



JOURNAL OF MEDICINE AND LAW

ARTICLES

Foreword - Brave New World: Are Old Laws and Regulations Keeping up with Advances in Medical Research and Innovation?

Aryn McCumber

Beginning-of-Life and End-of-Life Issues in Indiana Law: Will the Indiana General Assembly's Established Policies Protecting and Preserving Human Life Receive Judicial Deference?

Michael J. DeBoer

A Matter of Life and Death: Affording Terminally-Ill Patients Access to Post-Phase I Investigational New Drugs

Robert M. Harper

Animal/Human Hybrids and Chimeras: What are They? Why are They Being Created? And What Attempts Have Been Made to Regulate Them?

Rebecca A. Ballard

Employer Funding of Fertility Awareness Training: An Acceptable Alternative to Mandated Prescription Contraceptive Coverage in Employee Benefits

W. Jesse Weins

The Great Bathhouse Bugaboo: A Practitioner's Inquiry into the Criminal and Public Health Policy of Gay Bathhouses

Robert A. Beaty, Jr.

Victim-Offender Mediation: A New Way of Disciplining America's Doctors

Russell E. Farbiarz

The Not So Slippery Slope: Why the Regulation of Therapeutic Cloning Should Be Left to the States

Jamie Rasmussen

2008 Symposium – Brave New World: Are Old Laws and Regulations Keeping up with Advances in Medical Research and Innovation? Transcription of Keynote Speaker's Address

Dr. Charles W. Scarantino

Summer 2008

THE GREAT BATHHOUSE BUGABOO: A PRACTITIONER'S
INQUIRY INTO THE CRIMINAL AND PUBLIC HEALTH POLICY
OF GAY BATHHOUSES

Robert A. Beattey, Jr.¹

People crushed by law have no hopes but from power. If laws are their enemies, they will be enemies to laws; and those, who have much to hope and nothing to lose, will always be dangerous, more or less.

-Edmund Burke, letter to Charles James Fox, 8 October 1777²

In early 2007, multiple offices in the city of Columbus, Ohio, received the following email:

Subject: Inquiry two concerning Columbus establishment(s) - please confirm receipt of this email

Hi:

Is it legal for there to be a private mens [sic] health club in Columbus where people come in contact with each other (sexually) ? I am referring to Club Columbus at 795 W 5th Ave, 614 291-0049 on 5th avenue (1/4 mile west of Olentangy [River Road] and Club Flex at 1567 E Livingston Ave, 614 252-0730 (6-8 blocks east of High Street).

Anonymous³

Just over two weeks later, a second anonymous email was received. It was similar, but not identical, to the first and read:

Subject: Email to report potential illegal private men's health clubs in Columbus, Ohio - Please confirm receipt [sic] of this email

To whom it may concern:

Is it legal for there to be private men's health club's [sic] in Columbus where people are participating in physically touching (sexual) activities in open areas (which have structures built like booths with holes in the walls, S&M devices, strange structure for same and open viewing

1. B.A., Columbia University, J.D., The Ohio State University Moritz College of Law. Mr. Beattey wishes to extend his warm thanks and appreciation to Craig R. Ferguson, R.N.. Inquiries may be directed to robert@beatteylaw.com.

2. EDMUND BURKE, THE CORRESPONDENCE OF EDMUND BURKE 387 (Thomas W. Copeland ed., University Press 1958) (1774-1778).

3. E-mail from G. Private to Columbus Division of Police Website portal (Feb. 11, 2007, 4:55 PM EST) (copy on file with author).

areas), same activities in sauna's [*sic*] (which is a health code violation?) and multiple people in private room conducting the same activities.

I am referring to:

Club Columbus, (614) 291-0049, 795 West 5th Avenue, Columbus, OH 43212

Club Flex, (614) 252-0730, located at 1567 E Livingston Ave, Columbus, Ohio.

Please feel free to forward this to whoever the appropriate authorities or government office are to investigate same as they may be health hazards to our community and may need to be closed.

Anonymous⁴

The emails from "Anonymous" were forwarded by the various departments to the Columbus City Attorney's Office, which is general counsel to all city departments and the prosecuting authority within the city limits,⁵ with a request for advice as to the legality of the activities alleged to be taking place at the two locations identified by the author of the emails. While a contemporaneous response was provided to the City Attorney's clients, the issues raised by the anonymous emails deserve analysis beyond the practical concerns of day-to-day municipal government operations.

