



# WHY SADO-MASOCHISM SHOULD NOT BE CRIMINALISED

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What follows is the text, very slightly amended for publication, of the evidence submitted in July 1994 by the Libertarian Alliance to the Law Commission, in response to Consultation Paper No. 134, *On Criminal Law: Consent and Offences Against The Person*.<sup>1</sup> When submitted to the Law Commission, the evidence was accompanied by copies of two other Libertarian Alliance publications, both by Anthony Furlong. These were *Sado-Masochism and the Law: Consent Versus Paternalism*, Legal Notes No. 12, and “Reflections on the Case of *R v Brown*”, which was in issue No. 18, May 1993 of the Libertarian Alliance’s journal *Free Life*, pp. 4-6.

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## I The “Spanner” Case and Offences Against the Person

The Libertarian Alliance has previously expressed great concern over the “Operation Spanner” prosecutions, on the original December 1990 case, the February 1992 Court of Appeal judgment, and the March 1993 House of Lords final judgment. We therefore do not intend to repeat all the points made in our publications in this Submission, but to focus on the specific points raised in Law Commission Consultation Paper No. 134, *Criminal Law: Consent and Offences Against the Person*.

## II A Critique of Law Commission Consultation Paper No. 134 on “Criminal Law: Consent and Offences Against the Person”

In our view the Consultation Paper is thoroughly unsatisfactory as a basis for re-examining the subject of consent and offences against the person. We do not intend to comment on every issue raised by the report, nor to respond to every Question for Consultation raised in Part IV of it, pp. 70-71. Rather, we will make a number of observations that we hope will cut through what in our view is the muddled, self-contradictory and illiberal analysis contained in that Paper.

### 1. Common Law

As libertarians we take a generally favourable view of both the evolution and content of Anglo-American Common Law. We believe that common law arrives frequently at a substantive content which can largely be identified as liberal: that is, it sanctions rules and values largely identifiable as being supportive of individual freedom, autonomy, freedom of choice, and self-determination. We believe these values to be rationally and scientifically defensible as a body of “Natural Law” derived from, and sustaining, the nature of humanity — values that can fairly be termed, in political terminology, classically liberal or libertarian.<sup>2</sup>

However, where common law departs from such liberal principles we believe it to be flawed, illegitimate as real law, and subject to correction by legislative reform. We thus dissent from the Consultation Paper’s view that present common law on the topic of consent to harm should be reproduced (1.1, p. 1)

### 2. Our Basic Principle: Individual Self-Determination

In our view the principle of consent (provided such consent is not gained fraudulently or coercively, and is hence not truly consent) should be a total and absolute defence in law. We thus agree with the principle enunciated by John Stuart Mill in *On Liberty* (although not, unfortunately, actually fully or consistently maintained by him), that “Over himself, over his own mind and body, the individual is sovereign.”<sup>3</sup> Just as the individual is now recognised in British law as having the right

to commit suicide, we believe that the individual should have the right to harm him or herself in whatever way he or she so desires. We believe that the right to autonomy further means that an individual can consent to the involvement of others in the infliction upon himself of temporary pain or injury, permanent harm, damage, and mutilation or even loss of life. (In the case of such extreme forms of harm and/or death we would, of course, certainly recognise that surviving participants would be well advised to establish clear and demonstrable evidence that such activities were indeed fully voluntary and non-coerced, and that the police and the courts would expect such evidence to be available.)

Hence, we disagree fundamentally with the assertion in 12.4, p. 40, “that it is not enough to rely simply on the right of self-determination of the victim to do what he likes with his own body.” This principle, in our view, *does* cut through the Gordian knot of confusion and prejudice manifest in the Consultation Paper. It is the role of the law to protect individuals against invasive acts, against coercion. “Violence” is to be prohibited because of its invasive and coercive character. When “violence” is involved in consensual activity it is not a coercive act and is an entirely “private” transaction. Consent fully and absolutely alters the nature of “violence”. If acts are consensual, they are not coercive, and hence should not be interfered with by the law.

The irony of the Spanner decisions, and the sort of laws being endorsed by the Consultation Paper, is that real, non-consensual harms (imprisonment, loss of employment, invasion of privacy and social stigmatisation, personal despair and suicide) have been inflicted upon non-criminal individuals, in the absurd guise of protecting them from themselves and of “draw[ing] the line between what is acceptable in a civilised society and what is not”, as the trial judge, Mr. James Rant QC, put it in the first December 1990 case.

