

A MATTER OF COMMON KNOWLEDGE:
CONSENT TO SADOMASOCHISM:

It is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force likely produce great bodily harm.

-People v. Samuels (1967)

This essay presents a constellation of approaches to legitimizing women's consent to sadomasochistic activities.¹ The relevant issues seem to fold in on themselves and overlap and elude linear argument. In lieu of a consistent, sustained line of reasoning, I offer a series of thematic meditations on the notion of consent and on other concepts related to S/M.

All of the meditations begin with the (admittedly controversial) premise that, due to pervasive sex inequality, there are limitations on women's ability to provide meaningful consent in some sexual fora. Catharine MacKinnon has maintained that, "If child abuse plus abductions and homelessness and poverty and forced drug addiction and physical assault and stigma and no police protection and being bought and sold and treated as a leper in society and being so vulnerable that anything anyone will pay to do to you can be done to you is consent, prostitution is consensual. All of this and more are what it takes to get women into pornography."² Is this also what it takes to get women into S/M? If one believes that pervasive conditions of sex inequality mean that women's participation in the sex industry is necessarily coerced, it seems that one should also believe that the same conditions of sex inequality mean that women's participation in sadomasochistic sex must also be coerced.³ Perhaps, however, it is possible to distinguish the sex industry from S/M. Perhaps there are ways of seeing S/M that do not necessarily disempower women. Perhaps, despite courts' inauspicious early considerations of S/M, there is a way of approaching consent that promotes sex equality.

This essay does not attempt to come to any sort of comprehensive conclusion, but rather tries to sort out a dilemma in my own mind: why am I so skeptical of women's ability to consent meaningfully to sex work, but less skeptical of women's ability to consent meaningfully to S/M and other sex acts, given that both sex work and S/M exist within the same general societal conditions of inequality and coercion. This seems inconsistent and perhaps it is, but maybe something meaningful about sex equality resides within that inconsistency.

WHAT DIFFERENCE IN WOMEN'S HEDONIC LIVES?

A preliminary method of exploring whether there can be meaningful consent in S/M activities when there cannot be such consent in the sex industry may be to consider the choices men make regarding sex work and S/M. Men, presumably, are not generally subject to the same societal coercion created by pervasive male dominance as women, so their choices may be more likely than women's to be freely chosen.

Using male choice as a model entails, however, accepting that men and women are not completely different sexually; for male choice to be relevant men must have some of the same desires or some of the same aversions as women. In *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, Robin West posits that "[w]omen's subjective, hedonic lives are different from men's. The quality of our suffering is different from that of men's as is the nature of our joy."⁴ This is because, West continues, men enjoy things and experiences—such as pornography, sexual harassment, and rape—that give women pain: "[A] man may experience as at worst offensive, and at best stimulating, that which a woman finds debilitating, dehumanizing or even life-threatening."⁵

In some ways that is a compelling assertion: some men do indeed enjoy things that most women find objectionable. West, however, assumes that the roles are static. Certain men, unlike nearly all women, may find *raping* pleasurable,⁶ but, like women, men do not find *being raped* pleasurable. Perhaps the quality of men's and women's pleasure might, in some ways, be different in that more men than women appear to take pleasure in sex acts involving unconsenting victims. Still, the quality of suffering may be the same: by definition, no one likes to be raped or harassed or otherwise sexually victimized. The same acts cause both men and women to suffer, if they are the victims of those acts.

In general, men who can afford not to work in the sex industry avoid such work, particularly when they are not considered the “male” or dominant partner—that is, when they use their orifices rather than their penis in the acts in question. Many men do, however, enjoy being the submissive partner in S/M.⁷ This fact alone suggests that there is a difference between sex work and S/M. Most sex work is performed only by despairing men, men who may have been subject to the same sort of abuse and desperation that lead women to the sex industry. They are, after all, likely to encounter stigma similar to that faced by women in the sex industry (especially if, like women, their orifices are used). Perhaps, too, many men are harmed by nonconsensual participation in activities their abusers call S/M. Still, data suggest that many ordinary men, men who are accustomed to male privilege, enjoy being the submissive partner in S/M.

While it might be true that similar conditions lead both men and women to the sex industry, it may be wrong to assume that the conditions that lead to men’s participation in S/M are also what lead to women’s participation in it. Men may enjoy altering their societal role and playacting powerlessness, while for women being the submissive partner in S/M may merely reflect an extreme version of reality. Nevertheless, the fact that sex work and participation in S/M are distinguishable for men may indicate that they are also distinguishable for women. This is particularly true if one accepts that while the quality of men’s pleasure may be different from women’s, the quality of men’s and women’s suffering is likely to be the same. If men freely choose to be the submissive partner in S/M, perhaps women’s choice to do the same may also be free. Indeed, West, despite her belief that men’s and women’s hedonic lives are utterly different, suggests that finding erotic pleasure in “embracing absolute dependency” and testing “limits of our capacity to trust” “may be a fully human, and not just female need.”⁸ So even the quality of men’s and women’s pleasure may not be so different. If men can separate that which gives them pain—sex work—from that which gives them pleasure—S/M—perhaps women can make that distinction as well.

SADOMASOCHISM AND HIERARCHY

Different people are bothered by S/M for different reasons, but it seems that almost everyone is more disconcerted by the person who wants to be dominated than by the person who takes pleasure in dominating the other. Although it might be scary to imagine someone whose main sexual pleasure comes from inflicting pain, it might be ever scarier to imagine

someone whose main sexual pleasure comes from utter submission. That sort of voluntary loss of control seems incomprehensible and perhaps also reprehensible. Much of our early development involves increasing our own personal autonomy, moving from a powerless state to an individualized one, where we can exercise power over ourselves and perhaps over others. Maybe it is alarmingly regressive—a return to an infantile state—to want to submit to another. Further, a desire to submit also contradicts most of our basic notions of incentive and deterrence: we expect people to seek freedom and avoid pain. Those who desire submission subvert the expectations that underlie our criminal justice system and many other societal structures. Perhaps their desire to submit hints at a sort of anarchy: if people desire the very things that are typically used to deter and punish won't chaos ensue?