The Ohio General Assembly decriminalized consensual sexual behavior between adults in 1974,⁶ and presumably no jurisdiction in the United States may criminalize consensual sex between adults of the same sex in this post-*Lawrence v. Texas* landscape.⁷ So to the extent that Anonymous was concerned about consensual, adult sex because it was occurring between persons of the same sex, the state could express no objection through the penal code.

Still, Anonymous alleged "S&M devices, strange structure for same and open viewing areas" are maintained at the subject locations. While Anonymous did not specifically allege that sadomasochistic, i.e. "S&M," activity was occurring at the locations identified, were it occurring it might fall within the purview of city officials' law enforcement duties. Sadomasochism is, viewed purely in terms of essential elements, assault, and courts are unanimous in maintaining that consent cannot be a defense to assault stemming from consensual sexual violence because, as the New York Appellate Division wrote in *People v. Jovanovic*, "as a matter of public policy, a person cannot avoid criminal responsibility for an assault that causes injury or carries a risk of serious harm, even if the victim asked for or consented to the act."⁸ The same policy position can be observed in other common law jurisdictions.⁹

4. E-mail from G. Private to Columbus Public Health Website portal (Feb. 28, 2007, 12:43 PM EST) (copy on file with author).

5. COLUMBUS, OH, CHARTER §§ 67, 68 (1915).

6. H.B. 511, 109th Gen. Assem., Reg. Sess. (Ohio 1972).

7. *Lawrence v. Texas*, 539 U.S. 558 (2003).

8. *People v. Jovanovic*, 263 A.D.2d 182, 198 n.5 (1999), *appeal dismissed* *People v. Jovanovic*, 95 N.Y.2d 846 (2000). *See also* *State v. Collier*, 372 N.W.2d 303 (Iowa App. 1985), *Com-*

As an “interaction, especially sexual activity, in which one person enjoys inflicting physical or mental suffering on another person, who derives pleasure from experiencing pain,”¹⁰ sadomasochism (S/M) practices fall squarely into the public policy identified by the Javanovic court. “Consensual sexual violence runs the spectrum from playful pushing and wrestling to erotic asphyxiation.”¹¹ And though it might be debated whether S/M necessarily causes injury or carries a risk of serious harm, the elements of the criminal offense of assault are often present in S/M interactions. In instances where S/M involved only mental suffering, participants might escape criminal liability, but it is clearly established that consent is not a defense to assault that actually causes physical injury.¹² Prohibiting such activity is seen as a valid exercise of the government’s police powers because an assault that causes an injury is seen to breach the public peace and therefore provides the state the ability to regulate and prohibit the activity.¹³

The unanimity of judicial opinion that consent is no defense to consensual sexual violence lacks some coherence with the traditional treatment of consensual violence more generally. Consent in other recreational contexts where injury or the risk of serious harm are inherent—organized sport being the most ready example—is usually available as a defense to criminal liability associated with participation in the activity. The sport exception stems from the policy decision that the perpetrator of an injury sustained by a voluntary participant in sport should not be punished because the participation in sports has social utility which outweighs the harm of the activity to the individual. Sports provide not only the benefit of physical fitness, agility, and recreation to participants, but, at least in the case of professional sports, an entertainment benefit to society at large. As such, nothing is gained by deterring the activity. On the contrary, participation in the activity should be encouraged. Even though the whole community’s resources will be drawn upon to treat any injury sustained while participating in the sport, the whole community benefits by virtue of the sport being played in the first place. This justification is consistent with the Utilitarian perspective of criminal law which is not concerned with harm in and of itself or the magnitude of harm; it requires only that future harms not outweigh the societal benefit of a given activity, and that

monwealth v. Appleby, 380 Mass. 296 (1980), State v. Simmons, 59 Wn.2d 381(1962), People v. Lucky, 224 Cal.3d 259 (1988), *cert denied*, 488 U.S. 1034 (1989), State v. Roby, 83 Vt. 121, 129 (1909) (“though one consents to be beaten, this is not justification when it is a matter that concerns the peace and dignity of the state”), and Monica Pa, *Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex*, 11 TEX. J. WOMEN & L. 51, 65-69 (2001).