We thus address explicitly the comments made in 12.3 and 12.4 (pp. 39-40). The fact that the law currently “protects” individuals against self “abuse” by drug-taking is no argument against the principle we are enunciating. Such “protection” is also, in our view, immoral and wrong in principle. It not only infringes the legitimate rights of individuals, but creates social consequences that are disastrous. (Namely: it is impossible to enforce successfully such paternalist and prohibitionist laws; the police are corrupted; super-profits are generated that enrich organised crime and subvert society at almost every level; drugs are rendered more dangerous as they are supplied outside the normal constraints of market standards, competition and common law consumer protections; artificial inducements to “pushing” and subcultures of deviancy are created, etc., etc.). The counter-productive consequences of drug prohibition are now recognised by a large and growing number of economists, sociologists, psychologists, drug treatment experts, policemen, judges, and

public officials.<sup>4</sup> Drug paternalism is as immoral and socially harmful as sexual paternalism is now, and as the religious paternalism that effectively ended in the early 19th century was in its time.

We reject totally the view, enunciated by Judge Rant, that “the courts must draw the line between what is acceptable in a civilised society and what is not”. The role of the courts in a free society is to protect the lives, liberty and property of individuals from force and fraud. The fact that some people find sado-masochism “unacceptable” is a matter of their personal opinion, just as views on the religious beliefs and observances, the political beliefs or the artistic expression of other individuals are also a matter of personal opinion. The liberal order of Britain, and most Western nations, has now rejected the idea that the state should dictate what is religiously “acceptable”. We see no logical or good reason for it dictating what is *sexually* acceptable — or, rather what is sexually acceptable to Judge Rant and his colleagues.

### 3. Distinguishing Forms of Self-Harm

The libertarian principle of self-determination or self-sovereignty cuts through the intellectual gymnastics engaged in by the Consultation Paper in trying to distinguish between permissible and impermissible forms of risk and “violent” activities. Indeed, in our view the Consultation Paper, like the original Spanner judgment, engages in a classic example of disguising subjective preference with a veil of principle. As Professor Christie Davies, of the Department of Sociology of the University of Reading, has put it in a forthcoming paper:

What happened [in the Spanner case] was that the prosecutors and the judges put up what purported to be a general argument applied to a specific case. In reality, it was a device applied in a discriminatory way to the behaviour of a minority of which they disapproved on other grounds. In the Spanner case the general argument put forward was that you cannot ‘consent to an assault on yourself’ ... several people were prosecuted, convicted and punished, even though there were no unwilling ‘victims’ to complain. They had agreed among themselves to get up to all manner of sado-masochistic sexual activities, but there was no harm done outside the group. Then the judge popped up and said in effect: ‘You can’t consent to an assault against yourself. You have no defence and you are obliged to plead guilty.’

This bizarre perversion of an argument was upheld in appeal by other judges though only by three to two in the House of Lords. The problem is that the judges apply this principle in a very selective way. It isn’t applied in the case of a boxing match or a rugby match even when boxers or rugby players batter into nothingness such few brain cells as

they have or when rugby players end up crippled for life. In other words there are cases involving great harm where the principle is not employed, and cases of very minor harm where the principle is employed extremely rigorously to the point where the law is used to inflict far more harm on the individuals involved than they ever inflicted on each other.<sup>5</sup>

It is clear that the authors of the Consultation Paper find “manly sports” and even “horseplay” and possibly religious self-mortification morally or personally acceptable, but sado-masochistic sexual pleasure unacceptable. It is thus equally clear that the judges were ruling not legally, but morally, or as the Consultation Paper itself concedes, by “policy” rather than “strictly legal” considerations (8.1, p. 19). The Consultation Paper does not seem to realise that much of what it sees as “manly” and traditional horseplay (which actually borders on the truly coercive) might be seen by others as a morally unacceptable tradition of brutalisation and religious self-mortification the manifestation of outright mental illness. Those who would take such a view, such as myself, would, however, have no more right to impose their tastes by force of law than the judges or the Law Commission.