While many people are bothered by any desire to submit, perhaps some people are bothered by certain people's desire for submission more than others. It seems that many straight men are bothered that a man would submit to another man; they don't like the idea of men behaving like women.⁹ Feminists are bothered by women who want to submit to men sexually as they fear that such a desire subverts the goal of sex equality. They don't like the idea of women freely behaving as they have been coerced into behaving.

It doesn't seem particularly surprising to men or women that men would take pleasure in causing others pain, and no one seems to devote much attention to women who take pleasure in causing pain. It is also difficult to find a lot of concern about men who wish to be dominated by women, even though that where the term "masochism" comes from.¹⁰ Typically men who desire this are seen as freaky or comical, but not necessarily disturbing to anyone.¹¹

This essay is, obviously, most concerned about women submitting to men. But there seems to be no reason to believe that women enjoy sexual submission more than men. "There is no evidence, anecdotal or otherwise, to support the presumption that men prefer being the 'top' or dominant S/M partner, while women are more sexually responsive to submissive roles."¹² Some have contended that "men are four times more likely to express masochistic desires than women."¹³ It is also not clear that women enjoy being sexually submissive more than they enjoy being sexually dominant; it may be only that women's sexual submissiveness produces more anxiety—and therefore more books and articles—than women's dominance.

Still, maybe any permutation of sexual dominance, (man dominating man, woman dominating woman, woman dominating man, man dominating

woman, or scenarios with multiple actors) is ultimately harmful to women because it eroticizes violence and power. Perhaps any principled feminist sexual project should be focused not on accepting women's interest in S/M but rather on promoting a nondomination principle, attempting to desexualize power differentials and pain. After all, women are likely to (and indeed do) experience negative effects of the sexualization of power, as they so often possess less power than the men around them, whether on the street, in the workplace, in school, or at home. If pleasure taken in power imbalances is accepted in consensual sexual contexts it may be more likely to be considered acceptable, at least by men, in other contexts. Ultimately, perhaps all forms of consensual S/M, regardless of the sex of the participants, end up reinforcing male dominance because pleasure derived from imbalances in power will, in the end, benefit men and harm women. And perhaps all forms of consensual S/M, regardless of the sex of the participants, are reenactments¹⁴ of the ways men have traditionally abused women.

Some defenders of S/M claim that "S/M scenes gut the behaviors they simulate of their violent, patriarchal, defining features,"¹⁵ that this fictional subversion of hierarchy does, in reality, subvert gender hierarchy because in S/M "the violence is simulated but not replicated."¹⁶ This defense of S/M seems misguided, however, in that it does not address whether eroticization of hierarchy is actually harmful regardless of the fact that roles can be reversed. Further, it seems to deny that much of the violence in S/M is, in fact, quite real, that people really are whipped and that people really do bleed. The violence may be ritualized but that does not mean it is simulated.

A more promising approach to S/M as subverting sex and gender hierarchy may stem from the fact that S/M makes explicit what a male-dominated society keeps implicit; "many traditional heterosexual relationships...are often blind to how structural power dynamics inform their personal relationships,"¹⁷ but in S/M those dynamics are made clear. Still, isn't it possible to become aware of the fact of gender hierarchy and then simply reject the eroticization of hierarchy? It is unclear why making people aware of the way power and pain can operate is necessarily a good thing if one then proceeds to accept it and indeed celebrate it.

Perhaps the only reasonable response is to accept that S/M does, in fact, endorse the eroticization of hierarchy, which in turn reinforces sex and gender hierarchy, and then to suggest that, despite these things, maybe S/M is nonetheless not absolutely terrible.¹⁸ People (even women¹⁹) create

systems of hierarchy all the time. Moreover, in most hierarchies women tend to be at the bottom; women are continually harmed by the hierarchical structures men create. If one believes that some women do, in fact, genuinely consent to S/M, that the hierarchies that they create in the S/M context give them pleasure, it may be wrongheaded to disparage the fictionalized recreation of a structure that in other contexts frequently causes women real pain. An undeniable effect of sex hierarchy has been divorcing women from their own sexual pleasures, keeping women from fully exploring and experiencing what they desire. If, whether or not as a result of sex hierarchy, it turns out that women truly and meaningfully enjoy S/M, it seems perverse to deny them that pleasure, the pleasure of reclaiming their own sexuality, simply because S/M reinforces the very gender hierarchy that kept them from experiencing pleasure in the first place. It seems positively patriarchal to tell women that what they enjoy is unacceptable.

TRUTH IS MORE DANGEROUS THAN FICTION: THE GIVING SELF AND THE LIBERAL SELF

Robin West's most compelling idea in *The Difference in Women's Hedonic Lives* is that of the liberal self and the giving self. Essentially, the liberal self is self-regarding and the giving self is other-regarding. That is, the liberal self makes rational choices to maximize her pleasure and happiness while the giving self attempts to maximize the pleasure and happiness of another. Liberal selves, male or female, "create value by satiating their subjective desires through consensual choices."²⁰ The liberal feminist legal theorist who subscribes to the idea of women as liberal selves believes "[w]omen, like men, consent to that which will minimize their own suffering and maximize their own felt happiness. Therefore, the way to deal with women's suffering is to increase women's sphere of consensual freedom."²¹ Giving selves have negated their own desires and focus on satisfying the desires of those around them.

