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UNMANLY DIVERSIONS: THE CONSTRUCTION OF THE HOMOSEXUAL BODY (POLITIC) IN ENGLISH LAW[©]

BY CARL F. STYCHIN*

In this article, the author interrogates the construction of gay male sexuality in legal and popular discourse. Focusing on two events—the decision of the House of Lords in *Brown* which upheld convictions of sado-masochists for assault, and publicity surrounding a serial killer of gay men in Britain—he argues that gay men are discursively constructed around the concepts of addiction, seduction, and contagion. Through the manipulation of these concepts, a linkage is created between sexual acts, sexual identities, the destruction of the gay male body, and a threat to the health and safety of the body politic as a whole.

Dans cet article, l'auteur examine la question de la construction de la sexualité des hommes gays dans le discours légal et populaire. En considérant deux événements—la décision de la House of Lords dans l'affaire *Brown*, qui a confirmé les convictions des sado-masochistes pour l'agression, et la publicité autour d'un meurtrier d'hommes gays en Grande Bretagne—il propose que la construction discursive des hommes gays se base sur les concepts de l'addiction, de la séduction, et de la contagion. En manipulant ces concepts, on établit une relation entre les actes sexuelles, les identités sexuelles, la destruction du corps du mâle gay, et le menace contre la santé et la sécurité de l'ensemble du corps politique.

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I. INTRODUCTION

In Britain, two events concerning the relationship of gay men to crime attracted media and public attention in 1993. Perhaps not surprisingly, neither occurrence centred on the gay man as a victim of heterosexually imposed violence, or on the perpetuation of state violence upon gays.¹ Rather, these occurrences were employed to construct the gay man as lacking in self-control, as violent, and, ultimately, as murderous. The “homosexual” becomes one who has transgressed the boundaries not only of the sexual, but also of the civilized, through acts of depravity that require the reaffirmation of social norms. The events are symbolic in that they reaffirm definitions of normalcy and are designed to expurgate the gay man from the realm of the social to a pathologized sphere of decay, illness, and to an unavoidably brutal and, ironically, seductive death. Thus, these narratives link sex to death and serve as modern parables about homosexuality and the threat of an epidemic.

While the two stories that I focus on may seem disparate, I will argue that, on many different levels, there are connections in how they have been interpreted within dominant culture, and in the performative role they play in constituting a social reality. Each is concerned with the relationship between sex and violence. Moreover, both are narratives about homosexual men and, in different ways, both are about death and destruction. These are stories of sado-masochists and serial killers.

¹ The two phenomena are closely related. See generally, K. Thomas, “Beyond the Privacy Principle” (1992) 92 Colum. L. Rev. 1431.

II. SADO-MASOCHISM, CONSENT, AND THE BOUNDARIES OF MASCULINITY

A. *R. v. Brown*

In *R. v. Brown*,² the House of Lords decided, by a three-to-two majority, that consent is no defence in criminal law to an assault causing actual bodily harm. The simplicity of that holding disguises both the unusual character of the facts as well as how the judgment participates in the construction of gay male sexuality. The five accused were convicted at trial of assaults occasioning actual bodily harm contrary to section 47 of the *Offences against the Person Act 1861*.³ Three of the appellants were also convicted of wounding contrary to section 20.⁴ Those convictions were upheld by the Court of Appeal⁵ and by the House of Lords. There was no question that the appellants “intentionally inflicted violence upon another” and thereby caused actual bodily harm and, in some instances, wounding.⁶ However, the unique nature of the case stemmed from the fact that there was no complainant, for the so-called victims consented to the assaults, which were committed in the course of homosexual sado-masochistic sex. The only issue, simply put, was whether the consent of the victim operated to negate the commission of the offence, or as a defence to the charge of assault. The assaults themselves were described in some detail by Lord Templeman:

The evidence disclosed that drink and drugs were employed to obtain consent and increase enthusiasm. The victim was usually manacled so that the sadist could enjoy the thrill of power and the victim could enjoy the thrill of helplessness. The victim had no control over the harm which the sadist, also stimulated by drink and drugs, might inflict. In one case a victim was branded twice on the thigh and there was some doubt as to whether he consented to or protested against the second branding. The dangers involved in administering violence must have been appreciated by the appellants because, so it was said by their counsel, each victim was given a code word which he could pronounce when excessive harm or pain was caused. The efficiency of this precaution, when taken,

² [1993] 2 All E.R. 75 (H.L.) [hereinafter *Brown*].

³ (U.K.), 24 & 25 Vict., c. 100. Section 47 provides that “Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable ... to be kept in penal servitude ...”

⁴ Section 20 provides that “Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable ... to be kept in penal servitude.”

⁵ (1992), 94 Cr. App. R. 302.

⁶ *Brown*, *supra* note 2 at 78.

depends on the circumstances and on the personalities involved. No one can feel the pain of another. The charges against the appellants were based on genital torture and violence to the buttocks, anus, penis, testicles and nipples. The victims were degraded and humiliated, sometimes beaten, sometimes wounded with instruments and sometimes branded. Bloodletting and the smearing of human blood produced excitement.⁷

These events occurred over a ten-year period and came to light as a result of a police investigation concerning an unrelated matter. There had been no complaints to the police, nor had there been any permanent injury suffered. However, a number of the encounters had been videotaped for the benefit of members of the group. These videotapes formed the basis of the case against the appellants.

In his judgment, Lord Templeman characterized the issue as whether the prosecution must prove a lack of consent in order to establish guilt. In answering that question, he recognized, first, that consent does preclude a complaint when no actual bodily harm has occurred. Moreover, he recognized that even where actual bodily harm, wounding, or serious bodily harm results, an acquittal will be forthcoming "if the injury was a foreseeable incident of a lawful activity in which the person injured was participating."⁸ A limited range of events were cited as falling within this category: surgery, ritual circumcision, tattooing, ear-piercing, and violent sports such as boxing. The issue, then, was "whether the defence should be extended to the infliction of bodily harm in the course of sado-masochistic encounters."⁹

For Lord Templeman, this case was to be decided on the basis of the public interest and public policy, both of which led inexorably to conviction. First, he responded to the argument raised by the appellants that the defence of consent should be extended to the offence of occasioning actual bodily harm, but not to charges of serious wounding and the infliction of serious bodily harm. Such a differentiation was held impracticable as "[s]ado-masochistic participants have no way of foretelling the degree of bodily harm which will result from their encounters."¹⁰ Moreover, this was not a case about freedom of sexual satisfaction. Rather, the acts were portrayed as primarily violent:

In my opinion sado-masochism is not only concerned with sex. Sado-masochism is also concerned with violence. The evidence discloses that the practices of the appellants were

⁷ *Ibid.* at 83.

⁸ *Ibid.* at 79.

⁹ *Ibid.* at 82.

¹⁰ *Ibid.*

unpredictably dangerous and degrading to body and mind and were developed with increasing barbarity and taught to persons whose consents were dubious and worthless.¹¹

The last comment referred to the finding of the Court of Appeal that the participants were involved in the corruption of youths and employed alcohol and drugs as a means of obtaining consent.

Lord Templeman also focused on the potential dangers arising out of these sexual practices. The trial judge had been informed by the Crown (over the objection of defence counsel) that two members of the group had died of human immunodeficiency virus (HIV) related illnesses, and that one other had contracted an HIV infection (although it was conceded that this was not necessarily as a result of participation in this group). In response, the appellants asserted that steps were taken to reduce the risk of infection, including the sterilization of instruments of torture. Lord Templeman rejected this argument, finding that such measures could not remove the danger, and he concluded that “[i]t is fortunate that there were no permanent injuries to a victim though no one knows the extent of harm inflicted in other cases.”¹² As an aside, he noted that “[c]ruelty to human beings was on occasion supplemented by cruelty to animals in the form of bestiality.”¹³ For Lord Templeman, such activities were “unpredictably dangerous”¹⁴ and, although these activities were sexually motivated, “sex is no excuse for violence.”¹⁵ In the end, he upheld the convictions, concluding that “[s]ociety is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised.”¹⁶

Lord Jauncey of Tullichettle, in concurring reasons, emphasized that “[n]one of the appellants however had any medical qualifications and there was, of course, no referee present such as there would be in a boxing or football match.”¹⁷ For Lord Jauncey, the public interest demanded recognition of the possibility of serious injury arising out of sado-masochistic activities, particularly by practitioners less “controlled or responsible” than the appellants:

¹¹ *Ibid.*

¹² *Ibid.* at 83.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.* at 84.

¹⁶ *Ibid.*

¹⁷ *Ibid.* at 85.

