

ONGOING CONSENT:  
A PROPOSED MODEL FOR CONSENT TO  
ASSAULT IN THE S/M CONTEXT

PART I. INTRODUCTION

In the summer of 1996, Oliver Jovanovic, a graduate student at Columbia University met a female Barnard College student in an online chat room.<sup>1</sup> Over the course of the following months, the two exchanged numerous emails on various subjects, including their mutual interest in sadomasochistic practices (S/M).<sup>2</sup> Specifically, the woman described her fantasy of being tortured and admitted to past S/M relationships.<sup>3</sup> In November of that year, the two arranged to meet at Jovanovic's apartment with the expectation of practicing S/M together. During this initial encounter, the woman agreed to be tied to Jovanovic's futon. However, she later alleged that she *did not* consent to what followed—for the next 20 hours, Jovanovic poured hot candle wax all over her body, bit her, and shoved an object and/or his penis into her rectum.<sup>4</sup> Although she invoked the “safe word,” which was designated as the signal for him to stop, and although she yelled so loud that his neighbors reported “screams coming from the apartment”—Jovanovic continued. Finally, after 20 hours, the woman was able to free herself and get away.

Following the encounter, the woman reported the incident to police, and Jovanovic was charged with kidnap, assault, and sexual assault. At the trial level, the court rejected Jovanovic's argument of consent as a defense to the allegations. Therefore, under New York's Rape Shield laws, the judge excluded the e-mail correspondence between Jovanovic and the victim.<sup>5</sup> Jovanovic was convicted on all counts by the trial court.

On appeal, the Appellate Division, agreed in dicta that “consent is no defense to assault.”<sup>6</sup> However, in a split decision, the court held that the emails were “highly probative as to Jovanovic's belief that consent to these

activities existed.”<sup>7</sup> Pointing out the friction in these two positions, the dissenting judge noted that a reversal of Jovanovic’s assault charges implied that the failure to allow evidence of consent to S/M assault would lead to reversible error.<sup>8</sup> In 2000, the Appellate Division’s decision was affirmed by New York’s highest court,<sup>9</sup> and *Jovanovic* became the first instance where an American court recognized a defense of consent to assault in the S/M context.<sup>10</sup>

The *Jovanovic* case spurred debate between those who oppose a consent defense for S/M (individuals who support what I refer to as the “protectionist argument”) and those who advocate for the availability of a blanket consent defense (individuals who support what I refer to as the “liberal argument”). Commentators such as Cheryl Hanna, who oppose the availability of a consent defense in the S/M context, conclude that because it is from the pain (the violence) itself where S/M practitioners receive sexual pleasure or gratification, the primary purpose of S/M is violence. Therefore, Hannah argues that an S/M practitioner should not be able to escape culpability on a theory of consent. However, commentators such as Monica Pa, who advocate for an S/M consent defense, argue that S/M is primarily sex, albeit with some violent aspects. These advocates argue that because the activity of sex has an important social utility, a defense of consent to assault should be available in the S/M context.<sup>11</sup>

Both the protectionist argument and the liberal argument regarding a consent defense in the S/M context are compelling to a certain extent, yet they are over inclusive and under inclusive in application. For example, disallowing a consent defense is highly over-inclusive. As Hanna herself notes, disallowing a consent defense in the S/M context will often lead to the potential prosecution of individuals who are causing little or no harm.<sup>12</sup> In 2001, in Attleboro, MA, for instance, the police raided a clandestine S/M club and charged a New York City business woman and a New Hampshire man with 13 different charges, including assault with a dangerous weapon—a wooden spoon. The case was prosecuted, notwithstanding the fact that the “victims” claimed to have consented to the activity.<sup>13</sup>

Though the protectionist argument may seem over inclusive in application, an absolute consent defense, such as the one advocated by liberal commentators, S/M seems just as problematic because it is under inclusive in that it opens the door for situations where an escalation of events could occur, leading to tremendous harm. *Jovanovic* itself is evidence that allowing a blanket consent defense to S/M can lead to a situation where one single S/M encounter can turn from one that is primarily sex and not harmful to one that is primarily violence, with a high potential for harm. We can eas-

ily imagine an S/M encounter where an individual consents to the S/M practice in general, but may not have consented to a specific act, or the escalation of activities.