West does not believe that all women are giving selves all the time. She does, however, believe that violent male sexuality, whether in the form of rape, street harassment, domestic violence, or its other embodiments, creates pervasive fear in most women or all women, which affects the ways they see themselves sexually and emotionally. "Women respond to this fear by reconstituting themselves in a way that controls the danger and suppresses the fear. Thus: women define themselves as 'giving selves' so as to obviate the threat, the danger, the pain, and the fear of being self-regarding selves from whom their sexuality is taken."²² This means that women define themselves as "giving" sex "so that [they] will not become being[s]

from whom sex is taken.”²³ Because women cannot change the conditions that lead to male sexual predation they change their responses to it in order to make it less terrifying and dehumanizing. Interestingly, West believes that the transformation from liberal self to giving self is freely chosen, that it is “for self-regarding liberal reasons” that women consent to control their fear of men’s sexual violence by embracing “a self-definition and a motive for acting which is the direct antithesis of the internal motivational life presupposed by liberalism. The motivation of [their] consensual acts is the satisfaction of another’s desires.”²⁴ This consensual change from liberal self to giving self negates the possibility of meaningful consent once the woman becomes a giving self.

West goes on to make persuasive arguments about women becoming giving selves in the contexts of domestic violence, “promiscuous heterosexuality,”²⁵ fear of rape, and street harassment. She then makes, separately, what seem to be two very counterintuitive arguments: she regards female students in consensual affairs with male junior faculty as giving selves, but she regards women engaged in sadomasochism as liberal selves. This combination of ideas—that women in certain consensual romantic relationships have not meaningfully chosen their circumstances, but that women who submit to power-based and possibly painful sexual encounters have—is precisely the opposite of what one might expect yet she does not attempt at all to reconcile them. It is, perhaps, from this disjunction that an argument for meaningful consent in S/M emerges.

West obviously objects to facially coercive sex-for-a-grade transactions between faculty and students, but she regards as “the greater misery” “the fully consensual and highly regarded romantic attachments” between female students and male faculty who are, presumably, not much more older or even much more accomplished (“female graduate students and [male] assistant professors, or [female] undergraduates and [male] research assistants”).²⁶ Such affairs, West believes, result in the woman’s negation of her intellectual self as she becomes a giving self, giving her sexuality and support to the male academic. The relationships can be intoxicating, damaging, and addictive, according to West, who compares them to cocaine.²⁷ Academic relationships, West says, “can feel like a mystical blend: a transcendental, transformative experience. Self-objectification can feel beautiful.”²⁸ West goes on to explain, however, that “[t]he pain of these relationships—as well as the damage they do—far exceeds their Cassandra-like high,”²⁹ taking their toll on women’s self-respect, ambition, and intellectual development.

In contrast, West maintains that women who fantasize about sexual submission³⁰ are not expressing the giving self and that they are “clearly expressing desires, fantasies and pleasures that are their own.”³¹ She believes that “forego[ing] authorship of one’s actions” “can be pleasurable and exhilarating and sometimes so much so that it is sexually stimulating.”³² Further, “[a]bsolutely pliant obedience—the willingness to transform one’s subjectivity into another’s object” can “enable[] the submissive subject to transcend her own selfhood...” But doesn’t this, too, seem intoxicating, damaging, and addictive, like cocaine? How is this different from the falseness and harmfulness of the transcendent-seeming self-objectification that female students experience in academic affairs?

West never explains the distinction, but the language she consistently applies to damaging academic affairs could also be applied to S/M. West writes that “[a] liberal feminist theory of law which presumptively values consensual transactions on the assumption that the giving of consent is motivationally self-regarding, without addressing the fear that molds women’s self-definition, runs the risk of missing altogether the real causes of women’s misery.”³³ Here she is discussing academic affairs, but such language could easily be applied to S/M as well: couldn’t fear be molding women’s self-definition? Couldn’t it be women’s giving selves that lead them to submissive roles in S/M?

Despite the fact that the distinction between academic affairs and S/M goes unexamined, perhaps West is right. Perhaps harmless-seeming consensual affairs between students and junior faculty really are more damaging than the ritualized submission and pain of S/M. And perhaps the best reason for the difference is fairly simple: affairs are truth and S/M is fiction.³⁴

West’s concern about academic affairs is that they actually change the female student’s life. The woman who engages in affairs with faculty “receives an authoritative pronouncement” that her “contribution to art, history, music, or whatever”³⁵ “will be, at root, sexual,” that “[h]er contribution will not be in the delivery of ideas.”³⁶ The result of this pronouncement, West maintains, will affect the woman’s entire life: “‘Falling-in-love’ [with faculty] really does destroy the productivity, the careers, the earning potential, and eventually the self-respect of many gifted women. Smart women drop out of high school, college and graduate school... to date, to marry, to help, and to serve those they perceive as intellectual giants.”³⁷ This disruption in women’s lives is because the transcendent, intoxicating affair alters a woman’s entire self-definition. It is all-consuming. It is real.

S/M encounters, at least as West imagines them, are, though transcendent and intoxicating, finite—fictional. She imagines that women engage in S/M with partners they trust and then resume their normal lives. It might be unrealistic to imagine that the relationships that encompass these S/M encounters are not also embodiments of sex inequality, but West is willing to assume that these relationships are not damaging in the way that academic affairs are. Presumably West would find the situation of women subsumed in S/M relationships as objectionable as academic affairs, but while she is able to imagine scenarios where S/M is not damaging she is not willing to imagine undamaging academic affairs: to her they all seem to lead to dropping out of school and the disappearance of self.