[I]t would appear to be good luck rather than good judgment which has prevented serious injury from occurring. Wounds can easily become septic if not properly treated, the free flow of blood from a person who is HIV positive or who has [acquired immune deficiency syndrome] AIDS can infect another and an inflicter who is carried away by sexual excitement or by drink or drugs could very easily inflict pain and injury beyond the level to which the receiver had consented. Your lordships have no information as to whether such situations have occurred in relation to other sado-masochistic practitioners.¹⁸

In addition, the public interest in preventing the “proselytisation and corruption of young men” was a relevant issue.¹⁹ Lord Jauncey also questioned the actual secrecy of the activities in light of the creation of video recordings: “If the only purpose of the activity is the sexual gratification of one or both of the participants what then is the need of a video-recording?”²⁰

In conclusion, Lord Jauncey graphically asserted that if sado-masochistic homosexual activity is to be legal, then decriminalization is a matter for Parliament and not for the courts:

If it is to be decided that such activities as the nailing by A of B’s foreskin or scrotum to a board or the insertion of hot wax into C’s urethra followed by the burning of his penis with a candle or the incising of D’s scrotum with a scalpel to the effusion of blood are injurious neither to B, C and D nor to the public interest then it is for Parliament with its accumulated wisdom and sources of information to declare them to be lawful.²¹

Lord Lowry, concurring with Lords Templeman and Jauncey, focused on the public interest. In so doing, he sought to distance sado-masochistic sexual encounters between men from the “normal” sexuality of “family life” and from the “manly diversions” of sport where consensual assaults do not run contrary to law:

What the appellants are obliged to propose is that the deliberate and painful infliction of physical injury should be exempted from the operation of statutory provisions the object of which is to prevent or punish that very thing, the reason for the proposed exemption being that both those who will inflict and those who will suffer the injury wish to satisfy a perverted and depraved sexual desire. Sado-masochistic homosexual activity cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society. A relaxation of the prohibitions in ss 20 and 47 can only encourage the practice of homosexual sado-masochism, with the physical cruelty that it must involve, (which can scarcely be regarded as a “manly diversion”) by withdrawing the legal penalty and giving the activity a judicial imprimatur.²²

¹⁸ *Ibid.*, at 91.

¹⁹ *Ibid.*, at 92.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*, at 100.

In dissenting reasons, Lord Mustill framed the issue as a “case about the criminal law of private sexual relations.”²³ After reviewing numerous categories of cases where the infliction of actual bodily harm does and does not give rise to an assault in law, Lord Mustill concluded:

I cannot accept that the infliction of bodily harm, and especially the private infliction of it, is invariably criminal absent some special factor which decrees otherwise. I prefer to address each individual category of consensual violence in the light of the situation as a whole. Sometimes the element of consent will make no difference and sometimes it will make all the difference.²⁴

Lord Mustill emphasized that in this category of cases the importance of individual autonomy weighed in favour of interpreting the 1861 *Act* narrowly: “the state should interfere with the rights of an individual to live his or her life as he or she may choose no more than is necessary.”²⁵ In addition, Lord Mustill questioned the health risks cited by the majority and, in particular, the threat of the transmission of HIV:

The consequence would be strange, since what is currently the principal cause for the transmission of this scourge, namely consenting buggery between males, is now legal. Nevertheless, I would have been compelled to give this proposition the most anxious consideration if there had been any evidence to support it. But there is none.²⁶

Furthermore, in answer to arguments about the corruption of youth, Lord Mustill pointed out that existing legislation already covered that field. Finally, as for the danger of proselytization, he underlined the circularity of the argument: “[I]f the activity is not itself so much against the public interest that it ought to be declared criminal under the 1861 *Act* then the risk that others will be induced to join in cannot be a ground for making it criminal.”²⁷

²³ *Ibid.* at 101.

²⁴ *Ibid.* at 113.

²⁵ *Ibid.* at 116.

²⁶ *Ibid.* at 117.

²⁷ *Ibid.* Lord Slynn of Hadley, in dissenting reasons, at 122, found it reasonable to draw the line where consent is overridden based upon the seriousness of the injury: “[g]rievous bodily harm I accept to be different by analogy with and as an extension of the old cases on maiming.” On the facts, as these acts did not result in permanent or serious injury, the onus rested on the prosecution to prove the absence of consent of the assaulted person.

B. *Sado-masochism and the Construction of Sexuality*

The reasoning of the majority in *Brown* can be analyzed on a number of different levels for what it reveals about the construction of sexuality, violence, AIDS, and moreover, how the case functions symbolically to reaffirm social definitions of sanctified sexual norms. First, the judgment exemplifies what Gayle Rubin has described as the characterization of "sex acts according to a hierarchical system of sexual value" in which sado-masochists constitute a "despised sexual caste."²⁸ Consequently, those sex acts revealed by the House of Lords in *Brown* are constructed as "utterly repulsive and devoid of all emotional nuance ... a uniformly bad experience."²⁹ The issue of consent thereby ceases to be of overriding or even of primary importance; "some sex acts are considered to be so intrinsically vile that no one should be allowed under any circumstances to perform them. The fact that individuals consent to or even prefer them is taken to be additional evidence of depravity."³⁰

The presence of consent to sexual acts thereby demands "the need to find someone who has been hurt" in order to justify the imposition of criminal penalties.³¹ That injured party or victim may be the individuals involved, others who may be proselytized, or the general public. In other words, the hurt is inflicted both upon the individual body and upon the body politic. Indeed, a discourse of harm operates on a number of different fronts throughout the judgment. The threat of permanent injury to the individuals directly involved as recipients of sado-masochistic sex is reiterated throughout the majority reasons. Sado-masochistic sexual practices are "unpredictably dangerous;" "developed with increasing barbarity;" and probably "will get out of hand and result in serious physical damage."³² Consent thus becomes overridden by the likelihood of physical harm to participants. Although

²⁸ "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality" in C.S. Vance, ed., *Pleasure and Danger: Exploring Female Sexuality* (Boston: Routledge & Kegan Paul, 1984) 267 at 279.

²⁹ *Ibid.* at 282.

³⁰ *Ibid.* at 291. For a similar treatment of the issue of gay male sado-masochism in terms of the law of assault, but within an American context, see *People v. Samuels*, 58 Cal. Rptr. 439 (Ct. App. 1967), *cert. denied* 390 U.S. 1024 (1968).

³¹ J. Gange & S. Johnstone, "Believe Me, Everybody Has Something Pierced in California": An Interview With Nayland Blake" (1993) 19 *New Formations* 51 at 61.

³² The first two comments are attributable to Lord Templeman in *Brown*, *supra* note 2 at 82; the third to Lord Lowry at 100.

permanent physical injury did not occur in the *Brown* case, the potential is ever present and looms large.

The spectre of serious injury—of sexual acts out of control that lead to harm—is contradicted by some sociological research on sado-masochistic sexual practices. As Weinberg argued in his review of the literature in the field,³³ if sado-masochism is viewed sociologically, its meaning is tightly controlled and its actions are a product of an agreed set of terms:

The meaning of what is happening is shared, and a variety of “keys” are used to cue participants into what is “really going on.” Frames not only define interaction, but they also control and restrict it as well. They set forth mutually agreed upon limits for behavior, which participants accept as inviolable. So, for example, what may appear to the uninitiated observer as a violent act may really be a theatrical and carefully controlled “performance” from the perspective of the participants.³⁴

These shared meanings are learned within the subculture, and the “effect” of exclusive control by one party may be far removed from how the performance actually has been mutually planned: “the action is often, but not always, scripted and therefore collaborative, so that neither the dominant nor the submissive usually has complete control.”³⁵ Although scripting may take place, a certain amount of room for improvisation may remain, allowing for divergence from the planned scenario.³⁶

³³ T.S. Weinberg, “Sado-masochism in the United States: A Review of Recent Sociological Literature” (1987) 23 *J. Sex Research* 50.

³⁴ *Ibid.* at 52. In this article, I am not attempting to discern the “truth” of sado-masochism, but rather to highlight the difficulties involved in providing any single “true” reading of a sexual encounter of this (or any) type. The fact that social science-based arguments have been made that contradict the meaning ascribed by the House of Lords to the sexual relationships calls into question the majority’s characterization of the meaning of sado-masochism.

³⁵ *Ibid.* at 62.

³⁶ *Ibid.* at 63. In a somewhat different vein, the relationship between control and spontaneity within the sado-masochistic relationship was analyzed by Foucault in terms of “regulation” and “openness.” See M. Foucault, “Sexual Choice, Sexual Act: An Interview with Michel Foucault” trans. J. O’Higgins (1982-83) 58-59 *Salmagundi* 10 at 20, where he stated:

[S]exual relations are elaborated and developed by and through mythical relations. S & M is not a relationship between he (or she) who suffers and he (or she) who inflicts suffering, but between the master and the one on whom he exercises his mastery. What interests the practitioners of S & M is that the relationship is at the same time regulated and open. It resembles a chess game in the sense that one can win and the other lose. The master can lose in the S & M game if he finds he is unable to respond to the needs and trials of his victim. Conversely, the servant can lose if he fails to meet or can’t stand meeting the challenge thrown at him by the master. This mixture of rules and openness has the effect of intensifying sexual relations by introducing a perpetual novelty, a

Trust thus may play a function in limiting the potential for uncontrolled violence. Trust arises both from the relationship created over time between the parties to the scene, and from subcultural norms and values that are accepted by one who comes to self-identify as a sado-masochist.³⁷ The construction of sado-masochistic sex as uncontrolled violence, therefore, may be misplaced. The performance of the sexual encounter suggests a high degree of predictability and a mutual awareness of limits and boundaries beyond which participants are socialized not to proceed. On this point, the appellants argued that the use of “code words” by recipients ensured that limits would be respected. However, Lord Templeman’s rejection of the effectiveness of code words to control the encounters demonstrates an unwillingness to recognize the possibility of negotiated limits to sexual acts.