Because the protectionist argument is too over inclusive, capturing mild, non-harmful S/M, while the liberal argument is far too under inclusive, I propose an alternative approach to the S/M consent defense debate, which I call the “ongoing consent” model. As we shall see, this proposal not only most effectively defines consent in the S/M context, it also most successfully ensures consent.

## **PART II. Background to sadomasochism**

This section briefly describes what S/M is and how it works. Although intended to be brief, understanding how S/M works in practice will help to assess whether or not the ongoing S/M consent defense proposed in Part III of this paper would be practicable and effective within current S/M practice.<sup>14</sup>

S/M is erotic “play.”<sup>15</sup> According to the National Coalition for Sexual Freedom, S/M is “a sexual orientation or behavior among two or more adults.”<sup>16</sup> It has a broad definition, and includes, but is not limited to physical and/or psychological stimulation for the purpose of sexual arousal and satisfaction. In some cases, there is very little or no actual pain inflicted.<sup>17</sup> S/M is an “umbrella” term that is used to cover a variety of practices, including but not limited to dominance and submission, and bondage and discipline.<sup>18</sup> Usually, S/M involves an individual taking the “active role,” that of the “dominant” or “top” partner, and another individual taking a “passive role,” that of the “submissive” or “bottom” partner.<sup>19</sup> Practitioners of S/M “make real” their erotic fantasies by choosing which role they will play—often an individual who has a position of power will enjoy playing the submissive role, while women and other traditionally “powerless” individuals often play the active role.<sup>20</sup>

Because of the many methods and ways that individuals participate in S/M encounters, S/M is not easily defined. However, in a study by Weinberg, Williams and Moser, the authors found that S/M encounters usually had the following five features:

- (1) **Dominance and submission** – an appearance of dominance and submission, with extraordinarily clear roles.
- (2) **Consensuality** – the existence of a voluntary agreement to enter into the S/M “play” and clear understanding of the “limits” of the play

- (3) **Sexual content** – the content of the interaction has sexual or erotic meaning
- (4) **Mutual definition** – a shared understanding of the activities
- (5) **Role playing** – the existence of roles assumed for relationships that both parties recognize are not reality.<sup>21</sup>

Currently, there are a number of organized social groups and communities that practice S/M. In this paper, I refer to participants in these groups as engaged in “established” S/M practice. One such group, the Society of Janus, which is based in San Francisco has been in operation since 1974<sup>22</sup> and “focuses on providing education as well as social events and occasional play parties.”<sup>23</sup> Their website provides articles, answers to frequently asked questions, helpful resources, and a calendar of events in the Bay area. The motto of S/M communities such as the Society of Janus is “safe, sane, and consensual.” “Safe” in that the participants will not be damaged or hurt in any way that could cause real problems in their lives. “Sane” in that these participants will not be emotionally damaged. Finally, “consensual” in that participants get to choose what activities they would like to participate in, and that participation is voluntary by both parties - in other words, the “consent is required to be voluntary, knowing, explicit, and with the full understanding of previously agreed to parameters.”<sup>24</sup>

Established S/M practice can be differentiated from S/M that occurs in the privacy of the home between married couples, or otherwise partnered individuals. In this paper, I refer to this as “private” S/M practice. In fact, in 1990, a report conducted by the Kinsey Institute reported that roughly 5-10% of the U.S. population “engages in sadomasochism for sexual pleasure on at least an occasional basis, with most incidents being either mild or stage activities involving no real pain or violence.”<sup>25</sup> In a survey by Hunt, 2.1% of 2,026 women who were surveyed indicated that they had obtained sexual pleasure from inflicting pain, and 2.5% of men and 4.6% of women indicated that they had obtained sexual pleasure from receiving pain. These participants practice S/M in private, probably without knowledge of “safe, sane and consensual” or other standards of the S/M community.

### PART III. PROPOSAL FOR AN ONGOING CONSENT DEFENSE SCHEME

Cases such as *Jovanovic*, along with the fact that 5-10% of the adult population participates in some form of S/M practice,<sup>26</sup> indicate that the future of consent as a defense to assault in the S/M context is far from settled. This section outlines a new proposal for an ongoing consent defense.

It attempts to remove the over inclusive aspects of the protectionist position, as well as the under inclusive aspects of the liberal position, by shaping a new model for consent in the S/M context which mirrors actual S/M practices. This model also attempts to create an effective way to define defense, as well as a successful way for practitioners to seek and ensure consent.

