

## Asking for it: Erotic Asphyxiation and the Limitations of Sexual Consent

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*The contentious practices of the sadomasochism (S/m) community provide a template for investigating consensual sexual practices that are often deemed excessive. A recent Supreme Court of Canada (SCOC) decision convicted the defendant in an assault case regarding sexual activity performed during a sex partner's brief loss of consciousness due to consensual erotic asphyxiation. The SCOC cited law that requires continual consciousness for sexual consent and rejected the defendant's argument of prior consent. That is, despite prior consent for sexual activities the SCOC ruled on the legal parameters of sexual autonomy. Several contemporary court decisions regarding S/m practices in England and Canada have placed legal limitations on the permissible level of sexual consent, and subsequently, one's sexual autonomy. Legal parameters on sexual practices often conflict with the contemporary community standards of sexuality. This article argues that the autonomy to consent to the sexual practices one desires should not be limited by consciousness. There is a new sexual movement underway, fuelled by the discourses of feminist, sexuality, and queer theorists that seek to shift anti-porn and sexual assault dialogues to a positive project of sexual empowerment and queer sexualities. It is a call for sexual agency, the autonomy to negotiate sexual boundaries and pursue one's sexual desires. This sexual liberation movement desires a revaluation of sexual values, and the right to say 'yes'. Sexual autonomy, borne from negotiation and enthusiastic consent, is a re-imagination of the term 'asking for it'.*

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### I. INTRODUCTION

There is a new sexual movement<sup>1</sup> underway, a small but growing political action targeting conservative views of sexuality. This movement is fuelled by the discourses of feminist, sexuality, and queer theorists. It is a movement that follows in the wake of civil rights, women's rights, gay rights, and transgender rights movements. This is not a movement motivated by fear, seeking new laws; rather, it seeks to reinforce the separation of the state from consensual sexual practices.<sup>2</sup>

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1. I say more about the concept of a sexual movement in section VI of this essay titled 'Sexual Emancipation'.
2. BRENDA COSSMAN, *SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING* (2007).

This movement confronts sexual assault, rape victim-blaming,<sup>3</sup> and debates over sex education curricula.<sup>4</sup> It is a call for sexual agency,<sup>5</sup> the autonomy to negotiate sexual boundaries and pursue one's sexual desires: the contentious notion that sexual activities be engaged solely for pleasure. Sexual autonomy, borne from negotiation and enthusiastic consent, is a re-imagination of the term, 'asking for it'. This sexual liberation movement desires a revaluation of sexual values, the right to say 'yes', and negotiate an array of sexual practices that includes sadomasochism.<sup>6</sup>

In a May 27, 2011 Supreme Court of Canada (SCOC)<sup>7</sup> decision, the defendant in an assault case, *R. v. J.A.*,<sup>8</sup> was convicted regarding sexual activity performed during a sex partner's brief loss of physical consciousness. The brief loss of consciousness occurred during breath play, or erotic asphyxiation, which involved a tempered amount of manual choking<sup>9</sup> during a consensual sadomasochism scenario. The SCOC cited law that requires continual consciousness for sexual consent and rejected the defendant's argument of prior consent. That is, despite consent prior to specific sexual activities, the SCOC ruled on the legal parameters of sexual autonomy.<sup>10</sup>

The upheld conviction of the *J.A.* case in Canada comes almost two decades after a group of sadomasochism (S/m)<sup>11</sup> practitioners in

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3. A specific tangible example of this movement is the 'Slut Walk' marches, see SlutWalk Toronto, Because We Had Enough, available at: <http://www.slutwalktoronto.com> (last visited May 30, 2012); See also CBC News, Toronto 'slut walk' takes to city streets, CBC NEWS, Apr. 3, 2011, available at: <http://www.cbc.ca/news/canada/toronto/story/2011/04/03/slut-walk-toronto.html> (last visited May 16, 2012) (Originating April 3, 2011, in Toronto, Canada, following a January, 2011 comment by a Toronto Police officer that "women should avoid dressing like sluts in order not to be victimized" queer feminist activists organized Slut Walk Toronto, a collective demonstration that has grown to over 200 'Slut Walks' worldwide.).
  4. Cara Kulwicki, *Real Sex Education*, in YES MEANS YES: VISIONS OF FEMALE SEXUAL POWER AND A WORLD WITHOUT RAPE (Jaclyn Friedman & Jessica Valenti eds., 2008).
  5. KATH ALBURY, YES MEANS YES: GETTING EXPLICIT ABOUT HETEROSEX (2002); YES MEANS YES: VISIONS OF FEMALE SEXUAL POWER AND A WORLD WITHOUT RAPE (Jaclyn Friedman & Jessica Valenti eds., 2008).
  6. Nafsika Athanassoulis, *The Role of Consent in Sado-Masochistic Practices*, 8 RES PUBLICA 141 (2002).
  7. See Judgments of the Supreme Court of Canada, available at: <http://scc.lexum.org/en/2011/2011scc28/2011scc28.html> (last visited July 28, 2011).
  8. *R. v. J.A.*, 2011 SCC 28; [2011] 2 S.C.R. 440.
  9. The defendant placed his hand on the throat of his partner and applied pressure restricting the flow of oxygenated blood to the brain to enhance sexual stimulation.
  10. *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440.
  11. See DONATIEN ALPHONSE FRANÇOIS SADE, THE 120 DAYS OF SODOM AND OTHER WRITINGS (Grove Press ed., 1966) (Sadomasochism, or S/m, is the negotiated, consensual infliction of pain. The term Sadist is applied to persons who derive pleasure through the infliction of pain on others, while a masochist correspondingly experiences pleasure through physical pain. The etymology of the term Sadist is attributed to the life and writings of the Marquis de Sade.); See also LEOPOLD VON SACHER-MASOCH, VENUS IN FURS (1870) (The term masochist is equally

England had their convictions upheld on charges of assault causing bodily harm despite claims of consent. Both cases involved relationships of consensual S/m, that took place in private homes and did not require medical attention. Nor were the police summoned during or immediately following their S/m activities. Neither case received police attention until well after the events with which the defendants were charged.

Our sexual relationships are perhaps our most intimate ones. I suggest that sexual intimacy is an integral part of human life; most persons desire some form of sexual relationship, regardless of their placement in the plethora of diverse demographic classifications. Human sexuality denotes physically intimate activities that often involve touching other persons, caressing, kissing, and engaging in various sexual practices for the purpose of sexual pleasure. Furthermore, this level of intimacy has the capacity to create an emotional or spiritual bond between persons. Sexual consent is constitutive of sexual agency. It is the negotiation of intentional sexual activity and should not be limited by the loss of physical consciousness where prior consent exists.

This article addresses the most intimate level of safety: the negotiation, trust and consent between persons within the context of sexual relationships. Specifically, I address the linkage between consciousness and consent in the SCOC judgement in the *R. v. J.A.* decision and argue that sexual autonomy means that consent does not cease with loss of consciousness. Several contemporary court decisions regarding S/m<sup>12</sup> practices in England and Canada have placed legal limitations on the permissible level of sexual consent and, subsequently, one's sexual autonomy. Legal parameters on sexual practices conflict with contemporary discourses of feminist and sexuality movements seeking to shift anti-pornography and sexual assault dialogues to a positive project of sexual empowerment. This article interrogates the restriction of sexual consent based on legal decisions of S/m practices and argues that the impact of these laws negatively effect sexual autonomy.

There are three legal cases regarding sadomasochism that I examine here. They are, in both chronological order and their order of appearance in this article, the 1993, England, House of Lords

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attributed to the life and writings of Leopold von Sacher-Masoch.); These terms originated with S/m practitioners and were galvanized in the sexual research of psychiatrist Richard von Krafft-Ebing, see RICHARD VON KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS* (1886); Gilles Deleuze, *From Sacher-Masoch to Masochism*, 9 *J. THEORETICAL HUMANITIES* 125 (2004).

12. I use an upper case 'S,' and a lower case 'm' in abbreviating sadomasochism to appropriately indicate the Sadist's dominant position and the masochist's corresponding submission. This corresponds with the capitalisation of Dominant S/m titles such as Mistress, Daddy, or Sir, and the lower case submissive titles such as slave, girl, or puppy.



*R. v. Brown* (sodomasochism) assault case. Second, the 2004 British Columbia (Canada) provincial court, *R. v. Price* (pornography) obscenity case. My explanation of the British Columbia *R. v. Price* case includes an abbreviated explanation of Canada's obscenity law, generally referred to in Canada as the 'Butler decision'. This explanation is included because it is a vital part of the contemporary community standard of sexuality for which I argue. Third, the 2011, SCOC, *R. v. J.A.* (sodomasochism) assault case that centred on the issue of sexual activity following loss of consciousness. I examine these three cases together because they represent significant legal decisions on S/m practices in the contemporary secular, industrialised West. These cases also work together in highlighting the distinction of the public/ private divide and how legal decisions of S/m are influenced, or not, by contemporary S/m practices and the community standard of sexualities and tolerance. What I argue through these three separate legal decisions is that what the court understood and applied correctly in *R. v. Price* and what the courts failed to recognise in the *Spanner* and *J.A.* cases, is the contemporary community standard of tolerance regarding sexuality and the significance of autonomy and self-determination in adjudicating sexual consent.