9. Regina v. Brown, 1 A.C. 212, 230 (Eng. H.L. 1994).

10. WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 1690 (1996).

11. Cheryl Hanna, *Sex is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239, 240 (2001).

12. See generally W. E. Shipley, Annotation, *Consent as Defense to Charge of Criminal Assault and Battery*, 58 A.L.R.3d 662 (2000).

13. Pa, *supra* note 8, at 64. See also People v. Samuels, 250 Cal. App. 2d 501 (1967).

law must “exclude, as far as possible, all painful or unpleasant events.”¹⁴ The radically disparate treatment of sport and S/M is perhaps not surprising when one considers that, especially in the case of an “assault involving aberrant behavior or conduct with no apparent social utility[, the activity] is often held to be criminal without regard to the consent of the victim if the force used has as its probable result bodily injury.”¹⁵

Benefit to society or not, there “is no scientific study that indicates S/M practitioners suffer from any specific psychological problem or that their choice of sexual behaviors in any way interferes with their day-to-day functioning.”¹⁶ And with respect to the individual, there is some evidence that S/M may have psychological value.¹⁷ In fact, some claim that the “satisfaction gained from S/M is something far more than sex. . . . It can be a total emotional release.”¹⁸ Sadomasochist activities appear to be fairly widespread. A 1990 Kinsey Institute study reported that 5-10% of the U.S. population participate in S/M sex at least on an occasional basis.¹⁹ And a poll which appeared in *Playboy* in 1998 reported that of the college-age respondents,

- 18% of the men and 20% of the women have used a blindfold during sex.
- 30% of the men and 32% of the women have tied someone up or have been tied up during sex.
- 49% of the men and 38% of the women have spanked or have been spanked as part of sex.²⁰

Sadomasochism is an activity that most often takes place in private, so the chances that a dominate partner will be caught “assaulting” a submissive partner are quite small, though as the facts of *Lawrence v. Texas* demonstrate, it is not unheard of for police to inadvertently stumble upon private bedroom activity.²¹ According to the traditional calculus of deterrence, as the chance of getting caught participating in S/M activity is small, the penalty for S/M activity would have to be quite strong in order to serve as a deterrent.²² And in fact, several S/M prosecutions have resulted in unusually severe penalties even where no significant harm befell the participants.²³ However, as most S/M

14. Joshua Dressler, UNDERSTANDING CRIMINAL LAW 14 (3rd ed. 2001).

15. Note, *Assault and Battery - Consent of Masochist to Beating By Sadist Is No Defense To Prosecution For Aggravated Assault*, 81 HARV. L. REV. 1339, 1339 (1968).

16. Pa, *supra* note 8, at 62.

17. Marianne Apostolides, *The Pleasure of Pain: Why Some People Need S & M*, PSYCHOL. TODAY, Sept. 1, 1999 at 60, 61.

18. *Id.*

19. JUNE M. REINISCH & RUTH BEASLEY, KINSEY INSTITUTE NEW REPORT ON SEX: WHAT YOU MUST KNOW TO BE SEXUALLY LITERATE 162 (Debra Kent ed., St. Martin's Press 1990).

20. Marty Klein, *Poll*, PLAYBOY, November, 1998, at 81.

21. *Lawrence v. Texas*, 539 U.S. 558 (2003).

22. JEREMY BENTHAM, THE THEORY OF LEGISLATION 325 (1931).

23. Pa, *supra* note 8, at 71-72.

encounters do not result in serious injury,²⁴ this leaves the Utilitarian with the intolerable situation in which the harm caused to society by S/M activity is minor, but the suffering caused by the imposition of a penalty for participation in the activity is relatively great.

