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**FIFTY SHADES OF OPPRESSION:
SADOMASOCHISM, FEMINISM, AND THE LAW**

Abstract

But, most of all, I love how open I feel towards him, no secrets, no walls, nothing. Just wide open, physically, mentally and emotionally spread, waiting for him, and willing to wait for however long he wants me to wait, because in being bound to wait for him, I find freedom, I am the songbird, with the door of my cage wide open, yet I stay, not because I have no where else to go, but because everything I could need and want has been found within Sir's ownership. I do not need Sir's chains to bind me, because he has something more to hold me, he has my happiness in the palm of his hand. ¹

Can sadomasochism (S/M) be reconciled with feminism? When pain is pleasure and humiliation is empowerment, how should the law respond? This article investigates S/M under the legal gaze, particularly the manner in which legal theory and legal practice have constructed female masochism. This article argues that the jurisprudence of S/M is formed by the perception of the "sexual other" as a threat to the normative sexual behavior the law has worked tirelessly to maintain. Historically, society – and by extension the law – has been intolerant of behavior that transgresses sexual norms. As Laura A. Rosenbury and Jennifer E. Rothman point out, the law "has long attempted to regulate sexual activity by channeling sex into various forms of state-supported intimacy."² Thus, the legal response has been to categorize masochists as "victims" and sadists as "criminals." This approach is misguided because it fails to account for the possibility of a pleasurable, healthy sexual experience through S/M.

The law has a role to protect women from violence. However, consensual and mutually pleasurable sexual practices should not be subject to arbitrary and oppressive value judgments. By denying the opportunity of empowerment through S/M, what does the law "say" about acceptable female sexuality? This article suggests that the current legal regulation of S/M perpetuates an idealized female sexuality, which does little to improve the female condition. The law cannot, and should not, determine what sex is acceptable. Ultimately, the law should endeavor to promote healthy, consensual, pleasurable sexual practices, or at the very least should not inhibit them.

¹ thegirlpashn, *He Has Me*, A Slave's Journey with her Owners (Oct. 8, 2013) <http://thegirlpashn.wordpress.com/2013/10/08/he-has-me/>.

² Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 809 (2010).

As it currently stands, the jurisprudence of S/M amounts to nothing more than oppressive and patriarchal gender regulation.

In Part I, this article analyzes common definitions of S/M, comparing practitioners' definitions with psychological ones. Readers must consider the definition that the law has accepted, and the reason that this definition may be detrimental for women. In Part II, the article discusses societal acceptance of S/M through an analysis of prominent sexual theorists and pop culture, wherein the article will reveal that society has been unwilling to welcome S/M as a viable sexual practice. This article argues that because S/M threatens the puritanical sexual hierarchy that directly oppresses women, society has worked to tame it. When S/M has been accepted, it has been in limited circumstances: heterosexual, monogamous, marital, and male-dominant/female-submissive. This restricted acceptance of S/M supports and furthers an unrealistic and normative female sexuality.

In Part III, this article investigates female sexual submission through the lens of important feminist legal theorists: Catherine MacKinnon, Katherine Franke, and Robin West. Here, the article intends to reach a meaningful conclusion as to the proper role of feminist legal theory concerning S/M. What values should feminist legal theorists promote? This article argues that while female masochism may have undesirable roots and influences, it must be embraced. Feminist legal theory must work to provide grounds for a woman to be simultaneously sexual and empowered. In Part IV, this article analyzes and critiques Cheryl Hanna's assertion that "sex is not a sport." Hanna maintains that the law should not permit consent as a defense in criminal cases where S/M is concerned. However, this author disagrees, and will provide an alternative approach in Part V. This article intends to provide a solution that protects women from violence, while promoting alternative sexual behaviors that are healthy and pleasurable.

I. DEFINITIONS

Merriam-Webster Dictionary defines sadomasochism as “the derivation of pleasure from the infliction of physical or mental pain, either on others or on oneself.”³ However, no one definition of S/M is all-inclusive. One S/M practitioner’s definition is “the knowing use of psychological dominance and submission, and/or physical bondage, and/or pain, and/or related practices in a safe, legal, and consensual manner in order for the participants to experience erotic arousal and/or personal growth.”⁴ Indeed, “safe, sane, and consensual” appears to be the creed of responsible S/M practice.⁵ According to the National Coalition for Sexual Freedom (NCSF), “safe” means “being knowledgeable about the techniques and safety concerns involved in what you are doing, and acting in accordance with that knowledge.”⁶ Many S/M communities host safety seminars.⁷ Sane is “knowing the difference between fantasy and reality,” and “distinguishes between mental illness and health.”⁸ The NCSF sees consent as the most important component in sadomasochistic sex.⁹ “Consent is the prime ingredient of SM ... One difference between violence and SM is consent. The same behaviors that might be crimes without consent are life-enhancing with consent.”¹⁰

Richard von Krafft-Ebing was one of the first psychologists to consider S/M.¹¹ Krafft-Ebing argued that male dominance and female submissiveness were entirely natural.¹² These tendencies were said to be rooted in evolution: man is naturally dominant so that he can “fight rival suitors and external threats and can procreate without a woman’s consent if necessary,” while

³ Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/sadomasochism> (last visited Oct. 15, 2013).

⁴ Kelly Egan, *Morality-Based Legislation is Alive and Well: Why the Law Permits Consent to Body Modification but Not Sadomasochistic Sex*, 70 ALB. L. REV. 1615, 1616 (2007).

⁵ National Coalition for Sexual Freedom, *SM is Safe, Sane, and Consensual*, <https://ncsfreedom.org/key-programs/education-outreach/what-is-sm/item/382-what-is-sm>, (last viewed Oct. 19, 2013).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ National Coalition for Sexual Freedom, *supra* note 5.

¹¹ Ummi Khan, *Putting a Dominatrix in Her Place: The Representation and Regulation of Female Dom/Male Sub Sexuality*, 21 CANADIAN JOURNAL OF WOMEN AND THE LAW, 143, 144 (2009).

¹² *Id.*

women possess an instinct of “voluntary subordination to man,” and “the final victory of man affords her intense and refined gratification.”¹³ On the other hand, Krafft-Ebing regarded male submissiveness and female dominance as a “pathology and sickness” that damages individuals and society.¹⁴ Similarly, Sigmund Freud believed S/M to be pathological and a perversion; masochism was common to women, while sadism was common to men – this is not surprising.¹⁵ These theories are outdated, and not credible today. Krafft-Ebing and Freud set a patriarchal, oppressive foundation for the psychological conceptions of S/M to follow.

Sadism and masochism are both psychologically defined as a paraphilia, which is “a condition in which a person’s sexual arousal and gratification depend on fantasizing about and engaging in sexual behavior that is atypical and extreme.”¹⁶ Paraphilias are distinguishable from simple sexual preferences in that paraphilias are characterized by psychological dependence to achieve sexual gratification.¹⁷ The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) classifies sexual sadism as the utilization of “sexual fantasies, urges, or behaviors involving the infliction of pain, suffering or humiliation to enhance or achieve sexual excitement.”¹⁸ Sexual masochists “use sexual fantasies, urges, or behaviors involving being beaten, humiliated, bound or tortured to enhance or achieve sexual excitement.”¹⁹ Despite these reprobating definitions, studies have shown that S/M practitioners may have better mental health.²⁰ This may be because sadomasochists are “more aware of and communicative about their sexual desires,” or because “they

¹³ Khan, *supra* note 11, at 144.

¹⁴ *Id.* at 145.

¹⁵ Anne M. Lowery, *From Freud to America: A Short History of Sadomasochism*, THE HARVARD CRIMSON, <http://www.thecrimson.com/article/2004/10/28/from-freud-to-america-a-short> (last updated Oct. 28, 2004).

¹⁶ *Paraphilias*, Psychology Today, <http://www.psychologytoday.com/conditions/paraphilias> (last updated July 20, 2009).

¹⁷ *Id.*

¹⁸ BehaveNet, *Sexual Sadism*, <http://behavenet.com/sexual-sadism> (last viewed Oct. 19, 2013).