On the one hand, the proposed consent model agrees with the liberal argument in that we ought to have some form of consent available in the S/M context because the protectionist argument too greatly hinders personal sexual freedoms and is over inclusive in implementation. However, on the other hand, the proposed model strives to compensate for the liberal arguments' under inclusiveness by demanding a higher standard for consent.

### **1) Proposed Statute for Ongoing Consent in S/M Practices<sup>27</sup>**

- (1) All sadomasochistic practices between one or more persons must be consensual.
- (2) For the purposes of this statute, "consent" is defined as an act of willfully agreeing to engage in specific sadomasochistic contact or conduct.
- (3) Obtaining consent is an on-going process in any S/M interaction. Consent should be obtained with each new level of physical and/or sexual contact/conduct in any given interaction. The consent must be specifically given verbally, or through pre-negotiated mechanisms.
- (4) If someone has initially consented and then stops consenting during a sadomasochistic interaction, he or she should communicate withdrawal of consent according to pre-negotiated mechanisms, or through physical resistance.
- (5) The giver or withdrawer of consent's belief of consent or non-consent creates a rebuttable presumption that consent did or did not exist.
- (6) Consent, for the purposes of this statute, may never be given to activities involving permanent injury and/or long term physical or mental impairment, including but not limited to murder and amputation.

The premise of this proposed statute is that consent to assault in the S/M context should not be seen as extending throughout the entire S/M encounter, but that consent should be specifically achieved for every level of activity throughout, and during, the S/M encounter. This ongoing consent defense scheme creates a more demanding standard of consent because “consent” under this proposed model (a) must be given at every level, or for every new activity, as well as during the activity (b) must be subjective as to the giver or withdrawer of consent, and (c) must be given through verbal means, or through pre-negotiated mechanisms.

a) *Consent at every level and on an ongoing basis*

The proposed model states that “obtaining consent is an on-going process in any S/M interaction.” And that “Consent should be obtained with each new level of physical and/or sexual contact/conduct in any given interaction.” This ensures that within S/M activities, all participants will be protected throughout the *entire* encounter. In this way, we can adequately guarantee that there will not be an escalation of activities—such that an individual may have consented to the S/M encounter in general, or to a specific aspect of the encounter (*e.g.* being tied up), but had not consented to some other activity (*e.g.* the use of hot wax). Further, the statute provides a way for an S/M participant to withdraw consent during an encounter. Thus, if a person had consented to spanking, for example, but it began to get harder than he or she expected, the statute provides a way for that individual to withdraw her consent.

b) *Subjective as to the giver of consent*

Additionally, the proposed ongoing consent model in section (5) utilizes a subjective standard because the giver or withdrawer of consent’s belief creates the presumption that he or she did or did not consent. By using a subjective standard, we ensure that *both* S/M participants (the sadist and the masochist) will take care to clearly signal consent. In the case of the giver of pain, he or she will have an incentive to receive clear consent before the commencement and continuation of each activity, while the receiver of pain will have an incentive to provide clear consent before the commencement or continuation of the activity.

c) *Consent must be given through pre-negotiated means*

Often in S/M, where individuals receive sexual pleasure from the infliction of pain, the withdrawal of consent, or saying “no” actually signals pleasure. For example, the words “no” or “stop,” actually mean “keep going” or “harder”! Therefore the proposed ongoing consent model takes

into account the specific nature of S/M by stating that consent needs to be given through verbal or *pre-negotiated* means. The idea of pre-negotiated means is very important, because it provides an incentive for individuals to decide upon “safe words” prior to the start of the S/M encounter (more about “safe words” in the following section), thereby creating a method for pre-planning and negotiating.

**d) *Restriction on consent to activities which involve permanent injury and/or long-term physical or mental impairment***

In the context of boxing, and other carve-out exceptions to the consent defense, there are still actions that are not subject to a defense of consent. For example, if a boxer continues to strike his or her opponent after the referee has called a knock-down, the consent of the opponent does not preclude the boxer’s prosecution for assault. In the same way, the proposed model attempts to create a category of activities that the S/M practitioner can *never* consent to: activities which involve permanent injury and or long-term physical or mental impairment. These activities would include murder, amputation, and other forms of life-threatening or permanent injury.