I start with an overview of erotic asphyxiation, or asphyxiophilia, known to S/m practitioners as breath play. This will not constitute a complete analysis of the practice but will suffice as a working understanding for this article. The next three sections are descriptions of the legal cases listed above. These cases are followed by a comparison of two disparate narratives – one feminist theory, one queer theory – that serve to articulate the legal limitations of consent, sexual emancipation and agency in contemporary, secular Western democracies. I then provide an analysis of the legal cases in light of contemporary sexuality practices and discourses.

In this article, I take a liberal position with regard to sexual practices generally, and to S/m specifically. Following Athanassoulis' stance in *The Role of Consent in Sado-Masochistic Practices*, I endorse the significance of respecting individual "autonomy, self-determination and consent."<sup>13</sup> This view of autonomy will be familiar to readers of John Stuart Mill.<sup>14</sup> I do not pursue an interrogation on the requirements of consent here as that is beyond the scope of this article. I do however, wish to include Athanassoulis' summary of liberalism's view of the law as needing to "respect and uphold individual liberties in conformity with the principle

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13. Athanassoulis, *supra* note 6, at 142.

14. See JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS (1859).



that each individual should be accorded the greatest possible liberty compatible with respecting that of others.”<sup>15</sup>

I contend S/m practices are appropriate in a discussion of queer sexualities because they represent a non-normative sexual paradigm that invites multifarious possibilities for sexual pleasure via the modalities of bondage, pain, and submission. Certainly not all S/m practitioners would agree with labelling S/m as queer since many practitioners are hetero-identified and do not regard their sexuality or S/m practices as queer; in short, I respect this stance. Having said that, in Nikki Sullivan's introduction to queer theory, she refers to the substantive number of theorists who adjudicate S/m as queer and cites Foucault's discussion on S/m as a queer pleasure.<sup>16</sup> For Foucault, S/m is “the eroticisation of power”<sup>17</sup> and S/m practices represent “the real creation of new possibilities of pleasure.”<sup>18</sup> Queer theorist Leo Bersani notes that Foucault wrote “at some length, and with enthusiasm” about S/m, and cites a 1984 *Advocate* article where Foucault “praised S/M practitioners as 'inventing new possibilities of pleasure with strange parts of their bodies' [...]”<sup>19</sup> I suggest non-procreative sexual practices that eroticise power and pursue pleasure with strange parts of the body can be understood as queer.

Ken Plummer states that “queer” represents “the postmodernisation of sexual and gender studies” and “brings with it a radical deconstruction of all conventional categories of sexuality and gender.”<sup>20</sup> This queer deconstruction of sexuality and gender categories is articulated in Jacob Hale's<sup>21</sup> and Robin Bauer's<sup>22</sup> work on the creation of alternative identifications in S/m scenarios. Alternative personae generated through (some) S/m relationships can be understood as disidentifications<sup>23</sup> – queer and intersectional – traversing categories of ability, age, class, ethnicity, gender, religion, and sexual orientation. These definitions of the term queer suitably represent what I address here.

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15. Athanassoulis, *supra* note 6, at 142.

16. NIKKI SULLIVAN, A CRITICAL INTRODUCTION TO QUEER THEORY 156 (2003).

17. MICHEL FOUCAULT, ETHICS: SUBJECTIVITY AND TRUTH 169 (1997).

18. *Id.* at 165.

19. LEO BERSANI, HOMOS 79 (1995).

20. Ken Plummer, *Critical Humanism and Queer Theory: Living With the Tensions*, in THE LANDSCAPE OF QUALITATIVE RESEARCH 479 (Sage Publications, 2008).

21. C. Jacob Hale, *Leatherdyke Boys and Their Daddies: How to Have Sex without Women or Men*, 52/53, SOCIAL TEXT 223 (1997).

22. Robin Bauer, *Transgressive and Transformative Gendered Sexual Practices and White Privileges: The Case of the Dyke/Trans BDSM Communities*, 36 WSQ: WOMEN'S STUD. QUARTERLY 233 (2008).

23. JOSÉ ESTEBAN MUÑOZ, DISIDENTIFICATIONS: QUEERS OF COLOR AND THE PERFORMANCE OF POLITICS (1999); See also JUDITH HALBERSTAM, IN A QUEER TIME AND PLACE: TRANSGENDER BODIES, SUBCULTURAL LIVES (2005).

## II. EROTIC ASPHYXIATION

The broad context of this article is the relationship between S/m and the law. More specifically, it is the requirement of consciousness for sexual consent in Canadian law. This limitation on consent subsequently requires an end to sexual activities, regardless of prior consent. In the *R. v. J.A.* case I examine later, a conviction of assault resulted from sexual activity that occurred following the loss of consciousness of a sexual partner. The unconscious state was precipitated by erotic asphyxiation, or asphyxiophilia, in psychological terminology.

Erotic asphyxiation is commonly referred to as breath play in S/m communities. Breath play is the limitation or restriction of a person's ability to breathe and to receive oxygenated blood to the brain. In John Curra's work on deviance, he explains the physiological effects of erotic asphyxiation:

The carotid arteries (on either side of the neck) carry oxygen-rich blood from the heart to the brain. When these are compressed, as in strangulation or hanging, the sudden loss of oxygen to the brain and the accumulation of carbon dioxide can increase feelings of giddiness, lightheadness, and pleasure, all of which will heighten masturbatory sensations.<sup>24</sup>

Depriving oxygen to the brain can be achieved manually by gripping the throat by hand or by applying direct pressure with a cane, belt or rope. Alternatively, oxygen can be deprived through modes of suffocation such as a plastic bag placed over the head or limiting the flow of air entering a gas mask.<sup>25</sup>

Erotic asphyxiation is a relatively unknown and under-researched sexual practice.<sup>26</sup> Combining an individual's ordinary reluctance to disclose their sexual proclivities with the pathologisation of non-reproductive sexual practices as paraphilias<sup>27</sup> results in a surreptitious sexual practice. When erotic asphyxiation does enter as a topic of conversation it might be initiated through a news story of death by auto-erotic strangulation: the bizarre investigatory issue in forensic science.<sup>28</sup>

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24. JOHN CURRA, *THE RELATIVITY OF DEVIANCE* 111 (2000).

25. Lisa Downing, *Erotic Asphyxiation and the Limits of SM Discourse*, in *SAFE, SANE AND CONSENSUAL: CONTEMPORARY PERSPECTIVES ON SADOMASOCHISM* 121 (Darren Langdridge & Meg Barker eds., 2007).

26. *Id.* at 130.

27. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV* (1994); Hypoxyphilia, meaning the love of oxygen deprivation, is listed in the DSM as a sub-heading of sexual masochism, see Downing, *supra* note 25, at 121.

28. Lisa Downing & Dany Nobus, *The Iconography of Asphyxiophilia: From Fantasmatic Fetish to Forensic Fact*, 27 *PARAGRAPH: J. MODERN CRITICAL THEORY* 1, 9 (2004); See also JOHN

Asphyxiophilia is an extreme form of S/m, usually categorised in S/m jargon as 'edge play'. There is no easy guide to learning breath play; it is a practice that must be engaged gradually and with great caution.<sup>29</sup>

Practitioners must be aware of the health status of anyone submitting to asphyxiation and realise that loss of consciousness is a real possibility and perhaps poses greater dangers to health. In examining the reasonable limitations of various S/m practices the techniques of erotic asphyxiation stand out as a “literal threat to the promise of 'safety', to the extent that its outcome may be accidental death.”<sup>30</sup> The potential for death is real because what creates breath control's emotional and physical sensations is the restriction of oxygen generally and to the brain specifically. S/m practitioner and author Jay Wiseman, acknowledges that there is no absolute method of preventing possible death in breath play. This potent distinction leads Wiseman to categorise asphyxiophilia as a “qualitatively different” S/m practice.<sup>31</sup>

While the Diagnostic and Statistical Manual<sup>32</sup> (DSM-IV), Curra and other authors<sup>33</sup> describe asphyxiation as a behaviour related to auto-erotic and masturbation practices performed alone it is also incorporated into sexual activities with partners.<sup>34</sup> The focus of breath play above has been on the psychical and physical experiences for submissive persons being choked or strangled. However, while the excitation is of a different kind, it is also true that dominant persons inducing breath control derive sexual pleasure from controlling a partner's ability to breathe.<sup>35</sup>

The *J.A.* case is an example of asphyxiophilia as a sexual act between consenting adults. After learning of the potential for death through asphyxiophilia, some may wonder why anyone would engage in such a precarious sexual practice and why it would be referred to innocently as breath 'play'? I will not undertake a lengthy attempt at a satisfactory

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MONEY, G. WAINWRIGHT & D. HINGSBURGER, *THE BREATHLESS ORGASM: A LOVEMAP BIOGRAPHY OF ASPHYXIOPHILIA* (1991).

