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# SINS AND PASSIONS

by

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The decision of the Court of Appeal in the case of *R.* v. *Brown*[1] might be understood to have importance only as an issue of civil liberties or as a particular addition to the doctrine of consent in criminal law. No doubt these issues are not insubstantial and the debate which the case of *Brown* has generated has been conducted around these themes. Similarly discussions of sado-masochism have generally been undertaken as discourses on sexual deviation or psychopathology. This essay will use the decision of Lord Lane in *Brown* as the basis for a critique of the common law refusal to recognise desire. The desire evidenced in *Brown* does not conform to the legality of the common law. It represents a deeply political moment of transgression which is beyond the gaze of the law. It becomes a site of resistance to that order, it is sanctioned and prohibited in a continual process of capture and counter-capture played out between law and its other.

The story itself — the story of *Brown* — will be told as both a story of a trial and as a story judgement. Not only does Lord Lane refuse to look, but his very narration of the events is suspended in a particular interpretation of desire.[2] The real story cannot even be told. We are privy only to the "official version".

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1 (1992) 94 Cr. App. R. 302 (herein cited in the text by reference to the case page number).

2 On the concept of refusal, see P. Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld and Nicolson, 1990), 170-175. See also C. Stanley, "Spirits in the Material World: Regulation and the Symbolic Laws of Capital", *Manchester Institute for Law and Popular Culture: Working Papers in Cultural Studies* No. 3 (1993).

*Representations and Refusals: A Theoretical Orientation*

This can only be a story. We may be living through a great story, an historical moment of implosion, cancellation and reversal[3]; a moment when the will of the technoscape traces a great arch of reversal, connecting again to the almost mythic sense of a technological society. But our lives as experiences in this totality only 'make sense' as short stories of the contemporary, moments in the temporality of the contingent.[4] Our lives are both texts that we create, and texts created by the laws of others. This interplay opens spaces for new readings, for writing, speaking, witnessing, for becoming other. The discourses that we partake in are provisional conversations, overheard snatches of dialogue and gossip. The *grand recits* make sense now only as a multiple series of legitimating discourses within the heterotopias of postmodern institutions.[5]

This is a particular interpretation of a story about the prosecution of a series of acts of sado-masochism. If the politics of the contemporary is a politics of representation,[6] then the act of interpretation of the event, the translation of a moment, becomes central in the determination of the transmission — the naming — of that event within the

3 As Lyotard would suggest, see J.F. Lyotard, *The Postmodern Condition: A Report on Knowledge* (Manchester: Manchester University Press, 1984).

4 On the contingency of the contemporary see for example C. Douzinas and R. Warrington with S. McVeigh, *Postmodern Jurisprudence* (London: Routledge, 1992), 3-29.

5 The term "heterotopia" is taken from M. Foucault, "Of Other Spaces", *Diacritics* 16 (1986), 22, at 24. Foucault describes the heterotopia thus: "There are also, probably in every culture, in every civilisation, real places — places that do exist and that are formed in the very founding of society — which are something like counter-sites, a kind of effectively enacted utopia in which the real sites, all the other real sites that can be found within the culture, are simultaneously represented, contested, and inverted."

6 See for example J.F Lyotard, *Just Gaming* (Manchester: Manchester University Press, 1985); J. Derrida, "Sending: On Representation", *Social Research* 2 (Summer 1982); and R. Rorty, *Irony, Solidarity and Contingency* (Oxford: Basil Blackwell, 1989). And as applied by L. Hutcheon, *The Politics of Postmodernism* (London: Routledge, 1990); M. Gane, ed., *Ideological Representation and Power in Social Relations* (London: Routledge, 1989); and M. Shapiro *Reading the Postmodern Polity: Political Theory as Textual Practice* (Minneapolis: University of Minnesota Press, 1992).

legal order. The act in excess of naming — the unrepresentable, the reason beyond reason — becomes the determining point of an oppositional politics of law.[7] The participants in this act of excess thus become (with)out-laws.

It is a story about a story: an incursion into the provisional and the local. It is a story about those who operate along the lines of the transverse, across categories and over fluctuating and short-lived networks of affinity, interest and neighbourhood between which peo-

