BCCLA Position Paper

Sexuality and Civil Rights: Freedom from Government Reprisal

I. Introduction

This paper will argue that the practitioners of a distinctive form of sexual behavior, BDSM (bondage, domination, sadomasochism) (also known as sadomasochism and by the abbreviations S/M and B/D), should be protected from irrationally-based governmental interference and regulation. *The BCCLA believes that individuals should be free to engage in BDSM and any other consensual sexual practice without fear of government reprisal.*

II. Sexuality and Human Rights

The aspiration of the civil liberties movement has always been to permit people to pursue their full humanity without limitations based in bias. As a starting point for discussions of human rights, we might well refer to a general guiding principle, whose roots lie in John Stuart Mill, that individuals should be free to act as they choose provided their conduct does no harm. In the sexual domain of human life, this is no doubt especially true. Sexuality is a valuable domain of human pleasure and association, an expression of human activity in all its bewildering and changing complexity. As civil libertarians, we should strive to protect the liberty of sexual activity and the ability to act on erotic desires without fear of government reprisal, except where compelling arguments show serious harm to others.

Although it's no doubt common to believe that for the most part human beings have certain ways of doing things sexually that are "natural," even a cursory study of the history of human sexuality makes it clear that sexual customs and norms vary greatly across place and time.[1] The ancient Greeks held that the purest and most noble form of love was between two men. Although it was imperative that a city-dwelling, well-off Athenian male of the fifth century B.C. marry a suitable woman to produce children

[1] See generally Martha Nussbaum, "Constructing Love, Desire, and Care," *Sex, Preference and Family: Essays on Law and Nature*, eds. David Estlund Martha Nussbaum (New York: Oxford University Press, 1997).

for the city, trips to male and female prostitutes were also viewed positively, and his most passionate relationships were likely to be with young men.[2] We see great historical variety in customs and norms regarding the proper expression of sexual desire, what acts one chooses, and what partners are acceptable. Until the Enlightenment and the French revolution, most European countries held that masturbation, non-marital cohabitation, oral intercourse, and intercourse between Christians and non-Christians were grounds for criminal sanction (some were even capital offenses). In the United States, miscegenation laws remained on the books in many states until the middle of the twentieth century.

At times, sexual desire and conduct themselves have been viewed permissively, as was the case in ancient Greece; whereas in other milieu, sexuality and sexual desires were viewed as intrinsically sinful and morally problematic. Early Christians, for example, thought marriage was unavoidably tainted by the presence of sexuality. The medieval church ranked virgins highest in godliness, widows second, while wives were a distant third. Norms regarding what it desirable in a sexual partner also vary greatly. Even within a relatively short timeframe preferences regarding body shape, features, dress and so on can vary dramatically. Furthermore, in any given culture, at any one historical point, there is substantial variation in sexual practice. Even people of identical gender, race, nationality, class and "sexual orientation" can experience sexuality in drastically different ways — the self-evident fact is that people are different from each other. Most attempts to normalize certain sexual behaviors while marginalizing or condemning others are philosophically circumspect.

Currently, North Americans seem to be more tolerant of consenting sexual relations between unmarried adults than in the recent past.[3] In *Lawrence v. Texas*, 539 U.S. 558 (2003), the landmark U.S. Supreme Court case that struck down the criminal prohibition of homosexual sodomy in Texas, the Court surveyed the history of legal prohibitions against homosexual sexual conduct. The Court stated:

[2] *Ibid*. at 28.
[3] However, studies indicate that disapproval of nonconsensual sex, such as of rape, incest, and sex with minors has increased over the past 30 years in the United States. For example, one barometer of social change, the legal age of consent, has risen markedly in the last century. In 1889, a girl could legally consent to sex at the age of 10,11 or 12 in over half the U.S. states; it is currently much higher in all states..

> The Nation's laws and traditions in the past half century are most relevant here. They show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.