¹⁹ BehaveNet, *Sexual Masochism*, <http://behavenet.com/sexual-masochism> (last viewed Oct. 19, 2013).

²⁰ Emma Gray, *BDSM Correlated With Better Mental Health, Says Study*, HUFFINGTON POST, http://www.huffingtonpost.com/2013/06/05/bdsm-better-mental-health-study_n_3390676.html (last visited Mar. 29, 2014)

have done some ‘hard psychological work’ to accept and live with sexual needs that are beyond the scope of what is often considered socially acceptable to discuss in the mainstream.”²¹

Clearly, these definitions of S/M are in tension with one another. While S/M practitioners emphasize the importance that all sexual activity be “safe, sane, and consensual,” psychologists view S/M as an “extreme,” and “atypical” practice, characterized by suffering, humiliation, and torture. Responsible individuals who engage in sadomasochistic sex emphasize the importance of mutual sexual pleasure and growth.²² Psychologists, on the other hand, seem to assume a lack of enjoyment by the masochist or submissive partner. It is important to consider which of the above definitions society and the law adopt to provide a foundation upon which S/M is commonly understood. . Society accepts psychology’s insistence that sadists and masochists suffer from a mental deficiency, rendering S/M practitioners worthy of pity or condemnation. As Part II will show, S/M is generally viewed as “bad sex;” therefore, when it is portrayed for the general population, it must be tamed. S/M is made more digestible when practitioners are white, heterosexual, monogamous, married, and of course, the female partner is submissive to the male partner. This all-too-common depiction of sadomasochistic relationships is dangerous to women. When S/M is forced into normative confines, sexual liberation through S/M becomes nearly impossible.

II. ACCEPTANCE OF SANDOMASOCHISM

In *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, Gayle Rubin argues “sex is always political.”²³ Conflict surrounding sexual behavior is often a vehicle for “displacing social anxieties, and discharging their attendant emotional intensity.”²⁴ Rubin asserts that Western

²¹ Gray, *supra* note 20.

²² *Best BDSM Practices*, NATIONAL COAL. FOR SEXUAL FREEDOM, <https://ncsfreedom.org/key-programs/education-outreach/what-is-sm/item/579-best-practices.html> (last visited Mar. 8, 2015).

²³ Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 143, 143 (Carol S. Vance ed., 1984).

²⁴ *Id.*

cultures view sex as a destructive force.²⁵ This is particularly true when sexual activity is outside of the confines of heterosexual, marital, and reproductive norms.²⁶ Rubin also identifies a Western “hierarchical system of sexual value,” by which sexual activity is assigned varying levels of acceptability.²⁷ S/M lies at the very bottom of this hierarchy.²⁸ Sadomasochists are one of “the most despised sexual castes.”²⁹ While certain behaviors, closer to the heterosexual, monogamous standard (for example, unmarried cohabitation, masturbation, and monogamous homosexuality), have received limited acceptance, others will almost always be damned by society.³⁰ “Promiscuous homosexuality, sadomasochism, fetishism, transsexuality . . . are still viewed as unmodulated horrors incapable of involving affection, love, free choice, kindness, or transcendence.”³¹

The effects of this sexual hierarchy infiltrate all areas of human life.³² “As sexual behaviors or occupations fall lower on the scale, the individuals who practice them are subjected to a presumption of mental illness, disreputability, criminality, restricted social and physical mobility, loss of institutional support, and economic sanctions.”³³ Particularly relevant is Rubin’s discussion of the intersection between sexual “deviancy” and psychiatry. Practitioners of “low-status” sex are labeled as suffering from a mental disease, or some other psychological defect.³⁴ “[P]sychological terms conflate difficulties of psycho-dynamic functioning with modes of erotic conduct. They equate sexual masochism with self-destructive personality patterns, sexual sadism with emotional aggression, and homoeroticism with immaturity.”³⁵

²⁵ Rubin, *supra* note 23, at 150.

²⁶ *Id.*

²⁷ *Id.* at 151.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 152.

³¹ Rubin, *supra* note 23 at 152-53.

³² *Id.* at 151.

³³ *Id.* at 151.

³⁴ *Id.* at 152.

³⁵ *Id.*

Rubin is correct. The sexual hierarchy she describes affects society, whether or not society is cognizant of this effect. Such a division between “good” and “bad” sex reaches the law as well. The law has long been employed to guide behavior towards popular, accepted norms. When our legal goal, at its core, is assimilation into pre-conceived “good” categories (sexual or otherwise), what does this mean for S/M? Sexual deviancy is problematic for the “American Dream.” That is, male supremacy depends on relationships that are heterosexual, monogamous, and within marriage. For example, a common belief exists that homosexuals cannot have children and non-monogamous couples cannot possibly be stable parents. And who wants to see the mother of their children bound to a St. Andrew’s cross? Our culture perpetuates these “good” and “bad” sex categories, and in some instances, attempts to reconcile them.

Ummni Khan, Associate Professor of Law at Carleton University, analyzes cultural acceptance of S/M through a cinematic lens.³⁶ In *A Woman’s Right to Be Spanked: Testing the Limits of Tolerance of SM in the Socio-Legal Imaginary*, Khan argues that “legal and cinematic discourse coordinate to constitute SM sexuality as suspect, but nonetheless provide conditions upon which it will be rendered acceptable.”³⁷ For example, the successful film *Secretary* is the embodiment of the terms S/M can be accepted upon.³⁸ Khan claims that the narrative of *Secretary* relies upon certain cultural hegemonies for this acceptance: “their whiteness, their attractiveness, their male-top/female-bottom gender dynamic, the mildness of their kinks, and their assimilation into the law of marriage.”³⁹ To use Rubin’s terms, *Secretary* attempts to reconcile a “bad” sexuality (S/M) with “good” sexuality (heterosexual, monogamous, and marital).⁴⁰ Khan shows a connection between the normativity proposed by *Secretary* and how the law has addressed consensual sadomasochistic activity. Khan posits that, “the judging community (whether audiences, critics, or legal decision-

³⁶ Ummni Khan, *A Woman’s Right to Be Spanked: Testing the Limits of Tolerance of SM in the Socio-Legal Imaginary*, 18 LAW & SEX. 79, 82 (2009).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 83.

⁴⁰ *Id.* at 81.

makers) is more lenient with SM that is positioned within heterosexual, marital, and monogamous confines.”⁴¹

Khan discusses the American divorce case of *Twyman v. Twyman* to illustrate her argument.⁴² In *Twyman*, the husband asked his wife to try bondage activities.⁴³ After attempting to please her husband, the wife confessed that she had been raped at knifepoint prior to their marriage, and did not want engage in bondage anymore because it frightened her.⁴⁴ Ten years later, the wife discovered her husband was having an affair.⁴⁵ He contended that her refusal to participate in bondage was to blame, and the two sought counseling.⁴⁶ Mrs. Twyman eventually filed for divorce, demanding damages for her husband’s conduct, alleging negligent infliction of emotional distress.⁴⁷ Comparing *Twyman* to Canadian cases where homosexual S/M is demonized, Khan argues that it “appears that the outrageousness of William’s conduct was located in the overlap between his interest in bondage, his pursuit of it outside of marriage, and his insistence that his wife participate in bondage in order to save their marriage.”⁴⁸ Stated differently, it appears the husband’s behavior was more egregious because he transcended monogamous and marital norms.

Ummni Khan engages in a second analysis of the acceptance of S/M in her article, *Putting a Dominatrix in Her Place: The Representation and Regulation of Female Dom/Male Sub Sexuality*.⁴⁹ Khan argues that the “gender prescription of male dominance and female submissiveness is sustained and imposed” by the law.⁵⁰ Khan examines the Canadian case *R v. Bedford*, aiming to show that “the conduct of the police and the judgments in this case reveal an anxiety regarding the gender trouble

⁴¹ Khan, *supra* note 36, at 82.

⁴² *Id.* at 112.

⁴³ *Twyman v. Twyman*, 790 S.W.2d 819, 820 (Tex. Ct. App. 1990).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Khan, *supra* note 36, at 115.