7 The terms unrepresentable and excess are used in the sense taken from Lyotard. "The postmodern would be that which, in the modern, puts forward the unrepresentable in presentation itself; that which denies itself the solace of good form, the consensus of taste ... that which searches for new presentations", Lyotard, *The Postmodern Condition, supra* n.3 at 81. The unrepresentative becomes a political category when there is no possibility of translating the different languages into some common *tertium*, therefore existing languages of judgement must be abandoned because they cannot register the voice of the other. This other is the excess which Lyotard discusses thus: "In defiance of etymology, one needs to understand 'exceed' here in terms of the following Latin verbs taken together: *ex-cedere*, to pass beyond, to go out; *ex-cidere* (from *cadere*), to fall outside of, to be dispossessed from; *ex-cidere* (from *caedere*), to detach by cutting, to excise": J.F. Lyotard, *Heidegger and the "jews"* (Minneapolis: University of Minnesota Press, 1990), 17. Thus, to exceed can be related to the idea of the refused and refusal as noted by Goodrich, *supra* n.2, at 175, but also as excess in terms used by Bataille in relation to the theory of potlach, for example in G. Bataille, "The Notion of Expenditure", in *Visions of Excess: Selected Writings 1927-1939*, ed. A. Stoekl, (Minneapolis: University of Minnesota Press, 1985). To summarise: the contemporary is marked by escalating tendencies and excess becomes the sign of the times. Here prior divisions and boundaries become blurred and fractured into a multiplicity of survival zones in which the border between ethics and aesthetics collapses marking a point of re-investiture in the politics of describing, the politics of representation or rather the politics of that previously perceived as unrepresentable. Excess therefore becomes the agenda of action and reaction through the arrival of alternative forms of event. The act of transgression increasingly marks these forms of event — the becoming of the heterotopia — the presence at the edge of the border (the realm of potlach): a realm no doubt where what is in question is the limit, rather than the identity of a culture (M. Foucault, "A Preface to Transgression", in D.F. Bouchard, ed., *Language, Counter-Memory, Practice: Selected Essays and Interviews by Michel Foucault* (New York: Cornell University Press, 1977). Therefore in using the term excess to denote what is being simulatively assessed it is only possible to evoke an image of what can never be perfectly imaged or named.

ple shift constantly, modifying their behaviour, outlook and identity. A story told through the policing of a text (a law report) which illuminates the desire of the other for a moment prior to its execution under the gaze of the law. It is a tall-story of repression through representation directed against displays of accelerated action toward transgression in thought and deed articulated as and through desire.

In terms of story telling it is a question of value: the value of an interpretation. The nature of the value of interpretation has been discussed by Goodrich thus:

> If we pose that question seriously, then we need to take up the position of accountants and be explicit about the material expenditure of specific lives and more particular about the values — the passions, the movements, the risks — through which being is accumulated and through which being is spent. The very word 'interpretation' bears an important actuarial connotation since the Latin *interpres* from which interpretation is derived has as its root the word *pretium* or price. Interpretation haggles before it fixes prices, it negotiates with the law, it seeks to make a bargain, it endlessly poses the question of how much does this cost, what should we pay?[8]

Can we afford an interpretation of the story about to be told? It moves at the edge of fascination and despair, at the frontier of seduction and power. Can we recover the fragmented molecular plot with an apparently ordered molar narrative? Perhaps it will open up a realm of originary or creative language over and against the daily practice of degraded practical speech, the speech of the sexual and archaic over and against the reality and performance of adult life. Might we perhaps glimpse something which breaks up the sterile circle of repetition, something of the social production of desire?

The politics of the contemporary is thus a politics of interpretation as representation while meaning becomes the effect of the representation rather than its source. It is a question of recognition and identification, a moment of looking and of refusal. Through the deployment of an interpretation of the previously unrepresentable (that which might be called excess) it is possible to enter for a moment the territory of transgression. The previously unrepresentable thus constitutes the price of sharing in those missives from the margins. It is a question of a series of de-centred and de-centring stories of resistance to the totality of the 'real'. It is a question of the operation of the

8 P. Goodrich, *Languages of Law*, *supra* n.2, at 254.

'official' version in the silencing of politics and of the refusal of a narrative desire.

The space of this desire as articulated in this story is the body. The space of the individual ('the body') is the irreducible element in the social scheme of events, for it is in this space that control is exercised and law enforced.[9] The body exists in space and must either submit to or create spaces of resistance (what Foucault calls *heterotopias*), of temporal and spatial displacement and of interruption. The irreducibility of the body means that it is from this site of power that resistance through desire can be mobilised. Space becomes the metaphor for the site of power and it is therefore also a site of becoming. In terms of the gaze of the law alighting upon the sadist and the masochist it may be possible to discern for a moment both an awareness of the desire of law and of the manipulation of the individual body alienated from the body politic.

*A Story of Trial: From the Private to the Public*

The story of the prosecution of a particular series of sado-masochistic activities is already subject to interpretation in the process of naming, for it travels under a number of names and so also under plural narrative perspectives. As a report of the law it travels under the name of *Brown*. As a police surveillance operation it travels under the name of *Operation Spanner*. And as part of the political discourse of the gay and lesbian community it travels under the name of *Spanner*. In the near future (by the time of the next edition) it will also travel under a name within the doctrine of criminal law, as a footnote in a section in a chapter. As the story has entered the public domain, the people and their lives have faded from memory and merely become depersonalised characters in a legal narrative. As the story has entered the public domain, it has become subject to various interpretations, multiple investments in terms of meaning and significance. It will here be analysed in terms of two stories of the arrival of *Brown* in the public domain, two stories of reaction, of decision making and of the transference of the private into the public.