The discussion of harm in the judgments also includes numerous references to the danger of transmission of HIV through sado-masochism. Although no evidence was presented of transmission between group members, the risk of HIV infection becomes a harm that justifies criminal sanctions. Lord Lowry is most forthcoming as to the relationship between the virus and the criminalization of sexual activity. The danger of HIV is a direct result of the loss of control by participants in the sexual encounter. The threat of AIDS becomes *the* logical outcome of sado-masochistic (or, perhaps, homosexual) sex:

A proposed general exemption is to be tested by considering the likely general effect. This must include the probability that some sado-masochistic activity, under *the powerful influence of the sexual instinct*, will get out of hand and result in serious physical damage to the participants and that some activity will involve a danger of infection such as these particular exponents do not contemplate for themselves. When considering the danger of infection, with its *inevitable threat of AIDS*, I am not impressed by the argument that ... as long ago as 1967, Parliament ... legalised buggery, now a *well-known vehicle* for the transmission of AIDS.³⁸

This passage contains a complex matrix of the potential harms that stem from sado-masochistic gay sex. Sexuality is perceived as a powerful instinct that is not easily contained. Indeed, without legal constraints, it will wreak havoc. One result is infection and the *inevitable* outcome is the transmission of HIV and, ultimately, death.

The distinction between normal and sado-masochistic sex is one which is firmly maintained in the judgments. In fact, for Lord

perpetual tension and a perpetual uncertainty which the simple consummation of the act lacks.

³⁷ See Weinberg, *supra* note 33 at 63. Trust, therefore, to some extent might distinguish the long-term sado-masochistic relationship from the “one-off” encounter.

³⁸ *Brown*, *supra* note 2 at 100 [emphasis added].

Templeman, sado-masochism is at least as much about violence as it is about sex, while “normal” sex presumably is a bounded sphere removed from violence. For Lord Lowry, sado-masochistic sex is the antithesis of normal, heterosexual family life and, consequently, it is not compatible with the social good. Nor is it analogous to those “manly diversions” such as boxing where consent does provide a defence to a charge of assault. For the majority of the House of Lords then, the presence of negotiated limits and boundaries is what characterizes the acts as the antithesis of the sexual, as it is commonly understood.

C. *A Manly Diversion: R. v. Aitken and the Limits of Consent*

One kind of assault—a “manly diversion”—to which one can give meaningful consent was made clear in a case before the English Court of Appeal. In *R. v. Aitken*,³⁹ the central question was the effectiveness of consent to an assault that caused *grievous* bodily harm. The accused were three Royal Air Force (RAF) officers who had attended a party where a large amount of alcohol was consumed. Some “horseplay” ensued which involved the setting alight of some participants (who were wearing fire-resistant RAF suits). These activities were viewed as pranks which led to no serious injury. Later in the evening, after the party disbanded, the appellants set fire to another participant (also wearing fire-retardant clothing) using a considerable quantity of white spirit and a light. The victim, Gibson, resisted, but as he was severely intoxicated, his resistance was weak and ineffective. In this instance, the activity got “out of hand” and flames flared up rapidly. According to one appellant, Gibson “had gone up like a torch.”⁴⁰ Although the accused, themselves intoxicated, took immediate steps to extinguish the flames, the victim suffered severe burns “with 35 per cent of his body sustaining superficial burns of a life-threatening nature.”⁴¹ The issue before the Court was whether the appellants had inflicted grievous bodily harm *unlawfully* and maliciously.

In particular, the Court of Appeal considered whether the judge advocate had failed to give the jury proper direction as to the meaning of the word “unlawfully” in section 20 of the *Offences Against the Person Act*

³⁹ [1992] 1 W.L.R. 1006 (Ct.-M. A.C.) [hereinafter *Aitken*].

⁴⁰ *Ibid.* at 1010.

⁴¹ *Ibid.*

1861.⁴² In directing the jury on unlawfulness, the judge advocate had explained that it was up to them to determine whether this activity went beyond the bounds of horseplay:

Was this no more than horseplay? Looking at it in the light of the Royal Air Force ethos, was this going far beyond normal horseplay, to such an extent that you can say, "No. This is way beyond those levels. This [*sic*] is not possibly lawful to behave in this manner"?⁴³

The Court of Appeal, quashing the convictions, held that this instruction was inadequate. In essence, the Court accepted the argument of the appellants that the events of the evening were not *per se* unlawful, and that the jury should have been instructed accordingly. The appellants had argued before the Court of Appeal that

[I]n seeking to restrain him from leaving the room, grappling him to the ground and then, as he was getting up, trying to carry out the same type of burning incident as had happened earlier in the evening the appellants were acting in a manner consistent with what had been going on during much of the time. The fact that Gibson struggled, albeit weakly through drink, to avoid the attentions of the three during the incident in question should not, it was submitted on the appellants' behalf, be taken in isolation. The totality of the circumstances, his knowledge of the course which celebration evenings such as the one in question was likely to take and his continued presence with the others demonstrated an acceptance by him that horseplay of the nature perpetrated upon him might well take place.⁴⁴

The Court of Appeal accepted that the issue of consent to the assault which caused *grievous* bodily harm ought to have been put to the jury. Thus, consent would render the assault no longer unlawful. Interestingly, the issue turned, not only on actual consent, but also on the subjective belief of the appellants:

[T]he judge advocate should then have directed the court as to the *necessity of considering whether Gibson gave his consent as a willing participant to the activities in question, or whether the appellants may have believed this, whether reasonably or not.*⁴⁵

In this case, consent is assumed to operate as a defence to a charge of assault causing grievous bodily harm. Although the Court of Appeal never discusses which category of exception renders the physical assault lawful, the description of "horseplay" is similar to the "manly diversions" described by Lord Lowry in *Brown*. In *Aitken*, consent to the activity is comprehensible to the Court of Appeal and the jury therefore

⁴² Section 20 states, "unlawfully and maliciously inflicting grievous bodily harm." See *supra* note 4.

⁴³ *Aitken*, *supra* note 39 at 1018.

⁴⁴ *Ibid.* at 1019-20.

⁴⁵ *Ibid.* at 1020 [emphasis added].

should have been instructed that a belief in the victim's consent—whether reasonably held or not—was sufficient to negate the commission of an offence.⁴⁶ By contrast, in *Brown*, the analysis of consent focuses solely on the “victim.” Consent is continually queried for its voluntariness and the potential for coercion is frequently cited.

In *Aitken*, consent to the brutalization is plausible to the Court. Consequently, the activity can be reduced to mere “horseplay.” The use of that term demarcates a clear boundary between the homosexual practices of the defendants in *Brown* (which cannot be thought of as “manly diversions”) and the homosocial (albeit clearly not homosexual) activities in *Aitken*. The term horseplay conjures up innocent school boys—precisely the innocents who, according to the House of Lords in *Brown*, are in need of protection from the accused sado-masochists. Through this construction of the facts, any sexualized dimension to the activities in *Aitken* remains absent. The party itself took place in “married quarters,” a metaphoric safe haven for manly diversions, quarantined from the dangers of seduction lurking outside. To quote Lord Templeman in *Brown*, the married quarters provide a realm of “private and family life.” This creation of a metaphoric bounded space allows for the rigid separation between the homosocial environment of the military with its friendly horseplay and the spectre of the homosexual, who is removed and ostracized from the space of the homosocial and heterosexual male, and who is subjected to the judicial gaze.

However, the facts of *Aitken* highlight many of the dangers described by the House of Lords in *Brown*. The injuries suffered by Gibson were the result of a controlled activity that got out of hand. The rules of the game, if they ever existed, were transgressed as the thrill of victimization caused the limits to be crossed. The Court was faced with the persistent problem of determining consent when excessive alcohol is involved with the attendant danger of an induced consent which is not truly voluntary. Moreover, the possibility existed that alcohol caused the aggressors to wrongly assume consent. This, of course, was one basis upon which the House of Lords questioned the reliability of consent to sado-masochistic activities. Furthermore, in contrast to *Brown*, it is unlikely that limits were ever negotiated in any kind of conversation in *Aitken*. Curiously, though, in *Brown* it is the presence of negotiated limits agreed upon in advance that undermines the case for the appellants. The absence of a shared conversation—of rational conversation—in *Aitken* strengthens the claim of the relevance of

⁴⁶ This closely resembles the role of consent in the law of sexual assault.

consent and the perception by the defendants that consent was given. The *absence* of agreement thus characterizes the diversion as manly. In other words, it is the giving of consent voluntarily and fully informed which undermines the manliness both of the victim and the aggressor. This distinguishes the facts in *Aitken* from the sado-masochistic behaviour in *Brown* and serves to separate “normal” male sexuality from the “homosexual.”⁴⁷

III. SEDUCTION, ADDICTION, AND CONTAGION: THE PATHOLOGIZING OF THE HOMOSEXUAL

A. *Introduction: The Gay Man as Sado-masochistic Serial Killer*

The construction of “the homosexual” can be traced through the reasoning of the House of Lords in *Brown*. However, the construction of the homosexual as pathological is not unique to legal discourse. The creation of a pathological sado-masochistic identity, which becomes synonymous with the homosexual, occurs through a web of discourses. I suggest in this section that the homosexual is characterized through the language of addiction, seduction, and contagion. Each deployment provides metaphoric and mythic power for the expurgation of the homosexual from the realm of normal society and assists in the consolidation of that normalcy. The normal is thereby constituted as the non-addicted body exercising free will, immune from the threat of contagion. Lurking in the background will be another set of discourses—sometimes articulated and sometimes implicit—which focus on the threat of AIDS and a death that *inevitably* results from the dangers of addiction, seduction, and, especially, contagion.