29. WILLIAM A. HENKIN & SYBIL HOLIDAY, *CONSENSUAL SADOMASOCHISM: HOW TO TALK ABOUT IT AND HOW TO DO IT SAFELY* 211 (1996).

30. Downing, *supra* note 25, at 120.

31. Jay Wiseman, *Breath Control: I Want My “Precaution B!”*, available at: <http://www.leathernroses.com/generalbdsm/wisemanbreathcontrol4.htm> (last visited Nov. 20, 2011); Downing, *supra* note 25, at 120.

32. The Diagnostic and Statistical Manual (DSM) is a professional reference for the spectrum of psychological disorders used to determine treatment options and prognoses, see AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV* American Psychiatric Association (1994).

33. See Downing & Nobus, *supra* note 28, at 1, 9; See also MONEY, WAINWRIGHT & HINGSBURGER, *supra* note 28.

34. Downing, *supra* note 25, at 121.

35. HENKIN & HOLIDAY, *supra* note 29, at 61.



account of erotic asphyxiation here. Instead, I will refer to the S/m categorisation 'edge play' mentioned above. Edge play, as an unofficial category, consists of a number of S/m practices that vary depending on who you ask and how 'edgy' they consider various practices to be. What is largely accepted though is that the S/m activities in edge play are those that push the boundaries of one or more: safety, pain, humiliation, fear. An appreciation of these sexual desires should rather quickly indicate that these are persons who, for whatever reason, seek sexual adventure, sex on the edge.

### III. R. v. BROWN: THE 'SPANNER' CASE

In 1987, in Manchester, England, a police investigation culminated in the arrest of a group of men involved in sadomasochism. The arrests were the result of a series of unforeseen circumstances: the men had videotaped their hard-core S/m activities for their private viewing pleasure and by still unknown means a videotape fell into the possession of the police. The police viewed the extreme S/m practices recorded on the tape and determined it was of a violent nature that required investigation. All the defendants were known to each other; they had engaged in S/m together over a substantial period of time, having freely negotiated and consented to the activities which took place in private homes. None of the men required medical care, and none reported unlawful confinement or assault to the police before or after the charges were brought.<sup>36</sup> The defendants were tried on charges of 'assault occasioning bodily harm', contrary to Section 47<sup>37</sup> of the Offences Against the Person Act 1861, and specifically, 'inflicting bodily injury, with or without weapon', contrary to Section 20<sup>38</sup> of that Act.

The arrest of a group of gay men engaged in hard-core S/m, on trial for inflicting bodily harm caught significant media attention and subsequent

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36. R v Brown [1993] 2 All ER 75, 133.

37. See [Legislations.uk.gov](http://www.legislation.gov.uk/ukpga/Vict/24-25/100/enacted), Offences Against the Person Act 1861 § 47, available at: <http://www.legislation.gov.uk/ukpga/Vict/24-25/100/enacted> (last visited May 15, 2012) (Section 47 reads: Whosoever shall be convicted upon an Indictment of any Assault occasioning actual bodily Harm shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for the Term of Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour; and whosoever shall be convicted upon an Indictment for a common Assault shall be liable, at the Discretion of the Court, to be imprisoned for any Term not exceeding One Year, with or without Hard Labour.).

38. See *Id.* at § 20 (Section 20 reads: Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily Harm upon any other Person, either with or without any Weapon or Instrument, shall be guilty of a Misdemeanour, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for the Term of Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.).

public discussion. The media called it the “Spanner Case,” named after the chief police officer of the investigation.<sup>39</sup>

The original conviction of the *Spanner* case was held on November 7, 1990. The conviction was appealed to the House of Lords and in a three-to-two decision the convictions were upheld in 1993. The opening lines from Lord Jauncey of Tullichettle in the March 11, 1993, *R. v. Brown* majority decision include:

The events giving rise to all the charges were sado-masochistic homosexual activities carried out consensually by the appellants with each other and with other persons. [...] It was common ground that the receivers<sup>40</sup> had neither complained to the police nor suffered any permanent injury as a result of the activities of the appellants. [...] Your Lordships were further informed that the activities of the appellants [...] were conducted in secret and in a highly controlled manner, that code words<sup>41</sup> were used by the receiver [...]<sup>42</sup>

This brief passage reveals the court was aware of several contentious issues in the assault conviction. First, the Lords knew that these individuals had been participating in their activities consensually. Second, the activities of the participants were deemed as assault causing bodily harm though no one complained to police or sought medical attention. Third, the scenarios were held in secret (a participant's home), not in a public venue. Lastly, the participants regulated their activities and took precautions to avoid harm. The defence was based on these points with the added clarification that there was no potential for injury to anyone beyond those involved. Further, the defence argued the case does not meet the criterion for the Offences Against the Person Act because there was an absence of hostility: no malice or aggressive intent.<sup>43</sup>

The Crown responded that the fallacy of this argument is that actual bodily harm is a crime and therefore one cannot legally consent to it. The submissive partners were seen as aiding and abetting in a crime by their consent, though consenting to S/m is not a defence because it is a crime. The activities of lawful bodily harm cited by Lord Templeman include “Surgery, [...] circumcision, tattooing, ear-piercing, and violent

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39. Athanassoulis, *supra* note 6, at 141.

40. The term ‘receiver’ was used by some legal council to describe masochists, those receiving pain.

41. The Court here refers to the commonly used S/m term, safeword, a previously agreed word used as a code to cease activity, often because the masochist has reached or is near their pain threshold.

42. *R v Brown* [1993] 2 All ER 75, 86.

43. *Id.* at 108.

sports including boxing [...],”<sup>44</sup> and “parental chastisement” added Lord Jauncey.<sup>45</sup>

Speaking for the minority opinion in the *R. v. Brown* appeal, Lord Mustill introduced the idea of a “continuous spectrum of the infliction of bodily harm, with killing at one end and a trifling touch at the other”<sup>46</sup> so as to illuminate the simplicity of the majority's argument that sought to clearly identify a point distinguishing sadomasochism from legal harmful practices. Lord Mustill stated that bodily harm or pain incurred during sexual activity that is momentary or slight is acceptable and not subject to charges of bodily harm. This attempt to distinguish bodily harm leaves the burden of analysing slight pain or harm with the courts. However, given the adamant objections to S/m in *R. v. Brown* as a permissible activity allowing physical harm, it is certain this was the court's method of allowing playful sexual activity while excluding S/m.

In the appeal, the blatant disregard for harm from consensual S/m versus permissible injury from surgery, rugby, body piercing and other lawful practices are summarised in Lord Templeman's statement that,

[e]ven when violence is intentionally inflicted and results in actual bodily harm, wounding or serious bodily harm the accused is entitled to be acquitted if the injury was a foreseeable incident of a lawful activity in which the person injured was participating.<sup>47</sup>

In Lord Templeman's comments for the majority, he acknowledged that the 1861 law cited was originally written in the early eighteenth century to prohibit maiming through duelling and fighting “because the King was deprived of the services of an able-bodied citizen for the defence of the realm. Violence which maimed was unlawful despite consent to the activity which produced the maiming.”<sup>48</sup> Templeman also expressed concern that S/M participants could not accurately gauge the level of harm of their activities, and that the practice was “intentionally harmful to body and mind [...]”<sup>49</sup> He went on to describe S/m as not being only about sex, but violence and “society must be protected from a cult of violence.”<sup>50</sup>

In Lord Jauncey's comments for the majority, he acknowledged the participants used a safeword to cease activities when a pain threshold

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44. *Id.* at 78.

45. *Id.* at 93.

46. *Id.* at 108.

47. *Id.* at 78.

48. *Id.* at 79.

49. *Id.* at 89.