**2) How the proposed ongoing consent defense to assault in the S/M context would work in practice**

First, we must account for the fact that there are two forms of S/M that must be considered in determining whether or not an ongoing consent model would successfully work in the S/M context: S/M that occurs within the established S/M community and is conducted by individuals who are familiar with S/M “rules”<sup>28</sup> (which I referred to in Part II as “established S/M” practice<sup>29</sup>), and S/M that occurs within the private bedroom by individuals who are unaware of the S/M communities’ established practices (which I referred to in Part II to as “private S/M” practice). This section first considers the ongoing consent defense in practice within the established S/M context and then turns to the private S/M practice.

**a) *Amenability of ongoing consent defense in established S/M practices***

Because of the well-established rules for conduct in the established S/M community, an ongoing consent defense scheme would not only be practicable, but actually provide support to the consent that the established S/M community already strives toward. For instance, the National Coalition for Sexual Freedom notes that within the “Safe, Sane, and Consensual” model, “Consensual is respecting the limits imposed by each participant at *all times*”(emphasis added).<sup>30</sup> This indicates that unlike situations where participants have “vanilla sex”<sup>31</sup> (the term used to describe

regular sex), where it seems counter-intuitive to receive consent for every new level of sexual activity, there is already a cultural norm in place to advocate consensual activities throughout an established S/M encounter.

Furthermore, S/M is “highly negotiated” practice in that participants are encouraged to communicate their expectations and desires. Consider the following passage by Ethan Davidson in “S/M: An Introduction”:

Suppose you have fantasized for years about someone who will tie you up and alternatively whip you and caress you with feathers. Now is the moment you have been waiting for. You are tied up, but there are no feathers in sight. There isn’t even a whip. Instead, he or she puts a saddle on your back, and pretends you are a pony.

This irritating situation could have been avoided if the people involved had done some negotiating.

Negotiations vary. At their most simple, somebody might say, “Care for a flogging?” You might say “sure.”

But usually there is more to it. They will probably ask where you most and least like to be hit, what your pain threshold is, where you’re more of a masochist or a submissive or both, whether you have any health problems that could be important to know about...”<sup>32</sup>

Thus, in the S/M context, not only is there already a developed method of negotiating what you want, the established S/M community actually promotes the negotiation between the sadist and the masochist at every level, especially prior to the start of the S/M encounter. Again, the ongoing consent defense maps onto actual S/M practice because there is a built in norm for individuals to plan out the S/M encounter prior to the commencement of activities.

Finally, an ongoing consent defense scheme would be successful in the established S/M context because there are ways to directly signal the withdrawal of consent. In S/M encounters by established S/M participants, a “safe word” is decided upon prior to the S/M encounter. Common safe words utilized by S/M practitioners derive from the “traffic light system.”<sup>33</sup> In this system, green means “harder,” yellow means “slow down” and red means “stop immediately, something is really wrong.” Further, the Society of Janus notes that “word limits [are] frequent in S/M.”<sup>34</sup> These include things such as “no marks,” “no scar,” “light spanking only.” Because of this, S/M already has a built in language that practi-

tioners are aware of and utilize. Thus, allowing an ongoing consent defense would provide S/M practitioners with an additional incentive to discuss safe words and ways to actually signal consent.

The usage of pre-S/M negotiations, “safe words” and “word limits,” as well as culture of “consent at all times” not only makes S/M practices amenable to receiving consent at every level on an ongoing basis, it is also clear as to whether or not an individual consented at every level.

To see how the proposed ongoing consent defense would work in practice during an established S/M encounter, I again turn to the case of *People v. Jovanovic*, detailed in the introduction of this paper. Although the S/M activities between the defendant and the victim occurred in the privacy of the defendant’s apartment, I would define the *Jovanovic* encounter as established S/M because both participants were active in S/M relationships and understood and practiced S/M rules.<sup>35</sup>

If Jovanovic had been allowed to present the proposed ongoing consent defense in his case, then the court would have had five different levels of S/M activity between the victim and the defendant to analyze: 1.) tying of the victim to the victim 2.) pouring of the wax, 3.) biting, 4.) sodomizing with object, 5.) sodomizing with penis. The facts indicate that the victim consented to 1.) being tied to the futon, but she did not agree to steps 2, 3, 4, or 5. The fact that she used the “safe word” and that she screamed loud enough to alert Jovanovic’s neighbors, is likely be enough to show that the victim did not consent. Therefore, under the proposed ongoing consent model, *Jovanovic* would have resulted in the conviction of the defendant.