The legal narrative is here taken up during a momentary suspen-

9 See M. Foucault, *The History of Sexuality: Volume I* (Harmonsworth: Penguin, 1979), 138-139.

sion in its unravelling: the Court of Appeal decision was appealed to the House of Lords. The decision was affirmed and the defendants now await the right to appeal to the European Court. The final judgement — as ever — remains suspended.

*Two Stories of Trial: (1) A Police Story*

This is a story of detection and surveillance in the process of the discovery of evidence leading to arrest. In 1987, by chance and by mistake four video tapes entered the public domain and were subject to the scrutiny of the Greater Manchester Police. They were tapes that had never meant to have been seen apart from by the members of a small group of consenting men.[10] As is the popular mode of recording memory at the end of the millennium and given the advance of technology, the activities of these men ('their happy times') had been sensibly captured via the means of the camcorder. The contemporary cultural terrain is defined almost exclusively in visual terms including the display, the icon, the representations of the real through the camera's eye (through the law of representation we are constantly constructed as re-represented subjects).[11] Based upon the contents of one particular video tape the police mounted an in-depth, highly expensive surveillance programme known as "Operation Spanner", a policing exercise aimed at what was perceived to be a potentially dangerous homosexual sado-masochistic "torture vice ring".[12]

The contents of this particular video tape were subject to interpretation and a decision was made to begin an investigation. The eye of the camera moves from passive private observer to become inverted back upon itself as it becomes the eye of the state, the public eye. Because the video tape depicted scenes of extreme violence between

10 Although one of the defendants was later charged with the publication of obscene material.

11 See on the dominance of the visual in contemporary culture N. Denzin, *Images of Postmodern Society* (London: Sage, 1992).

12 Much of the background to this account comes from A. Kershaw, "Spanner in the Works", *The Guardian* February 8th-9th 1992. In addition I have drawn upon material published by the gay-lesbian press. Of course there is an alternative story being told here — the journalistic account — in which the tabloid press and the broadsheet press both related the events of the prosecution.

men it was subject to the initial interpretation that it was a "snuff" or "slasher" video depicting scenes of *real* violence and possibly murder: *the videodrome*. What in fact were scenes in the extremes of pleasure obtained through the giving and receiving of pain and punishment, an orgy of delight in which suspended orgasm is *un petit mort*, were interpreted as scenes of horror and death. In addition, the interpretation of the scenes on the video tape was determined by the fact that the actors and actions were necessarily by and between homosexuals. This series of interpretations led to arrests. Some while later, after peering behind the curtains of suburban houses in middle class districts, a "torture vice ring" was uncovered/constructed. It consisted of approximately forty men, the majority of professional status. During the investigation — the gathering of the evidence — sniffer dogs were used to search for possible corpses in the garden.

At this stage the body is only on tape: it is a representation upon which judgement is about to be passed. The accusation emerged out of the interpretation of the contents of a video tape. It is an image, less of the real than of a subject of interpretation and speculation. It is the subject of what an authority (the police) intended and the reason for their intention to determine in terms of realising their investment (and more than just the £3 million which the operation cost). Upon reaching their interpretation the police then had to decide what charges should be brought.

*Two Stories of Trial: (2) A Prosecutor's Story*

There is a charge sheet and there is an indictment. There are forms to be completed in which a version of the narrative is given. The indictment appears in the form of 'The Queen v A.B'. It is the Crown that prosecutes, the accuser becomes the symbol of an immemorial common law, of the monarchical constitution which has been transgressed, angered and offended. You have erred before the icon and symbol of a unitary authority, you have broken the contract. There then follow the counts (in this 'case' there were 29) each divided into statement of offence followed by particulars of the offence. A decision to be crystalised through the process of filling in the relevant document. In this story the decision becomes a question of what would be the most 'successful' charge to bring (in terms of securing conviction), and against whom?

Twenty-Six were cautioned for the offence of aiding and abetting assaults upon themselves (which in terms of law is probably unique — if not impossible). Fifteen were sent for trial at the Central Criminal Court (The Old Bailey). Six appeared in the Court of Appeal. Five appealed to the House of Lords.

You are named. Your name will be recorded. You have become nominated as important enough — or notorious enough — to merit a role in the story of Common Law. One name will enter the library of legal knowledge, ceasing to be what he was but becoming part of that subdivision of the Common Law known as the doctrine of criminal law (the General Part), part of the memory of what went before in which his life becomes his offence.