In one case, for example, the police in Attleboro, Massachusetts were investigating a report of stolen property when they happened upon a private bondage and S/M play party. The police ended up charging a number of participants with assault and battery, exhibiting or lending articles for self-abuse, keeping a house of ill fame for lewdness, and carrying a dangerous weapon.²⁵ The man who rented the facility where the party took place was also charged with accessory to assault and battery before the fact.²⁶ The charges were filed despite the fact that no money was exchanged for sex, one of the dangerous weapons, for example, was a wooden spoon,²⁷ and none of the participants complained. Though no injuries were reported,²⁸ prosecutors defended the police handling of the case.²⁹

Despite the rarity of serious injury resulting from S/M activity, the activity does present at least the risk of serious harm befalling its participants.³⁰ If the submissive partner is incapacitated and the dominate partner loses control or goes too far, serious injury is certainly a possible result.³¹ One might argue, therefore, that because S/M activity is of limited social utility and the potential for harm, up to and including death, is detrimental to society's overall happiness, the activity should be deterred through criminalization.

But S/M is hardly the only conduct that poses a risk of serious harm in the absence of apparent social benefit. Any number of recreational activities can result in serious injury to their participants. Approximately 3.5 million children under the age of fourteen are injured participating in recreational activities each year in the United States.³² Sports and recreational activities contribute to approximately 21% of all traumatic brain injuries among American children.³³ The U.S. Consumer Product Safety Committee (CSPC) tracks

24. See *supra*, notes 15-18.

25. Cindy Rodriguez, *Attleboro Sex Club the Talk of the Town: Residents Split Over Justification for Arrests, Seizures at S&M Party*, THE BOSTON GLOBE, July 12, 2000, at B1.

26. *Id.*

27. *Id.*

28. *Id.*; Meridith Goldstein, *Prosecutor Defends Police Handling of SadoMasochist Party*, PROVIDENCE JOURNAL-BULLETIN, November 2, 2000, at 3B.

29. Goldstein, *supra* note 28.

30. J.M. Lawrence & Dave Wedge, *S & M Pros Lay Low in Sex Death Fallout*, THE BOSTON HERALD, August 17, 2000, at 21 and Jane Fritsch with Katherine E. Finkelstein, *Charges Dismissed in Columbia Sexual Torture Case*, THE N.Y. TIMES, November 2, 2001, at D1 (an account of the facts underlying *People v. Jovanovic* *People v. Jovanovic*, 263 A.D.2d 182 (1999)).

31. Fritsch and Finkelstein, *supra*, note 30.

32. National SAFE Kids Program and American Academy of Pediatrics Injury Statistics, <http://www.lpch.org/DiseaseHealthInfo/HealthLibrary/orthopaedics/stats.html> (last visited August 24, 2007).

33. *Id.*

the number of injuries reported to emergency rooms each year. In 1998, the CPSC's National Electronic Injury Surveillance System reported 3,321,674 sports related injuries which resulted in hospital care.³⁴

Absent moral judgment of the activity in question, and no "matter how egregious the wrongdoing, Utilitarians do not advocate punishment unless they believe it will provide an overall social benefit."³⁵ The basic principle behind Retributivism, on the other hand, is that "punishment is justified when it is deserved."³⁶ For the Retributivist a person who fails to comport herself with the requirements established by society gets her just deserts in the form of punishment, and a wrongdoer should be punished whether or not it will lead to a future reduction in crime.³⁷ Immanuel Kant, who is often associated with retributivist theory, had as his main concern that man should conduct himself in a moral manner. In his words, "[t]here is an imperative which commands a certain conduct immediately, without having as its condition any other purpose to be attained by it. This imperative is Categorical. . . . This imperative may be called that of Morality."³⁸

The problem with both metrics of analysis—utilitarian and retributivist—as a basis for supporting criminalization of consensual S/M activities is that they both rely upon a determination that S/M causes a social harm which must be prevented because it is not moral. It appears that the consensual nature of S/M is ignored in the analysis of its criminality not because S/M creates a larger social harm to which no individual may consent—as noted above it usually results in no harm to the individual participants and may even have psychological benefits. Rather, the state's interest in prohibiting and prosecuting S/M finds its genesis in a squeamish, if well-intentioned, puritanical distaste for the activity being prohibited. This approach of using the criminal law to prosecute by proxy conduct which the legislature has not actually made illegal is the worst possible use of the state's power to criminalize conduct.