⁴⁹ Ummni Khan, *Putting a Dominatrix in Her Place: The Representation and Regulation of Female Dom/Male Sub Sexuality*, 21 CANADIAN JOURNAL OF WOMEN AND THE LAW, 143 (2009).

⁵⁰ *Id.*

stirred up by a female dominatrix establishment as well as indicate a jealous need to establish the justice systems (implicitly male) monopoly on meting out humiliation.”⁵¹ In *Bedford*, the defendant owned “Madame de Sade’s House of Erotica,” which provided many services to clients, including cross-dressing, bondage, and whipping.⁵² The clients at Madame de Sade’s House of Erotica were given certain restrictions: sexual intercourse, oral sex, and masturbation of a client by a mistress were not allowed on the premises.⁵³ Regardless, the defendant in *Bedford* was charged with keeping a “bawdy house,” which is essentially a brothel.⁵⁴

Most shocking about the facts in *Bedford* is the behavior of the male police officers, who engaged in “pushing and shoving the female dominants, demanding that the accused call them ‘master,’ asking for a demonstration of boot licking, and ridiculing the sadomasochistic props and clothes,” and forced the female dominants to participate in an unnecessary strip search.⁵⁵

According to Khan, each alleged incident can be read as a moment of gender regulation.⁵⁶

By pushing and shoving the female dominants, the police assert their physical strength over the women (with the threat of weapons backing them up). Demanding to be called “master” explicitly uses sadomasochistic lingo to assert their male top position. Similarly, asking the women to demonstrate boot licking, positions the women in the submissive role in a sadomasochistic dyad. By ridiculing the sadomasochistic props and clothes, the officers distance themselves from male submissives who don female clothing and willingly submit to female dominance. Finally, the strip search not only deprives the women of their dominant costume but also puts them in a position of sexual vulnerability.⁵⁷

Justice Bogusky downplayed the disgusting police behavior stating, “[B]oys will be boys,” after all.

⁵⁸ Khan makes a crucial point: “it was unlawful for Bedford to provide consensual and pleasurable degradation and humiliation, but it was law ful for the police to degrade and humiliate the suspect, all because it was ‘almost predictable’ that male police officers would be unsettled by the

⁵¹ Khan, *supra* note 49, at 167.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Khan, *supra* note 49, at 168.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 168-69.

accouterment and ambience of the establishment and act inappropriately.”⁵⁹ Further, Justice Bogusky’s described S/M as “bizarre and disgusting,” and claimed to need “all the help” he could get in “putting a human face on the participants as they are members of our community.”⁶⁰ The sexuality on trial in *Bedford* is as far from Rubin’s “good” sexuality as it can be. The law had no sympathy.

Finally, one cannot engage in a meaningful analysis of S/M without discussing *Fifty Shades of Grey* by E.L. James.⁶¹ *Fifty Shades of Grey* is the story of Anastasia Steele, an innocent and pure college student, who falls in love with Christian Grey, an impossibly wealthy businessman who takes her virginity and seeks to introduce her to S/M.⁶² The novel sold more than 70 million copies, sparking what many called a cultural phenomenon.⁶³ While *Fifty Shades of Grey* may have encouraged more women to sexually experiment, the novel’s depiction of S/M is flawed.⁶⁴ Amy Bonomi, chair of the Department of Human Development and Family Studies at Michigan State University, has condemned the novel as a “glaring glamorization of violence against women.”⁶⁵ Others have pointed to Anastasia, who is weak, fragile, and extremely eager to please as an undesirable female protagonist.⁶⁶

Could the character of Anastasia Steele be any more of a stereotype? She is an introvert, has low self-esteem, has abandonment issues from her father, apparently has only one close friend who bullies her and even though she works in a hardware store, she doesn't seem to possess any self-sufficiency aside from cooking for her roommate and herself. She seems to have no sexual identity until Christian Grey

⁵⁹ Khan, *supra* note 49, at 169-70.

⁶⁰ *Id.* at 172-73.

⁶¹ E.L. James, *Fifty Shades of Gray* (Random House 2012) (2011).

⁶² *Id.*

⁶³ Kristen Acuna, *By The Numbers: The Fifty Shades of Grey Phenomenon*, Business Insider (Sep. 4, 2013), <http://www.businessinsider.com/50-shades-of-grey-by-the-numbers-2013-9>.

⁶⁴ Rachel Pomerance Berl, *What's Wrong with Fifty Shades of Grey*, U.S. News & World Report (Aug. 12, 2013), <http://health.usnews.com/health-news/health-wellness/articles/2013/08/12/whats-wrong-with-50-shades-of-grey-and-what-you-should-know-about-bdsm>.

⁶⁵ *Id.*

⁶⁶ Carey Purcell, *Fifty Shades of Feminism: A Response to E.L. James' Fifty Shades of Grey*, Huffington Post (Jan. 2, 2013), http://www.huffingtonpost.com/carey-purcell/fifty-shades-of-grey-feminism_b_2395932.html.

enters her life and requests that she become his Submissive in a sexual relationship.
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The *Fifty Shades of Grey* backlash is not surprising. While the exploits between Anastasia and Christian in his “Red Room of Pain” seem mutually pleasurable, their relationship outside of the bedroom is concerning. Christian is *very* controlling, using stalking, intimidation, isolation, and humiliation to keep Anastasia “in her place.”⁶⁸ In short, Anastasia Steele is a feminist’s worst nightmare – she is a masochist *inside* and *outside* of the bedroom.

In light of the “Fifty Shades of Grey Phenomenon” (and the inevitable backlash), Gayle Rubin and Ummni Khan’s theories are shown in sharp relief. Society, and by extension, the law, views S/M as a threat to the hegemony it has worked to create. Therefore, society’s acceptance of S/M is contingent on whether or not it has conformed to this cultural and legal hegemony. Like *Secretary*, *Fifty Shades of Grey* portrays an assimilation of S/M into “good” sexuality by conforming to normative sexual standards. Again, both Anastasia and Christian are white and attractive (although Anastasia, for much of the novel, cannot fathom that she might be physically worthy of Christian’s affections). Further, he uses his wealth, along with his gender, to assert his control over Anastasia. This narrative is risky. When 70 million readers see Anastasia Steele as the masochist prototype, the novel sets a dangerous precedent. Anastasia and Christian engage in consensual, pleasurable, and liberating sex. However, when power is used in the name of love and not sex, *Fifty Shades of Grey* shows the *real* danger – sexual subordination “spilling over” into other parts of life.

As Rubin, Khan, and *Fifty Shades of Grey* show, S/M is far from accepted in mainstream society. When accepted, S/M must be within the confines of heterosexual, monogamous, marital, male-dominant and female-submissive sexuality. This is troubling for women. In forcing this heterosexual, monogamous, marital, male-dominant and female-submissive sexuality paradigm, society uses a viable sexual practice as a means of imposing a patriarchal and normative standard of

⁶⁷ *Id.*

⁶⁸ Berl, *supra* note 64.

sexuality onto women. This imposition is particularly shown when women choose to dominate men, but affects submissive women as well. Societal notions of “sexual deviancy” concerning S/M are particularly important when looking at the law. Society influences the law, and vice versa. S/M under marital, monogamous, and heterosexual confines would possibly receive a different judgment than the cases in Part IV, where the participants were homosexual or engaged in other “bad” sex. Surely, the law must protect women from sexual violence. However, should the law protect women from themselves?

III. FEMINIST THEORIES

In *Sexuality*, Catherine MacKinnon identifies the eroticization of male violence against women as a core issue for feminists.⁶⁹ She argues that a paradigm has emerged in which sex is defined as restriction, intrusion, violation, and objectification.⁷⁰ “Violence is sex when it is practiced as sex. If violation of the powerless is part of what is sexy about sex, as well as central in the meaning of male and female, the place of sexuality in gender and the place of gender in sexuality need to be looked at together.”⁷¹ This paradigm encourages male aggression and female subordination to be sexualized.⁷² “Dominance, principally by men, and submission, principally by women, will be the ruling code through which sexual pleasure is experienced. Sexism will be a political inequality that is sexually enjoyed, if unequally so.”⁷³ MacKinnon posits that gender inequality only *appears* consensual:⁷⁴ “It may be worth considering that heterosexuality, the predominant social arrangement that fuses this sexuality of abuse and objectification with gender in

⁶⁹ Catherine MacKinnon, *Sexuality*, in *FEMINIST JURISPRUDENCE: CASES AND MATERIALS* 120, 120 (Cynthia Grant Bowman et. al ed., 2011).