It should be particularly clear to us given the recent history of the gay rights movement, that social, political and religious attempts to regulate and prohibit certain consensual sexual behaviors (and the human relationships that underlie them) as unnatural or immoral can have devastating human consequences. Narrowly defined views of what constitutes "normal" or acceptable sexual behavior and social intolerance for human difference extract an enormous cost in terms of human suffering.

III. BDSM Subculture

The term "sadism" was derived from the name of the Marquis de Sade, whose eighteenth century novels described forms of distinctive sexual practices.[4] The term "masochist" was coined later in the nineteenth by the German psychiatrist Richard von Kraft-Ebing in reference to the novels of the Austrian writer Leopold von Sacher-Masoch, where punishment in a sexual context figured prominently in the story lines. Around this time, based in part on the work of various psychiatrists and sexual researchers, "sadomasochism" came to be regarded as a type of disorder, a pathological sub-species of sexual behavior. The current incarnation of the BDSM subculture can be traced to the advent of the sexual liberation movement of the 1960s, and its attendant rejection of repressive attitudes towards sexual experimentation and expression, and the gay liberation movement of the same era. This new counterculture, some of whose members were also involved in the gay leather community, engaged in BDSM behaviors, and were frequently viewed with distaste and seen as a liability even within the gay movement.

According to Robert Ridinger, in the 1980s the practice of BDSM activities became more socially acceptable due to the appearance of the AIDS epidemic and the search for "safe sex" techniques and practices. "The powerful rituals of sadomasochistic play,

with their deep emotional satisfactions and freedom from the requirement that body fluids be exchanged, began to attract more attention from gays and lesbians and, as the fear of AIDS increasingly manifested in the heterosexual population, the mainstream media."[5] BDSM clubs were pivotal in developing communities that were supportive of the practice and provided individuals with the opportunity to meet like-minded partners.

BDSM and fetish imagery is now widespread in Western mainstream culture, from Robert Maplethorpe's photographs, to Madonna's music videos (and that was just the 1990s). The psychological and psychiatric mainstream no longer views sadomasochistic behavior as pathological. The DSM-IV states that in order for sexual sadism or masochism to be considered a disorder, "the fantasies, sexual urges, or behaviors" must "cause clinically significant distress or impairment in social, occupational, or other important areas of functioning." In fact, BDSM activities appear to be widespread. The *Kinsey Institute New Report on Sex* (St. Martin's Press, 1990) reported that that 5-10 percent of the U.S. population engaged in sadomasochism for sexual pleasure on at least an occasional basis; most incidents were reported to be either mild or stage activities involving no real pain or violence.

Although it appears that there is no commonly accepted definition of what constitutes BDSM behavior, certain characteristics seem to be common to the practice, including rituals of sadomasochistic play, infliction of pain that is experienced as pleasurable by both partners, and using fantasy and role-playing and fetishistic elements, such as dress and scenery.[6] Members of the BDSM subculture often state that the mantra of the practice is "safe, sane and consensual." Indeed, it appears that serious, lasting injury is the unusual exception. If anything, it seems that for the most part the practice emphasizes the symbolic role playing of dominance and submission, rather than the infliction of lasting pain.

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[4] See generally Robert Ridinger, "Negotiating Limits: The Legal Status of S/M in the United States," *Journal of Homosexuality*, Vol. 50 No. 2/3, 2006, pp. 189 -216. In his paper, Ridinger discusses the medical, social and legal history of what has come to be known as sadomasochism.

[5] *Ibid*. at 195.

[6] See Niklas Nordling, N. Kenneth Sandnabba, Pekka Santtila, and Laurence Alison, "Differences and Similarities Between Gay and Straight Individuals Involved in the Sadomasochistic Subculture," *Journal of Homosexuality*, Vol. 50 No. 2/3, 2006, pp. 41-57.