Because S/M doesn't actually tend to cause harm, the goal of meting out severe sentences in S/M cases is achieved only from the morphing of "the terms 'dangerous weapon' and 'serious bodily injury' into arbitrary and meaningless categories."³⁹ As Monica Pa rightly notes, the abhorrence toward deviant sexual practices which gives rise to the statutory gymnastics required to prosecute S/M practitioners "effectively weakens criminal law protections for

34. National Electronic Injury Surveillance System, U.S. Consumer Product Safety Commission, National Injury Information Clearinghouse, <http://www.nyssf.org/statistics1998.html> (last visited August 24, 2007).

35. Dressler, *supra* note 14, at 16.

36. *Id.*

37. *Id.*

38. IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF ETHICS §. 1, (T.K. Abbott trans. 1987) (1785).

39. Pa, *supra* note 8, at 72.

all members of society.⁴⁰ If the poll results cited above⁴¹ are representative across the population, 49% of men and 38% of women in the United States would be guilty of some form of assault for having struck a partner during sex. A criminal law admittedly violated by 40 to 50% of the population is of dubious value, indeed. Not to mention that calling a consensual spanking during sex an assault numbs the public to the very real harm that can result from, for example, a domestic violence. An attorney for Gay & Lesbian Advocates & Defenders put it more succinctly when she was interviewed in the aftermath of the Attleboro case. She observed that “[l]aws such as assault and battery should not be relied on as proxy for enforcing moral judgments about private conduct.”⁴²

In the end, calculating the overall social utility or cost of a given activity proves difficult, but holding constant the morality of sport and S/M, it is not at all clear that the latter carries with it any greater social cost than the former. The Utilitarian is interested in increasing the sum of human happiness through deterring conduct which is costly to society. Prosecuting and punishing consensual S/M activity may not only fail to increase happiness, but may undermine the deterrent value of the criminal law.

Retributivism, looking backward to an actor’s voluntary commission of a crime and his moral blameworthiness,⁴³ fails to provide any better justification for prosecuting S/M participants, absent a determination that consensual sexual violence is immoral. Central to retributivist theory is the notion that humans have free will—that they can choose to do the “right” thing and might justly be punished for not doing so.⁴⁴ Also of interest to the retributivist is the symbolic value of punishment.⁴⁵ For the retributivist, punishment is a “conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part of the punishing authority himself or of those in whose name the punishment is inflicted.”⁴⁶ These latter tenants—that criminal law should express resentment, indignation, and judgments of disapproval—have certainly carried the day in the cases where S/M activity has been prosecuted.

To address the retributivist notion that judgments of disapproval and reprobation are a valid basis for criminalizing conduct, it is tempting to turn to *Lawrence v. Texas* in search of support for the proposition that the criminalization of private sexual conduct, including S/M, is now beyond the power of the state to regulate. This would, I think, be a misreading of *Lawrence*, not least of all because the holding in *Lawrence v. Texas* cannot be stated so broadly

40. *Id.* at 72-73.

41. Klein, *supra* note 20.

42. Rodriguez, *supra* note 25.

43. Dressler, *supra* note 14.

44. *Id.*

45. JOEL FEINBERG, DOING AND DESERVING 98 (1970).

46. *Id.*

without someone arguing it necessarily extends constitutional protection to prostitution, bestiality, and incest. Addressing this argument is worth a brief detour.

The argument that if we decriminalize “X” sexual conduct then there is no reason we won’t have legalized prostitution, incest, and bestiality, and all manner of other horrors, is frequently heard as a basis for prohibiting any number of consensual sexual practices. These arguments really boil down to the natural law argument that some things are just morally wrong.⁴⁷ Though some have taken this argument seriously,⁴⁸ I refuse to do so because it takes as its core the moral certitude that the only morally irreproachable sexual expression is one intended for procreation. This position may be taken seriously in other disciplines, but it has been rejected by the law since at least *Griswold*.⁴⁹ As soon as non-procreative sex is recognized as a right by the law, then the state must restrain itself from interfering with non-commercial sexual conduct between consenting adults. The argument that not criminalizing gay sex, S/M, or any other sexual fetish renders indefensible laws regulating conduct which is not non-commercial sexual conduct between consenting adults, is just plain hokey. Proponents of this theory simply “present a false dilemma, claiming that we must either accept a very narrow understanding of appropriate sexual expression or else abandon all hope for drawing serious moral distinctions,”⁵⁰ when it comes to sexual conduct.