⁷⁰ *Id.*

⁷¹ *Id.* at 121.

⁷² *Id.*

⁷³ *Id.* at 121.

⁷⁴ MacKinnon, *supra* note 69, at 122.

intercourse, with attendant trauma, torture, and dehumanization, organizes women's pleasure so as to give us a stake in our own subordination."⁷⁵

MacKinnon's analysis of the sexualization of female subordination is correct. To deny that our sexual preferences are influenced by cultural hegemonies would be futile. However, MacKinnon's argument fails to account for the sexual autonomy of female masochists. MacKinnon contends: "women do not thrive on violation, whether or not it is done through sex."⁷⁶ However, this creates many questions: what happens when women physically respond to this violation? Can one "thrive" on violation, when violation is pleasurable? Even if masochistic women are victims of "false consciousness", what options are left? Is the female masochist forced to choose between pleasurable sex and the rewards of not succumbing to patriarchy? This compromise does not seem ideal, or even remotely fair. It may be more helpful to think of S/M as an *appropriation* or *profanation* of sexual violence. There is a certain danger and fear that seems to be lacking in "safe, sane, and consensual" sadomasochistic encounters, when compared to sexual assault and domestic violence.

In *Theorizing Yes: An Essay on Feminism, Law, and Desire*, Katherine Franke addresses the task of understanding "yes."⁷⁷ She argues that legal feminism has reduced questions of sexuality to dependency and danger.⁷⁸ By focusing on sex in this negative light, legal feminists have ignored the possibility of the truly empowered, sexual woman.⁷⁹ Franke asks interesting questions: "Can law protect pleasure? Should it? Or have legal feminists implicitly made the (arguably mistaken) strategic judgment that feminist legal theory cannot explore sexuality positively until danger and dependency are first eliminated?"⁸⁰ Most relevant to our present inquiry is Franke's understanding of *danger*. She points out that many feminist legal theorists consider saying no to sex as saying yes to

⁷⁵ *Id.*

⁷⁶ MacKinnon, *supra* note 69, at 120.

⁷⁷ Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 Colum. L. Rev. 181 (2001).

⁷⁸ *Id.* at 182.

⁷⁹ *Id.*

⁸⁰ *Id.* at 183.

power. That is, women can never be simultaneously sexual and powerful.⁸¹ Franke says that this is a misunderstanding:⁸² “The overwhelming attention we have devoted to prohibitions against bad or dangerous sex has obscured, if not eliminated, a category of desires and pleasures in which women might actually want to indulge.”⁸³

Franke finds part of this misunderstanding of sex as inherently dangerous exists in the heteronormative vacuum in which feminist legal theory must necessarily occur.⁸⁴

Men desire women, their opposite, and that desire takes a form that is good for them, and bad for us, empowers them, subordinates us, subjectifies them, objectifies us. Many feminist theorists have taken up the project of using law to tame sexual danger, hoping to leave in their wake a domain of safe sex, of love and intimacy in which danger figures as sex’s opposite.⁸⁵

Once female sexuality is posited as “the projection of violent male desire,” what is left? Franke argues that female sexuality has only three options:⁸⁶ the first is merely a void, best understood as the trauma left by male sexuality;⁸⁷ the second is “a warm, fuzzy, soft-focused cuddling, not the hot, steamy, edgy stuff that got us into trouble in the first place;”⁸⁸ third is “a desire that risks bumping up against danger,” which is often dismissed as false consciousness, or a tragic imitation of male sexuality.⁸⁹ Franke suggests that sexuality is not something to be purified, but rather, something to be reconciled with danger.⁹⁰ “It is precisely the proximity to danger . . . the steamy side of shame that creates the heat that draws us towards our desires, and that makes desire and pleasure so resistant to rational explanation.”⁹¹

⁸¹ *Id.* at 197.

⁸² Franke, *supra* note 77, at 199.

⁸³ *Id.* at 200.

⁸⁴ *Id.* at 206.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Franke, *supra* note 77, at 206.

⁸⁹ *Id.*

⁹⁰ *Id.* at 207.

⁹¹ *Id.*

This author agrees with Franke that feminist legal theorists must find a way to say “yes” to sex. This task is difficult, and there is not a perfect solution. Certainly, a crucial goal of legal feminism is to understand how sex is constructed to perpetuate male supremacy. The eroticization of female submission must be, as MacKinnon asserts, an intentional consequence of female subordination. Sexuality is not created in a vacuum. However, a space for sexual pleasure must be created, even if women risk “bumping up against danger.” Sex will always be dangerous for women, and this includes “vanilla” sex as well as “kinky” sex. This article argues that because sadomasochistic sex involves an increased element of danger, these sexual practices may, in fact, be less harmful. When violence becomes eroticized, the issue of danger becomes even more critical, and must be confronted. The S/M community emphasizes the importance of “safe, sane, and consensual” sex. Sexual danger is thus exposed, and not brushed under the rug. This approach is ultimately more empowering for women, regardless of false consciousness.

In *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, Robin West directly addresses the issues of pain, pleasure, and sexual submission.⁹² West begins by arguing that female pleasure and pain is inherently different than that of men.⁹³ Women suffer more than men for the very reason that “women often find painful the same objective event or condition that men find pleasurable.”⁹⁴ West uses her idea of “difference” to critique both liberal feminist legal theory and radical feminist legal theory.⁹⁵ She argues that both approaches fail to account for female happiness.⁹⁶ “[B]oth assert a definition of the human being which in turn assumes a correlation between some condition of the objective world and a subjective state of well-being and then aim to maximize that objective, external condition.”⁹⁷ Thus, liberal legalism assumes that people will choose what provides happiness, and that this subjective gain of happiness

⁹² Robin West, *The Difference in Women’s Hedonic Lives*, 15 Wis. Women’s L.J. 149 (2000).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 156.

⁹⁶ *Id.*

⁹⁷ West, *supra* note 92, at 156.

is contingent on the objective act of choice.⁹⁸ Conversely, radical legalism assumes a correlation between equality and happiness.⁹⁹ West suggests “an alternative normative model for feminist legal criticism which aims neither for choice nor equality, but directly for women’s happiness.”¹⁰⁰

Relevant to the present inquiry is West’s critique of radical feminist legal theory. West considers “sexual inequality” and its political ramifications under a radical feminist analysis.¹⁰¹ “This creates a conflict between theory and method as well as between stated ideal and felt pleasure: what should we do when the consciousness that is raised in consciousness-raising finds pleasure in what is definitionally regarded as substantively undesirable – sexual submission, domination and erotic inequality?”¹⁰² West argues that the radical feminist approach is problematic for a number of reasons. “First, the judgment that women’s desires for erotic submission are ‘false’ is typically made by reference to the content of those desires, not their source . . . Second, the desire is judged not because it is determined to be a lie . . . but solely because of its content, solely because it is a desire for sexual submission.”¹⁰³ This suggests a tension between the dearly beloved liberal value of choice and the dearly beloved radical value of equality. Third, the judgment that masochistic desire and pleasure is false or imaginary is “almost always against the will as well as the opinion of the woman who has the desire.”¹⁰⁴

An important issue West alludes to in *The Difference in Women’s Hedonic Lives* is the issue of female ownership of desire.¹⁰⁵ These desires may in fact be distinctly *unfeminine*, not because they are submissive (which is often thought to be a distinctly feminine characteristic), but because they are *sexual* and they are *owned* (which is, many would argue, a distinctly masculine feature). West quotes Maria Marcus:

⁹⁸ West, *supra* note 92, at 156.

⁹⁹ *Id.* at 156.

¹⁰⁰ *Id.* at 158.

¹⁰¹ *Id.* at 185.

¹⁰² *Id.* at 186.