In June 1993, the British media gave extensive coverage to a series of murders of gay men in London. An individual enticed five different men back to their homes after engaging in conversations in a London gay pub. Each man was found dead; four from asphyxiation and three of those from strangulation. All of the victims were discovered naked and in some cases there was evidence of sexual activity. An individual subsequently was arrested and convicted in connection with

⁴⁷ In contrast, the Supreme Court of Canada has held that public policy vitiates an apparent consent to bodily harm resulting from a fist fight: see *R. v. Jobidon*, [1991] 2 S.C.R. 114.

those murders.⁴⁸ According to press reports, “[f]our of the five victims were homosexual and are believed to have had an interest in sado-masochism. Several of their homes contained bondage equipment.”⁴⁹

The reporting of these events by the mainstream media provides as fertile a source for investigating the themes raised earlier as does the judgment of the House of Lords in *Brown*. In fact, the two events are not wholly disconnected. It has been argued that the murder investigations were impeded by the reluctance of practitioners of gay sado-masochistic sex to provide evidence, given that in so doing they might implicate themselves as having committed unlawful assaults through consensual sexual relations.

On a rhetorical level, the commonalities between the discourses surrounding both events also are readily apparent. The construction of the homosexual and his lifestyle as other than the normal, the familial, and the social, filters through the coverage of events. The “gay world” is described as “a mystery;” “all but closed to outsiders;” “where assumed names are common;” “where young men appear and vanish in an endless stream;” and “where violent assault is always to be feared.”⁵⁰ The “scene” is a “predatory, risky and anonymous world of multiple sexual partners, rushed and often violent sex with strangers.”⁵¹ The men who enter this world often lead “a double life.”⁵² The murdered men in this case were described as “quiet,” “quiet-living,” “little,” “bespectacled,” holding “steady responsible jobs,” and “living in respectable areas.”⁵³ These descriptions highlight the difficulty of distinguishing the

⁴⁸ This case has not been reported, but has been discussed in the following newspaper articles: T. Kirby, “Calculating murderer who preyed on gays: Terry Kirby builds up a picture of a man with a lethal wish to prove he was someone of consequence” *The Independent* (21 December 1993) 6; R. Duce, “Mass murderer who craved fame preyed on gay masochists” *The [London] Times* (21 December 1993) 3; and T. Kirby, “Serial killer locked up for life, ‘To take one human life is an outrage, to take five is carnage,’ says judge” *The Independent* (21 December 1993) 1.

⁴⁹ S. Tandler, “Gay-killer tells police he will murder one victim a week” *The [London] Times* (17 June 1993) 1. The press also reported on the HIV status of some of the deceased. The ethics of such disclosure is a subject of serious concern, but is beyond the scope of this article.

⁵⁰ See J. Dalrymple & B. Deer, “Killed for kicks” *The [London] Sunday Times* (20 June 1993) 11.

⁵¹ A. Thomson & J. Llewellyn-Smith, “Death goes cruising: A serial killer is pursuing homosexual men who go in search of sado-masochistic relationships” *The [London] Times* (17 June 1993) 14.

⁵² W. Bennett, “Four of the victims were regular visitors to gay pubs” *The Independent* (17 June 1993) 3.

⁵³ See Dalrymple & Deer, *supra* note 50; Thomson & Llewellyn-Smith, *supra* note 51; and Bennett, *ibid.*

pathological from the normal—"they" could be anywhere, "they" could be your neighbours, "they" seem perfectly respectable. Public persona and private life are sharply differentiated and it is through the gay subculture—this "twilight zone"—that the media can bridge the yawning gulf between public and private worlds. At the time of the media's interest, reporters were sent to investigate the gay subcultural scene and the descriptions conjure up the image of explorers in a foreign land. Furthermore, from this terrain emerged the language of addiction, seduction, and contagion that also permeates the judgment of the House of Lords in *Brown*.

B. *The Language of Addiction*

The discursive appearance of addiction and the creation of the identity of the addict is an increasingly prevalent phenomenon in late capitalist society. As Eve Sedgwick suggested in her recent exploration of the use of the language of addiction within a variety of sites, we are seeing the extension of addiction to a wide range of "substances," rendering it devoid of any essential meaning:

To the gradual extension of addiction-attribution to a wider variety of "drugs" over the first two thirds of the twentieth century there has been added the startling coda of several recent developments: in particular, the development that now quite explicitly brings not only every form of substance ingestion, but more simply every form of human behavior, into the orbit of potential addiction-attribution ... the locus of addictiveness cannot be the substance itself and can scarcely even be the body itself, but must be some overarching abstraction that governs the narrative relations between them.⁵⁴

It is this "narrative relation" between body and substance that structures the language of addiction and increasingly "any substance, any behavior, even any affect may be pathologized as addictive."⁵⁵ But as addiction comes to lack "any necessary specificity of substance, bodily effect or psychological motivation,"⁵⁶ the focus shifts from the substance of addiction to the subject of addiction—and, in so doing, addiction comes to be associated simply with individual free will. Thus, we are witnessing a "pathologizing of addiction as a malady of the will."⁵⁷ However, the relationship of addiction to the exercise of the will is

⁵⁴ "Epidemics of the Will" in J. Crary & S. Kwinter, eds., *Incorporations Zone 6* (Toronto: Bradbury Tamblin & Boorne, 1992) 582 at 582-83.

⁵⁵ *Ibid.* at 584.

⁵⁶ *Ibid.*

⁵⁷ M. Seltzer, "Serial Killers (1)" (1993) 5:1 *Differences* 92 at 111.

deeply problematic. On the one hand, discourses of addiction focus on the failure of the individual will. To be “hooked” is to lose control, to fall victim to a compulsion which negates the exercise of choice. On the other hand, addiction is now structured precisely around those phenomena that are associated with personal freedom. The exercise of individual will, therefore, becomes a symptom and object of an addictive personality (the “exercise addict” being the obvious example). As Sedgwick argued, this structuring of addiction around both compulsion and volition gives rise to a “system of double binds,” where claims of free will can be answered through the language of compulsion, and vice versa:

[W]here an assertion that one can act freely is always read in the damning light of the “open secret” that the behavior in question is utterly compelled—while one’s assertion that one was, after all, compelled, shrivels in the equally stark light of the “open secret” that one might at any given moment have chosen differently.⁵⁸

This relationship between compulsion and free will also has been described as “self-destruction for fuller self-possession.”⁵⁹ It is the addictiveness of free will itself—a manifestation of the possession of the self—that leads, within this formulation, to the destruction of that same self.

The development of this discourse around addiction closely parallels the emergence of discourses of the “homosexual,” which makes it less surprising that the language of addiction was employed in the House of Lords decision in *Brown* and in the commentary on the serial killer case. The construction of the addict and the homosexual as identities, rather than acts, has “historical interimplications”:

The two taxonomies of the addict and the homosexual condensed many of the same issues for late nineteenth-century culture: the old anti-sodomite opposition between something called “nature” and that which is *contra naturam* blended with a treacherous apparent seamlessness into a new opposition between substances that are *natural* (for example, “food”) and those that are *artificial* (for example, “drugs”), and hence into the characteristic twentieth-century way of distinguishing desires themselves between the natural, called “needs,” and the artificial, called “addictions.”⁶⁰

The discourse of addiction amounts then to a reification of the natural, which is contrasted to the artificially stimulating. Of course, this analysis

⁵⁸ *Supra* note 54 at 587.

⁵⁹ Seltzer, *supra* note 57 at 112.

⁶⁰ Sedgwick, *supra* note 54 at 589.

reveals that the unnaturalness (or naturalness) of any desire is itself a social construction realized discursively.⁶¹

This process of condensing the categories of addiction—of unnatural abuses—is also clearly at work in discourses surrounding HIV. The collapsing together of risk groups reaffirms the social construction of the natural and the artificial, and provides a cautionary warning for the consequences of free will:

[O]ne of the many echoes resounding around the terrible accident of HIV and the terrible nonaccident of the overdetermined ravage of AIDS is the way that it seems “naturally” to ratify and associate—as unnatural, as unsuited for survival, as the appropriate objects of neglect, specularized suffering and premature death—the notionally self-evident “risk group” categories of the gay man and the addict.⁶²

The ways in which the discourse of addiction structures the discourse of the gay male are easily discernible. Most obviously, the gay man’s sexuality is out of control. The exercise of free will (self-possession) necessarily and inevitably leads to his self-destruction. The artificiality and unnaturalness of desire thus becomes addictive and requires ever increasing quantities to satisfy. Ultimately, the limits are reached only at the point of physical exhaustion:

Homosexual desire symbolizes pure sexual lust or unrestrained desire, subject only to the quantitative limitations of physical exhaustion. It is this compulsive, hyperactive, insatiable desire that is thought to compel homosexuals to eroticize the forbidden and to transgress all moral boundaries, rendering them a profound social danger.⁶³

In this regard, the homosexual possesses the same attributes as others who are portrayed as unregulated and devoid of self-control: “Gays, prostitutes, and addicts are not in control of their desires or do not allow

⁶¹ In developing her thesis, Sedgwick, *ibid.*, looks to the nineteenth-century cautionary tales *The Picture of Dorian Gray* by Oscar Wilde (1882) and *The Strange Case of Dr. Jekyll and Mr. Hyde* by Robert Louis Stevenson (1885) as “expression[s] of the dynamics of male same-sex desire and its prohibition: both books begin by looking like stories of erotic tensions between men, and end up as cautionary tales of solitary substance-abusers.” To my mind, an equally compelling example can be found in the twentieth-century in *The Vortex: A Play in Three Acts* by Noël Coward (1925). In this example, the tortured drug-addicted male youth obviously “stands in” the place of “the homosexual” within the narrative. See generally, N. De Jongh, *Not in Front of the Audience: Homosexuality on Stage* (New York: Routledge, 1992).