The difference between the transcendent, intoxicating self-objectification of S/M and that of academic affairs appears to hinge on the idea that outside of S/M the woman has an ordinary life, but the academic affair *is* the woman's life. An academic affair, West believes, forecloses other options, but S/M can be cabined, a small part of one's "normal" life. The woman *becomes* the partner in the academic affair, but, ideally, she only playacts her part in S/M. The academic affair disrupts the student's intellectual image, but in West's ideal S/M relationship, the woman's self-image goes unmolested. Further, the male faculty member views the student as the lesser partner, as being in a supporting role. In S/M the dominant partner's view of the woman is not, again ideally, affected by the roles played during the S/M encounter.

Further, the context of the acts is different. The academic setting should be focused on the woman's intellect and personal growth, so it may be all the more galling that an academic affair pushes her intellectual development aside in order to celebrate her as a sexual giving self. In S/M West presumes that the context is either specifically sexual or that the sexual aspects of the acts remain separate from the other parts of the relationship of the parties. The truth of the academic scenario should be, West believes, the woman's intellect. There is no truth to the S/M scenario except the search for sexual fulfillment.

The liberal self is capable of reveling in the fiction of S/M, but the giving self is destroyed by the truth of the academic relationship. Perhaps West's point is that no woman—or, likely, no human—is capable of consenting to turn an erotic fiction into a reality.

CONSENT TO S/M AND THE MARITAL RAPE EXEMPTION

Courts have taken a hamfisted approach to issues of consent in S/M. One suspects that judges have been guided far more by puritanical distaste for S/M practices than they have by concern for the alleged victim. They have surely been untroubled by considerations of sex equality. The consent defense to S/M is problematic in that there is obviously reason to be worried that sexual assault will be forgiven if the defendant can prove that he thought that the victim was consenting to sadomasochistic sex.³⁸ It seems, however, in rejecting this defense courts have been motivated less by a fear of its negative consequences than by a desire to reinforce the mainstream sexual status quo.

People v. Samuels, a California case from 1967,³⁹ demonstrates that courts really were not thinking at all about those potentially harmed by a consent defense to S/M, much less of women as potential victims in particular. This case, which involves S/M activity among men, holds that “consent of the victim is generally not a defense to assault or battery” except in the context of “ordinary physical contact” or athletics. The court goes on to maintain that “[i]t is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force likely produce great bodily harm.”

What is interesting about *Samuels* is that at the time of the decision, the marital rape exemption was in full effect. That means that by taking marriage vows, normal women (presumably) in full possession of their mental faculties freely consented to the use, upon themselves, of force likely to produce bodily harm; that is, they consented to be raped by their husbands, or at least consented to be in a situation where rape of them by their husbands was perfectly legal and acceptable. Anglo-American law had long embraced Matthew Hale’s assertion that “the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”⁴⁰

This kind of consent is far more extreme than the consent that appalled the *Samuels* court. The consent offered in S/M is typically for only one encounter and, if it is to be meaningful consent, it probably must be able to be freely revoked by the submissive partner. The consent offered by the wife, however, was complete: the husband was permitted to forcibly rape her throughout the duration of the marriage. By asserting that the wife could not retract her consent to be her husband’s sexual property, Hale clearly contemplated a situation in which the wife would indeed like

to refuse sexual access to her husband. She would, however, be legally incapable of doing so. Of course the wife's contractual consent to be raped was not actually available as a defense as the rape of the wife was considered a legal impossibility: no such defense was needed.

The *Samuels* court probably did not think that a woman's choice to get married indicated that she was not a normal person in full possession of her mental faculties. Likely the court did not, in deciding the case, think of women at all. Yet, the judges' world seems to easily reject one conception of consent that involved practices they found distasteful and embrace another, far broader, conception of consent to violence that they considered quite ordinary.

Nineteen years after *Samuels*, after the marital rape exemption had begun to erode, and after California indeed had recognized the crime of "spousal rape,"⁴¹ another case with very peculiar notions of consent was decided in California. In *People v. Burnham*⁴² an appellate court overturned a jury's conviction of a husband who was accused of beating his wife nearly to death, raping her, and forcing her to have intercourse with a dog. The appellate court found that the "appellant's reasonable belief in the victim's consent was supported by substantial evidence." That evidence consisted mostly of the husband's assertions that the wife consented to intercourse with both him and the dog after he had nearly killed her, the testimony of three witnesses that the wife was promiscuous, and testimony that the wife was known to carry a gun (and therefore could have protected herself had she chosen to).

Apparently "a jury composed of reasonable men" could have concluded that the husband reasonably believed that his wife had consented to the sex. It staggers the imagination to believe that such a defense would be considered anything but laughable were the defendant not married to the victim. And had the defendant and the victim been homosexual men? It seems the court would have probably taken the *Samuels* route, for surely what normal person in full possession of his mental faculties would freely consent to be beaten nearly to death and then fucked by the assailant and his dog? Note also that there was no complaining victim in *Samuels* but there was in *Burnham*. In *Burnham* the wife, the "prosecutrix," was in court saying she had been raped, while in *Samuels* no one came forward to complain of abuse. In many of these kinds of cases the law is not focused on force and consent but rather on policing acceptable means of sexual expression; apparently abusing one's wife was, and possibly still is, often more acceptable than engaging in S/M with willing partners.