¹⁰³ *Id.*

¹⁰⁴ West, *supra* note 92, at 192-93.

¹⁰⁵ *Id.* at 193.

Then one day he was there, my Black Prince – my dream lover, the sadist, just like in fairy tales when someone waves a wand. Everything went of its own accord. I didn't even have to provoke him. He did everything I had hoped for in my fantasies. He spoke quietly and menacingly and he beat me, and while in bed, forced me to do humiliating things. I was taken up as high as never before. ¹⁰⁶

West suggests that the idea that masochism is inherently a falsehood is a tempting conclusion to draw. ¹⁰⁷ Submission, by its very nature, could not possibly be pleasurable or desirable. ¹⁰⁸ “The pleasure is therefore on some level a lie, either to others or oneself. And yet, if we examine the accounts of the pleasure had in erotic submission and domination for indicia of lying by any criterion other than content, the charge is singularly hard to substantiate.” ¹⁰⁹ Thus, West supports the approach of understanding, rather than judging, masochism. ¹¹⁰ While it is arguable that sexual lives are private and thus should be beyond the scope of legal analysis, this author agrees with West. Gender inequality directly supports, and is supported by, legal inequality. “If we can identify what human needs are met through eroticized submission, perhaps we can better understand, and identify, the human needs which will be met or frustrated through political, legal, and economic equality.” ¹¹¹

West is willing to consider that S/M may be an exercise of trust, rather than an exercise of fear. ¹¹² Engaging in S/M enables the Submissive to transcend subjectivity, thereby liberating herself from the responsibilities attached to personhood. ¹¹³

That this total abdication of responsibility can be erotic, reflects a genuine human truth and a deep human need . . . When we grant power to another to control – to author – our acts, that grant may, and I have argued often does, express a deep seated and forgotten (or not so forgotten) fear. But it might not. It might also express our total trust in that other. That ‘other’ might be trustworthy. ¹¹⁴

¹⁰⁶ West, *supra* note 92, at 193.

¹⁰⁷ *Id.* at 194.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 198.

¹¹¹ West, *supra* note 92, at 198.

¹¹² *Id.* at 199.

¹¹³ *Id.*

¹¹⁴ West, *supra* note 92, at 198.

For West, the difference between submission from trust and submission from fear lies only in the subjective. ¹¹⁵ “It is the difference between the battered woman’s consensual endurance – motivated by fear – of beatings, and the lover’s consensual enjoyment – motivated by trust – of controlled submission . . . From an external perspective, this difference is muted. From an internal perspective, it is glaring.” ¹¹⁶ Further, West argues that this trust is a powerful manifestation of human needs, as opposed to distinctly feminine. ¹¹⁷ It is uncontested that humans crave the liberal legalist’s freedom and the radical legalist’s equality. ¹¹⁸ However, humans – not equally autonomous – need to trust one another. ¹¹⁹ “When we test the limits of our capacity to trust . . . to embrace absolute dependency, and when we discover erotic pleasure lurking at that limit, we give expression to our desire to be able to trust someone . . . which may be a fully human, and not just female, need.” ¹²⁰

West’s proposed dichotomy between fear and trust is particularly helpful. By its very nature, something that is “safe, sane, and consensual” negates the possibility of fear. When the masochist is aroused, eager to indulge, and trusts her partner in this pursuit – where is the harm? West’s emphasis on *subjective* pleasure is perhaps most enlightening. Instead of focusing on the male-supremacist pressures acting on women, West is willing to imagine a realm in which a woman can be simultaneously feminist and masochist. When the goal becomes subjective happiness, instead of “truth,” or “safety,” the encouragement of S/M becomes desirable. While many feminists are horrified at the thought of a woman bound, beaten, humiliated, or infantilized, what would make a masochist *happiest*? The answer seems obvious. Now, the question remains: how should the law respond? Cheryl Hanna argues that the law should not promote S/M. I disagree, and give recommendations in Part V.

¹¹⁵ *Id.*, at 201.

¹¹⁶ *Id.* at 201-02.

¹¹⁷ *Id.* at 201.

¹¹⁸ *Id.*

¹¹⁹ West, *supra* note 92, at 201

¹²⁰ *Id.*

IV. THE PROBLEM OF CONSENT

Courts have addressed S/M most prominently in criminal cases, where the defendant argues the victim's consent should be a defense, typically to assault. Cheryl Hanna authored the seminal piece on consent and S/M, *Sex Is Not a Sport: Consent and Violence in Criminal Law*.¹²¹ Hanna's interest in the law of S/M began when prosecuting domestic violence cases.¹²² Defendants charged with assault of their intimate partner would put forth "rough sex defenses."¹²³

On more than one occasion, I argued to a court that consent was immaterial. Furthermore, I have argued that domestic violence victims should be mandated to participate in the prosecution of their abusers – that women cannot implicitly consent to violence by refusing to press charges or cooperate with the prosecution. But I had never handled a case where the victim claimed that she had actually consented to violence as part of an erotic encounter, so I had not considered whether the "no consent to violence doctrine" as applied to S/M was practically, ethically, and legally sound.¹²⁴

Hanna acknowledges that the law here is murky.¹²⁵ The legal treatment of S/M involves resolving the "ambiguity of power and powerlessness, of masculinity and femininity, of coercion and consent, and the limits and limitations of the law."¹²⁶ When these kinds of issues are raised in the law, every proposed solution has shortcomings.¹²⁷ Ultimately, Hanna finds that those engaging in consensual violence resulting in actual serious physical injury should not enjoy legal protection.¹²⁸ Correctly, she argues that responsible, "safe, sane, and consensual" S/M rarely comes to the attention of the law.¹²⁹ However, what are the consequences of legal refusal to validate S/M relationships?

Hanna's first step is to analyze consensual violence in the context of sporting—where injuries are common—for comparison.¹³⁰ Courts have been assumed to use the "harm test," which decides

¹²¹ Cheryl Hanna, *Sex is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. Rev. 239 (2001).

¹²² *Id.* at 244.

¹²³ *Id.*

¹²⁴ *Id.* at 244-45.

¹²⁵ *Id.* at 245.

¹²⁶ Hanna, *supra* note 121, at 245.

¹²⁷ *Id.*

¹²⁸ *Id.* at 247.

¹²⁹ *Id.*

¹³⁰ Hanna, *supra* note 121, at 249.

the relevancy of consent based on the likelihood of injury.¹³¹ The more likely it is that a participant will be injured; it is less likely that a court will permit the activity.¹³² Legal relevancy also depends on the activity's social utility.¹³³ For example, sports such as prize fighting and hockey carry a high risk of violence.¹³⁴ Hanna argues that the law allows dangerous sports because they serve a "manly purpose," as opposed to "expressive, emotional violence."¹³⁵ "The law clearly distinguished between those contexts in which men competed to enhance their manliness and those contexts in which their aggression went unchecked, or inspired runaway passion by the parties or observers."¹³⁶ The goal of the law, therefore, is the promotion of "civilized masculinity," and the deterrence of social unrest.¹³⁷ Hanna does not critique this. However, does sex not have a similar social utility as well? To assume that men and women do not engage in casual, playful sex is a bit old-fashioned. And what of "civilized femininity," what would that look like?

Hanna sees more harm than benefit in allowing violent consent to apply to sexual cases.¹³⁸ "The argument that sex is a sport has the unintended consequence of allowing people, mostly men, to use violence to satiate their sexual desires, redefining civilized masculinity with a sexual context."¹³⁹ She fears the loss of permitting physical force solely in highly regulated contexts.¹⁴⁰ For example, hockey and prize fighting have rules and referees. Sexual conduct, whether in the bedroom or the dungeon, is generally private and beyond most means of public control. Hanna points to case law to support her argument. She begins by discussing cases where the defendant and victim were homosexual men.¹⁴¹ She approves of the decisions, finding them to be protective of

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Hanna, *supra* note 121, at 250.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 256.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 257.