Extreme formulations of BDSM that result in death or severe bodily harm appear to be rare, but do occur. Deciding whether we reach the limits of acceptable libertarianism at this stage, and how we might define "severe bodily harm" could be the subject of further discussion. Additionally, careful consideration should be given to how to formulate an accurate and practicable definition of consent in the context of BDSM activities, particularly in a criminal context where there is a need to balance the interests of accused persons, complainants and society as a whole. For instance, if the practice of BDSM is recognized as protected human right, how will this right be balanced against the right of a complainant to limit the use of sexual past history under "rape shield" laws? Again, for now the BCCLA merely highlights this issue as an important area for further discussion.

IV. Governmental Regulation of Sexuality

Courts have largely been unwilling to view BDSM as an acceptable practice — in Canada, engaging in BDSM activities is subject to criminal sanction. One of the most renowned legal cases involving BDSM practitioners occurred in Great Britain in the case of *R. v. Brown, Lucas, Jaggard, Laskey and Carter*, [1993] 2 All ER 75 (H.L.) (often referred to as the "Spanner" case.) In that case, a group of gay men participated in BDSM activities. All participants consented to all activities, and none of the participants suffered lasting injuries. Although none of the participants complained to law enforcement authorities, during the course of an unrelated investigation videotapes of the activities came into the possession of the police and the accused were charged with assault. The trial judge held that the consent of the participants was not a defense. On appeal, the House of Lords upheld the convictions by a three-to-two majority. Lord Templeman, delivering one of the majority speeches, noted that English law recognizes consent as defense to the infliction of bodily harm as a matter of public policy in the course of lawful activities such as surgery and sporting events, but he was of the opinion that consensual BDSM activity should not be added to the list. In 1997, the European Court of Human Rights reviewed the case and affirmed the right of governments to outlaw the consensual infliction of harm through the enactment of criminal codes (European Court of Human Rights, February 19, 1997, Report of the commission, section 63).

The leading Canadian case on whether consent is a defense to bodily injury in the context of BDSM is a case of the Ontario Court of Appeal, *R. v. Welch*, (1995), 25 OR (3d) 665. In that case, the male accused was charged with sexual assault causing bodily harm; the complainant testified that the accused sexually assaulted her without her consent, including beating her with a belt, tying her to a bed, and penetrating her with an object. The accused admitted much of the conduct alleged but testified that complainant consented to everything he did. Griffiths JA, delivering the reasons of the Court, reviewed the *Brown* case and *R. v. Jobidon*, [1991] 2 S.C.R. 714,[7] and concluded that the trial judge was right in removing the defense of consent to the crime of assault causing bodily harm. He stated:

> [A] victim cannot consent to the infliction of bodily harm upon himself or herself, as defined by s. 267(2) of the *Code*, unless the accused is acting in the course of a generally approved social purpose when afflicting the harm. Specifically, the majority in *Jobidon* recognized that consent may be a defense to certain activities such as rough sporting activities, medical treatment, social interventions, and "daredevil activities" performed by stuntmen, "in creation of socially liable cultural product." Acts of sexual violence, however, were conspicuously not included among these exceptions.

Although it appears from the facts of the case that there was considerable evidence that the complainant did not in fact consent to the activities, the Courts did not convict and uphold the conviction of the accused on that basis. Instead, the Court of Appeal found that it was irrelevant whether the complainant consented. The fact that the accused applied force to the complainant in a sexual context that would inevitably cause her bodily harm was enough to find him guilty. The Court stated:

> The sadistic sexual activity here involved bondage (the tying of the victim's hands and feet) and the intentional infliction of injury to the body and rectum of the complainant. The consent of the complainant, assuming it was given, cannot detract from the inherently degrading and dehumanizing nature of the conduct. Although the law must recognize individual freedom and autonomy, when the activity in question involves pursuing sexual gratification by deliberately inflicting pain upon another that gives rise to bodily harm, then the personal interest of the individuals involved must yield to the more compelling societal interests which are challenged by such behavior.

[7] The case involved a consensual fist fight between two adults that resulted in the death of one of the participants. The Supreme Court held that an accused could not rely on the consent of the complainant in defense to a charge of assault causing bodily harm.