#### 4. The Validity of Sado-Masochistic Sexuality

We see no difference in the moral status of sado-masochistic sexuality (whether homo- or heterosexual) and homosexuality. It has taken time and a great deal of intellectual and Parliamentary endeavour to expel the law from the private lives of homosexuals. That process has still not quite been completed in the case of homosexuality, as the inequality in the age of consent, and the continuation of other discriminatory legal and law enforcement practices still attests. Nevertheless, most people now accept that homosexuality cannot be repressed by legal measures, that homosexuals are not demonic monsters whose presence will lead to the end of civilisation, and that people are entitled to have different sexual orientations. It is bizarre that the judges in the Spanner case, the appeal, and the House of Lords ruling, and the authors of the Consultation Paper, should all be so set upon criminalising sado-masochism.

The sole basis for this criminalisation appears to be that sado-masochism, like drug addiction, is “dangerous and injurious to individuals and ... if allowed and extended is harmful to society” (12.3, p. 39) and productive of “social damage” (12.4, p. 40).

We have already argued for the principle that individuals have a right to engage in self-harm. However, it should be pointed out that most sado-masochistic acts involve no permanent harm, disfigurement, or damage to their practitioners. Indeed, most sado-masochists have far less chance of receiving serious injury than practitioners of the “manly sports”, whether boxing,

martial arts, rugby, soccer, skiing or a thousand and one other risky pastimes. (In fact, no one in the Spanner case, which constituted a fairly extreme piece of sado-masochist activity, needed medical treatment).

In passing, we would also note that we find it ironic that “lawful correction”, the truly coercive infliction of punishment upon children, should be should be viewed as acceptable by the Consultation Paper, while consensual activities are not!

#### 5. “Social Damage”

We simply do not believe that any more “social damage” will occur by refraining from criminalising sado-masochism than has occurred from decriminalising homosexuality. We reject as fallacious the idea suggested in the passage quoted from Professor G. P. Fletcher (12.2, p. 39), that someone who has participated in consensual “sexual violence” is more likely to engage in non-consensual (i.e. real) violence. (If he does, he should be punished of course.) We know of no research that has established any such likelihood. Indeed, we believe that Professor Fletcher’s suggestion misunderstands the nature of sado-masochism and the character of sado-masochists. As a result of extensive contacts with participants in both the homosexual and heterosexual sado-masochist communities, and as a result of examining the research into sado-masochism currently being conducted (and scheduled for publication) by Dr. Bill Thompson of the Department of Sociology at the University of Reading, we see no evidence that sado-masochists are more likely to be anti-social, dangerous or mentally pathological in any way. Sado-masochistic “violence” is not invasive or indicative of desires to commit invasive or coercive acts upon other people. Sado-masochism is usually a form of sexual *play* which is usually “negotiated” in great detail by its participants and which is conducted with great concern for their mutual satisfaction by its participants. It should also be pointed out that in some theories of sado-masochism it has been argued that the conscious engagement in such forms of sexual play acts as a psychologically beneficial way of dealing with certain aspects of our socio-biological nature (relating to power, hierarchy, dominance and submission), and renders one less likely to be pathologically motivated in real life.

#### 6. Personal “Damage”

The Consultation Paper states that any prospective defenders of the right of self-determination should also deal with the damage that participating in sado-masochism would inflict upon the active instigator (12.4, p. 40). We find it far from apparent as to what the nature of this damage is supposed to be. The question can only rest upon an assumption that sado-masochism is a form of mental pathology and thus harmful in this way to its practitioner. But, as suggested above, this is by no means obvious. The only other interpretation

we could put upon this point is that participants in sado-masochism are religiously harming themselves, i.e., damaging their chances of divine salvation. Whether or not this is true seems irrelevant for modern law. We have long since rejected the idea that the religious stewardship of souls is a legitimate function of the law.

## 7. The Consequences of Criminalising Sado-Masochism

We would also like to draw your attention to the practical consequences of criminalising sado-masochism. The number of ordinary men and women who engage in varying forms of consensual sado-masochism is unknown. The popularity of sado-masochistic pornography, both “soft” and “hard”, in books and magazines read by men and women alike, the results of certain sex surveys, the popularity of *Skin 2* magazine and various sado-masochist and fetish clubs throughout the country, and the extensive supplying of such services by prostitutes, would suggest, however, that it is huge. Many celebrities, writers, film stars, artists, entrepreneurs — and even a considerable proportion of politicians, lawyers and judges — are known to participate in sado-masochism. Indeed, some sexologists suggest that elements of sado-masochism (“forceful” sex, bondage, spanking, slapping, fantasy games, etc.) are engaged in at some time or another by the majority of people.