For technical-administrative 'legal' reasons the prosecutor (the Crown Prosecution Service) decided against charges of gross indecency under the Sexual Offences Act 1967. Those of keeping a disorderly house were considered too trivial. Those of conspiracy to corrupt public morals were thought too difficult to run successfully. The final recourse was a series of charges under the Offences Against the Persons Act 1861 sections 20 and 47. These can be abbreviated as follows:

> Section 20: "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 liable ... to imprisonment for not more than five years."
>
> Section 47: "Whosoever shall be convicted on indictment of any assault occasioning actual bodily harm shall be liable ... to [imprisonment] ... for not more than five years"

For the prosecution — the Crown — the issue becomes one of the inevitability of the esoteric and peculiar logics of legal argument. For the defendants the issue becomes one of remand, dismissal, the position of the social outcast and misfit in a society which allows the tickle but not the slap. Could the "defendants" (once again a renomination, a transfer in status) use a defence of consent against the charges which had been brought against them? For the prosecution the issue becomes one of academic interest, the setting of a precedent and the addition of another layer to the memory of the Common Law. Had consent been admitted by the Crown then the charges would have been dismissed. At the Old Bailey trial in 1990 the aptly named Judge Rant Q.C. (Stowe School, Selwyn College, Cambridge) ruled that con-

sent was not a defence, that it was unnecessary for the prosecution to prove that the victim did not consent to infliction of bodily harm or wounding on him and that the freedom of the individual did not extend to acts of cruelty and "perverted gratification". In passing sentence on the men, Judge Rant accepted that all those involved in the activities consented, that no money changed hands, that no minors were involved and that the video tapes had not been intended for wider circulation. Custodial sentences were given of up to four and a half years.

*A Story of Judgement (1): The Blind Eye of the Legal Gaze*

Six of the defendants appealed against conviction and sentence: Brown, Laskey, Lucas, Jaggard, Carter and Cadman. The appeal was heard in 1992 by the Lord Chief Justice, Lord Lane (the way, the path, the law via Shrewsbury School and Trinity College, Cambridge). In attendance, but silent, were Mr. Justice Rose and Mr. Justice Potts.

The introduction to the judgement (the *resumé* of how we got to where we are) states the following: "The appellants belonged to a group of sado-masochistic homosexuals who willingly and enthusiastically participated in the commission of acts of violence against each other for sexual pleasure engendered in the giving and receiving of pain ... All activities were done with the consent of the passive partner or victim and were carried out in private. There was no permanent injury; no infection of wounds; no evidence of any medical attention being sought; and no complaint to the police, who discovered the activities by chance." (302)

The judgement delivered by Lord Lane is contained in five pages. One of these pages describes the sentences handed down by Judge Rant in respect of the conviction of the six appellants. There then appears the following statement: "*It is, unhappily, necessary to go into a little detail about the activities which resulted in the various counts being laid against these men.*" (305) Lord Lane's unhappy little detail runs for one and a half pages. Since Lord Lane thought this necessary — even if unhappily so — (although, of course, it is entirely *unnecessary in terms of the delivery of his judgement*) — I shall re-iterate the activities and we can decide for ourselves:

- Branding a man with Laskey's initials using a wire heated by a blow lamp. Scarring from those injuries remains. Matches were taped to the victim's nipples and the navel and having been set alight were then doused.
- Hitting the victim's penis with a ruler and holding his testicles with a spiked glove. Map pins were inserted into the buttocks.
- Stinging nettles were applied around the genital area and buttocks. He was hit with a cat o'nine tails and the insides of his thighs were caned.
- Branding a victim whilst in bondage with a metal shaped into the letter "S" and heated with a blow lamp. This was applied once above the penis and a second time on the inner thigh.
- Caning on the buttocks and whipping on the back. A cat o'nine tails was used.
- The victim's buttocks were bitten. He was caned on the buttocks and the nipples were bitten.
- Shaving of the body hair and being hit with stinging nettles.
- Beating with the hands, the strap and the cane.
- Hot wax was dripped into the urethra of the penis. The penis was burned with a candle flame and then a syringe needle was inserted.
- The pushing of a safety-pin through the head of "L's" penis.
- The nailing of the penis to a bench. He was then caned, hit and rubbed with a spiked strap, then cut with a scalpel to the penis and the scrotum.
- Sand papering of the penis.
- Clamping of the testicles causing the blood to flow.
- Caning with a riding crop.
- The penis was hit and rubbed with sand-paper. The scrotum was clamped and pinned to a board with three pins. The foreskin was nailed to a board.
- The pushing of a piece of wire and the fingers down the urethra. The insertion of safety pins and hooks through the penis. The testicles were pushed out of the scrotum into the groin and there manipulated.

A litany of movements, of actions: Pushing, Inserting, Hitting, Rubbing, Clamping, Pinning, Nailing, Caning, Rubbing, Dripping, Beating, Shaving, Biting, Whipping, Branding, Taping, Scarring.