50. *Id.*



was reached but then pointed out that unlike sporting events there was no “referee” present in S/m, and that none of the participants were medically trained for their activities.<sup>51</sup> As with Templeman, Jauncey's concerns extended to morality, claiming that in the case of the *Spanner* defendants, the “corruption of young men is a real danger.”<sup>52</sup> Similar to the other majority opinions, Lord Lowry voiced his moral concerns in stating S/m “cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society.”<sup>53</sup> And on the question of including S/m into the list of lawful activities for bodily harm, Lord Lowry claimed S/m is a “wish to satisfy a perverted and depraved sexual desire.”<sup>54</sup>

The dissenting opinions in *R. v. Brown* came from Lords Mustill and Slynn. Mustill problematised the court's limitations of lawful bodily harm by adding euthanasia and “religious mortification.”<sup>55</sup> However, the main strategy for the defence was the argument that it was not a decision for the court at all. Lord Mustill stated S/m activities should be seen as a case of “private sexual relations.”<sup>56</sup> Lord Slynn agreed that consensual S/m activities are private, stating, “It is a matter of policy in an area where social and moral factors are extremely important and where attitudes can change. In my opinion, it is a matter of policy for the legislature to decide.”<sup>57</sup>

The issue in the *Spanner* case is that, in the opinion of the courts, there is a list of lawful activities that permit bodily harm but sadomasochism is not suitable for that list. A key point of contention for the courts in the *Spanner* case is the idea of consenting to S/m, consenting to bodily harm of a particular kind. As Athanassoulis articulates, the critics of S/m find something objectionable with the idea of desiring and consenting to physical harm as a means to sexual fulfilment. She rightly points out that the legal opinion forwarded from the House of Lords decision is that it is rational to harm another person for the purposes of child character development or sport but not in pursuit of “sexual gratification.”<sup>58</sup>

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51. *Id.* at 86.

52. *Id.* at 94.

53. *Id.* at 105.

54. *Id.*

55. *Id.* at 117.

56. *Id.* at 106.

57. *Id.* at 134.

58. Athanassoulis, *supra* note 6, at 150; I want to add here that in addition to the issue of consent in the *Spanner* case, there are other academic analyses that target what is reasonably perceived to be the court's issues and motivations regarding gay men's sexuality and the HIV status of some *Spanner* defendants, see Annette Houlihan, *When 'No' Means 'Yes' And 'Yes' Means Harm: HIV Risk, Consent And Sadomasochism Case Law*, 20 (31) TUL. J. L. & SEXUALITY (2011).

The minority opinion from Lord Slynn recognises that society's attitudes regarding sexuality can change; this is a fundamental idea in this article. I now move to a 2004 British Columbia provincial case on S/m pornography, and the court's recognition that community standards change. What I seek to underline in the following *R. v. Price* decision is that, unlike Lord Slynn's contention in *Spanner*, the British Columbia provincial court hinged directly on the recognition of shifting societal views of morality and attitudes toward sexuality.

#### IV. R. v. PRICE: THE 'SWEET PRODUCTIONS' CASE

In response to the UK Court conviction on the *Spanner* appeal of 1993 and the SCOC ruling of assault in the *J.A.* case in 2011, I introduce the British Columbia (BC) provincial court case of *R. v. Price*.<sup>59</sup> In 2004, the BC Courts dismissed the obscenity charges in *R. v. Price* based on a changing idea of obscenity, and evidence of how the community standard of tolerance on sexuality generally, and sadomasochism specifically, had shifted to accepting a higher level of violent depictions.

I will state immediately that I am aware of the difference in charges of assault, as in the *Spanner* and *J.A.* convictions, and an obscenity charge pertaining to sexual representations. I contend that while assault and obscenity are criminal charges of a different kind, the charges in all cases are related to acts of sadomasochism and the various courts' interpretation of the acceptability of these activities. As I mentioned in the introductory paragraphs, what I argue here is that what the court understood and applied correctly in *R. v. Price* and what the courts failed to recognise in the *Spanner* and *J.A.* cases is the contemporary community standard of tolerance and the significance of that community standard in adjudicating sexual consent.

In the summer of 2002, an adult video production company in Vancouver, Canada, called 'Sweet Productions Inc.' (SPI)<sup>60</sup> operated by Mr. Price was raided by the police and charged with twenty counts of obscenity based on eleven pornography videos obtained in the raid.<sup>61</sup> All of SPI's video work involved explicit depictions of bondage, sexual domination, and sadomasochism.<sup>62</sup>

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59. *R. v. Price*, [2004] BCPC 0104 141079-3-C2.

60. All references to the 'Sweet Productions' case are from the BC Provincial Court decision through their website: Provincial Court of British Columbia, *Regina v Randy Price*, available at [http://www.provincialcourt.bc.ca/judgments/pc/2004/01/p04\\_0103.htm](http://www.provincialcourt.bc.ca/judgments/pc/2004/01/p04_0103.htm) (last visited Nov. 7, 2011).

61. *R. v. Price* 2004 BCPC 0104 141079-3-C2, § 1.

62. *Id.* at § 4.

To provide a clear explanation regarding the judgement of the obscenity charges against SPI, it is necessary to have a basic understanding of Section 163(8) of Canada's Criminal Code on Obscenity.<sup>63</sup> I will provide a summary of this law as it pertains directly to the outcome of the SPI ruling and to my argument.

Canada's current obscenity law is based on what is known as the "Butler Decision."<sup>64</sup> In brief, Donald Butler owned an adult-only business that sold hard-core print pornography, and sold and rented video pornography. In 1987, Butler's store was raided and charges were laid after police seized material deemed obscene because it depicted the "undue exploitation of sex," containing one or more of the categories "crime, horror, cruelty and violence."<sup>65</sup> The original provincial court conviction on numerous obscenity charges came in 1989. Butler appealed and was convicted by the Supreme Court of Canada in February, 1992, under Section 163 of Canada's Criminal Code, which, at the time, set the standard for Canadian Courts; hence the dubious attachment of his name to Canada's obscenity law.

I will not undertake a lengthy, detailed explanation of the *Butler* decision here. Rather, I want to highlight Section 163(8) of this legislation pertaining to a legal test that seeks to determine what constitutes "undue" in adjudicating an "undue exploitation of sex," thereby identifying an "objective standard of obscenity."<sup>66</sup> Under the heading of undue exploitation of sex, there are three test components; I will briefly explain these three legal considerations.

The first of these is titled the "Community Standard of Tolerance" Test. In *R. v. Butler*, the Court stated that this test must be based upon the current level of acceptability in matters of sexual representation, citing from *R. v. Close*<sup>67</sup> and *R. v. Dominion News & Gifts (1962) Ltd.*<sup>68</sup> These judgements recognise that a society's conceptions of obscenity shift over time and that the courts must adjudicate in keeping with contemporary ideas and mores. The *Butler* decision also cites case law intended to

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63. See *R. v. Butler*, [1992] 1 S.C.R. 452 available at: <http://scc.lexum.org/en/1992/1992scr1-452/1992scr1-452.html> (Section 163 of Canada's Criminal Code addresses obscenity. Section (8) defines obscenity: "For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.").

64. *R. v. Butler*, [1992] 1 S.C.R. 452; See Supreme Court of Canada, *R v Butler*, available at: <http://scc.lexum.org/en/1992/1992scr1-452/1992scr1-452.html> (last visited Retrieved Nov. 7, 2011) (for the full Supreme Court of Canada decision.).

65. *R. v. Butler*, [1992] 1 S.C.R. 452.

66. *Id.*

67. *R. v. Close*, [1948] V.L.R. 445

68. *R. v. Dominion News & Gifts (1962) Ltd.*, [1963] 2 C.C.C. 103.



clarify the community standard test as one that applies to members of society as a whole, not only to a specific group or individuals, stating, “[t]he cases all emphasize that it is a standard of *tolerance*, not taste, that is relevant.”<sup>69</sup> That is, the test is not to determine what a citizen is prepared to tolerate viewing themselves but rather what they will tolerate other citizens viewing. This test recognises that there is a context to the exposure based on the audience and the circumstances of the viewing. In *R. v. Butler*, the court states that the most important of the three tests in determining an undue exploitation of sex is the community standard of tolerance. The notion of a community standard in adjudicating undue sexual exploitation is an important point that I will say more about later.

The second test for the undue exploitation of sex is the “Degradation or Dehumanization” Test. The target of this test is relatively self-explanatory and concerned with sexual indignities. The *Butler* decision cited *R. v. Doug Rankine Co.*<sup>70</sup> and its attention to “scenes which portray violence and cruelty in conjunction with sex”<sup>71</sup> deemed to be degrading or dehumanising. Representations of this nature are of specific concern because they are thought to be linked to moral decay and harm to society. Having said that, if exposure to such material is that potent, it seems it would also fail the community standard of tolerance test. The level of public acceptance for degradation again hinges on what is deemed undue, where representations of sexual objectification achieve an interpretation as dehumanising.

The third test is the “Internal Necessities” Test, also referred to as the “Artistic Defence” Test. In *R. v. Butler*, counsel for the Crown stated that artistic defence is the last step in determining whether a material's content should be considered undue sexual exploitation. The Court recognised that there are artistic works that may offend many viewers but that this discomfort is weighed against the artistic and literary merit of the material and the creative freedom of the artist. The Court must arrive at a determination as to the intention of the author, whether sexual exploitation is an integral part of the theme or the story's development, or if it is an unnecessary and undue pursuit of obscenity.