**b) *Amenability of ongoing consent defense in private S/M practices***

Private S/M practices differ from established S/M because they do not operate under the same rules and regulations that seasoned S/M practitioners utilize. Because of this, the effect of an ongoing consent defense model, both on the effectiveness of determining consent and the practicalities of giving consent on an ongoing basis will be different than in the established S/M context. Yet I argue that an ongoing consent defense will still work effectively even in situations where individuals practice S/M in a private setting without the usage of clearly norms and rules from the established S/M community.

Although private S/M practitioners may not follow “safe, sane and consensual” the proposed model, where consent is needed at every point in an S/M encounter, still effectively reflects the private S/M encounter. This is because the proposed model acknowledges the escalation of S/M encounters, even one that is in the privacy of the bedroom between married or otherwise committed couple.<sup>36</sup>

Through an ongoing consent defense scheme, we can effectively protect victims in situations where they consented to one activity (such as light spanking) but then the activity escalates into another form of S/M (such as whipping, etc.), while at the same time, protecting the privacy of the bedroom for sexual practices. The ongoing consent defense works to sever each new form of S/M activity, by requiring active consent at each new level, so that the courts will need to assess whether or not consent was present on an ongoing basis. This helps courts and juries distinguish between the fact that an individual might have agreed to the S/M encounter, in general, but did not necessarily consent to where it would lead.

*c) Benefits of the proposed ongoing consent defense in S/M practice*

First, the general availability of a consent defense in the S/M context will help to reduce the stigma that is currently associated with S/M practice. For instance a study conducted by National Coalition for Sexual Freedom found that S/M practitioners were discriminated against and even sometimes physical harmed by the fact that they were publicly known to participate in S/M activities.<sup>37</sup> For example, of the first 200 NCSF surveys, 72 reported some incident of discrimination, while 74 reported incidents of violence against them.<sup>38</sup> Further, the survey found instances of discrimination where people lost visitation rights and child custody battles because of their S/M tendencies. Other examples of discrimination included a woman who was repeatedly sexually harassed by her boss after he became aware of her S/M inclinations.<sup>39</sup>

As further evidence of this stigma, one S/M organization, following the British decision in *Brown* to categorically reject a consent defense, noted that the decision “gives an open ticket for harassing our [S/M] community. This includes cheap journalists and some members of the police.”<sup>40</sup> By creating a consent defense scheme, the stigma associated with S/M would greatly be reduced. And with a proper mechanism to assess the giving and receiving of consent, individuals who participate in S/M will not only be protected within their S/M practice, but will be protected from the stigma that is associated with S/M activities.

Second, as usually occurs, the criminalization of activities often merely acts to push these activities underground. If we continue to disallow a consent defense thereby criminalizing S/M, it could very well lead to the situation where S/M activities are kept private. This would lead to the continuation of a number of detrimental consequences. By adopting the proposed ongoing consent defense, these S/M activities will be brought out of the underground.

If S/M practice continues to be driven underground, it would hinder access to information and education on how to practice safe, sane and consensual S/M. Further, information on HIV prevention and other beneficial information will not reach the underground S/M community.

Additionally, S/M practitioners are currently too concerned about their criminal liability and/or stigma, and therefore fail to contact the police or receive the assistance of the police and other authorities following a violent S/M encounter. Indeed, following *Brown*, one man who practiced “breath restriction” with his partner prior to *Brown*, was afraid that his lover would be criminally culpable if he was involved. Because of this, he practiced breath restriction on his own and died. Further, according to the National Council for Sexual Freedom survey, 96% of those who reported being harassed or attacked in some way did not feel that they could contact the police with their complaints.<sup>41</sup>

Again adopting the proposed consent defense would allow the S/M community to emerge from the underground. By entering into mainstream society, the S/M community will be able to receive help and assistance from the authorities, and have access to information about safety and disease prevention.

Third, the proposed consent defense prevents the escalation of S/M activities into non-consensual behavior. The benefits associated with an ongoing consent defense scheme goes even further than the liberal argument’s blanket consent defense because it successfully captures the intricacies of S/M practice in order to make sure that consent is achieved in an ongoing way, at *every level*. As mentioned previously, by doing this, we can make sure that the potential for harm is reduced at every new activity initiated during an S/M encounter. This would greatly limit the chance that an S/M participant who had agreed to a light spanking, but not to a whipping or something more drastic, would not be seen as consenting to the S/M. Also, section (7) of the proposed statute never allows consent to permanent, long-term such as murder, amputation, etc. This limit further helps to reduce escalated instances of harm to S/M practitioners. By severing each level of activity, and considering whether consent was achieved as to each new activity and throughout the entire activity, the proposed consent defense goes further than an absolute defense in ensuring that the potential for harm in S/M will be reduced.