¹⁴¹ Hanna, *supra* note 121, at 257.

homosexual men as opposed to discriminatory.¹⁴² To allow consent as a defense “would have created a ‘you asked for it, you got it’ doctrine and denied legal protections to gay men as well as reinforced stereotypes of sexual deviancy.”¹⁴³

In Hanna’s first case, *People v. Samuels*, the defendant was an ophthalmologist convicted of aggravated assault, conspiracy, and sodomy after the police discovered a film he developed.¹⁴⁴ The film depicted individuals bound, gagged, and whipped by the defendant.¹⁴⁵ The defendant testified that he “recognized the symptoms of sadomasochism in himself, and his primary concern became to control his sadomasochistic urges in ways which were harmless.”¹⁴⁶ He contended that the “apparent force of the whippings was ‘faked’ and that cosmetics were used to supply the marks of the apparent beating.”¹⁴⁷ Further, the defendant had instructed the victim to squirm violently so as to appear in pain to make the film more realistic.¹⁴⁸ On appeal, the defendant argued that: (1) the prosecution failed, as a matter of law, to prove the commission of an aggravated, as opposed to a simple assault, and that (2) the trial court erred in failing to instruct the jury that the consent of the victim is an absolute defense to the charge of aggravated assault.¹⁴⁹ As to the defendant’s first contention, the California Court of Appeals found it irrelevant that the victim did not sustain real injuries.¹⁵⁰ The defendant’s second argument was also rejected.¹⁵¹

It is a matter of common knowledge that a person in *full possession of his mental faculties* does not freely consent to the use, upon himself, of force likely to produce great bodily injury. Even if it be assumed that the victim . . . did in fact suffer from *some form of mental aberration* which compelled him to submit to a beating which was so severe as to constitute an aggravated assault, defendant’s conduct in inflicting

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *People v. Samuels*, 250 Cal. App. 2d 501, 504 (1967).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 508.

¹⁴⁹ *Samuels*, 250 Cal. App. 2d at 512-13.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

that beating was no less violating of a penal statute obviously designed to prohibit one human being from severely or mortally injuring another.¹⁵²

Here, the court shamelessly describes masochism as a condition characterized by mental illness and appears to have no meaningful sympathy for the victim. The judicial contempt for the defendant and the victim's "sexual deviancy" is obvious.

Hanna rightly acknowledges: "the prosecution may have been motivated by factors other than public safety or bodily integrity."¹⁵³ Considering this case in the context of 1960's homophobia makes analysis more difficult.¹⁵⁴ However, she ultimately approves of the holding in *Samuels*. Without corroborating witnesses, the jury could hardly just assume that the whippings were consensual.¹⁵⁵ She also questions: "Had the person on the film been a woman, would we not be concerned that she was beaten? Would we not wonder why the doctor did not know her name or whereabouts?"¹⁵⁶ *Samuels* is problematic for a number of reasons. "On one hand, we want to protect Samuels and his civil right not to be singled out by bigoted law enforcement; on the other hand, we must be concerned the safety and dignity of the unknown man on the film."¹⁵⁷ Hanna's concerns are legitimate, but she reaches a flawed conclusion. The *Samuels* court, while perhaps protecting potential victims, set a dangerous precedent. This decision, relied on in many subsequent cases, boldly shames and vilifies S/M practitioners, which encourages discrimination.

Hanna next discusses the 1980 Massachusetts case, *Commonwealth v. Appleby*.¹⁵⁸ She argues that *Appleby* depicts a situation in which the law has an important duty to intervene into private sexual conduct, regardless of the victim's consent.¹⁵⁹ The facts of *Appleby* are "more analogous to cases involving battered women than it is to cases in which the courts are morally outraged by

¹⁵² *Samuels*, 250 Cal. App. 2d at 513-14 (emphasis added).

¹⁵³ Hanna, *supra* note 121 at 258.

¹⁵⁴ *Id.* at 259.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Hanna, *supra* note 121, at 260.

¹⁵⁹ *Id.*

homosexuality.”¹⁶⁰ In *Appleby*, the defendant and the victim were involved in a homosexual, sadomasochistic relationship for over two years.¹⁶¹ For the duration of their relationship, the victim lived as the defendant’s “servant,” and was responsible for household duties and was beaten when the defendant was dissatisfied.¹⁶² The defendant owned a torture chamber, and the court described his residence as similar to a military camp.¹⁶³ Appleby beat the victim harshly numerous times with a bullwhip, even sending him to the hospital.¹⁶⁴ Further, the victim suffered from a fractured kneecap and was once beaten so severely that he ran from the house in his underwear to a monastery.¹⁶⁵ Hanna points out that the victim’s testimony is chillingly similar to that of abused women when they describe their reasons for staying with abusive partners.¹⁶⁶ The victim claimed “that he suffered low self-esteem, was afraid of Appleby, and acted under duress, fearing that Appleby would harm him or his family if he did not continue the relationship.”¹⁶⁷

The court’s denial of consent as a defense in *Appleby* was likely not the result of discrimination. It is hard, even impossible, to imagine the victim in *Appleby* as sexually empowered. There is nothing “safe, sane, and consensual” about hospital visits, fractured kneecaps, and fearing for one’s life. Hanna claims that the *Appleby* court “focuses on the nature of the violence itself,” instead of the defendant’s sexual orientation.¹⁶⁸ And what if a woman was the victim instead? Hanna contends that if the *Appleby* court had held otherwise, defendants in every domestic violence case, homosexual or heterosexual, would argue “they too had an explicit contract with their partner that included physical punishment.”¹⁶⁹ This, Hanna argues, is not permissible: “There is a common stereotype that women who stay in abusive relationships not only deserve it, but like it. Sadism

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Hanna, *supra* note 121, at 260.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 260-61.

¹⁶⁸ Hanna, *supra* note 121, at 261.

¹⁶⁹ *Id.*

would thus become a natural state for men, while masochism would become a natural state for women – arguably a relationship with which the law should not interfere.”¹⁷⁰

Next, Hanna turns to cases involving private sadomasochistic conduct between heterosexuals.¹⁷¹ She argues that the law exists to “prevent the powerful from hurting the powerless; by criminalizing S/M that results in injury, the law arguably protects masochistic women from men who injure them in the course of non-consensual sexual relations, effectively eliminating the ‘she likes it rough’ defense.”¹⁷² This normative sexual standard applied to men, therefore, indicates this notion of “civilized masculinity.”¹⁷³ Hanna recognizes that this standard may be problematic for women.¹⁷⁴

At the same time, the law limits women’s pursuit of pleasure through pain, thus prescribing normative behaviors that can be paternalistic and repressive. The current doctrine of consent assumes that no reasonable woman would or should consent to sexual activity that involves violent domination, just as it once assumed women had no right to play sports. The current doctrine of consent also fails to recognize that “rough sex” is not always victimizing to the masochist...Some have even argued that sadomasochism can create avenues of empowerment for the masochist as she becomes paradoxically strong and the sadist weaker.¹⁷⁵

However, Hanna claims that S/M is most likely to be used by defendants to explain away their abusive behavior.¹⁷⁶ Hanna argues that the danger in allowing the defense of consent to invalidate assault and battery charges is greater than the danger that women’s private sexual conduct may be condemned by the law.¹⁷⁷

The first case Hanna uses here is *State v. Collier*.¹⁷⁸ In *Collier*, the Iowa Court of Appeals was asked to decide whether S/M was a “social activity,” thus exempt from assault prosecution.¹⁷⁹ The defendant in *Collier*, after an argument with the victim, forced her to remove her clothing and tied

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 270.

¹⁷² *Id.* at 269-70.