"1) You may tie me down on the table, ropes drawn tight, for fifteen minutes, time enough to prepare the instruments; 2) One hundred lashes at least, a pause of several minutes; 3) You begin sewing, you sew up the hole in the gland; you sew the skin around the gland to the gland itself, preventing the top from tearing; you sew the scrotum to the skin of the thighs. You sew the breast, securely attaching a button with four holes to each nipple. You may connect them with an elastic band with buttonholes — Now you go to the second phase; 4) You can choose either to turn me over on the table so I am tied lying on my stomach, but with my legs together, or bind me to the post with my wrists together, and my legs also, my whole body tightly bound; 5) You whip my back buttocks and thighs a hundred lashes at least; 6) You sew my buttocks together, all the way up and down the crack of my ass. Tightly with a double thread, each stitch knotted. If I am on a table, now tie me to the post; 7) You give me fifty lashes on the buttocks; 8) If you wish to intensify the torture and carry out your threat from the last time, stick pins all the way into my buttocks as far as they go; 9) Then you may tie me to the chair; you give me thirty lashes on the breasts and stick in the smaller pins; if you wish, you may heat them red-hot beforehand, all or some. I should be tightly bound to the chair, hands behind my back so my chest sticks out. I haven't mentioned burns, only because I have a medical exam coming up in a while, and they take a long time to heal." Deleuze and Guattari comment: "*This is not a fantasy, it is a programme*".[13]

This is the violence of repetition. One "vile" act followed by an even more horrendous one. Reading we recoil. The scenes provoke nausea, disgust, revulsion (for us, the "normal" ones, the repressed, whose chained imaginations cannot go this far). But these acts also engage our perverse fascination — our lurid gaze — fixated by the intricacy of the detail. It is a detail which is slow, meticulous and ceremonial, an aping of the law. The gathering momentum of repetition both draws us in and ultimately, inevitably, neutralises the effect of the "irrational". It is a detail where the banality of violence through repetition is heightened through its operation in the chintz furnished house of the bourgeois of Birmingham, Bolton and beyond. A most unlikely setting which serves only to exaggerate the absurdity of the process to which the events become subject.

13 G. Deleuze and F. Guattari, *A Thousand Plateaus* (Minneapolis: University of Minnesota Press, 1987), 151-152.

The judgment of Lord Lane is one in which the values of the Marquis de Sade as distinct from the Marquis de Queensbury are found wanting. After his unnecessary deviation into the sexual activities of the accused he spends a short time reviewing the legal argument where the value has become the construction of the meaning of consent in an action for assault. He arrives at his conclusion through the not unfamiliar routes of orthodox English judicial decision making: a reliance upon what has gone before, a reliance upon that much-loved judicial phrase "the public interest" and finally a refusal to examine in any way the context of what has previously been revealed (the private becoming the public), the sado-masochistic libido.

(1) In terms of what has gone before Lord Lane relies upon three previous judicial statements for guidance on the question of consent in assault. He frames the issue thus: "There are, however, certain circumstances in which the law does not permit a defendant to rely, so to speak, on the victim's consent ... Where the assault to which consent is given involves permanent injury or maiming — there is no dispute that the victim's consent is immaterial." (308) The first statement Lord Lane relies upon comes from the case of *R.* v. *Coney*, a prize-fight case which clearly stated that consent to assault was immaterial. This case however, also contains broad qualifications, which are ignored by Lord Lane. The second statement Lord Lane relies upon comes from the case of *R.* v. *Donovan* in which the defendant was indicted for assault for having beaten the prosecutrix with a cane. Lord Lane comments that "although some of the reasoning of that Court appears to be tautologous ... the decision is clear" (308). In reaching their decision Mr. Justice Swift in the Court of Appeal stated that "if an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can licence another to commit a crime". This remark might be rightly denounced as confusing since it might lead one to suppose that consent is wholly irrelevant to the question of whether an act is unlawful or not.

(2) The third statement that Lord Lane relies upon and central to his decision is his consideration as to the propriety of the circumstances under which the "beatings" took place. At this point the issue becomes — at least for Lord Lane — a test of evaluating whether consent is constitutive of legality which can only operate within the realm of the consideration of the "public interest". Lord Lane relies upon

the decision of *Attorney General's Reference (No.6 of 1980).*[14] In this case the judgment was delivered by Lord Lane (betraying the constant circularity and self-referentiality of the seamless web of the Common Law). In this case two youths who had started to quarrel decided to settle their differences through a fist fight in the street. In his decision Lord Lane poses the following question: "Starting with the proposition that ordinarily an act consented to will not constitute an assault, the question is: At what point does the public interest require the court to hold otherwise?" Lord Lane answers his own question thus: "It is not in the public interest that people should try to cause, or should cause, each other bodily harm for no good reason."