What becomes immediately clear in reviewing the above tests is that the courts have the final word, although they are regarded as speaking for the community as arbiter in determining the nation's standard of tolerance and threshold of obscenity. It is because of the differing opinions involved that it is unusual for these court decisions to be unanimous.

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69. *R. v. Butler*, [1992] 1 S.C.R. 452.

70. *R. v. Doug Rankine Co.*, [1983] 9 C.C.C. 3d. 53.

71. *R. v. Butler*, [1992] 1 S.C.R. 452.

While there is a majority decision, the dissenting justices give voice to an alternate interpretation of the law and show the unlikelihood of arriving at a united judgement. An example of judicial uncertainty from *R. v. Butler* is the majority decision delivered by Justice Sopinka, and the stern condemnation of obscenity, which states:

Obscenity leads to many ills. Obscene materials convey a distorted image of human sexuality, by making public and open elements of human nature that are usually hidden behind a veil of modesty and privacy. These materials are often evidence of the commission of reprehensible actions in their making, and can induce attitudinal changes which may lead to abuse and harm.<sup>72</sup>

However, in the initial 1989 provincial court conviction of Mr. Butler, Justice Wright considered whether the confiscated materials met the definition of obscene in Sec. 163(8) of the Criminal Code, and expressed serious difficulty in applying the community standards test. Wright stated that to render a definitive decision “on the basis of experience is contrary to the judicial role” and that applying his own views drawn from “experience” are unreliable.<sup>73</sup>

I place these two contrasting legal opinions of obscenity together to disrupt any claim that resembles former American Supreme Court Justice Potter Stewart's famous 1954 quote on pornography, “I don't know what it is, but I know it when I see it.”<sup>74</sup> Stewart helps elucidate that the demarcation of pornography is often, if not always, subjective; one person's erotica is another person's obscene pornography. What I want to garner from this description of the *Butler* obscenity decision is the ambiguous nature of the concept 'community standard' at that time.

I return now to the first part of the undue exploitation of sex in the *R. v. Butler* decision and draw attention to the court's statement that the most important of these tests is the “community standard of tolerance” test. As I mentioned above, the community standard test is a key element in my argument. I now summarise the outcome of the 2004, *R. v. Price* (SPI) case and the importance of the community standard test in that decision. Mr. Price faced twenty charges of obscenity based on eleven videos obtained in a police raid. All eleven videos depicted graphic acts of bondage, discipline, sadism and masochism.<sup>75</sup> The legal defence assembled a strategy targeting the measurement of the contemporary community standard based on four separate but supportive components.

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72 *Id.*

73 *Id.*

74 LINDA WILLIAMS, *HARDCORE: POWER, PLEASURE, AND THE “FRENZY OF THE VISIBLE”* 5 (1999).

75 *R. v. Price* 2004 BCPC 0104 141079-3-C2, § 4.

The first defence strategy called on expert testimony from two medical doctors, Moser and Fisher, with expert knowledge in sadomasochism.<sup>76</sup> The Crown argued against the supposed expert testimony but Judge Low permitted it, stating he would determine how much weight to attribute to this testimony.<sup>77</sup> Dr. Moser's testimony stated that pleasure and pain are closely related in human sexuality and that "pain giving rise to sexual pleasure is a normal sexual experience and is the basis for practising BDSM."<sup>78</sup> He suggested that S/m is more common than might be thought and went on to describe various levels of S/m whereby people who might not consider themselves as S/m practitioners may indulge in mild bondage or similar lower level S/m.<sup>79</sup> Dr. Moser clarified that while many S/m scenarios appear as acts of degradation both the dominant and submissive participants derive a "sense of accomplishment and feeling good and a whole variety of other emotions [...]."<sup>80</sup> Dr. Moser stated that consensual S/m "is normal and appropriate sexual behaviour" and that consent "is the overriding ingredient of normal and appropriate sexual behaviour."<sup>81</sup> Judge Low accepted that this definition was agreeable with Canada's Criminal Code.

Dr. Fisher was accepted by the Court as an expert in sexuality and pornography. In this capacity, he stated that the proliferation of pornography, including S/m, has been proved statistically not to increase sexual violence and rape.<sup>82</sup> Judge Low accepted the opinion of Dr. Fisher and the numerous studies he cited refuting a correlation between pornography and sexual violence.<sup>83</sup> Ultimately, the Court concluded that while valuing Dr. Fisher's opinion, it cannot be given weight because it conflicts with the *Butler* decision and Parliament's concern of harm from pornography.<sup>84</sup>

The second defence component introduced the status of the local Vancouver S/m community, and the police relationship with their activities. Mr. MacDonald, a retired thirty-year veteran with the Vancouver Police testified for the defence. Although he was not

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76. *Id.* at § 6.

77. *Id.* at § 9.

78. *Id.* at § 32 (BDSM is another acronym for sadomasochism, one that gives a fuller account of practices. The 'B' represents bondage, and 'D' represents discipline, for persons who engage in dominant-submissive power-exchange relationships but who may not necessarily engage in S/M pain activities.).

79. *Id.* at § 33.

80. *Id.* at § 41.

81. *Id.* at § 34.

82. *Id.* at § 46-51.

83. *Id.* at § 56.

84. *Id.* at § 86.



considered an expert in matters of S/m the Court gave weight to his testimony given his extensive police experience.<sup>85</sup> The defence entered evidence that “most larger urban centres in Canada” have S/m and fetish clubs or organisations where adults interested in S/m practices can easily gather in a regulated public venue.<sup>86</sup> Mr. MacDonald stated that local police are aware that S/m events take place on a regular basis and are routinely visited by police. He further stated that police do not interfere with the activities at these events and that in his experience the conduct of participants is “exemplary.”<sup>87</sup> Mr. MacDonald stated that in his experience he had seen S/m activity move from being a marginalised practice to achieving what he regarded as “socially acceptable”<sup>88</sup> status. Based on the testimony of Dr. Moser and the evidence of regular S/m events, Judge Low accepted that S/m is not an isolated sexual practice.<sup>89</sup> MacDonald said the activities at these events is the same or very similar to that on the eleven evidence videos from SPI.

The third piece of defence evidence affecting the contemporary community standard is the prevalence of worldwide communication through internet access and its prolific usage by current Canadian society.<sup>90</sup> SPI admitted that their S/m videos may be easily accessed via the internet through payment websites operated by SPI using a valid credit card.<sup>91</sup> Dr. Fisher's testimony stated “the Internet has provided anonymous, accessible, unfettered access to every variant of sexually explicit material from erotic to violent pornographic” images.<sup>92</sup>

The fourth and final major evidence introduced was a number of videos from mainstream movie rental outlets – *American Psycho*, *I Spit on your Grave*, and *Rape Me*, for example. The defence stated there is an abundance of sexually violent mainstream movies that are easily accessible through movie rental shops, theatres, cable television and libraries.<sup>93</sup> These films were introduced as evidence of the current community standard.<sup>94</sup> In his concluding discussion, Judge Low states “the level of violence in the Fictional Materials is higher than that portrayed in” the eleven videos from SPI.<sup>95</sup> Judge Low accepted that the

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85. *Id.* at § 38.

86. *Id.* at § 28.

87. *Id.* at § 29.

88. *Id.* at § 37.

89. *Id.* at § 36.

90. *Id.* at § 11-16.

91. *Id.* at § 17-20.

92. *Id.* at § 48.

93. *Id.* at § 25.

94. *Id.* at § 25-27.

95. *Id.* at § 95.

mainstream fictional videos are readily available thereby representing the current community standard and concluded that Canadians tolerate other Canadians viewing material “indistinguishable” from the SPI videos.<sup>96</sup> This determination ended the Court's discussion with Judge Low acquitting Mr. Price of all obscenity charges.

In assessing the case, Judge Low considered *R. v. Butler* and its intent to prevent harm from obscene material,<sup>97</sup> and recognised that *Butler* “criminalizes the exploitation of sex and sex and violence, when on the basis of the community test it is undue.”<sup>98</sup> The ruling gave weight to the Community Standard of Tolerance test in stating that “Canadian community standards change,”<sup>99</sup> and recognising that S/m “is not an obscure practice.”<sup>100</sup>

The acquittal was based on a community acceptance of S/m as a public practice given Dr. Moser's statement that S/m is a normal form of sexuality, Mr. MacDonald's thirty-year police career experience, the sample of sexually violent fictional films available at mainstream video stores and the proliferation of the internet and its burgeoning pornography sites that include hard-core sadomasochism.

Following the *SPI* judgement, there was an anxious assumption from pornography producers and members of the S/m communities in Canada that the Crown would appeal the decision but there was no appeal. While it is unknown to the public why an appeal was not filed, it was generally assumed that the evidence put forward by the defence sufficiently convinced the Court as to the contemporary community standard of tolerance.