¹⁷³ Hanna, *supra* note 121, at 270.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Hanna, *supra* note 121, at 271.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *State v. Collier*, 372 N.W.2d 303, 305 (Iowa Ct. App. 1985).

her spread-eagle face up on the bed.¹⁸⁰ He blindfolded her, whipped her with a belt, and gagged her when she began crying and begging him to stop.¹⁸¹ Eventually, the defendant untied the victim and proceeded to have anal intercourse with her.¹⁸² As a result of the assault, the victim suffered a swollen lip, large welts on her ankles, wrists, hips, buttocks, and severe bruises on her thighs.¹⁸³ At trial, the victim alleged that the defendant had inflicted this severe beating to punish her for using drugs and returning from a customer without being paid.¹⁸⁴ In response, the defendant alleged that the victim had requested the bondage and beating in order to celebrate her birthday.¹⁸⁵ Further, the defendant testified that the encounter was meant to fulfill one of the victim's sexual fantasies, as she had enjoyed books concerning bondage and similar sadomasochistic conduct.¹⁸⁶

On appeal, the defendant's first assignment of error was that the trial court erred in failing to instruct the jury on the defense of consent on the charge of assault that arose out of an incident of S/M.¹⁸⁷ The defendant contended that sadomasochistic activity is a "social activity," to which the victim voluntarily consented.¹⁸⁸ Iowa Code section 708.1 provides, in part:

Provided, that where the person...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.¹⁸⁹

As this was an issue of first impression for the Iowa Court of Appeals, the court relied on *People v. Samuels* and *Commonwealth v. Appleby*.¹⁹⁰ Ultimately, the court disagreed with the defendant, finding that the legislature did not intend S/M to be a "social activity."¹⁹¹ "Whatever rights the defendant

¹⁸⁰ *Id.* at 304.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Collier*, 372 N.W.2d at 304-05.

¹⁸⁶ *Id.* at 305.

¹⁸⁷ *Collier*, 372 N.W.2d at 305.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 306.

¹⁹¹ *Id.* at 307.

may enjoy regarding private sexual activity, when such activity results in the whipping or beating of another resulting in bodily injury, such rights are outweighed by the State's interest in protecting its citizens' health, safety, and moral welfare."¹⁹² The defendant's conduct, whether sexual in nature or originating from a heated argument, was still assault.¹⁹³

Justice Schlegel dissented in *Collier*, arguing instead that the trial court failed to properly instruct the jury on the defense of consent.¹⁹⁴ According to Schlegel, the majority made two "glaring faults."¹⁹⁵ First, the court "purports to decide an issue of statutory construction, but fails to analyze the statute."¹⁹⁶ Second, the court determined the intent of the Iowa legislature solely by looking at case law from other jurisdictions.¹⁹⁷

Justice Schlegel urges that the first step in ascertaining legislative intent should be to look to the words of the statute itself, which the majority failed to do.¹⁹⁸ The cases relied upon by the *Collier* court, such as *Samuels* and *Appleby* construed statutes varying significantly from Iowa Code 708.1.

¹⁹⁹ "Because those cases are dissimilar from this case, all that can be gleaned from them are the general principles that the State has an interest in protecting individuals from violence, and an interest in preventing breaches of the peace. Those principles do not, by themselves, resolve the issue presented in this case."²⁰⁰ Justice Schlegel asserts that the legislature's choice of the words "sport, social, or other activity," showed its intent to make the exception broadly applicable.²⁰¹ Therefore, sadomasochistic activity could be the "other activity" alluded to by the legislature.²⁰²

For several reasons, Hanna praises the decision in *Collier* as a protective measure for

¹⁹² *Collier*, 372 N.W.2d at 307.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 308.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Collier*, 372 N.W.2d at 308.

¹⁹⁸ *Collier*, 372 N.W.2d at 308.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 308-09.

²⁰¹ *Id.* at 309.

²⁰² *Id.*

women.²⁰³ She finds it significant that “the victim in this case was someone whom a jury could have found deserving of a beating, or at least not worthy of the protection of the law. She was a prostitute and a drug addict, and arguably sexually deviant by the nature of her profession.”²⁰⁴ Hanna argues that the *Collier* court’s refusal to allow the issue of consent to go to the jury was a check on the “passions and prejudices of the jury.”²⁰⁵ She maintains that holding otherwise would permit the law to go in a dangerous direction.²⁰⁶ “Even worse, had it allowed consent to be a defense, the court would have implied that there are ‘good girls,’ and ‘bad girls’ and that ‘bad girls’ get what they deserve, just as when, as a legal matter, prostitutes could not be raped.”²⁰⁷ The ruling in *Collier*, she claims, protects those who could be defined as sexually deviant and protects against the “cult of violence.”²⁰⁸ Hanna asserts that the paternalistic function of the court served a feminist purpose here.²⁰⁹ However, I agree with the dissent in *Collier*. Likely, even if the court had permitted consent as a defense, a just and educated jury would have found that the victim did not consent.²¹⁰ By holding, as a matter of law, that S/M is not a “social activity,” and thus exempt from the consent defense, *whose* interests are protected?

The next case Hanna discusses, *People v. Jovanovic*, stands apart from the others. In most cases involving S/M and the defense of consent, whether or not the victim actually consented is unclear. However, in *Jovanovic*, there was independent evidence of consent beyond the defendant’s testimony.²¹¹ The victim, a college student, was not inexperienced with S/M.²¹² By her own testimony, she consented to some activity with the defendant, but eventually found her fantasies

²⁰³ Hanna, *supra* note 121, at 272.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Hanna, *supra* note 121, at 272.

²⁰⁹ *Id.* at 272-73.

²¹⁰ *Id.*

²¹¹ *People v. Jovanovic*, 263 A.D.2d 156 (1999).

²¹² Hanna, *supra* note 121, at 275.

frightening.²¹³ The defendant was not a “a pimp or a careless lover or a homosexual man involved in an underground S/M sex scene” but was a graduate student at an Ivy-league school.²¹⁴ Hanna argues that *Jovanovic* poses significant problems for discerning the meaning of consent.²¹⁵ Women consenting to sadomasochistic sex can be unsure of what they are really getting into and change their minds.²¹⁶ “Furthermore, although proponents of S/M stress the role of negotiation and communication, the facts of *Jovanovic* indicate that the meaning of consent was, at best, ambiguous. What started as consensual S/M arguably became sexual violence.”²¹⁷

In *Jovanovic*, the victim and the defendant, after exchanging erotic e-mails for some time, met at his apartment.²¹⁸ He gave her some tea, which she found to have a “chemical taste,” and the two looked at a book of photographs depicting corpses placed in grotesque positions.²¹⁹ After a while, the defendant told the victim in a voice described as “stern” to take off her clothes.²²⁰ “He instructed her to lie down, and he tied her legs and arms to the frame of the futon, one limb to each corner; she explained that she did not protest because she did not know what to think.”²²¹ When the defendant began to pour candle wax on her stomach, vaginal area, and nipples, she screamed and told him to stop.²²² The defendant also asphyxiated her and eventually “retrieved two batons from the closet, turned her on her stomach, and penetrated her rectum with either a baton or his penis, causing the complainant intense pain.”²²³ The day after the encounter, the defendant e-mailed the victim “I have the feeling the experience may not have done as much good as I’d hoped,

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Hanna, *supra* note 121, at 275-76.

²¹⁸ *Jovanovic*, 263 A.D.2d at 187.

²¹⁹ *Jovanovic*, 263 A.D.2d at 187.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 188.

²²³ *Id.*

because you weren't acting much smarter at the end than you were at the beginning.”²²⁴ She replied that she was “purged by emotions and pain,” and while she was “quite bruised, mentally and physically,” she was “never so happy to be alive.”²²⁵

The defendant was convicted of kidnapping, sexual abuse and assault.²²⁶ In New York, consent is a defense to kidnapping and sexual abuse.²²⁷ Therefore, the court found that the trial court improperly excluded the defendant's e-mail correspondence with the victim on the grounds that he should have been given “free rein to explore the complainant's truthfulness, her accuracy . . . and her grip on reality . . .”²²⁸ The court is correct, Hanna contends, in determining that the e-mails were relevant to the issue of consent and suggest why the complainant may have motive to fabricate non-consent as to the sexual assault and kidnapping charges.²²⁹ In a footnote, the court rejected the defendant's argument that there is a “constitutional right” to engage in S/M.²³⁰ The court acknowledged that while a meaningful distinction can be made between “ordinary violence” and “violence in which both parties voluntarily participate for their own sexual gratification,” “a person cannot avoid criminal liability for an assault that causes injury...even if the victim asked for or consented to the act.”²³¹ Hanna rightly points out the “logical disconnect between this statement and the court's holding.”²³² If consent is not a defense to assault, what legal relevance do the e-mails have to the assault and battery charge?