Returning to the broader issue, what Jamal Green, writing in the Yale Law Journal, rightly concluded about *Lawrence* is that it “raises a bar to morals-based regulation of conduct recognized by social consensus as status-defining.”⁵¹ He went on to observe that the notion that the law will treat neutral conduct that society recognizes as status-defining (whether or not society approves of the conduct itself) leads to the conclusion that “a retributive rationale based on ‘character’ is constitutionally inadequate as a justification for capital punishment.”⁵² Presumably the conclusion that justifying punishment based on conduct that is perceived to be the result of a character flaw is not limited to capital punishment; in fact *Lawrence* explicitly endorsed the position that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”⁵³ It is safe to say at any rate that “*Lawrence* restricts a

47. See, e.g., John M. Finnis, *Law Morality and Sexual Orientation*, 69 NOTRE DAME L. REV. 1049 (1994).

48. See, e.g., John Corvino, *Homosexuality and the PIB Argument*, 115 ETHICS 501 (2005).

49. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

50. Corvino, *supra* note 48, at 534.

51. Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L. J. 1862, 1868 (2006).

52. *Id.* at 1902.

53. *Lawrence*, 539 U.S. at 577, quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting).

community's use of the criminal law to suppress status masquerading as conduct."⁵⁴

Of course that leaves open the question why the liberties of some groups (gays in the *Lawrence* example) are protected, but others, such as nude dancers and strip club goers are not.⁵⁵ The resolution comes in the nuanced reading of *Lawrence* that sees it protecting conduct which is definitional for members of the targeted community—conduct that is “recognized as an attribute of personhood,” rather than conduct which is incidental to personhood.⁵⁶ This reading prohibits criminalizing sodomy as it is definitional—integral to the status—of being gay, but allows regulation of nudists, jugglers, joggers, strip club goers, and S/M participants as those activities are seen as recreational activities incidental to personhood.⁵⁷

If this reading of *Lawrence* is correct, it is possible that the judicial unanimity that S/M constitutes illegal conduct in the form of assault is now open to question. This would require a determination that society recognizes the conduct associated with sadism and masochism as inherent—i.e., definitional—to some individuals' personhood. William N. Eskridge, Jr. proposed one possible way to analyze whether this threshold has been met by considering whether society has revised consensus to allow that S/M is a tolerable variation of sexual expression, even if not as good as the norm.⁵⁸ I suspect that stated thusly, the consensus would be against S/M as a tolerable variation, but asking whether spanking a partner during sex, clearly at least a misdemeanor assault, is a tolerable variation of sexual expression might well yield different results. And in fact, it appears that some courts are willing to allow finders of fact to consider the issue of consent in criminal prosecutions resulting from S/M activity.

In the summer of 1996, Oliver Jovanovic, a graduate student at Columbia University, struck up an internet correspondence with a Barnard College student [hereinafter, Complainant].⁵⁹ The two also participated in a series of lengthy telephone conversations. The pair's conversations quickly took on a macabre tone, covering such topics as snuff films; pagan rituals; Joel-Peter Witkin's corpse photographs; Eris, the Greek god of discord; dismemberment of the Complainant; and murder. Several of her emails also detailed her participation in sadomasochist relationships. Her relationship with Jovanovic eventually led to the pair meeting in Jovanovic's apartment where Jovanovic

54. Greene, *supra* note 51, at 1902.

55. See *Id.* at 1876, referencing Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312 (2004).

56. Greene, *supra* note 51, at 1878.

57. *Id.*

58. William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1296 (2005).

59. *People v. Jovanovic*, 700 N.Y.S.2d 156, 160 (1999).

subjected the Complainant to physical and emotional violence, which the Complainant later told authorities had not been consensual.

