1999).

n111. For a brief discussion of the inconsistencies between heterosexual and homosexual case law, see Weait, *supra* note 35, at 125; Weait *supra* note 83, at 72-73, 78.

n112. [1997] Q.B. 47.

n113. Id.

n114. For a discussion of consent in Wilson, see Mitchell Davies, Comment, R v. Dica: Lessons in Practising Unsafe Sex, 68 J. of Crim. L. 498, 498, 502 (2004).

n115. *Wilson*, [1997] *Q.B.* at 47.

n116. It should be noted that the House of Lords specifically declined to make an exception for homosexual s/m. For a more thorough discussion of this point, see Stanley Christopher, *Sins and Passion*, 4 *Law & Critique* 207, 220-21 (1993).

n117. *Wilson* at 47.

n118. *Id.* at 50.

n119. *Id.* at 48.

n120. *Id.* at 50.

n121. Passivity was used to create victims within *Brown* and *Wilson*. Mr. *Wilson* may even be read as the victim.

n122. The judge made the analogy between branding and jewellery, something that is worn voluntarily and can be removed. *Id.*

n123. Another reading of the statement may be that a man branding his sign, name, or reference onto the body of a woman is seen as acceptable because of patriarchal ideology inferring "his" ownership of "her" body, see Weait, *supra* note 35, at 111-12.

n124. *R v. Donovan*, [1934] 2 *K.B.* 498, 503.

n125. *Id.* at 502.

n126. *Id.* at 503.

n127. *Id.* at 502.

n128. *Id.* at 498.

n129. *Id.*

n130. *Donovan*, [1924] 2 *K.B.* at 498.

n131. *Id.*

n132. *Id.*

n133. *Id.*

n134. *Id.* at 502-03.

n135. *Id.* at 498.

n136. [1934] 1 *A.C.* 212, 213.

n137. *Donovan*, [1994] 2 *K.B.* at 502.

n138. This issue was obliterated because of mishandling of consent by the trial judge. Harrison's consent may have been more adequately addressed if the law had been followed in the trial and an appeal allowed. *Id.* at 498.

n139. [1995] *Crim. L.R.* 570.

n140. *Id.*

n141. *Id.*

n142. This offence is also known as involuntary manslaughter. For more information about the definition of this particular type of manslaughter, see Reed Alan & Fitzpatrick Ben, *Criminal Law* 321-28 (2006).

n143. Another similar case is *R v. Boyea*, [1992] *Crim. L.R.* 574, where the complainant met the defendant at a bar and upon arriving at her residence he forced her into the house and indecently assaulted her. The defendant pinned the victim to her bed and forced his hand inside her vagina, resulting in internal and external vaginal injuries. *Id.* He was sentenced to six years imprisonment. *Id.* The judge was guided by the rule in *Donovan*, [1934] 2 *K.B.* 498, which states that an individual cannot consent to an injury that is nonpermanent, but more than "transient and trifling." It should be noted that the defendant and complainant were not involved in a relationship and the sex was nonconsensual, so it bears similar characteristics to the ideal conceptualisation of crime and is markedly different to the particulars of *Brown*, [1994] 1 *A.C.* 212. Yet, both cases are defined as assaults by the criminal law.

n144. See Spanner Trust Submission to the Home Office Review Board on Sexual Offences, The Spanner Trust, <http://www.spannertrust.org/documents/sexualoffencesreview> (last visited Jan. 18, 2011).



n145. [1995] *Crim. L.R.* 570, 571.

n146. *Id.*

n147. *Id.*

n148. Previous to this act, these offences were governed by the Sexual Offences Act 1956.

n149. [1994] 1 A.C. 121.

n150. Another important aspect of this case was the complainant was unable to speak about the incident because she was dead. Therefore, she was spoken for by the court. In *Brown* the complainants were alive and present, yet their voices were silenced and ignored.

n151. See also Paul Lehane, Assault, Consent and Body Art: A Review of the Law Relating To Assault and Consent in UK and the Practice of Body Art, 4 *J. of Env'tl. Health Res.* 41, 45-46 (2005).

n152. [1999] EWCA (Crim.) 1710.

n153. *Id.*

n154. *Id.*

n155. *Id.*

n156. *Id.*

n157. *Id.*

n158. *Id.*

n159. *Id.*

n160. I am not suggesting that any of these acts are violations or nonconsensual, rather that the criminal justice system imposes this concept within male same-sex s/m and then removes the same concept within heterosex s/m.

n161. *Donovan*, [1934] 2 *K.B.* at 500.

n162. It should be noted that Christopher Carter's sentence of twelve months was suspended.

n163. See Giles, *supra* note 48, at 102.

n164. *Id.* at 106-07.

n165. *Id.*

n166. *Id.*

n167. Helen Power, Consensual Sex, Disease and the Criminal Law, 60 *J. Crim. L.* 412, 420 (1996).

n168. *Id.*

n169. See, e.g., *R v. Clarence*, (1888) 22 Q.B.D.

n170. Power, *supra* note 167, at 416.

n171. *Id.* at 417; see also Alan Turner, Criminal Liability and AIDS, 7 *Auckland U. L. Rev.* 875, 881 (1995).

n172. Winifred Holland, HIV/AIDS and the Criminal Law, *Crim. L.Q.* 279, 287 (1994); see also Power, *supra* note 167, at 416-17; Turner, *supra* note 171, at 881.

n173. Giles, *supra* note 48, at 104.

n174. Moran, *supra* note 86, at 186-87. Lynda Hart gives some excellent examples of these reproductions within feminist and lesbian feminist discourses. She explains the unsettling nature of s/m relies on the contagion/possession panic, that s/m might "somehow seep into the fantasies of women who do not prefer it." Hart, *supra* note 82, at 47.

n175. Moran, *supra* note 86, at 238.