I stated above that my argument recognises the difference in criminal law between assault charges in the *Spanner* and *J.A.* cases, and obscenity in the *SPI* trial. What I want to bring attention to is that the *SPI* defence is entirely built upon community standards from the disparate perspectives of medical, policing, communication technology, and mainstream entertainment sources. While the last two perspectives – internet and entertainment – address the more fictional aspects of S/m, the former sources – medical and policing – gave testimony regarding the actual practices of S/m practitioners. It is because the *R. v. Price* decision includes expert testimony, accepted by the court, on the permissibility of real

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96. *Id.* at § 99.

97. *Id.* at § 85-86.

98. *Id.* at § 73.

99. *Id.* at § 89.

100. *Id.* at § 36.

S/m practitioners and their activities within the Canadian community standard of tolerance that I hold this ruling in high regard.

### V. R. v. J.A.

One evening in May, 2007, a Canadian couple had consensual sex in their home. The couple had been involved sexually for approximately seven years and had a child together. Their sexual repertoire included engaging in S/m practices, including erotic asphyxiation and bondage, and on that night they did so. The man, known as JA, choked his partner and she lost consciousness, as had happened in the past. While the woman, known as KD, was unconscious JA inserted a dildo<sup>101</sup> into her anus. After less than three minutes, KD regained consciousness and asked that the dildo be removed; JA complied. He then untied her hands and the couple had peno-vaginal intercourse.<sup>102</sup>

Two months after this event, KD reported to the police that she had been the victim of an assault. KD stated that she had consented to being choked but had not consented to anal penetration, a sexual activity that occurred while she was unconscious. Her statement initiated an investigation and court case that would result in an original conviction for assault in Ontario provincial court, a successful appeal in Ontario, and culminate in an assault conviction in the SCOC. JA testified that there was no assault based on her prior consent.<sup>103</sup>

This case is somewhat problematic as a legal example for this article because of the relationship between JA and KD. The court transcripts include testimony that their relationship was failing. The time lapse of two months between the assault and KD's report to police was later explained by her as a response to JA's threat to seek sole custody of their child. The SCOC also recognised that KD was less than forthcoming on the question of whether the couple had engaged in anal sex previously. The court acknowledged that KD later recanted her initial testimony.<sup>104</sup> However, at that stage the legal process was underway.

Having said that, the *J.A.* case set a precedent in Canadian law. It upheld the legislation that states that sexual consent requires ongoing consciousness. Although the details of the case question whether there

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101. ROBERT M. GOLDENSON & KENNETH ANDERSON, *THE WORDSWORTH DICTIONARY OF SEX* 63 (1994) (A dildo is a phallic-shaped insertible sex toy available in various sizes and materials, usually silicone, rubber or plastic. These devices are used in auto-erotic and other sexual practices for orifice penetration. The term dildo is derived from 'diletto', the Italian word for delight.).

102. *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440.

103. *Id.*

104. *Id.*



was consent to sexual activities occurring while unconscious, that was not a determining factor. First, the court recognised that KD recanted her testimony but made no reference to that in the decision. Second, and more significantly, the majority opinion focused on law that regards a loss of consciousness as the termination of consent; it is therefore moot whether KD consented.<sup>105</sup>

The SCOC convicted JA of assault in a 6-3 decision. Delivering for the majority, Chief Justice Beverley McLachlin stated that in her opinion, “the code makes it clear that an individual must be conscious throughout the sexual activity in order to provide the requisite consent.”<sup>106</sup> In explaining the current consent law, McLachlin stated the requirement of consciousness is “to ensure that women and men are not the victims of sexual exploitation, and to ensure that individuals engaging in sexual activity are capable of asking their partners to stop at any point.”<sup>107</sup> It is not sufficient that a person believes there is consent; consciousness is required to allow “revoking or withholding consent to each and every sexual act.”<sup>108</sup> In specific reference to the JA case, McLachlin said the defendant was required to take “reasonable steps” to confirm whether there was consent and that he must “believe that the complainant communicated her consent to engage in the sexual activity in question. This is impossible if the complainant is unconscious.”<sup>109</sup>

In his dissenting opinion, Justice Morris Fish suggested that the interpretation of the law by the majority in the JA case goes beyond what Parliament intended. Fish recognised that the problematic outcome of such an interpretation could criminalise otherwise harmless affection – like kissing or touching – with a partner or lover who is sleeping. Fish also called into question the prohibition of prior consent, stating, “Prior consent, or even an explicit request – ‘kiss me before you leave for work’ – would not spare the accused from conviction.”<sup>110</sup>

There are at least two questions that arise from this decision. The first is the definition of sexual exploitation or perhaps even ‘sex’ as an activity itself. As Justice Fish wrote in his dissenting opinion, the ruling prohibits sexual contact with a sleeping partner or a previously arranged kiss.<sup>111</sup> Opposing this is McLachlin’s language that references “sexual

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105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. This refers to Justice Fish’s problematisation of prior consent and his example of agreeing in the evening to kiss before leaving for work the following morning.

activity.” It follows that there is a burden on the Court to adjudicate what constitutes an intelligible and clearly demarcated definition of sexual activity. Is it a kiss? This seems unlikely given that people kiss their children, parents, and pets, for example, in a non-sexual context. Fish's reference to physical contact with a sleeping partner has more traction but again requires further clarification. Does touching breasts constitute sexual activity? Or touching genitals? Is merely touching a sleeping lover's genitals sexual activity or is some level of sexual stimulation required? I leave these questions for the courts to address. Clearly the courts deemed JA's anal penetration of his partner with a sex toy sexual activity. I do not dispute this and doubt many would.

The second question I want to address is the prohibition of prior consent. Justice Fish questions the legal considerations of touching a sleeping lover and the scenario of a prearranged kiss. In contrast with the first question of defining sexual activity, I think this question is more easily interrogated. In brief, if a couple discuss engaging in sexual activity and then mutually agree that they will have sex later in the day, is there a legal requirement to later confirm consent? What is the time limitation on consent? Immediate or within an hour? If the answer to these questions holds fast to Chief Justice McLachlin's account, consent would not be quashed over the course of the day because the lovers have not lost consciousness. Is consent then invalidated if the persons involved sleep between the time of consent and when they see each other again? Or is consent resumed once they wake up?

What is absolute about the *J.A.* decision is that the court held to an immediate termination of consent with consciousness. The final point I wish to raise on the prohibition of prior consent connects the recent *J.A.* case to the *Spanner* decision. As discussed above, in the *R. v. Brown* decision, the House of Lords defended consenting to numerous forms of bodily harm, excepting S/m. The *Spanner* decision's list of legal activities of consensual bodily harm includes surgery and medical procedures. Most types of surgery and many medical procedures require an individual to both consent to bodily harm and then undergo bodily harm while in an unconscious state. What I want to underline here is that a common denominator in both the *Spanner* and *J.A.* cases is that erotic asphyxiation is an impermissible practice. That is, in *R. v. Brown* S/m is a consensual activity involving bodily harm that is deemed illegal; in *R. v. J.A.* legal consent is terminated with consciousness but only in sexual practices, surgery is exempted. The question arising from this analysis is: what makes consent to surgery different from sexual

activities? It is arguable that if an individual is judged to be rational and capable of consenting to being rendered unconscious and undergo invasive surgery then a similar person should have the autonomy to consent and engage in contentious S/m practices. Presumably a response to this assertion is that surgical procedures are practices of a different kind, and are physically required or even life-saving in nature. While this may be medically accurate (and pragmatic), it does not respond to the endorsement of autonomy and self-determination mentioned above. There are cases where, for varying reasons,<sup>112</sup> individuals refuse recommended medical or surgical procedures. I also want to add that, not unlike erotic asphyxiation, surgical procedures, even routine ones, hold the potential for danger or death and often have less predictable outcomes. I will leave this discussion here and along with the determination of what constitutes sexual activity leave it to the courts to respond to a distinction between prior consent for surgery versus prior consent for sexual activities.

Although the facts of the *J.A.* case are murky, it is clear that the only people who know what happened on that occasion are JA and KD. KD testified that the couple had engaged in breath play numerous times in the past and had enough experience with this activity that she had empirical knowledge that her length of unconsciousness averaged “less than three minutes.”<sup>113</sup> The decision in the *J.A.* case showed the Court's unwillingness to waver on any lapse of time while unconscious. My objective here is to argue that the loss of consciousness should not terminate freely negotiated consent. I recognise the current Canadian law is aimed at stopping the sexual exploitation of persons who are unconscious. Cases of rape and sexual assault are adjudicated on their own merit and we hold trust in the judicial system that they will distinguish illegal and ignoble acts of violence involving non-consensual sex. Notwithstanding the very real concern for horrific outcomes from sexual assault, the courts in both *Spanner* and *J.A.* have positioned S/m practices as the limitation of sexual consent.