⁶² Sedgwick, *supra* note 54 at 589.

⁶³ S. Seidman, *Embattled Eros: Sexual Politics and Ethics in Contemporary America* (New York: Routledge, 1992) at 159.

their desires to be controlled, and this makes them perverse and threatening agents of pathology.”⁶⁴

Like other addicts, the gay man comes to be unable to control his desire for the artificially stimulating and is caught in the system of double binds. The exercise of a particular sexual choice leads to a compulsiveness—an addiction to sexual freedom. Once he enters this realm of the forbidden and the transgressive, the compulsion leads to ever increasing heights of depravity of lust—an escalation that leads ultimately to his self-destruction.

Both the serial killer case and the reasoning in *Brown* utilize this discourse. The murdered victims of the serial killer often are described as victims of their own unnatural needs, which they are compelled to fulfil. As a result of their “addiction” they “strayed into the orbit of a man who had been long preparing to push the game of sexual pain beyond the final barrier.”⁶⁵ Murder, then, becomes the erotic limit for the addicted gay man, which is the logical end result of taking up such a dangerous “habit.” Indeed, in one article, one of the murdered men is described as “cheerfully *addicted* to bondage sex,” his good cheer no doubt reflecting an ignorance of the dangers that result from the exercise of his sexual will.⁶⁶

A similar use of addiction is engaged by the Law Lords in *Brown*. Throughout the majority reasons, the appellants are characterized in terms of their uncontrolled and unregulated need for sexualized violence. Like other forms of addiction, their desire for stimulation escalates, which means that the addiction becomes uncontrollable. Once again, the relationship of free will and compulsion is paradoxical. In exercising a choice to engage in sado-masochistic sexual encounters, the appellants increasingly become addicted to their sexual proclivity, with necessarily dangerous consequences.

A discourse of addiction thus underpins the reasons of the majority. It explains why, in Lord Templeman’s reasons, “[s]ado-masochistic participants have no way of foretelling the degree of bodily harm which will result from their encounters,”⁶⁷ despite any system of regulation in place during those sessions. Ever increasing degrees of

⁶⁴ J.W. Jones, “Discourses on and of AIDS in West Germany, 1986-90” in J.C. Fout, ed., *Forbidden History: The States, Society and Regulation of Sexuality in Modern Europe* (Chicago: University of Chicago Press, 1992) 361 at 364-65.

⁶⁵ Dalrymple & Deer, *supra* note 50.

⁶⁶ *Ibid.* [emphasis added].

⁶⁷ *Brown*, *supra* note 2 at 82.

stimulation are required to get a sexual “fix.” Similarly, Lord Jauncey conflated the sexual with other addictions, which reinforces the uncontrollability of the situation: “an inflicter who is carried away by sexual excitement or by drink or drugs could very easily inflict pain and injury beyond the level to which the receiver had consented.”⁶⁸

The analysis of Lord Lowry, however, at first blush appears at variance with that of his brethren. Like Lords Templeman and Jauncey, he recognized the likelihood (perhaps inevitability) of a cycle of escalating violence resulting from addictive behaviour. He framed the analysis, though, not in terms of the artificiality and unnaturalness of the sexual pursuits, but in terms of instinct. Thus, he foresaw the “*probability* that some sado-masochistic activity, under the powerful influence of the sexual instinct, will get out of hand.”⁶⁹ Rather than structuring desire around the binary of the natural and the artificial, Lord Lowry suggested that the sado-masochistic sexual encounter will get out of hand because of its instinctive and presumably natural foundations. If we are engaged with a “problem” of instinct rather than addiction, then the double bind of volition and compulsion seems resolved. The sex instinct, by virtue of its “natural” basis, cannot be described both as addictive and volitional in the way that addictions usually are constructed.

However, if the concept of addiction has been evacuated of any essential meaning, then presumably the sexual *instinct* itself can be the substance of addiction. In this way, Lord Lowry’s reasoning is consistent with addiction analysis. Free will must control the instinctive in Lord Lowry’s approach in order to prevent the spiral of addiction. If the instinctive is in some sense natural, then another discourse emerges within this judgment. The natural, rather than being juxtaposed against the artificial, forms a binary relationship with the social. It is the natural which must be brought under control or “harnessed” to the proper ends of society. The sexual instinct must be regulated to prevent a loss of control and utilized towards appropriate social ends. Despite his focus on the social as a contrast to the natural, Lord Lowry remains firmly entrenched within a discourse of addiction.

Furthermore, the phenomenon of addiction becomes problematic because of the way it is read as threatening to the bonds of society. In a recent interview, Jacques Derrida explored the logic of addiction in relation to drug use and suggested that the threat from

⁶⁸ *Ibid.* at 91.

⁶⁹ *Ibid.* at 100 [emphasis added].

addiction arises in relation to the perceived withdrawal of the addict from civil society: “[H]e cuts himself off from the world, in exile from reality, far from objective reality and the real life of the city and the community; ... he escapes into a world of simulacrum and fiction.”⁷⁰ Addiction is a fictional world because of the inauthenticity of the stimulation of the drug, which contrasts to the genuineness of social life. A “free and responsible subjectivity”⁷¹ depends upon a symbolic connection to that social life. The normal, non-addicted, and engaged body is thus a prerequisite to the continued existence of the social bond:

[T]his protection of the social bond, and thus of a certain symbolicity, indeed of rationality in general—this is almost always presented as the protection of a “natural” normality of the body, of the body politic and the body of the individual-member.⁷²

Addiction, as I have argued, is read as destructive of the self and, as well, as destructive of society by virtue of its power to desocialize. The indictment against drug use is designed to “forbid a pleasure that is at once solitary, desocializing, and yet contagious for the *socius*.”⁷³

Addiction, then, is devoid of the “truth” of social life. It is constructed as a withdrawal of the body from the body social and from the “authentic” life in favour of the simulacrum. Although Derrida’s analysis is framed in terms of drugs, the analysis also applies to the deployment of the language of addiction in relation to gay male sexuality. It explains why, for Lord Templeman, the fact that charges against the appellants were laid pursuant to the law of assault, rather than indecency, is perfectly comprehensible. As he posits, “indecency charges are connected with sex. Charges under the 1861 *Act* are concerned with violence.”⁷⁴ The sado-masochistic encounters are an inauthentic form of sexual expression that ultimately need not even be characterized as sexual by the law. For the majority of the Law Lords, there is a truth and an authenticity to sex, and the experience of sado-masochism is both inauthentic and artificial.⁷⁵

Furthermore, the normal, non-addicted body becomes the precondition for the survival of the social body. It is the addict, no

⁷⁰ J. Derrida *et al.*, “The Rhetoric of Drugs An Interview” (1993) 5:1 *Differences* 1 at 7.

⁷¹ *Ibid.* at 12.

⁷² *Ibid.* at 14.

⁷³ *Ibid.* at 19.

⁷⁴ *Brown, supra* note 2 at 84.

⁷⁵ The creation of a film of the sado-masochistic sexual encounters heightens the effect of simulacrum and representation, one step removed from the “reality” of sex.

matter what the substance of addiction, who threatens society through his withdrawal from its reach. This desocializing effect of addiction can be reframed in terms of the public-private distinction. Addiction is constructed as a withdrawal from the public realm into a private world. Discourses surrounding both the serial killer case and the *Brown* decision are replete with references to the gay "other" world and the double life ("public" vs. "private") led by many gay men. The retreat from the social into another world renders a reading of the occurrences within that private realm particularly difficult for judges to decipher publicly.

Of course, the fact that the "private" world is itself a discursive sphere and a sub-community means that its construction as contrary to the social is flawed. Rather, it presents an alternative social ordering. As Derrida argued, "[T]he act of drug use itself is structured like a language and so could not be purely private."⁷⁶ So too, as I suggested earlier, the sado-masochistic community, instead of constituting a realm of privacy (in the sense of isolation from a social reality), creates a social world (and legal order) with its own language and regulatory codes of conduct. The judiciary's lack of fluency in that language renders them unable to interpret the limits and boundaries that may well be respected within the sado-masochistic sexual encounter.⁷⁷ Similarly, the public's lack of fluency in this other language explains how the serial killer episode can be characterized as the ultimate (and inevitable) step in a progression of violent acts.