SEX ADVICE

Mustn't it count for something that sex-advice columns are rife with questions from women asking how to convince their partners to dominate them sexually? Of course it is a self-selected group writing in, and sex-advice columnists choose which letters to print based primarily on entertainment value. Nevertheless, the most famous sex-advice columns⁴³ frequently feature such letters, which could mean either that they are swamped with such letters or that their readers find them particularly interesting; it's impossible to say what, exactly, either scenario would mean, but it does seem to imply that there must be some women who seek to be dominated who are with men who do not seek to dominate. Just one week before this essay was completed Dan Savage of "Savage Love" answered the most recent in a long line of questions from women who want to be dominated or from reluctant men whose female partners want to be dominated. This week's woman calls herself "a freaky girl" and likes to be "spanked, choked, and fisted." Her boyfriend, "a straitlaced officer in the military forces" (someone who should surely understand the pleasures of hierarchy), refuses to indulge "her kinks." Savage suggests that the woman leave the officer if he continues to deny her.⁴⁴

Of course this could be an instance of the false consciousness of the oppressed: it may be only because of societal male supremacy that she has such desires, and that desires developed through abuse and self-abnegation are not real. Still, because sex-advice columns generally give the impression that the oppressed are not hooking up reliably with their oppressors, and in fact sometimes seem to end up with men who find their desires confusing, embarrassing, distasteful, or bizarre, there appears to be something here pointing to meaningful consent. If the reluctant partners overcame their aversion and dominated these women, it's hard to insist that the men would be acting upon or against their partners' giving selves. The demands made by such women seem to come from their liberal selves, in that they insist on the acts despite their partners' obvious discomfort. If the male actor is essentially blameless, it's difficult to know whom to blame for the acts if they are considered nonconsensual. The culture at large could be deemed the perpetrator, and surely any prior abusers who might have affected the women's sexual autonomy could be playing a role, but this seems to stretch the notion of meaningless consent beyond recognition. In most cases where meaningful consent can be questioned there is a man who desires the acts as well. The fact that women insist on these acts despite their partners' wishes to avoid them seems to mean that where the man does not want the

activity the woman's consent *must* be meaningful: she, like Sacher-Masoch, is the submissive partner who is controlling the situation.⁴⁵

LIMITS AND GUIDELINES

The goal of the law in regard to S/M should be to sanction the greatest possible degree of sexual autonomy and sexual expression without the consent defense allowing abusive actors *carte blanche* to harm unconsenting victims. Maybe one way to consider the role of consent in S/M, and whether it is viable as a defense for alleged assault, would be to look carefully, on a case-by-case basis, at who is doing what to whom. That is, to systematically consider what the act is and the relative power dynamics—those outside of the limits of the sexual encounter—between the participants. Still, even this relatively straightforward approach runs into problems related to sexual autonomy, paternalism, over- and underinclusiveness, and decreased protection for “bad girls” and other sexual outliers.

Monica Pa proposes a system in which “the legislature legalize[s] private, consensual S/M sex that does not cause grievous bodily injury or death.”⁴⁶ She then recommends accepting the British formulation whereby consent is a defense when the submissive partner “suffers no permanent or serious bodily injury.”⁴⁷ But note the quick jump in Pa's formulation from “grievous bodily injury” to “permanent or serious bodily injury.” Already, in the space of a sentence, the realm of possible sexual expression shrinks drastically. “Grievous bodily injury” presumably encompasses allegedly consensual amputations, castration, and death in the S/M context.⁴⁸ It may be easy to argue that the state's interest in preventing such harm outweighs individuals' interest in doing such things or having them done to them. But permanent bodily injury would also include anything that left a scar. It may also be difficult to distinguish tattooing and cosmetic surgery using the British formulation.⁴⁹

If one accepts the notion of consent in S/M, however, setting any limitations at all presents a real problem. It seems that those who believe in consent to S/M want to draw limits not dissimilar to those drawn by people who reject the notion of consent. Both West and Pa seem to want to extend the line in order to encompass pleasures that seem reasonable to them. One can imagine Pa asking what “normal person in full possession of his [or her] mental faculties”⁵⁰ would consent to permanent injury or death. Promoters of the consent defense for S/M seem to reflect the prejudices of the *Samuels* court, only with the boundaries pushed a bit further. No one wants to

include what seems incomprehensible to them; everyone seems comfortable with limiting the sexual autonomy of those they don't understand.

Despite the possible puritanism involved in the drawing of limitations, it's very difficult to argue that one should be able to consent to one's own S/M death or life-threatening or even grievous injuries.⁵¹ If the goal of setting any limits or guidelines is to promote sex equality, it's not clear that the goal is compromised by prohibiting truly serious (as opposed to merely permanent) injuries. In any case, whatever limitations are or are not drawn, the acts performed during S/M and their relative dangerousness should perhaps be considered along with who is doing what to whom. The law could look not just at the act and not just at the actors but rather consider both in tandem to determine whether consent seems plausible.

In considering the actors, perhaps certain differences in relative power between the dominant party and the submissive party may point to lack of consent. For instance, courts could consider whether the dominant party is male or white and the submissive party is female or nonwhite, and whether the dominant party is older or richer or more physically powerful than the submissive party, and whether the dominant party is the submissive party's boss or superior or teacher or is in some other way an authority figure to the submissive party. If the acts engaged in seem excessively dangerous and the characteristics of the actors seem excessively unbalanced, then consent might be viewed quite skeptically.