There have been other attempts at establishing an easily understood definition of consent to ensure sexual safety. A well-known version of sexual consent developed in 1991 at Antioch College,<sup>114</sup> states that “each

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112. These reasons may include but are not limited to religious convictions, quality of life options, or end-of-life decisions.

113. *Id.*

114. See Antioch College, About Us, available at: <http://antiochcollege.org/about> (last visited May 30, 2012) (Antioch College is located in Yellow Springs, Ohio, USA. The Antioch College ‘Sexual Offense Prevention Policy’ (SOPP) states, “In 1991, a group of Antioch College students



new level of sexual activity requires consent.”<sup>115</sup> Students at Antioch generally supported the goal of ending sexual violence and fostering consent. The objections to the policy's wording came from students whose concerns, similar to Justice Fish, interpreted “each new level of sexual activity” to mean that a person would have to stop and ask permission for each new touch, kiss, or advance. In Bussel's article, *Beyond Yes or No*, she claims that “we do everyone a service when we recognize that consent is not simply a legal term.”<sup>116</sup> As the title of the article implies, Bussel urges honest sexual negotiation. In a corresponding article on consent, Lee Jacobs Riggs promotes the negotiation and consent principles correlative with S/m practices. Riggs states that S/m “may be the most responsible form of sex because you *have to* talk about it. You have to articulate exactly what you do and do not want to happen before anything starts.”<sup>117</sup> Concurring with Riggs, I contend it is this idea of a sexual discourse constituted of honest negotiation, articulated expectations, and consent that normative sexuality can benefit from S/m practices.

Philosopher Martha Nussbaum states that consensual S/m acts can be empowering because the “willingness to be vulnerable to the infliction of pain, in some respects a sharper stimulus than pleasure, manifests a more complete trust and receptivity than could be found in other sexual acts.”<sup>118</sup> From the perspective of masochists, or persons submitting to S/m activities, there is an imperative to know one's desires and to clearly state to partners what is sexually permissible. “The masochist's consent is specific and mapped out in detail prior to any activity.”<sup>119</sup> The aim of this discourse is to avoid abuse or from providing an excess of permission, thereby allowing a level of submission beyond one's true limitations. Athanassoulis writes that the responsibility for sexual action lies “with the consenting individual rather than the person actually executing the act.”

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began creating this policy, which would alter the culture of an entire community. This policy is the embodiment of Antioch College's commitment to ending sexual violence and fostering a culture of consensual sexuality. It governs the Antioch College Community by working with existing staff and faculty policies.”); See also ANTIOCH COLLEGE, STUDENT HANDBOOK 14-18, available at: <http://antiochcollege.org/assets/files/StudentHandbook-4.pdf>.

115. Rachel Kramer Bussel, *Beyond Yes or No: Consent as Sexual Process*, in YES MEANS YES: VISIONS OF FEMALE SEXUAL POWER AND A WORLD WITHOUT RAPE 44 (Jaclyn Friedman & Jessica Valenti eds., 2008); See also, Antioch College Student Handbook, *supra* note 114, at 15.

116. *Id.*

117. Lee Jacobs Riggs, *A Love Letter from an Anti-Rape Activist to Her Feminist Sex-Toy Store*, in YES MEANS YES: VISIONS OF FEMALE SEXUAL POWER AND A WORLD WITHOUT RAPE 113 (Jaclyn Friedman & Jessica Valenti eds., 2008).

118. Martha C. Nussbaum, *Objectification*, 24 PHIL. & PUB. AFF. 249, 280 (1995).

119. Athanassoulis, *supra* note 6, at 148.

For Athanassoulis, the consensual acts “originate with the consenting individual, and are merely carried out by another person.”<sup>120</sup> However, my respectful response to Athanassoulis is that such a template for consent places a disproportionate attribution of sexual responsibility with submissive persons. The notions of sexual self-knowledge and personal cultivation are equally required from individuals wielding power; a good Dominant<sup>121</sup> must “have control over her own pleasure,” she must recognise her limits, desires, and displeasures to maintain autonomy.<sup>122</sup> I conclude this section by endorsing a shared responsibility for honest sexual negotiation, that engenders a substantive level of trust with our sexual interlocutors, and permits consent to sexual practices that moves beyond the binary of yes or no.

## VI. SEXUAL EMANCIPATION

In the opening paragraphs I make reference to a sexual movement, rising from the discourses of feminist, sexuality, and queer theorists which calls for sexual agency and the re-imagination of sexual possibilities. This re-imagination is a consideration of the possibilities for individuals to create the sexual relationships and practices they desire, a sexual agency that negotiates freely, and charts a course of action with one's sexual interlocutors. This is what I refer to in the introduction, borrowing from Nietzsche,<sup>123</sup> by a revaluation of sexual values; sexual agency unfettered by historic expectations of procreative sexual practices and monogamous relationship schema.

In this section, the struggle for sexual emancipation and agency starts from Joan Scott's paper, *Sexularism*. I posit Scott's concept of “sexularism”<sup>124</sup> here because she questions the potential claim “that takes sexual emancipation to be the fruit of secularism.” That is, the issue of secularism producing autonomous individuals is problematised by recognising that the separation of religion from the state still leaves citizens influenced and regulated by cultural, judicial, religious and state ideologies. While recognising that Scott largely addresses the historical

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120. *Id.* at 143.

121. A Dominant is a term for a person in the dominant position of a Dominant-submissive relationship or power-exchange relationship. A person who identifies as a Dominant may be a Sadist, or not, but it denotes a position of sexual authority.

122. MIDORI, *WILD SIDE SEX: THE BOOK OF KINK* 56 (2005).

123. Nietzsche's *On the Genealogy of Morality* can be regarded as a revaluation of values, it is a phrase he uses in that text. I borrow from the spirit of that writing in arguing for a revaluation of sexual values, see FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALITY* 3.27 (1887).

124. Joan W. Scott, *Sexularism* 6 Paper presented at the Robert Schuman Centre for Advanced Studies, European University Institute, Florence, Italy (April 23, 2009).

intersections of women's status by varied religious dogmas and political epochs, I want to navigate the concept of secularism in support of my own argument and claim that a secular, feminist emancipatory discourse is appropriately placed for the legal limitations of sexual consent I address in this article.

In the section titled "Agency," Scott cites Chowder et al. in highlighting the French enforcement of secularism through the example of a Muslim student ordered to remove her *hijab* by her teacher. When the student questions the demand, her teacher states it is required for normalcy. The young Muslim woman points out that some students wear their hair in dreadlocks, and asks how that is normal while her *hijab* is not?<sup>125</sup>

Scott states that in recent debates regarding headscarves there has been more attention given to the opinions of critics than to Muslim women who wear headscarves.<sup>126</sup> The concern to hear the voices of a particular constituency is relevant to S/m practitioners and the claim that they have been unfairly criticised and misrepresented.<sup>127</sup> I appreciate that the positioning of S/m practices alongside Muslim headscarves might appear intellectually ambitious or erroneous but the struggles for agency, consent, and sexual identity amid cultural, judicial, and religious apparatuses are, I think, quite similar. For the defendants in the *Spanner* case, various types of physical harm were lawful, but not for S/m. For the Muslim student, a variety of hairstyles are allowed while wearing a *hijab* is not; both face social and legal limitations on their identities. And while laws designed to protect bodily harm and non-consensual sex have not served S/m practitioners well, the promise of secularism has not brought sexual emancipation to Muslim women. The agency of the individual to knowingly consent to a practice must be respected "regardless of how unappealing or immoral such acts may appear to others."<sup>128</sup>

Some persons, like the Muslim student's teacher, might have discomfort or a moral reaction to headscarves. Similarly, some S/m practitioners push society's moral limitations by usurping and manipulating what some hold sacred. S/m scenarios that engage issues of ethnicity, gender and religion, for example, can be visceral to outside viewers and call to question what the individual can consent to, in some cases going beyond consciousness or sexual practices some people find unappealing,

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125. *Id.* at 10.

126. *Id.*

127. Terry Hoople, *Conflicting Visions: SM, Feminism, and the Law- A Problem of Representation*, 11 CANADIAN J. OF LAW & SOC'Y 177,180 (1996).