The justification for the prosecution of "private" sexual relations implicit in the judgment of the majority in *Brown* (and the public/private distinction forms the basis of the liberal critique of the decision) is that such activities are harmful to the body social because they represent a withdrawal from the dominant social order in favour of an alternative set of norms. It is the difficulty of monitoring that order (which, although private, is not solitary) that renders those activities particularly dangerous. Within this subculture, language itself has been reworked through the introduction of code words that provide the basis for the regulation of sexual conduct. The fact that judges are unable to read that language (or perhaps to comprehend the negotiation of a language of sexual limits) also "speaks" to the construction of the sexual. The creation of a set of sexual rules through language suggests a subcultural "exit" from the dominant regime. This alternative, however, is

⁷⁶ *Supra* note 70 at 19.

⁷⁷ I recognize, of course, that members of the judiciary may be members of this community in their "private" lives.

construed by the Law Lords as inauthentic, unreal, and the product of a sexual addiction.

Thus, the public/private distinction, rather than foreclosing the prosecution of the defendants in *Brown*, demands that public order be protected from the emergence of an alternative set of norms. This is achieved in part through erecting barriers against the other, constructed as outside the dominant order.⁷⁸ As Beverly Brown argued in the context of indecency law, we are witnessing the collapse of a private realm free of the penetrating gaze of the state. Of course, as Brown noted, the Wolfenden Strategy itself was designed to isolate homosexuality in a private realm, where it would not display itself or participate in dialogue within the public sphere.⁷⁹ Yet, ironically, the development of a "private" subcultural world that has avoided the gaze comes to be the subject of condemnation and is found particularly dangerous. The home itself becomes a target of surveillance in order to detect "an inherently dangerous, unpredictable, latent and punitive sexuality, a degenerate sexuality capable of extinguishing future generations."⁸⁰

⁷⁸ This deployment of the binary of inside/outside in relation to the construction of "the homosexual" has been analyzed by D. Fuss, ed., *Inside/Out: Lesbian Theories, Gay Theories* (New York: Routledge, 1991) at 3: "Those inhabiting the inside ... can only comprehend the outside through the incorporation of a negative image. This process of negative interiorization involves turning homosexuality inside out, exposing not the homosexual's abjected insides but the homosexual as the abject, as the contaminated and expurgated insides of the heterosexual subject."

⁷⁹ "Troubled Vision: Legal Understandings of Obscenity" (1993) 19 *New Formations* 29 at 39: "[P]ublic spaces were not to be places of diversity and debate in which tolerance would be a civil necessity and, ideally, consensus might be born out of the experience of everyday exposure to variety. On the contrary, difference and diversity were born to bloom unseen, cordoned off in the private domain." The Wolfenden Report of 1957 was the product of an independent committee, established by the British government, to make recommendations on the laws dealing with prostitution and with male homosexuality. In regard to the latter, the Committee recommended that consensual homosexual sex between two adult men over the age of twenty-one years in private should be decriminalized. See U.K., *Report of the Committee on Homosexual Offences and Prostitution* (London: H.M.S.O., 1957) (Chair: Sir John Wolfenden), particularly paragraphs 62, 64, and 71. On the Wolfenden Report and the struggle for gay law reform in the United Kingdom, see generally, S. Jeffery-Poulter, *Peers, Queers & Commons: The struggle for gay law reform from 1950 to the present* (New York: Routledge, 1991).

⁸⁰ Brown, *supra* note 79 at 40. Within these cultural conditions, the use of codes which cannot be read outside the subculture become an important means of self-defence; see C. Patton, "Safe Sex and the Pornographic Vernacular" in Bad Object-Choices, ed., *How Do I Look? Queer Film and Video* (Seattle: Bay Press, 1991) 31 at 47:

[P]eople from certain subgroups become afraid to speak their native tongue when their "texts"—a red hanky, a turn of phrase or cut of suit, a pamphlet, a book—thought private, suddenly come under scrutiny and become public, rendering the public language

C. *The Language of Seduction*

Seduction, like addiction, is a discourse that pathologizes the homosexual. The power of the gay man to seduce the "normal" male into both a sexual act and a sexual identity is frequently employed to expurgate the homosexual from the bounds of civil society. The seductiveness of the gay man (and of homosexuality) is constructed as threatening the integrity of a heterosexual identity. It is a threat which has been cited as justification for the use of force in retaliation to the "homosexual advance." Such a response to the sexual advance stems not only from the fear of being seduced into an act but, more importantly, from the seductiveness of this alternative sexual identity:

Of course, heterosexual culture in the West has long interpreted homosexuality as a threat to the security or integrity of heterosexual identity. In our dauntingly inconsistent mythology of homosexuality, "the love that dared not speak its name" ... was so designated not only because it was seen as lurid, shameful, and repellent, but also, and contradictorally, because it was, and is, conceived of as being potentially so attractive that even to speak about it is to risk the possibility of tempting some innocent into a fate too horrible—and too seductive—to imagine.⁸¹

The temptation that the gay man offers is so powerfully seductive as to be almost irresistible. Moreover, this seductiveness is linked to a discourse of youth and the potential corruption of the young. This connection has long had a resonance which functions to stifle dialogue. The gay male becomes a "predatory, determined invert, wrapped in a Grand Guignol cloak of degeneracy theory, and casting his lascivious eyes—and hands ... onto 'our' children, and above all onto 'our' sons."⁸² Most importantly, though, the danger of seduction lies not simply in the possibility of an *act* of same-sex intercourse (which does not in itself

and symbols of the subculture vulnerable to unanticipated readings by someone with greater social power.

The interrogation of a subculture in light of the decision in *Brown* was exemplified by a police raid of a house in a South Yorkshire village. Acting on information suggesting that stolen goods were being received, the police instead found a group of thirty-eight "partying homosexuals in various states of undress;" see M. Macdonald, " 'Stolen goods' raid surprises gay party" *The Independent* (11 May 1993) 3. Although no sex acts were taking place, some of the men were found "bound in leather," and a "large quantity of clothes and sexual apparatus" were seized. The Crown Prosecution Service considered the case, and the men were released on bail, pending possible charges of conspiracy to commit gross indecency. Those charges were not laid because of insufficient evidence.

⁸¹ L. Edelman, "The Plague of Discourse: Politics, Literary Theory, and AIDS" (1989) 88 S. Atlantic Q. 301 at 309-10.

⁸² S. Watney, "The Spectacle of AIDS" in D. Crimp, ed., *AIDS Cultural Analysis Cultural Activism* (Cambridge, Mass.: MIT Press, 1989) 71 at 77.

create the “homosexual”), but the seductiveness of an *identity*, and an all-consuming sexual identity.

The spectacle of the homosexual as the source of erotic seductiveness is one means of pathologizing the gay man. It provides a recurring image of child molestation, which helps facilitate the social construction of homosexuality as “intrinsically monstrous within the entire system of heavily over-determined images inside which notions of ‘decency’, ‘human nature’ and so on are mobilised and relayed throughout the internal circuitry of the mass media marketplace.”⁸³

This discourse is employed by the Law Lords. The dangers of seduction of vulnerable and innocent youth into a degenerate (and all too appealing) lifestyle is a rationale for criminalizing the consensual sado-masochistic sexual encounter. Lord Templeman is most expansive in employing this justification. He noted that “[t]he victims were youths some of whom were introduced to sado-masochism before they attained the age of 21.”⁸⁴ He then favourably cited at length the judgment of Lord Lane in the Court of Appeal, who described the degeneracy and seductiveness of the appellants. According to Lord Lane C.J., two members of the group

were responsible in part for the corruption of a youth “K” ... It is some comfort at least to be told, as we were, that “K” has now it seems settled into a normal heterosexual relationship. Cadman had befriended “K” when the boy was 15 years old. He met him in a cafeteria and, so he says, found out that the boy was interested in homosexual activities. He introduced and encouraged “K” in “bondage” affairs. He was interested in viewing and recording on video tape “K” and other teenage boys in homosexual scenes.⁸⁵

Fortunately, the awesome seductive power of the homosexual was not overwhelming in the case of “K,” who managed to resist and, in a move that provided some solace, entered the domain of normal sexuality. Presumably, “K” left behind a life of degeneracy and assumed a thoroughly heterosexual (and non-sado-masochistic) identity. Like Lord Templeman, Lord Jauncey also recognized that “the possibility of

⁸³ S. Watney, *Policing Desire: Pornography, AIDS and the Media*, 2d ed. (Minneapolis: University of Minnesota Press, 1989) at 42 [hereinafter *Policing Desire*].

⁸⁴ *Brown*, *supra* note 2 at 82. In the United Kingdom, the age of consent for sexual intercourse between males has been twenty-one years. During a House of Commons debate on the *Criminal Justice and Public Order Bill*, private member Hon. Edwina Currie moved that the bill be amended such that a uniform age of consent for intercourse be set at sixteen. There was another motion to lower the age to eighteen years. The first motion was defeated on first reading; the second passed first reading. See U.K., H.C. *Parliamentary Debates*, 6th ser., vol. 238, col. 74 at col. 115-23 (21 February 1994). The *Criminal Justice and Public Order Bill* has not yet been enacted into law.

⁸⁵ *Brown*, *supra* note 2 at 83, citing to (1992), 94 Cr. App. R. 302 at 310.

proselytisation and corruption of young men is a real danger,” thereby justifying a dismissal of the appeals.⁸⁶

The pathologizing of the gay man through an association with the seduction of the innocent extends to media representations in the gay serial killer case. In this example, the seductiveness of the sex act stems from its connections with danger and the possibility of death. In other words, the *addictiveness* of gay sex contributes to its *seductive* potential and heightens its attractiveness.