Fourth, the subjective standard advocated in the proposed ongoing consent defense acts to make certain that S/M practice is very deliberate at every step along the way. Because of this, we can ensure that those who are established S/M practitioners, as well as private S/M practitioners, carefully seek and receive consent. As mentioned previously, the consent model

is so demanding on the defendant to prove that there was consent, it will likely increase the use of pre-S/M encounter negotiating techniques, as well as making sure that S/M practitioners have decided on a safe word, and will stick to a safe word.

In fact, an ongoing consent scheme does even better to prevent harm to individuals than a blanket disallowance of a consent defense. This is because, as we know, there are already structures in place under “safe, sane and consensual” that S/M practitioners currently use. However, without the force of the law, it makes these practices only optional and policed through the cultural norms of the S/M community. By giving the negotiation and cultural norms such as safe, sane, and consensual legitimacy under the law, it provides the S/M community a forceful way of ensuring that these are utilized in the community.

Fifth, by creating an ongoing consent defense scheme, it allows individuals in the private S/M community to clearly understand what consent looks like. This gives private practitioners the incentive to take on the negotiating techniques used in the established S/M community, as well as providing private practitioners a roadmap to understand what consent ought to look like during an S/M encounter.

Finally, it is likely that there are a number of individuals who participate in S/M activities for the sole purpose of defying authority and breaking the law. Creating an ongoing consent defense reduces the chance that S/M will draw “thrill” seekers who merely practice S/M as a way to act out against the law. As the Society of Janus asserts, S/M is a form of “individualism against authority” and “the stereotype enemy of S/M is an authoritarian, mistrustful of human nature.... In S/M, we can celebrate and use our diversity; they [authoritarians] want to impose uniform values.”<sup>42</sup> As the culture of S/M indicates, there is a sense that S/M participants are in some way defying authority by practicing S/M. The decriminalization of S/M by allowing an ongoing consent defense will likely take some of the “glamour” off of S/M, thereby reducing the number of people who get involved in the practice merely for the “thrill.”

#### PART IV: POTENTIAL CRITIQUES OF THE PROPOSED ONGOING CONSENT DEFENSE MODEL

The main critique from the general public will likely be that the proposed consent defense will act to legitimize S/M conduct, and therefore, S/M activities will proliferate. For example, after the repeal of prohibition, alcohol consumption increased in the United States. While there is a potential that S/M activities, if granted legitimacy will increase, there is little or no evidence that there will even be an increase on S/M activities.

Before this, or any other model of consent, is adopted in the S/M context, research should be conducted on the potential increase of S/M activity, and the negative impact, if any, that increase will have.

Similar to the criticisms leveled against the liberal argument of allowing a blanket consent defense to S/M activities, the feminist critique of the proposed consent defense model would likely center on two issues. First, the feminist critique would argue that that this consent defense model acts to eroticize violence, especially violence against women. As feminists such as Andrea Dworkin and Catherine MacKinnon argue, the proliferation of S/M images works to increase sexual brutality against women, and negotiations regarding S/M practices “permits the enactment of sexual violence.”<sup>43</sup>

Addressing this critique, I would argue that the proposed consent defense model actually de-eroticizes violence because it breaks down violence to its most basic parts and forces both the sadist and the masochist to scrutinize each specific violent activity before participating in the activity, and during the participation of the activity.

A second feminist critique of the ongoing consent model would center on whether or not we can actually have a meaningful “consent.” Many radical feminists argue that because the patriarchic societies in which we live forces women to “economically, psychologically and socially” depend on men, women are “incapable of providing voluntary and knowing consent.”<sup>44</sup>

However, Katie Roiphe, and others have responded to the radical feminist viewpoint by arguing that the feminist position undermines itself by constantly victimizing women. Roiphe argues is this precise victimization and characterization of women as powerless that reinforces the stereotype, making women weak and powerless to consent.<sup>45</sup>

The proposed ongoing consent model works to fall between the two positions. It allows women, and other S/M participants, to have the opportunity to consent, thereby empowering them to take control of their sexual identities. However, this consent is much more strenuous than regular consent because it is demanded at every level of new activity within an S/M exchange. Also, the consent is subjective as to the victim, and therefore, the standard to prove consent, when an individual claims that he or she did not consent, is very difficult.