Welch was cited with approval by the B.C. Supreme Court in *R. v. Hancock*, 2000 BCSC 1581. In that case, a man with masochistic sexual tendencies hired a group of men, some of whom were unknown to him, to assault him; the assault resulted in the victim's death. The Court held that the accused men need not have intended or been reckless as to whether the victim might die in order to be parties to manslaughter; the victim's consent to the assaults was not considered a defense. The Court further held that the rule regarding consent did not constitute discrimination based on sexual orientation contrary to s. 15 of Charter.

Given the extremely violent nature of the assault at issue in *Hancock*, and the terminal physical injuries the assailants allegedly inflicted on the victim, this case may validly have presented the Court with an opportunity to delimit the outer reaches of acceptable libertarianism. On the contrary, however, the Court decided to accept the blanket prohibitions against consensual adult sexual activity involving bodily injury laid down *Brown*, *Jobidon*, and *Welch*:

> The public policy reason which underlies the judge-made rule that there can be no consent to intended bodily harm save in the closely controlled exceptions of games, medical treatment and certain "daredevil activities" or stunts, as noted in *Jobidon*, is not the suppression of sexuality but the suppression of violence because it is dangerous to individuals and the public order. ... If such violence is not condemned as criminal and wrong and it is practiced with impunity, society and individuals become inured to it.

It appears from *Welch* that the law enforcement mechanisms of society have singled out BDSM practitioners as engaging in an activity singularly lacking in social utility. Boxing matches, ear-piercing, and tattooing are all considered risky, potentially painful activities to which one can, under the *Jobidon/Welch* paradigm, consent on the basis that they are seen to have social utility. On the other hand, sexual activities that involve the infliction of pain are criminalized. In these cases, the Courts appear to have taken it upon themselves to be the final arbiters of which activities serve a "generally approved social purpose."

Intuition suggests that if a person were accidentally injured in the course of "normal" non-BDSM sexual contact, injuries sustained would not be subject to prosecution for assault providing the activity did not exceed the scope of the consent – and one suspects that even unexpected injuries such as nail scratches or bumps on the head

would be overlooked by the law. It follows that it not only the sexual aspect of BDSM, or the fact that it is socially unusual, that has led it to be singled out as unworthy of even the most basic protections of the law. Rather, it is the perception that the activity and the participants are sexually deviant. In this way, the prejudice against practitioners of BDSM appears to be motivated by essentially the same prejudice that underlay miscegenation laws.

Case law bears out the notion that the laws criminalizing consensual adult sexual activity are applied in an discriminatory manner. In *R v. Wilson*, (1996) 2 Cr App Rep 241, a case from the British Court of Criminal Appeal, a man used a hot knife to carve his initials in his wife's buttocks; the man was charged with criminal assault. On appeal, the Court referred to the House of Lords decision in *R v. Brown* that criminalized sadomasochistic sex, but distinguished the facts of *Wilson* on the basis that the husband's activity amounted to tattooing, not assault. The Court stated:

> ... We are firmly of the opinion that it is not in the public interest that activities such as the appellant's in this appeal should amount to criminal behavior. Consensual activity between husband and wife, in the privacy of the matrimonial home, is not in our judgment, a proper matter for criminal investigation, let alone criminal prosecution.

It appears that the *Wilson* Court was prepared to accept consent as defense to assault where the participants were married heterosexuals; however, one suspects that Court would not have been so forgiving if the participants identified as members of a minority sexuality.

V. Conclusion

The BCCLA has a long-standing concern with individuals' rights to liberty and freedom. Governmental activities that seek to regulate consensual adult sexual activity are an affront to our organization's most deeply held convictions: the right of individuals to self determination, expression and equality. Furthermore, as civil libertarians, we are particularly alert when state regulation is aimed toward the regulation of a minority sexuality. As an organization, we affirm our commitment to protecting human rights and civil liberties by marking our opposition to irrational

governmental interference with and discrimination against members of the BDSM subculture.