The seductiveness of homosexuality then is a siren song that leads the unwary into the clutches of the pathological. It is irresistible, despite the victim’s awareness of its dangers and the perhaps fatal outcome. This in turn contributes to the seductiveness of the sexual encounter—the linking of pleasure and danger—and leads to a powerful seduction into a lifestyle that is both all consuming and usually irreversible.

D. *The Language of Contagion*

Like the discourses of addiction and seduction, the construction of homosexuality as a deviant sexual practice consistently has been realized through a discourse of contagion. Although the association of disease and its contagiousness with sexual practices is not new, the present climate has facilitated a renewed vigour in the deployment of the language of contagion and disease within an analysis of gay male sexuality.

The linking of the dangers of disease with transgressions of the dominant moral code is hardly unique to our current cultural conditions. Mary Douglas argued that “danger-beliefs,” centring upon disease and pollution that result from socially transgressive behaviour, are one means of maintaining social norms. The language of disease employs “nature” and the consequences of disobeying the laws of nature as a means of social control:

[T]he laws of nature are dragged in to sanction the moral code: this kind of disease is caused by adultery, that by incest; ... The whole universe is harnessed to men’s attempts

⁸⁶ *Ibid.* at 92. The strictly legal response to these arguments was provided by Lord Mustill, in dissent, at 117:

The element of the corruption of youth is already catered for by the existing legislation; and if there is a gap in it which needs to be filled the remedy surely lies in the hands of Parliament, not in the application of a statute which is aimed at other forms of wrongdoing.

to force one another into good citizenship. Thus we find that certain moral values are upheld and certain social rules defined by beliefs in dangerous contagion.⁸⁷

Thus, morality is reinforced by apparently universal rules deriving from nature which "make judgments on the moral value of human relations."⁸⁸ Moreover, for the morally transgressive citizen, protection from the wrath of nature may come only from the social body, because the individual is unable to resist the danger himself.⁸⁹ The figure of the transgressor comes to be seen as blameworthy. He is a polluted figure; "[h]e has developed some wrong condition or simply crossed some line which should not have been crossed and this displacement unleashes danger."⁹⁰

The transgression that leads to danger and exposes the individual to the contagiousness of disease centres upon the body. Transgression is a violation of social norms because it is a crossing of boundaries which must be protected and the body serves as a metaphor for this space. Boundaries symbolized by the body must be strengthened through their social construction as impermeable. That norm is undermined by morally deviant behaviour:

The body is a model which can stand for any bounded system. Its boundaries can represent any boundaries which are threatened or precarious. The body is a complex structure. The functions of its different parts and their relation afford a source of symbols for other complex structures. We cannot possibly interpret rituals ... unless we are prepared to see in the body a symbol of society, and to see the powers and dangers credited to social structure reproduced in small on the human body.⁹¹

The language of pollution accentuates and reinforces moral indignation at the undermining of the structure of boundaries, for "[w]hen action that is held to be morally wrong does not provoke moral indignation, belief in the harmful consequences of a pollutant can have the effect of aggravating the seriousness of the offence, and so of marshalling public opinion on the side of right."⁹²

The association of homosexuality with pollution, disease, and contagion has been exacerbated in the age of AIDS. Homosexuality has long been the target of the metaphors of pollution and fatal illness. The

⁸⁷ *Purity and Danger: An analysis of the concepts of pollution and taboo* (London: Routledge & Kegan Paul, 1978) at 3.

⁸⁸ *Ibid.* at 87-88.

⁸⁹ *Ibid.* at 97.

⁹⁰ *Ibid.* at 113.

⁹¹ *Ibid.* at 115.

⁹² *Ibid.* at 133.

homosexual has been constructed as a "vessel holding disease and, therefore, an extension of the disease."⁹³ The AIDS pandemic, however, "has been invoked as proof of the diseased, contagious and dangerous nature of homosexuality."⁹⁴ As a consequence, the association of AIDS and the gay man has facilitated a discourse of contagion, disease, and decay leading to an inexorable death.

This linkage between sexual act, sexual identity, and destruction (both of the body and the body politic) is maintained through connections between the discourses of addiction, seduction, and contagion. In fact, the construction of "the homosexual" as an identity in the nineteenth century emerged precisely

at the interstices of a host of overlapping discourses concerning sickness, contamination and genetic throwbacks, and was regarded as the most concrete evidence of the results of indecency, depravity and uncleanness. The category of "the homosexual" personified such concerns, revealing an unhealthy sexual appetite in an unhealthy body, doubly threatening because not so readily identifiable as other agents of filth and degradation.⁹⁵

The homosexual as personification of disease has been reinforced through the social response to AIDS. The "disease" of homosexuality—which has been utilized to collapse an identity into an immune deficiency syndrome—demands the creation of a heterosexual sphere protected against the destructiveness of this "other." Through the discourses surrounding AIDS, a literal and a metaphoric illness are joined together and the contagiousness of both demands a social response. Homosexuality thus becomes a hazard for individual and social life because "the mere fact of gay sex is held to be dangerous for other people."⁹⁶ In developing these connections within dominant discourses, there emerges a "moral etiology of disease that can only conceive homosexual desire within a medicalized metaphor of contagion."⁹⁷ Combined with the association of homosexuals with corruption, the connections between homosexuality (and its seductiveness) and individual death, social disorder, and decay are further strengthened. To reiterate, this social construction of the contagiousness of a sexual disease and the disease of a sexuality is far from historically specific:

⁹³ S.L. Gilman, *Disease and Representation: Images of Illness from Madness to AIDS* (Ithaca, N.Y.: Cornell University Press, 1988) at 4.

⁹⁴ Seidman, *supra* note 63 at 160.

⁹⁵ Watney, *Policing Desire*, *supra* note 83 at 49.

⁹⁶ *Ibid.* at 85.

⁹⁷ Watney, "The Spectacle of AIDS," *supra* note 82 at 73.

And it is no surprise to any gay person that death holds down the center around which the sliding signifiers of AIDS discourse swirl; for centuries in the West, death has been held out as the penalty for homosexual acts. All of the discourse of AIDS has encoded the homosexual Other ... In fact, no event in the AIDS crisis has been a surprise—not the relentless deaths, not the years of invisibility, not the sudden and promiscuous speaking about AIDS once sexual anxiety could be repressed and rearticulated as “public health.”⁹⁸

Thus, the discourses surrounding the AIDS pandemic must be understood as a “powerful condensor for a great range of social, sexual and psychic anxieties.”⁹⁹ Reaction to these anxieties leads to the reinforcement of the boundaries that mark off risk groups, whereby “[t]he innocent victim is bounded off from the guilty one, pure blood from contaminated, the general population from the AIDS populations, risk groups from those not at risk.”¹⁰⁰ Through the reinforcement of these boundaries, heterosexuality and the family become a protected sphere that forms the foundation of the social order, which is under continual threat from outside.

Epidemic conditions also can be employed to justify public intervention. As Linda Singer argued, the construction of disease as an epidemic creates the social conditions not simply for repression but, more importantly, “the epidemic provides an occasion and a rationale for multiplying points of intervention into the lives of bodies and populations.”¹⁰¹ Moreover, the current pandemic has been inscribed as profoundly sexual, which facilitates connections between disease, contagion, and the transgression of the boundaries demarcating the limits of social propriety. It is this fusing of disease and moral transgression that fuels the perception of a threat to the body politic arising from the contagiousness of the disease of transgression. The deployment of power thus becomes justifiable given the danger to the social order:

The establishment of a connection between epidemic and transgression has allowed for the rapid transmission of the former to phenomena that are outside the sphere of disease ... The use of this language marks all of these phenomena as targets for intervention because they have been designated as unacceptable, while at the same time reproducing

⁹⁸ C. Patton, *Inventing AIDS* (New York: Routledge, 1990) at 127-28.

⁹⁹ S. Watney, “AIDS, ‘Moral Panic’ Theory and Homophobia” in P. Aggleton & H. Homans, eds., *Social Aspects of AIDS* (New York: Falmer Press, 1988) 52 at 59.

¹⁰⁰ J. Gamson, “Silence, Death, and the Invisible Enemy: AIDS Activism and Social Movement ‘Newness’ ” (1989) 36 *Social Problems* 351 at 359-60.

¹⁰¹ *Erotic Welfare: Sexual Theory and Politics in the Age of Epidemic*, ed. by J. Butler & M. MacGrogan (New York: Routledge, 1993) at 117.

the power that authorizes and justifies their deployment. According to this discourse, it is existing authority that is to be protected from the plague of transgressions.¹⁰²

Transgression itself becomes a plague which must be eradicated to protect the viability and continued existence of society. Unsafe activities which may lead to HIV transmission are therefore judged as “indulgence, delinquency—addictions to chemicals that are illegal and to sex regarded as deviant.”¹⁰³

Transgression of the moral boundaries of society is perceived as leading to fatal consequences, which provides the ideal precondition for the reinforcement of the naturalness of those boundaries. Activities, though, must be continually monitored and regulated because, despite the consequences of crossing the moral divide, the addictiveness and seductiveness of sexual transgression will lead many into peril. The transmission of HIV is caused by the contagiousness of homosexuality which is particularly dangerous for the innocent and vulnerable. Homosexuality thus becomes a “death wish” and the homosexual body is rendered a contagious vessel, threatening to infect the body politic.