The final potential source of criticism comes from the established S/M community itself. This is because the proposed consent defense model will likely interfere with the current operation of the S/M community. In the current status quo, where there is no consent defense available in the S/M context, those who are charged with assault during an S/M

encounter are either convicted or not. However, once consent becomes available, not only will the entire community be open to heightened regulation, each specific S/M encounter will be open to scrutiny. Under the proposed model, every S/M related complaint will be broken down and analyzed in front of the court and the public.

Also the S/M community may critique the proposed consent defense model because it would work to dramatically change the dynamic between S/M practitioners. Where before, the safe, sane, and consensual model was merely an optional device for practitioners to follow, it will not have the force of the law. For instance, many S/M practitioners report that they like to negotiate in the beginning, however, they sometimes submit to their partner—in order to “push their limits.” Under the new consent defense model, this activity would no longer be acceptable.

Further, the proposed statute’s heightened reliance on pre-negotiation activities may also be opposed by the S/M community. Although, as I have shown, negotiation is an integral part to the established S/M practice, requiring pre-negotiation under the law may “cramp the style” of many S/M practitioners.

Although these arguments may come up if the proposed consent defense were to become law, it seems likely that the benefits that will come with allowing a consent defense in the S/M context will sway many current practitioners to support the proposed statute.<sup>46</sup>

## PART V. CONCLUSION

This paper has proposed a new model for consent to assault in the S/M context, a model based on the notion of ongoing consent. The model, which requires ongoing consent at every level of an S/M encounter, uses a subjective standard, provides an incentive for pre-negotiation, continues to disallow long-term and life threatening injury in the S/M context, and attempts to find a consent defense that will cure both the over inclusiveness of the protectionist argument and the under inclusiveness of the liberal argument. Although the radical feminist position and the S/M community may find some aspects of the proposed model to be problematic, there will be a number of benefits that the proposed model will generate. Among these benefits, which were discussed in Part VI of this paper, are the reduction of stigma and discrimination against the S/M population, the willingness of S/M practitioners to receive education and contact authorities with complaints, and the prevention of escalation into non-consensual behavior. As cases such as *Jovanovic* suggest, the potential for a consent defense exists in the S/M context. This paper serves as a starting point for discussion about how we, as a society, should approach

the creation of an S/M consent defense, and suggests an ongoing consent defense as the most effective model, not only to define consent, but to ensure that consent is present in an S/M encounter.

NOTES

- 1 *People v. Jovanovic*, A.D. 2d 182, 184 (NY App. Div. 1999).
- 2 *Id.* at 185 –86.
- 3 *Id.*
- 4 *Id.* at 187 –189.
- 5 See, *People v. Jovanovic*, 676 N.Y.S. 2d 392 (N.Y. Sup. Ct., Trial Division 1997).
- 6 *Jovanovic*, A.D.2d at 198 n.5.
- 7 MONICA PA, *Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex*, 11 Tx. J. Women & L. 51, 67 (2001) (citing *People v. Jovanovic*, A.D.2d at 198 n.5).
- 8 *Jovanovic*, A.D.2d at 206 –07.
- 9 *People v. Jovanovic*, 95 N.Y.2d 846 (2000).
- 10 Prior to *Jovanovic* no American or British court had held that consent can be a defense to criminal charges in the S/M context. As mentioned above, the court *did* find in dicta that consent is no defense to assault, but the effect of the decision is such that there is room to argue for the existence of a consent defense. At common law, traditionally all violence was illegal, whether or not the victim of such violence had consented or not. Even if the victim did not complain, it was seen as an interest of the state to prosecute and punish the aggressor if there was actual bodily injury because a breach of the peace had occurred. The idea being that an individual cannot consent to an injury inflicted against the greater community. The victim merely acts as a witness to the injury. However, courts eventually carved out an exception to the rule, where on a case-by-case basis, certain forms of assault could carry with it a full defense if the victim consented. Currently, consent is a defense to activities such as boxing, football, hockey, tattooing, piercing—all activities that would be seen as legal assault and battery without a special exception. Consent by a participant in these activities is seen as an absolute defense to assault and battery.
- 11 Criminal prosecutions in the S/M context, Pa concludes, should *only* occur when the victim complains, and presumably, consent by the victim would absolve the defendant. The consent defense that she proposes requires not only that (1) a capable adult that (2) has given full and informed consent, and (3) suffers no permanent or serious bodily injury, but the victim would be required to testify as to his or her consent. Within Pa’s S/M consent defense model, the defendant’s liability is determined as the defendant believed the facts to be. If these elements were satisfied, under Pa’s model, consent would serve as an absolute defense to assault charges involving S/M.
- 12 HANNA, *supra* note 26 (noting that “Many people who engage in S/M follow clear rules and guidelines,” and “Admittedly, these cases will indeed be decided one at a time, and courts will struggle to decide the bounds of the law.”)
- 13 See, <http://www.topknot.org/20011007topknotarchive.php> (Later, the defendants were found not guilty).
- 14 As an aside, the “sado” in sadomasochism refers to the Marquis de Sade, and the “maso” refers to the Polish Baron Sacher-Masoch. However, the term “sado-masochism” was first used by psychologist Krafft-Ebing to indicate what he then thought to be a psychological disorder. However, the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) has recently noted that SM is *not* per se a mental disorder. DSM-IV states that SM only *becomes* a mental disorder when “the fantasies, sexual urges, or behaviors cause clinically significant distress or impairment in social, occupational or other important