(3) In neither the *Att-Gen's Reference* nor in *Brown* was it sought to provide criteria as to what constitutes good reason: "The satisfying of the sado-masochistic libido does not come into the category of good reason." Therefore the sado-masochistic libido becomes part of a category beyond the public interest; the activity is simultaneously recognized and in the moment of that recognition it becomes a category both inside and outside the institution. It is brought within the bounds of formal legal classification as a subject which is external to that system of classification. It is recognized, silenced and neutralised as an activity that cannot come within orthodox reason and rationality. In terms of the legal construction of consent what can be ventured in terms of legal and moral reasoning is that consent will render an activity lawful is there is no perceived public interest against it. Therefore the public interest serves to act as the entitlement of the judicial division of the state to trump arguments based upon appeals to rights to moral autonomy by recourse to wider conceptions of the public good. The basis for such intervention thus becomes the deliberate infliction of corporal hurt which, if not of a direct harm to the victim, may yet indirectly harm the network of social relationships through which the victim's society is constituted, underpinned, as it will be, by a prudential concern to minimise the occasions upon which harm may be inflicted. This argument, which I present as a possible formalistic approach to understanding the nature of Lord Lane's decision, is paternalistic. The judges become the guardians of moral order and send messages about "fundamental" social values. Such an analysis is offered as the mark of yet another

14 (1981) 73 Cr. App. R. 63, [1981] 1 Q.B. 715.

possible narrative in this story, when the legal implications of *Brown* become subject to comment by the morally concerned criminal lawyers of the academy.[15]

*A Story of Judgement (2): Diversions and Displacements*

Of course there are at least four diversions in operation in the form of judgement:

(1) The first concerns the disappearance of the subject. Lord Lane's decision negates the existence of sado-masochistic activity at the very moment of its arrival into the legal arena. It is a negation which operates through classifying sado-masochistic activity as being outside of the category of good reason. On one level of analysis the decision achieves importance primarily because of the articulation of moral-ethical norms in the further establishment of the parameters of lawful conduct.

(2) The second concerns, paradoxically, the recognition of sado-masochistic activity through the process of its categorisation. The diversion operates through the peculiar truth that at the very stage of classification, in which the activity is sanctioned, sado-masochistic practices are becoming increasingly acceptable forms of so-called "safe-sex" in an era of high risk through epidemic. As Brown himself has commented "Perhaps there's a tendency for S & M activity to have increased, particularly among homosexual men, as a result of the threat of AIDS. To a degree it's a displacement activity."[16]

(3) The third is the temptation to regard the decision of Lord Lane as another example of judicial hetero-centrism. In popular imagination (for example that related by the tabloid press) the decision involved the prohibition of certain — necessarily — homosexual activities. It was assumed that the "torture vice ring" was composed solely of homosexual members. Therefore the effect of the decision is to be applied only to homosexual members of the community. Of course sado-masochistic practices can be conducted between males, between females and between heterosexuals. As an operative sexual activity it

15 For example W. Wilson, "Is Hurting People Wrong?", *Journal of Social Welfare and Family Law* 5 (1992), 388. Wilson writes that "The recent case of *Brown* ... provides an opportunity for the principles governing the enforcement of morals in a morally differentiated society to be expounded."

16 As noted by Kershaw, *supra* n.13.

is genderless. Opinion can be ventured as to whether the judicial process would have been activated at all had this been a "torture vice ring" operating between the consenting heterosexual couples of Putney.

At this stage the notorious video tape must be re-examined. Acts which might be described as resembling murder can be interpreted as having little to do with "orthodox" conceptions of sexual activity in which penetration is the norm. With regard to this video tape there is no mention of penetration (there are plenty of other adjectives available). There are few hard cocks in the orgy room in the sense that in the fulfilment of the desires of the sadist and the masochist the central determinant is the suspension of orgasm. The tools and props applied in particular sado-masochistic scenarios operate so as to cause pain to the phallus in its attempt to become erect. Penetration is not necessary, and the "form" it may take is that of "fist-fucking" (the insertion of the arm into the rectum). For the sadist fulfilment-pleasure is achieved through the administration of intense pain in domination. For the masochist fulfilment-pleasure is achieved through the perusal of the intensity of the pain that is inflicted in submission. Thus the act is the achievement of sexual gratification through the displacement of the phallus. Herein lies the perversion and the danger.