The problem with this (beyond being over- and underinclusive) is that it is inherently paternalistic. If the submissive party wanted to experience S/M with a certain sort of person, someone who actually did wield power in the world, this might be harder to achieve, as such people might be deterred from engaging in these activities due to fear that their consent defense would not be believed. If this were true (and it would depend on a far more responsive and consistent legal system than the current one for such incentives to operate reliably), then it might be that only the most reckless, least responsible people who had power in the real world would be willing to act as the dominant party in S/M—that is, exactly the sort of people we should want to deter. Further, writers such as West focus on the role of trust in S/M encounters: that woman (and men) who desire sexual submission wish to do so with someone they trust fully. She does not seem to consider that some may find exciting the thought that perhaps the dominant partner may not be fully trustworthy, that there is, in fact, the chance of danger. Indeed, one of the reasons to allow a consent defense to S/M activities is to broaden the scope of possible sexual expression and to

allow greater sexual autonomy to those who have been traditionally denied it, namely gay men, lesbians, and straight women. We want people to be able to define their own pleasures; considering such factors as sex, age, wealth, race, and even trustworthiness in the applicability of the consent defense may limit this capacity for autonomy. This is because it could mean that straight, white, rich older men would have, as usual, more opportunities, in this case more opportunities to be submissive, than everyone else. On the other hand, young, poor, nonwhite lesbians would have the greatest opportunities to be the dominant party. Still, this seems like a strange way to incentivize behavior.

Another problem with this sort of case-by-case consideration is that sexual outliers may be left unprotected. Cheryl Hanna, who rejects the consent defense, maintains that S/M is frequently used as “a guise invoked by defendants to explain away their sexual battery and abuse”⁵² and that the consent defense would be used by defendants to excuse their violence against victims whose morality is seen to deviate from the norm. She cites an Iowa case, *State v. Collier*,⁵³ in which a pimp said that his victim, a drug-using prostitute, consented to his abuse. Hanna fears that had the issue of consent gone to the jury, the jury would have found that the woman had consented because as a “prostitute and a drug addict, and arguably sexually deviant by the nature of her profession” she “could have been found deserving of a beating, or at least not worthy of the protection of the law.”⁵⁴ Hanna suggests that had the issue of consent been considered by the jury, “the court would have implied that there are ‘good girls’ and ‘bad girls’ and that ‘bad girls’ get what they deserve, just as when, as a legal matter, prostitutes could not be raped.”⁵⁵

Still, if the jury’s prejudices were not inflamed by the *Collier* victim’s status, perhaps an examination of the power relationship between victim and accuser would have been fruitful. In this case, the defendant was the victim’s employer and the victim was a drug addict. Those factors, combined with the relative extremeness of the acts performed and the fact that the victim testified, might have been sufficient to overcome the consent defense. Nevertheless, Hanna’s concerns about the consent defense further sanctioning male violence are well taken.

PLEASURE AND MONEY

Our culture generally presumes that people will engage in otherwise undesired activities in exchange for money, and it generally presumes that economic incentives do not mean that the choice to engage in the activity

for pay is not free. We also generally believe that people enjoy what they say they enjoy. This should mean, then, that both sex work and S/M are freely chosen by the women who engage in them.

But perhaps we even assume that activities engaged in for pay are *more* likely to be freely chosen than unpaid activities. That is, if person A is paying person B to do something, person A is clearly not forcing person B to do the thing; person B is being paid after all. Almost everyone does things they wouldn't do if they weren't being paid, but most people do not regard their participation in their jobs as being coerced. We do recognize that people are sometimes forced to engage in activities against their will, but payment for an act seemingly suggests that the act was freely chosen. So this would mean that sex work would be more likely to be seen as freely chosen than S/M.

However, as discussed above, this essay begins with the presumption that sex work is not currently freely chosen.⁵⁶ But in exploring how S/M might be freely chosen when sex work cannot be, something seems to hinge on the difference between the pursuit of money and the pursuit of pleasure.⁵⁷

Any assumptions about women freely choosing sex work or freely choosing to engage in S/M are clearly vulnerable to charges of *Lochnerizing*. If coercive social conditions are what lead women both to the sex industry and to S/M, neither choice should fall prey to the legal fiction that the act was free. This is a kind of freedom of contract that we have been rejecting since 1937. But is there anything about the pursuit of pleasure that makes the choice to go into S/M free?

Women have of course traditionally been denied the ready access to the labor market that has been available to men. In fact, sex is probably the only thing in human history that men have consistently been willing to pay women money for.⁵⁸ Access to their bodies has often been the only thing that women had that was of value.⁵⁹ It is not clear that women's access to sexual pleasure has been quite as limited and cabined as their access to financial capital. While it seems clear that women need money and that the sex industry may be the only way they know how to make money or are permitted to make money, it is not clear that their ability to imagine or experience sexual pleasure has always functioned under the same constraints.

To believe that women are as unable to freely choose their sexual pleasure as they are unable to freely choose sex work would be to believe that their hedonic imaginations have been as brutalized and colonized by male supremacy as their bodies have been. Some feminists, such as Andrea

Dworkin and Catharine MacKinnon, have indeed believed this, regarding “the undeniable reality of the pleasure many women find in the eroticization of controlled submission as simply an example—perhaps an example par excellence—of the false consciousness of the oppressed.”⁶⁰ These theorists believe that women’s desire for S/M does not indicate that S/M is truly a free choice. Rather “it illustrates how gender domination has permeated human relationships and erotic desires.”⁶¹

But shouldn’t women’s reports of their own experience count for something? It seems that sex equality and sexual autonomy must entail believing women when they report on their own experiences and desires, even if those experiences and desires are shaped, to whatever degree, by sex inequality.