128. Athanassoulis, *supra* note 6, at 147.



undesirable or immoral. With that in mind I examine Gary Fisher's short, non-fiction story *Arabesque*.<sup>129</sup>

Fisher recounts a consensual S/m scenario between himself and a gay lover. The *Arabesque* scene disrupts “socially encoded scripts of identity”<sup>130</sup> on several axes, including ethnicity, religion and sexual orientation. Two gay men assume the roles and identities of an “Arab boy,” Fisher, and an “Israeli soldier,” his lover. Fisher is African-American; his lover is presumably (but not necessarily) White. The ‘Arab boy’ has been captured and is forced to be sexually submissive to the ‘Jewish soldier’. Their scenario is intense, physical, sexual, driven by the potency of racism, nationalism and warfare. The Israeli soldier ties a red and white *keffiyah* tightly on the prisoner's head. He intimidates his captive, saying, “thousands of little Arab boys are being killed – blown to bits, shot, crushed in their bunkers.” The humiliation continues, “Aren't you glad that I captured you and made you my slave, my toy?”<sup>131</sup> The soldier snidely asks the boy if he knows what his mouth is to be used for, then laughs. The Arab boy is threatened; his head slammed several times, he is assured that more violence will be used if necessary, in part, because it gives pleasure to his tormentor. The captive is threatened with death by forced fellatio: “I'm going to choke you to death, and you're going to love it.”<sup>132</sup> The soldier continues to force his penis down Fisher's throat, eventually ejaculating, screaming that he's going to “blow [Fisher's] fucking head off!”<sup>133</sup>

The power of the scenario is executed through the captor's physical and sexual assault on the boy, yet one that Fisher, in the role as the boy, welcomes. Fisher describes his understanding of the encounter through “its strength, its unrelenting, its selfishness and selflessness.”<sup>134</sup> Some might regard this type of S/m play reprehensible; others might think it is sexually charged. What I want to emphasise in this scenario is that, like the legal cases above, the participants entered into it freely, with an understanding of what action would occur. (I say this with recognition that there remains a question of consent regarding anal penetration in the *J.A.* case.)

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129. GARY FISHER, *GARY IN YOUR POCKET: STORIES AND NOTEBOOKS OF GARY FISHER* 63 (Eve Kosofsky Sedgwick ed., 1996).

130. JOSÉ ESTEBAN MUÑOZ, *DISIDENTIFICATIONS: QUEERS OF COLOR AND THE PERFORMANCE OF POLITICS* 8 (1999).

131. FISHER, *supra* note 129.

132. *Id.* at 65.

133. *Id.* at 67.

134. *Id.* at 65.

The second consideration to underline here is that the brutality of consensual scenarios involving activities like punching or choking occur in a context of trust that is not aimed at real or lasting physical harm. Fisher recalls how his thoughts immediately shift from the contentious sexual fantasy play of Arab existentialism to briefly re-situate his life in contemporary California where in reality his 'captor' had taken him for dinner earlier that evening.<sup>135</sup>

It is of course not accidental that I situate Fisher's *Arabesque* story immediately after Scott's sexularism. I wish to contrast legal limitations on the agency of Muslim women in consenting to wear a *hijab* as a symbol of religious identity, and the agency of Fisher in consenting to wear a *keffiyah* as part of a role in his sexual identity. The paper's main theme of S/m, consent and the law is disrupted and juxtaposed here through the practice of wearing a *hijab*, regulated by the state in some Western democracies that regard secularism as the harbinger of tolerance, liberalism and personal freedom.<sup>136</sup> Contrarily, S/m activities sometimes constitute bodily harm and are illegal in other secular Western democracies. Scott's notion of sexularism elucidates how the role of the state in secular democracies has not brought sexual emancipation and Fisher provides a story of sexual liberation representative of the community standard of tolerance.

## VII. FINAL ANALYSIS

To those inexperienced with S/m, unfamiliar with consensually aggressive, even violent sexuality, there can be a questioning of psychological contiguity. How does the non-S/m practitioner make sense of these activities? Erotic asphyxiation is a dangerous, marginalised form of sexual practice with the potential result of unconsciousness, and there are S/m participants who willingly consent to this practice.

In the SCOC's recent *R. v. J.A.* assault case, the Court held strictly to the law that requires continual consciousness during sexual activity so that one is "capable of granting, revoking or withholding consent to each and every sexual act." The court's jurisprudence denied the defendant's claim of prior consent and, I argue, sent a troubling message as to what rational sexual agents can freely negotiate and consent to. The SCOC decision is unfortunately reminiscent of the Antioch College attempt at establishing a robust definition of consent as the standard for

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135. *Id.* at 64.

136. WENDY BROWN, *REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE* 17 (2006).

sexual safety. The response for both Antioch College and the Canadian public following these decisions has included mockery and confusion: the snide questions as to whether every slight physical contact and movement must be prefaced with a “May I?”

A salient difference between the SCOC *J.A.* decision and the House of Lords ruling on the *Spanner* appeal is that while the Lords accepted seemingly every common form of bodily harm whilst forbidding S/m, the SCOC recognised potential situations where the consciousness legislation was not well thought out. My purpose in introducing the Sweet Productions case is obvious at this point; I remain hopeful that the courts will be reasonable in the face of existing legislation and give greater consideration to the contemporary community standard and the realities of people's sexual practices.

Admittedly, my reference to Canada's *Butler* obscenity law might be regarded as misplaced in a discussion of sexual consent and assault legislation. My reasoning here, to restate, is a concern with how the legal decisions discussed have been affected by the coupling of sexual acts with what the *Butler* ruling describes as crime, horror, cruelty and violence. Erotic asphyxiation is a practice at the intersection of sex and violence. It might be adjudicated as cruelty but when freely negotiated and engaged consensually between rational adults, it should not be legislated as a crime. The dismissal of charges in the *SPI* case signals a recognition of the change in the community standard of tolerance. In *R. v. Butler* the Crown states that the most important test in adjudicating the undue exploitation of sex is the Community Standard of Tolerance test. The Crown also acknowledges that this standard shifts over time and courts must remain mindful of contemporary attitudes and the level of acceptability in sexual practices, as Lord Slynn stated for the minority in the *Spanner* case. I take the Court's recognition of a community standard that varies with changes in a society's ideas of sexuality to be a general agreement that a state prescription of morality would result in a sexual dystopia.

While acknowledging that the SCOC adhered to the most conservative interpretation of consent, I concur with the dissenting opinion in *J.A.* that consent was given prior to the loss of consciousness. The question of penetration post-consciousness being negotiated or consented to on that occasion is known only to the participants and I do not question the complainant's motivation for filing an assault charge. However, as I included in the section on the *J.A.* case, I contend that sexual activities



require mutual negotiation and consent, and that a disproportionate level of responsibility cannot be placed on one participant.

### VIII. CONCLUSION

This article calls for a revaluation of sexual values in a context similar to Nietzsche in *On the Genealogy of Morality*.<sup>137</sup> What I have tried to problematise, congruent with Nietzsche, is the unquestioned status quo of morality, the conditions and circumstances of our present set of values which render non-normative sexual practices such as S/m suspect, misunderstood and misrepresented. With regard to the ethics of consensual S/m practices, this article calls for a sexuality that allows a “glimpse of something perfect, completely finished, happy, powerful, triumphant, that still leaves something to fear!”<sup>138</sup>

*The Fantasy of Acceptable Non-Consent* is the title of an article by Stacy May Fowles. As a sexually submissive woman who pursues S/m relationships with dominant men and consents to being “violated via play,” Fowles describes the difficulty of reconciling sexual desire with the politically contentious.<sup>139</sup> Fowles' conundrum is not about legal prohibitions on S/m but about the cultural stigmatisation. The proliferation of S/m pornography and psychopath killer movies was documented in the *SPI* case. Fowles points to these media misrepresentations of S/m practices as leading to the social inability to knowingly negotiate consensual 'non-consent'.<sup>140</sup> The outcome Fowles seeks from discourses of sexual empowerment is a reclamation of the phrase, “she was asking for it.”<sup>141</sup> In navigating the precarious intersection between her concurrent identities as both a feminist and a masochist, Fowles reports sadly that “claims of sexual emancipation do not translate into acceptance for submissives.”<sup>142</sup>

The lack of sexual emancipation is as true in Fowles' fantasy of non-consent as it is in Scott's sexualism. Fowles' struggle for unquestioned

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137. NIETZSCHE, *supra* note 123, at 3.27.

138. *Id.* at 1.12.

139. Stacy May Fowles, *The Fantasy of Acceptable 'Non-Consent': Why the Female Sexual Submissive Scares Us (and Why She Shouldn't)*, in YES MEANS YES: VISIONS OF FEMALE SEXUAL POWER AND A WORLD WITHOUT RAPE 118 (Jaclyn Friedman & Jessica Valenti eds., 2008).

140. Non-consent is an S/m term for hardcore scenarios that resemble actual rape or assault but have been negotiated and consented to. This is often referred to as consensual non-consent. The term should not be interpreted as a lack of consent.

141. *Id.* at 125.

142. *Id.* at 119.

opportunities for consenting to non-consent confronts the legislation barring consent in *Spanner*, the limitation of consent in the *J.A.* case, and concurrently represents the community standard of tolerance adjudicated in the *SPI* decision. Like Fisher, Fowles provides a glimpse of that to which we aspire: negotiate and consent, something happy and powerful, a sexuality that we can create with our sexual interlocutors and a re-imagining of what it means to be asking for it.