The submissive male in the sado-masochistic experience assumes what, in the judicial consciousness, is the female position. In terms of recent judicial pronouncements on the crime of rape such an assumption assumes a horrifying aspect in that it becomes possible to sanction a mythical operation of consent when one is obviously not there in the male to male relationship, ("yes means no") when consent so often appears to negate a charge of rape in a male-female relationship ("no means yes"). Finally, it is possible to read in this decision its refusal to contemplate sado-masochistic activity through its categorisation as an aspect of heterosexual abhorrence of the absent phallus. The phallus is the weapon, the tool that provides pleasure in the exercise of its authority. Here the phallus takes on significance as an instrument to which something "unnatural" is done, or through its non-participation and its replacement through different tools and props. Obviously the manipulation of the phallus is central but it is as a dormant and repressed entity: not of symbolic law, but of the absent other. At this level of analysis the proscription of sodomy takes on a spurious logic in terms of the operation of binary oppositions,

where as in the example of the sado-masochistic experience where there is a complete displacement, the activity operates beyond the bonds of such logic. If consummation in law is to be constituted as an area of investment, and invested as a matter of sexuality, then there are techniques of knowledge present to establish it as a possible object, to enable it to be so invested. The absence of consummation thus inverts established legal proscriptions and the parameters of that investment. As Moran notes, the courts have developed a precise calibration of heterosexual male performance, a "penile economy" in which the phallus is constructed as the organising principle of the sexual act.[17] The pleasures of the sexual act are thus the pleasures of the phallus within this normative legal order. To remove the phallus is thus a fundamental act of disruption to the established order.

4) The final diversion is the displacement operated by this author. It is my confession of why I chose to write about the legal regulation of sado-masochism. I am conscious of denying/disavowing my own sexual alienation/inclination. I am aware that within my construction of postmodern politics as a politics of representation, my interpretation of the sado-masochistic experience is simply just that — another interpretation — another reading — another investment — another representation. Perhaps I can argue the validity of my fascination within a schema of political practice (the sights and sites of excess and refusal). But I cannot ignore my fascination with these acts, exerting my lurid gaze upon these acts and partaking in the experience of Lord Lane. I am also aware that this particular reading — this inversion of the decision of Lord Lane — serves to reveal sado-masochism as a naively constructed political space which, once revealed, possibly serves as merely another colonised territory of legal subjectivity.

*A Story of Judgement (3): Remembrance and Revulsion of Times Past*

As Goodrich suggests a semiotics of law depicts the implicit rationalism of legal method and instances the relationship between the legal gaze, the visual measure of conduct seen and circumscribed from the outside, and a Cartesian or modernist reason, a heliotropic rationality that, since Descartes, has silenced the imaginary and

17 L. Moran, "A Study in the History of Male Sexuality in Law: Non-Consummation", *Law and Critique* 1/2 (1990), 155.

frozen its images in the name of logical schemata. Enlightenment reason constantly constructs the world from the outside, as an external thing. In doing so, Goodrich suggests, it loses the very tradition and temporality that it claims as its frame or as its source, replacing temporal movement with spatial categories and with a forensic gaze that is essentially a panoptic surveillance of a space inhabited by others.[18] The forensic speculum, the technology of surveillance, is diagnostic and distanced: the law opens up the body to the public eye but forgets itself.

At the level of a literal reading, the judgment delivered by Lord Lane is simply banal. His later exhortations: "It is hoped that he might now be rid of his sado-masochistic inclinations" (311) and "it is some comfort at least to be told, as we were, that 'K' is now it seems settled into a normal heterosexual relationship" (310) in addition to his statement prior to sentence that the defendants "[s]hould be prepared for prison", exhibit the displacement of his own fascination in drawing out — and simultaneously pushing back — these private acts of sado-masochistic desire. He summons his own "time out of mind", that of the all male boarding school (Shrewsbury) and the sharing of the dormitories and baths and games as part of the ritual of violent initiation rites suffered at any early age. Small wonder that Lord Lane in his apparent revulsion at the acts before him ("*It is, unhappily, necessary to go into a little detail*") is trapped for a moment in the reversal of the forensic gaze, recalling those ambivalent memories of sadness and happiness and of loss and formation of that very English institution and of a very profane body subject to constant reference and exposure to regimes of corporal punishment administered either through the external authority of the Master or through the internal self-infliction of the Game:[19] "and the very particular hothouse regime in which our judges ... are usually trained and in which ... they are birched or caned, smacked, seated, sometimes caressed: and

18 Goodrich, *supra* n.2, at 251.

19 The Game figures prominently in the judgment of Lord Lane in his consideration of the previous case law, and even more so in the judgment of Lord Mustill in the House of Lords. That "contact sport" should be acceptable serves only to emphasise the role of law as referee, in which law has a role to play in delimiting the rules. In the sado-masochistic experience the internal rules generated by the consenting parties require no such external validation by referees in wigs and gowns.

there is nothing more frightening (or exciting) to the rustic Englishman than the intimacy of that particular caress."[20] So Lord Lane evades the issue and returns to the memory of law and the order of reference that law institutes and simply signals what the law has always known: there are those who are like us and there are those who are not. The body of desire is forced to succumb to the body of law, that is the body politic.