And there does seem to be something meaningful in women’s self-reporting. It appears to be quite difficult to get women to claim in any legitimate forum that they freely seek work in the sex industry or that they enjoy their work. Reviewing a book by a male sex-industry supporter, MacKinnon reports that the author “sneers” at the notion that women are victimized in the production of pornography; she notes that he “then parades all two women he can find saying what a wonderful time they had.”⁶² This essay is obviously not based on a comprehensive independent study of women’s descriptions of their sex work, but there does seem to be a noticeable lack of positive reports on sex work by women who are not trying to sell something.⁶³ Most of the positive reports one does find seem to come from middle to upper-middle-class women, most of whom are white and most of whom are either college educated themselves or who come from college-educated families,⁶⁴ that is, women who are likely to have other choices and to have to a clear path out of sex work. As MacKinnon points out, an assertion that women enjoy sex work “is the pimp’s line; it is good for business.”⁶⁵ It is indeed remarkable how few women—especially nonwhite lower-class, less-educated women, precisely the women who may have no other choices—praise the work, especially given that many men would, presumably, like to hear such praise.

But many women do seem to enjoy S/M; they seem to enjoy it enough that they pursue it even when they feel deeply emotionally conflicted about it.⁶⁶ This could be, as MacKinnon believes, the false consciousness of the oppressed, but it does seem odd to think of such insightful theorists and principled feminists as Robin West as mindless victims who are oblivious to the effects of male supremacy.

West, in fact, claims that women who desire sexual submission desire it not because of male supremacy but because “we...crave—because we also

need—the capacity to trust one another.”⁶⁷ West is not focused on what men crave, but she suggests that men, too, feel erotic pleasure in submission through trust, that it is a human need, not a desire borne of oppression.

LISTENING TO WOMEN

Whether or not West is actually right, there is good reason to feel apprehensive when someone, even Catharine MacKinnon, tells women that they don’t know what they’re talking about, that they don’t what’s good for them. Women have been hearing this from men for millennia (usually precisely as they are denied what is actually good for them). Most women don’t believe that they want sex work, but some women do believe that they want S/M. This seems to essentially mirror what men believe they want: it appears to take abuse and deprivation to get men into sex work, while men freely engage in S/M. Given this, it may be hard to argue that some women’s desire for sexual submission is based on the false consciousness of the oppressed: the oppressor seems to have the identical desire. Perhaps the best reason to make a distinction between the conditions that lead to sex work and the conditions that lead to S/M is that women themselves seem to make the same distinction, and maybe we should start listening to women.

NOTES

- 1 It does not distinguish between bondage and dominance and sadoomasochism, as both include a dominant partner and a submissive partner.
- 2 CATHARINE A. MACKINNON, "Pornography Left and Right", 30 *Harv. C.R.-C.L. L. Rev.* 143 (1995).
- 3 S/M presents numerous challenges to sex equality regardless of whether it is heterosexual or homosexual or whether any women involved are submissive or dominant. The issue of roles and the effect of S/M on sex and gender hierarchy will be discussed below. For now, all considerations, unless otherwise specified, are based on the scenario most troubling to feminists: where a woman is submissive and a man is dominant.
- 4 ROBIN L. WEST, "Fifteenth Anniversary Celebration: The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory", 15 *Wis. Women's L.J.* 149, 149 (2000).
- 5 *Id.*
- 6 See, *e.g.*, JILL ELAINE HASDAY, "Contest and Consent: A Legal History of Marital Rape", 88 *Cal. L. Rev.* 1373, 1495 (2000). There are very few cases involving the sexual assault by women of adult men. This cannot all be due to limited opportunity for women to assault men; there must be some hedonic difference here.
- 7 See, *e.g.*, MONICA PA, "Beyond the Pleasure Principle: The Criminalization of Consensual Sadoomasochistic Sex", 11 *Tex. J. Women & L.* 51, 60 (2001).
- 8 WEST, *supra* note 4, at 201.
- 9 For instance the court in *People v. Samuels* (*infra*, note 39) did not like the idea that men would consent to being harmed by other men sexually, but their worldview presumably contained the marital rape exemption, which meant that married women could, indeed must, consent to sexual harm. This is discussed further in an essay below on the marital rape exemption.
- 10 LEOPOLD VON SACHER-MASOCH, of course.
- 11 It is arguable that Sacher-Masoch terrorized his wife and female servants through his demands to be abused by them, thereby turning even his desire to be abused by women into an occasion for abuse of women.
- 12 PA, *supra* note 7, at 60.
- 13 *Id.*, citing NANCY FRIDAY.
- 14 Which isn't *quite* to say celebrations.
- 15 PA, *supra* note 7, at 78.
- 16 *Id.*
- 17 *Id.* at 90.
- 18 The thoughts that follow assume that women's consent to S/M is possible. If women do not, in fact, meaningfully consent to S/M then it is simply unacceptable whether it reinforces, topples, or leaves unaffected the existing sex and gender hierarchy.
- 19 Hierarchies of associations among all-female groups well known, though it's possible that most such hierarchies are created in the absence of men. See, *e.g.*, ROSALIND WISEMAN, *Queen Bees and Wannabees: Helping Your Daughter Survive Cliques, Gossip, Boyfriends, and Other Realities of Adolescence* (2002) for a discussion of hierarchies among girls.
- 20 WEST, *supra* note 4, at 160.