- areas of functioning.” In fact, the Society of Janus (a San Francisco based S/M organization) urges SM practitioners to take back the name “sodomasochism” from those who “take the name for sickness,” and reclaim the names for something good.
- 15 See, DONALD MIESON “SM: A View of Sodomasochism,” by the *Society of Janus*, found at [www.soj.org/miesen2.html](http://www.soj.org/miesen2.html).
  - 16 See, “What is SM - Chapter 1” by the *National Coalition for Sexual Freedom*, found at [www.ncsfreedom.org/library/whatissm/chapter1.htm](http://www.ncsfreedom.org/library/whatissm/chapter1.htm).
  - 17 See, ETHAN DAVIDSON, “SM: An Introduction/SM Today” found at [www.cat-and-dragon.com/stef/Poly/Labriola/SM.html](http://www.cat-and-dragon.com/stef/Poly/Labriola/SM.html).
  - 18 *Id.*
  - 19 See, NCSF *supra* note 15.
  - 20 See, MIESON, *supra* note 14.
  - 21 See, THOMAS S. WIENBERG, *Studies in Dominance and Submission*, Prometheus Books, pg. 89 (1995).
  - 22 See, <http://www.soj.org/faq.html>.
  - 23 *Id.*
  - 24 See, NCSF, *supra* note 15. See, also PA, *supra* note 7 at 61.
  - 25 JUNE M. REINISCH, PH.D. with RUTH BEASLEY, M.L.S (1990), *Kinsey New Report on Sex*, St. Martin’s Press: p. 162 – 3.
  - 26 See, MARIANNE APOSTOLIDES, “The Pleasure of Pain—Why Some People Need S&M,” *Psychology Today*, Sept/Oct. 1999.
  - 27 This statute is modeled after the Antioch College Policy on Sexual Assault.
  - 28 By “rules” I mean the “safe, sane, and consensual” model.
  - 29 This form of SM does not necessarily need to be in public, such as in an SM club, it just refers to the participation by individuals who are a part of the SM community and are familiar with the rules and regulations.
  - 30 NCSF, *supra* note 15.
  - 31 MIESON, *supra* note 14.
  - 32 DAVIDSON, *supra* note 15
  - 33 *Id.*
  - 34 MIESON, *supra* note 14.
  - 35 This is evidenced by the fact that the victim and the defendant met up solely to practice S/M, the victim used a “safe” word, and that the two had discussed their participation in S/M activities, indicating that this encounter was not merely a “private” incident within non-frequent S/M practitioners.
  - 36 MIESON, *supra*, note 14
  - 37 See, PA, *supra* note 7 at 57(citing “Violence and Discrimination Against You, National Coalition for Sexual Freedom, at <http://www.ncsfreedom.org> - this survey is no longer available on this website).
  - 38 *Id.*
  - 39 *Id.*
  - 40 *Id.* at 82 – 3.
  - 41 *Id.* at 84.

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42 MIESON, *supra* note 14.

43 PA, *supra* note 7 at 88.

44 *Id.*

45 See, KATIE ROIPHE, *The Morning After: Sex, Fear and Feminism*, Boston: Little Brown & Co. (1994).

46 It would be an interesting study to survey the S/M community to get reactions on whether or not this S/M consent defense would be seen as favorable to the S/M community. Unfortunately, it was beyond the scope and timeframe of this paper.