It is this destructive potential—and the destruction not only of the “self” but also of society—which provides the justification for this intervention in the lives of citizens. This is particularly apparent in the reasoning of the House of Lords. The impossibility of the homosexual body weaves its way throughout the judgments of the majority. Lord Lowry, for example, was most forthright in his determination that

[w]hen considering the danger of infection, with its *inevitable* threat of AIDS, I am not impressed by the argument that this threat can be discounted on the ground that, as long ago as 1967, Parliament, subject to conditions, legalised buggery, now a *well-known vehicle* for the transmission of AIDS.¹⁰⁴

The gay male thus becomes firmly tied to the transmission of HIV. Infection is the inevitable result of sexual contact and death is the consequence of a sexual identity. The fact that no evidence was presented linking the particular sexual practices of the appellants to HIV infection does not dispel the inevitability of the consequences of gay sex, whether sado-masochistic or not. Lord Jauncey described it as “good luck rather than good judgment” that injury did not occur.¹⁰⁵

¹⁰² *Ibid.* at 118.

¹⁰³ S. Sontag, *AIDS and Its Metaphors* (Toronto: Collins, 1989) at 25.

¹⁰⁴ *Brown*, *supra* note 2 at 100 [emphasis added].

¹⁰⁵ *Ibid.* at 91.

In fact, Lord Templeman questioned whether any action to reduce or eliminate the possibility of the transmission of HIV through a gay male sexual act could be successful. At one point, it appears that the impossibility of the homosexual body ultimately will triumph over safe sex practices. Lord Templeman argued that “[t]he assertion that the instruments employed by the sadists were clean and sterilised could not have removed the danger of infection, and the assertion that care was taken demonstrates the possibility of infection.”¹⁰⁶ Thus, safer sex techniques cannot counter the threat of contagion and the fatal disease of homosexuality cannot be eliminated from the sex act. Rather, safer sex itself becomes the proof of contagion. It is only by regulatory surveillance through the state that the body and the body politic can be protected *from* the homosexual’s inevitable drive towards death.

Within the judgment in *Brown*, this characterization of the diseased and contagious body is realized in large measure through the frequent mention of blood as an agent of contagion. The preoccupation with blood is explicit in the judgment of Lord Templeman, who explained that “[b]loodletting and the smearing of human blood produced excitement. There were obvious dangers of serious personal injury and blood infection.”¹⁰⁷ Interestingly, Foucault argued that historically “blood was a reality with a symbolic function,”¹⁰⁸ and, moreover, “the preoccupation with blood and the law has for nearly two centuries haunted the administration of sexuality.”¹⁰⁹ In *Brown*, blood continues to carry this symbolic function, operating to further reinforce the proposition that, in this case, “sex is indeed imbued with the death instinct.”¹¹⁰

In engaging in this process of medicalization, the House of Lords transformed the “symptoms” of sado-masochism—the letting of blood, the penetration of skin, the imposition of pain generally—into the signifiers of the disease of homosexuality and the end result of that disease, a gruesome death. The Law Lords operate a “clinical gaze” that reveals the truth of the sado-masochistic acts—they “discover its

¹⁰⁶ *Ibid.* at 83 [emphasis added].

¹⁰⁷ *Ibid.*

¹⁰⁸ *The History of Sexuality Volume I: An Introduction*, R. Hurley, trans. (New York: Pantheon, 1978) at 147 [emphasis added] [hereinafter *The History of Sexuality*].

¹⁰⁹ *Ibid.* at 149.

¹¹⁰ *Ibid.* at 156.

secrets."¹¹¹ Indeed, the literal secrets of the appellants are revealed and the "truth" of those acts is discerned by the Law Lords. Ultimately, as Foucault described so eerily in reference to the development of the clinic, the gaze reveals that "the idea of a disease attacking life must be replaced by the much denser notion of *pathological life*."¹¹² This gaze that reveals the pathological life of the homosexual body condemns the lives of the appellants and ultimately the lives of all gay men, for within the judgment it is apparent that death becomes the "invisible truth" of the body rendered visible.¹¹³

The reporting of the serial killer case also uncovers this "truth." When newspaper reports disclosed that all five men died "as a direct result of cruising,"¹¹⁴ the truth of homosexuality as a death wish is brought to light, which is also explicitly linked to the threat of HIV. For example, the reports speculated that the motive for the murders "could be revenge for an HIV infection or a desire to destroy homosexuals."¹¹⁵ The self-destructiveness of the homosexual thus forms the basis of a new urban myth of the vengeful HIV-positive serial killer. The gaze also is employed within this narrative. The 1993 London Gay Pride March itself, which occurred in the midst of the serial killings, was described as being overshadowed by the *literal* gaze of the killer: "[T]hey [the marchers] knew it was almost certain that a murderous psychopath was either walking alongside or watching closely."¹¹⁶ Such narratives ultimately serve as AIDS parables through a process of "project[ing] upon the living body a whole network of anatomo-pathological mappings: to draw the dotted out-line of the future autopsy."¹¹⁷ They also serve to eroticize sado-masochism for the general public.

In both the *Brown* decision and in the events surrounding the serial killer case, the contagiousness of disease and the polluted body of the homosexual serve as reminders of the outcome of sexual

¹¹¹ M. Foucault, *The Birth of the Clinic: An Archeology of Medical Perception*, A.M. Sheridan Smith, trans. (New York: Pantheon, 1973) at 120 [hereinafter *The Birth of the Clinic*].

¹¹² *Ibid.* at 153.

¹¹³ *Ibid.* at 172.

¹¹⁴ Dalrymple & Deer, *supra* note 50.

¹¹⁵ Tendler, *supra* note 49 at 1. The HIV theory proved unfounded. The convicted killer, apparently heterosexual, had expressed a desire "of doing the perfect murder." See P. McGowan, "This man must never go free" *The Evening Standard* (20 December 1993) 1, 2.

¹¹⁶ J. Dalrymple & B. Deer, "Police on alert at gay rally" *The [London] Sunday Times* (20 June 1993) 113.

¹¹⁷ See Foucault, *The Birth of the Clinic*, *supra* note 111 at 162.

transgression. Thus, homosexuality itself becomes a contagious condition which requires a sharp protective boundary between heterosexuality and its "other," for transgression of that boundary leads to a brutal and inevitable death.

IV. CONCLUSION

In this article I have examined two examples of the relationship between law and a deviant sexuality as a means of illustrating how law, as a set of discourses, works to pathologize gay male sexuality. The operation of power through law and the discourses that surround law are not simply prohibitive. Law also constitutes sexuality as deviant and seeks to regulate what is defined as beyond normality. The pleasure of sex and the power of law thus exist in a complex relationship. In *Brown*, for example, a sexual proclivity is transformed into legal discourse. In so doing, the law operates to intensify the body and to exploit it as an object of knowledge.¹¹⁸ Through its gaze, law is engaged in "penetrating bodies in an increasingly detailed way, and in controlling populations in an increasingly comprehensive way."¹¹⁹ As the Law Lords recognized, the pleasure of power and powerlessness is realized only through an escalation of relations of dominance and submission. However, it is the intensity of the deployment of sexuality within legal discourse that is escalating; this escalation highlights the power imbalances that operate between the appellants and that discourse.

However, the relationship of pleasure and power is far from straightforward. The exercise of power is not simply a response to sexual pleasure, but power also is constitutive of pleasure. The attempt to prohibit erotic pleasure through law may therefore operate as a precondition to the erotic fantasy itself. As Judith Butler argued so persuasively, "the very rhetoric by which certain erotic acts or relations are prohibited invariably eroticizes that prohibition in the service of a fantasy."¹²⁰ The sado-masochism of the encounters in *Brown*, then, must

¹¹⁸ See Foucault, *The History of Sexuality*, *supra* note 108 at 107.

¹¹⁹ *Ibid.*

¹²⁰ "The Force of Fantasy: Feminism, Mapplethorpe, and Discursive Excess" (1990) 2:2 *Differences* 105 at 111.

be understood as produced and sustained by the discourses of prohibition that already have conditioned it in advance.¹²¹

In conclusion, both the decision of the House of Lords in *Brown* and the serial murders in the summer of 1993 highlight a sado-masochistic relationship. However, it is the production through discourse of the figure of “the homosexual”—sado-masochistic, polluted, addicted to his desires, self-destructive and yet terrifyingly seductive—which itself constitutes that relationship. What is achieved is “a vehement and public way of drawing into public attention the very figure that is supposed to be banned from public attention.”¹²² In the end, then, it is law itself which acts sado-masochistically—engaged in “a public flogging and debasement of the homosexual,”¹²³ who is brought under its gaze in order to be denigrated and reviled.

¹²¹ See *ibid.* at 111:

[E]fforts to restrict or prohibit pornographic fantasy end up inadvertently but inevitably producing and authorizing in their own discursive actions precisely the scenes of sexual violence and aggression that they seek to censor. The effort to enforce a limit on fantasy can only and always fail, in part because limits are, in a sense, what fantasy loves most, what it incessantly thematizes and subordinates to its own aims.

¹²² *Ibid.* at 117.

¹²³ *Ibid.*