- 21 *Id.*
- 22 *Id.* at 162. West also believes that women's biology, that is, the ability to get pregnant, give birth, and nurse children, as well as women's social conditioning to be caretakers contributes to women's abdication of self.
- 23 *Id.* at 165.
- 24 *Id.*
- 25 By this she means situations in which a woman submits to sex with various predatory partners in order not to be raped by them on dates. West focuses on young women who are consistently attracted to abusive men but does not discuss whether or not going on dates with such men is a "choice." Because she rejects MacKinnon-style arguments that pervasive male dominance makes free sexual choice for women nearly impossible, it is unfortunate that she does not explore the relative freedom to avoid predatory men. West freely concedes that not all men are predatory, which makes this lacuna (is the choice to be with abusive men free, at least initially?) all the more disappointing.
- 26 *Id.* at 178. She is not even considering the sort of contact Naomi Wolf accused Harold Bloom of attempting, which is more obviously problematic.
- 27 *Id.* at 179.
- 28 *Id.*
- 29 *Id.*
- 30 *Id.* at 185. Here West's fondness for the first person plural becomes particularly annoying as she ascribes such fantasies to all women, discussing "the undeniable female eroticization of submission" and that "equality in sexuality is not what we"—women—"find pleasurable or desirable."
- 31 *Id.* at 193.
- 32 *Id.* at 199.
- 33 *Id.* at 177.
- 34 There is probably quite a large difference between S/M relationships, where one person essentially becomes the slave to another, and S/M encounters among people who otherwise don't have much contact or who are otherwise in a fairly ordinary, egalitarian relationship that is punctuated by S/M encounters. All of the concerns about academic affairs should, it seems, be applied to S/M relationships as well.
- 35 Note that West does not include fields such as science, math, engineering, or medicine. She surely cannot think that male faculty in such departments would not sleep with their students. Perhaps she simply forgets that women even enter these fields.
- 36 *Id.* at 178.
- 37 *Id.* at 179.
- 38 See, e.g., PA, *supra* note 7.
- 39 *People v. Samuels*, 250 Cal. App. 2d 501 (1967).
- 40 MATTHEW HALE, *The History of the Pleas of the Crown* (Philadelphia, Robert H. S/Mall 1st Am. ed. 1847) (1736), cited in HASDAY, *supra* note 6 at 1397.
- 41 The fact that the penal code distinguished spousal rape from other rapes probably indicates that it was seen as a lesser crime. Note also the gender-neutral language, as though there were a problem with wives taking advantage of the marital rape exemption to assault their husbands.
- 42 *People v. Burnham*, 176 Cal. App. 3d 1134 (1986).

- 43 See, e.g., “*Savage Love*” at theonion.com or “*Miss Information*” at nerve.com.
- 44 [Http://www.theonionavclub.com/savagelove/index.php?issue=4119](http://www.theonionavclub.com/savagelove/index.php?issue=4119). Last viewed on 5/15/05.
- 45 Though unlike the case of Sacher-Masoch, the control exerted by the women over the situation does not imply that the men involved do not consent meaningfully. See the section below about proposed guidelines for determining meaningful consent.
- 46 PA, *supra* note 7, at 81.
- 47 *Id.*
- 48 All of these issues pop up in the news from time to time, with the bizarre case of Armin Meiwes, the German cannibal, and his apparently willingly victim being possibly the most fascinating.
- 49 Though the fact that the parties do not typically engage in those activities to experience pleasure at that moment might remove them from the law’s purview, as the law seems more concerned, in some ways, with policing pleasure than it does in preventing harm. That concern might not be so misguided, however. If one’s worldview can embrace assisted suicide but cannot embrace Armin Meiwes, the reason for the disjunction probably lies in the pleasure taken by Meiwes (well, that and the cannibalism). If Jack Kevorkian claimed to receive sexual pleasure from his assisted suicides many of his defenders would surely defect. This is likely because consent becomes harder to guarantee if the person assisting the suicide may actually be actively seeking sexual gratification. (Defections would also be likely to stem from disgust, which may not be as valid.)
- 50 SAMUELS, 250 Cal. App. 2d 501.
- 51 See *supra* note 49.
- 52 CHERYL HANNA, “Sex Is Not a Sport”, 42 *B.C. L. Rev.* 239, 270 (2001).
- 53 STATE V. COLLIER, 372 N.W.2d 303 (Iowa Ct. App. 1985), cited *id.* at 272.
- 54 HANNA, *supra* note 52, at 272.
- 55 *Id.*
- 56 There is no reason to believe that, if a number of problems related to it were effectively addressed, sex work could not be freely chosen. In many ways sex work does not differ terribly from many other jobs, except that sex workers are far more vulnerable to violence and stigma. If the violence and stigma were removed—along with several other aspects of male supremacy that may lead women to the sex industry—perhaps sex work could be freely chosen. See MARTHA NUSSBAUM, *Sex and Social Justice* 276 (2000).
- 57 This discussion assumes, possibly contrary to fact, that most sex workers are actually paid and that the money they receive incentivizes them and not just the pimps, pornographers, etc. who make money from their labor.
- 58 Because of this, there may be something slightly perverse about completely denying the agency of women in the sex industry. To suggest that women, as financially disempowered as they have always been, should not be able to capitalize on even their bodies could, perhaps, be seen as wrongheaded.
- 59 Even if that’s not technically true and if women were actually able to become domestic servants or other kinds of menial workers, perhaps the conditions of male supremacy that lead MacKinnon to believe that sex work cannot be freely chosen also keep many women from seeing their other options.
- 60 WEST, *supra* note 4, at 186, discussing Dworkin and MacKinnon.

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- 61 PA, *supra* note 7, at 89, discussing “radical anti-S/M feminists.”
- 62 MACKINNON, *supra* note 2.
- 63 See, *e.g.*, *Sex Work: Writings by Women in the Sex Industry* (FREDERIQUE DELACOSTE & PRISCILLA ALEXANDER eds., 2d ed. 1998), which includes some examples of women who do not feel brutalized by their work; still, even these women do not typically endorse it.
- 64 See, *e.g.*, TRACY QUAN’s reports at salon.com (Quan is not white but in every other respect seems to fit the mold of the sex-work-positive reporter).
- 65 MACKINNON, *supra* note 2.
- 66 See, *e.g.*, WEST, *supra* note 4.
- 67 *Id.* at 201.