The Consultation Paper is thus proposing the criminalising of an activity which is engaged in or seen as normal or legitimate by extremely large numbers of people. It will thus bring into further disrepute a legal system that is already seen by many people as failing to perform its proper function, that is, protecting their lives and property against the rising tide of criminality.

In our view, rather than concerning itself with what ordinary people are doing in their bedrooms, it would be more appropriate for the law to pay increased attention to ensuring that it delivers speedy, efficient and reasonably priced redress to ordinary people in civil matters, and effective protection and restitution in criminal ones — things it is so notably failing to do at the present time.

If the Law Commission is determined to create *real* “social damage” then it will continue on its present course and criminalise sado-masochism. It should be fully aware, moreover, of the ramifications of such a decision. Amongst the consequences will be the ruining of the lives of thousands of ordinary people and their subjection to blackmail, stigmatisation, and imprisonment. The Commission should also bear in mind that there is an enormous likelihood that amongst those affected will be close friends, relatives, children, and perhaps even spouses. We trust that you might give a moment’s thought to this fact: sado-masochism is not confined to a minority of “deviants” and “mon-

sters”. You will be surprised how many of your friends and relatives are going to be criminalised by your decisions.

You should also bear in mind that there will also be the birth of a new struggle, uniting civil libertarians on both the so-called “left” and “right” of the political spectrum; it will lead to civil disobedience, protest campaigns, and the “outing” of sado-masochist politicians and judges. Sado-masochists and civil libertarians are not going to rest until the criminalisation of sado-masochism is swept into the same dustbin of history as the criminalisation of religious dissent and of homosexuality. The Libertarian Alliance will certainly give every support possible to those resisting the persecution of sado-masochists and fully endorses the right of civil disobedience against such injustice.

Criminalisation will thus lead to both a further decline in the respect for, and adherence to, even the legitimate functions of law and to increased social division and conflict.

## III Conclusion

We thus appeal to the Law Commission to realise the folly of criminalising sado-masochism. We appeal not merely on grounds of principle — the libertarian philosophy of autonomy and self-determination — but also of social utility. A harmonious and decent society cannot be built upon a basis of paternalism and social engineering, whether relating to religion, politics, economics, health, lifestyle or sexuality. The purpose of the law is to protect individual liberty, not to enforce the subjective opinions of one segment of society upon the beliefs, expression or non-coercive behaviour of others.

## Notes

1. *Criminal Law: Consent and Offences Against The Person*, Her Majesty’s Stationery Office, London, 1994.
2. See Bruno Leoni, *Freedom and the Law*, Nash Publishing, Los Angeles, 1972; John C. H. Wu, *Fountain of Justice: A Study in the Natural Law*, Sheed and Ward, London, 1959, esp. Part One, “The Natural Law and Our Common Law”, pp. 55-154; Leon Louw, *Libertarianism and the Lessons of the Common Law*, Legal Notes No. 10, Libertarian Alliance, London, 1990; Murray N. Rothbard, *The Ethics of Liberty*, Humanities Press, Atlantic Highlands, New Jersey, 1982; Douglas Rasmussen and Douglas Den Uyl, *Liberty and Nature: An Aristotelian Defense of Liberal Order*, Open Court, LaSalle, Illinois, 1991.
3. John Stewart Mill, *On Liberty ... Three Essays*, Oxford University Press, p. 15.
4. Some of the best studies of this issue are: Mark Thornton, *The Economics of Prohibition*, University of Utah Press, Salt Lake City, 1991; Richard Stevenson, *Winning the War on Drugs: To Legalise or Not*, Institute of Economic Affairs, London, 1994; Thomas Szasz, *Our Right to Drugs: The Case for a Free Market*, Praeger, New York, 1992; Ronald Hamowy, ed., *Dealing With Drugs: The Consequences of Government Control*, Pacific Research Institute for Public Policy, San Francisco/Lexington Books/D. C. Heath, Lexington, Mass., 1987.
5. Christie Davies, *Invisible, Intrusive and Insidious: The Discourse of Contagion in the Anti-Smoking Movement*, FOREST, London, forthcoming 1994.