Hanna finds the *Jovanovic* decision more troubling than *Collier*. “Here the court suggest that ‘she asked for it, she got it,’ or that she at least should have known better. It is a classic ‘blame the victim’ decision. The court is clearly repulsed by her interest in S/M, and is far more sympathetic to

²²⁴ *Jovanovic*, 263 A.D.2d at 189.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 193.

²²⁸ *Jovanovic*, 263 A.D.2d at 189.

²²⁹ Hanna, *supra* note 121, at 277.

²³⁰ *Id.*

²³¹ *Id.* at 277-78.

²³² *Id.* at 278.

a ‘good young man’ than to a ‘bad college girl.’”²³³ I agree. While the e-mails may have indicated that the victim *might* have consented to initial encounters with the defendant, her actions during and after their encounter clearly show she did not consent to anything beyond taking her clothes off. “Furthermore, the complaining witness promptly told five people about the encounters, and some observed her injuries. In addition, the complainant went to a hospital. Lab results on her clothing corroborated injury. She was bruised and suffered burns from candle wax, and was physically restrained for an extended period of time.”²³⁴ The court was likely influenced by both (1) a repulsion of S/M and (2) a desire to protect a “nice boy” like the defendant. However, it is important to note that the defendant engaged in S/M as well. How much did gender play a role in the judgment? Both the defendant and the victim are made to suffer through the *Jovanovic* court’s judgment.

While Hanna’s balanced discussion of the issue is appreciated, her conclusion is unsupported. Hanna fears that allowing consent as a defense will encourage further subordination of women through legitimizing sexual violence. These fears are understandable, particularly because in all of the aforementioned cases, the victim denied consent and alerted authorities to the abuse. To argue that the victim consented in *Appleby* and *Collier*, for example, is misguided. However, courts perpetuate discrimination through these rulings. By refusing to acknowledge S/M as something that could be consented to (and thus, desired) under any circumstances, the law echoes the belief that S/M is “bad sex,” and masochistic women are victims needing our sympathy and paternal intervention. Courts are (supposedly) able to distinguish between *sex* and *rape* – the distinction, of course, lies in whether or not the victim consents. Can courts apply a similar analysis to distinguish between *sadomasochism* and *violence*? I believe courts require understanding of what “safe, sane, and consensual” S/M actually looks like. In this way, judges and juries will more easily

²³³ *Id.* at 279.

²³⁴ Hanna, *supra* note 121, at 278.

identify cases of real abuse, furthering justice. The following section contains recommendations in response to Hanna, relying on Monica Pa, author of *Beyond The Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex*.

V. RECOMMENDATIONS FOR SOLVING THE “PROBLEM OF CONSENT”

In *Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex*, Monica Pa argues against Hanna.²³⁵ Pa contends that criminal prosecution for S/M sex should occur under limited circumstances, for example where the dominant partner goes beyond what the submissive partner originally consented to. Pa shares this author’s concerns that current S/M jurisprudence encourages discrimination against those perceived as sexual deviants.²³⁶ S/M practitioners, she argues, are subject to various kinds of abuse once they are “out-ed,” particularly from law enforcement.²³⁷ Further, she claims that prosecutors confuse S/M with violence: they “confuse the presence of traditional symbols of violence (whips, chains, handcuffs), utilized in a theatrical and self-conscious simulation of power relationships, as the presence of real dominance and exploitation.”²³⁸ This echoes the aforementioned concern that a distinction exists between S/M and violence that the law has yet to grasp. Her central point is that sex cannot be policed as if it were violence.²³⁹

Monica Pa is undoubtedly correct. Under certain circumstances, consent should be allowed as a defense in criminal trials. First, there is a legitimate reason to be concerned that Hanna’s argument will perpetuate discrimination against S/M practitioners. The law should not function as a tool for determining “bad” sex; instead, the law should aim to encourage safe and responsible sexual practices. Second, there are questions as to ulterior motives the state might have in prohibiting S/M. The law has long functioned to subordinate individuals who defy normative

²³⁵ Monica Pa, *Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex*, 11 Tex. J. Women & L. 51, 53 (2001).

²³⁶ Pa, *supra* note 235, at 53.

²³⁷ *Id.* at 56.

²³⁸ *Id.* at 53.

²³⁹ *Id.*

sexual standards – interracial relationships and homosexual relationships, for example. The law may be eager to prevent violence against women; however, the law may be equally motivated to maintain its monopoly on pain, discipline, and humiliation. When the law categorizes S/M as “bad” sex, the state plays a role in the perpetuation of the woman as unfit for self-determination.

Third, danger is inherent to S/M, and the current law might drive S/M activities underground.²⁴⁰ Lack of public recognition and regulation discourages open discourse about safe sexual practices.²⁴¹ Fourth, there is a risk that victims of abuse may be reluctant to seek help. That is, when sadomasochistic activities go beyond what the submissive partner consented to, victims may be hesitant to have their sexual preferences publicly condemned or criminalized. The “illegal status of S/M discourages victims of S/M abuse from reporting to the police or going to the hospital after an accident,” due to fears of prosecution, harassment, mockery, or blackmail.²⁴² Openly acknowledging S/M as a viable practice may encourage true victims to speak up. Surely, those who engage in “safe, sane, and consensual” S/M can differentiate between sexual pleasure and sexual violence. Masochists can be victims too – and they should not fear that a court will confuse their preferences with abuse.

There are two means for enabling the law to differentiate between S/M and violence. First, policy makers, judges, and juries should be educated on “safe, sane, and consensual” S/M. When S/M becomes an issue at trial, Pa advocates the use of expert witnesses.²⁴³ “The S/M expert would educate the jury that S/M involves carefully defined negotiations, mutual definition, and above all else, consent that can be revoked at any point.”²⁴⁴ Jury instructions explaining that S/M is supposed to be “safe, sane, and consensual,” not reckless assault, would also be helpful. If consent were allowed as a defense, a jury likely would have found the defendants in *Appleby* and *Collier*

²⁴⁰ *Id.* at 83.

²⁴¹ Pa, *supra* note 235, at 83.

²⁴² *Id.* at 84.

²⁴³ *Id.* at 87.

²⁴⁴ *Id.*

guilty regardless. However, when consent is murky, such as in *Samuels* and *Jovanovic*, practical knowledge of S/M is useful. When legal decision-makers are notified as to what S/M actually is, identifying the abuse seen in *Appleby* and *Collier* becomes easier.

Second, courts should encourage submissive and dominant partners to enter into sexual contracts. This would take the idea of a “safe word” into a legal realm. Defendants and victims alike would have proof that the defendant’s behavior was inside or outside of previously agreed upon terms. This is a mutually beneficial scenario, protecting the potential victim from abuse and the potential defendant from malicious prosecution and harassment. Pa suggests, “[E]vidence of negotiation should be presented and tested by traditional adversarial processes.”²⁴⁵ Had the defendant and victim in *Jovanovic* entered into such a contract, consent would have been much less complex. Another benefit of judicial recognition of S/M contracts would be that parties would be more likely to communicate their desires and limits with one another.

VI. CONCLUSION

The current jurisprudence of S/M is oppressive. As this article has shown, society and the law have limited tolerance of activity that defies sexual norms. S/M is a threat to the patriarchal ideal of female sexuality, and thus must be tamed or eliminated altogether. While some feminist theorists have found S/M problematic and damaging to women, others have attempted to reconcile masochism and empowerment. Above all, feminist legal theory must consider women’s desires. When subjective pleasure is the goal, encouraging S/M becomes more advantageous. Surely, the law must prevent violence against women, and must ensure that sexual preferences are not given to excuse assault. However, the law cannot criminalize behavior that is “safe, sane, and consensual.” By prohibiting consent as a defense in S/M cases, the law sets a dangerous precedent that has many consequences. To condemn troublesome sexual activity without exception seems misguided, heavy-

²⁴⁵ Pa, *supra* note 235, at 88.

handed, and just plain lazy. Even if pleasure means pain and liberation means humiliation, the law must endeavor to promote healthy, consensual, and pleasurable sexual experiences.