It is therefore perhaps not surprising that Lord Lane's judgment in *Brown* treats the question of consent as part of a general public policy issue. It is not impossible to discern that behind the technical arguments with regard to consent lie fundamental issues of the unitary foundation of hierarchy and authority in the Common Law, the nature of its processes of closure and its power struggles within the framework of a *corpus mysticum* that never dies.[21] Lord Mustill in the House of Lords makes explicit reference to *Cole* v. *Turner*[22] and to the 17th edition of *Blackstone's Commentaries*: "The law cannot draw the line between different degrees of violence, and therefore prohibits the first and lowest stage of it: *every man's person being sacred, and no other having right to meddle with it, in any the slightest manner.*"[23]

The body that *is* the realm is ultimately law's subject (and subject to law) and its very reflection, and every member thereof a limb, an organ or a microcosm of the whole. The remnants of natural law theory are, among the rest, the solid foundations of a judiciary independent from political force inside the state, stating the law of the monarch in parliament, the very mouth of the body politic.[24] As Deleuze notes "every force is related to others and it either obeys or commands. What defines a body is this relation between dominant and dominated forces. *Every relationship of forces constitutes a body - whether it is chemical, biological, social or political.*"[25] Bodies being unequal relationships of forces, are the products of chance, the very essence, and ultimate character of force itself. "Being composed of a

20 Goodrich, *supra* n.2, at 252-253.

21 On this see E. Kantorowicz, *The King's Two Bodies* (New Jersey: Princeton University Press, 1957), 4, and Goodrich, *supra* n.2, at 58-59, 169-170.

22 (1704) Holt KB 108, 90 ER 958.

23 31 BL COM (17th edn., 1830), 120.

24 For a discussion of this see H.J. Berman, *Law and Revolution* (Cambridge: Harvard University Press, 1983), 33.

25 G. Deleuze, *Nietzsche and Philosophy* (London: Athlone Press, 1983), 39-40.

plurality of irreducible forces the body is a multiple phenomenon, its unity is that of a multiple phenomenon, a 'unity of domination.'"[26] The relation between the dominant and the dominated in the body creates a reality of active and reactive forces, qualified by quantity in relation to the different sources, described as hierarchy.

The body of the law, the soul mate of the body politic, died a while ago and only emits putrid gases. In formal terms, therefore, the logic of Lord Lane's decision in *Brown* is circular; it is dead in the sense that it institutes a life that masks the life that is lived, that denies that lives are actually led. It has nothing to say and is running scared: scared of its own desire, scarred by the memory of sin. As Goodrich suggests: "An institution which has lost its desire to speak, that has abandoned the surface of the text, that tyrannises with the emptiness of reason, is a dead institution, an entombed law, no more than detritus, relic, remains."[27] Because it is with the writhing of ecstatic and orgiastic bodies that *Brown* is concerned, any legal rule that emerges or abstract standard of behaviour ("fundamental social values") cannot escape the brute particularity, the libidinal surface, upon which an idea (of transgression, of violence, of desire) is inscribed, across which or through an idea makes itself felt, makes itself life. The dead language of the law, the frozen speculum or forgotten body, is forced to confront its own desire when confronted with the desire of a body of passion, of imagination beyond law and subject to its own laws, determined by pleasure and not pain, by joy and not guilt.

*Other Stories Which Cannot Be Told: Sado-Masochism Sees the Law*

It is possible to use the symbolism of sado-masochistic practices as a foundation for a critique of law.[28] Through an analysis of sado-masochistic contracts and rituals it is possible to identify a series of inversions of the symbolic order. Through such a process of inversion, read as ironic reversal, the values of the legal order are demystified. This makes possible the establishment of alternative de-regu-

26 *Ibid.*

27 Goodrich, *supra* n.2, at 254.

28 I draw here particularly upon the work of Deleuze: G. Deleuze, "Coldness and Cruelty", in *Masochism* (New York: Zone Books, 1991) and upon the account of Michael Foucault's sexuality presented by J. Miller, *The Passion of Michael Foucault* (New York: Simon and Schuster, 1993).

lated experiences of power. Such a critique would change the body's role in society. The body would become an acutely political moment of transgression articulated as a refusal — or the mark of the refused — expressed in an ironic liberation in the acts of the body of one (with)out-law.

The sado-masochistic experience can thus be analysed as a deeply lunatic gesture. Its madness lies in the reversal of the violence of the symbolic legal order, in the distribution of pain and the repression of pleasure, in a desire which is received in the ecstasy of pain. As a deeply ironic inversion of the social contract the sado-masochistic experience becomes a political moment in which the order of law is disavowed. In this relationship between alienated bodies there is no role for the external law of the symbolic order. The space of the activity is governed by internal laws of individual desire. Rather than succumbing to the violence of the external order of law, in which the individual is sacrificed (repressed) in the formation of the contract which binds the body politic, what occurs is the abandonment of the external referent. The contract and its ritual enforcement is taken to an absurd logical conclusion in which desire is fulfilled (liberated) through the satisfaction of imagination. The participants to this contract-ritual thus become (with)out-laws. The dead eyes of the law cannot see sado-masochism even though it is brought within its gaze.