At trial for kidnapping, sexual abuse, and assault, Jovanovic was prohibited by the trial court from introducing certain parts of the email correspondence between himself and the Complainant based upon New York's Rape Shield law,⁶⁰ as they would have the impermissible effect of demonstrating Complainant's "unchastity."⁶¹

Jovanovic argued, however, that the Rape Shield law should not apply because the emails he sought to introduce contained *statements* by the Complainant about her prior sexual conduct which were distinct from the prohibited introduction of *evidence* of her prior sexual conduct. Jovanovic, drawing a thin, though not purely semantic, line argued that the emails went to establish the Defendant's and Complainant's states of mind and were not offered as evidence of Complainant's actual sexual history. Further, he argued, the importance of the emails was that they were a deliberate attempt on the part of the Complainant to communicate her interest in participating in a sadomasochistic relationship with him.

The New York Appellate Division was persuaded by Jovanovic's argument. The emails should have come in, they reasoned, because they tended to establish that Complainant may have concocted her accusation.⁶² In and of itself interesting is the determination by the Appellate Division that the rape shield law had an exception for statements made by a complainant which could be adduced to show a defendant's state of mind.⁶³ Of course this would be meaningless unless the Appellate Division thought that the Complainant's consent to the conduct would somehow change Jovanovic's culpability. The Court apparently acknowledges that if Jovanovic could establish the Complainant had consented to the S/M activities between them, then that would be a defense Jovanovic could raise to the charges of kidnapping (obviously), assault, and sexual abuse. This shift did not escape the dissent's notice, and it pointed out the departure from the traditional position that consent is not a defense to sexual violence.⁶⁴

60. N.Y. CRIM. PROC. LAW § 60.42 (Consol. 2003); *see also id.* at 164-65.

61. *Jovanovic*, 700 N.Y.S.2d at 164.

62. *Id.* at 169. Trial testimony revealed that Complainant had a relationship with another student named Luke (the person who, as she revealed in an email to Jovanovic, she considered her "master" and she his "slave") and that she may have made up her accusation against Jovanovic to explain to Luke why she had had relations with another man or to explain her absence during the night she spent in Jovanovic's apartment.

63. *See id.* (As the court pointed out, however, it is not a unique position.) *See generally* State v. Guthrie, 428 S.E.2d 853 (N.C. Ct. App. 1993) and Commonwealth v. Killen, 680 A.2d 851 (Pa. 1996).

64. *Jovanovic*, 700 N.Y.S.2d at 174-75. (Mazzarelli, J.P. concurring in part and dissenting in part).

Whatever the current societal consensus on S/M, one senses that one of the factors at play in *Lawrence* and *Jovanovic* was the doctrine of desuetude.⁶⁵ Research for this article failed to unearth a modern example of a state actor affirmatively setting out to investigate and prosecute private S/M activity; rather, prosecutions occur when one party has not consented to participate in the activity (clearly an assault), as in (possibly) the *Jovanovic* case, or when police stumble upon the participants by mistake (as in the Attleboro case). I suspect that much of the *post hoc* scholarly analysis of *Lawrence* is, as Greene feared, “rationalizing legal analysis;”⁶⁶ and that at base courts have tired of extending constitutional protection to state criminalization of consensual, non-commercial, adult sexual behavior, whatever analytic review mirror is used to view the courts’ reasoning.

Much could no doubt be written about the thought processes of the individuals involved in the cases discussed herein, from the law enforcement officers stumbling upon “deviant” sexual activity to the judges hearing the ensuing cases, but it appears that increasingly the criminal law cannot be a vehicle for vindicating abhorrence, personal or societal, of private sexual practices. In the absence of any evidence that private, consensual, adult S/M causes harm to the participants or to the community one can, at a minimum, conclude that manipulating the criminal code to encompass consensual S/M conduct is at best an exercise in squeamishness driving public policy, rather than reason. As Justice Thomas wrote in his *Lawrence* dissent, “[p]unishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.”⁶⁷ One might even say it was an “uncommonly silly”⁶⁸ thing to do.

Bathhouses provide an opportunity to advance public health goals through outreach and programming. Aside from Anonymous’ apparent concern surrounding the legality of men having sex with men and the possibility that sadomasochistic activity was occurring at the bathhouses to which Anonymous wished to draw the city’s attention, Anonymous’ emails did raise a public health concern. Though one can assume Anonymous directed his or her emails to Columbus Public Health in part because of the possibility of disease transmission at bathhouses, Anonymous did not explicitly identify disease transmission as among his or her concerns. Still, the relationship be-

65. *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003); see also Greene, *supra* note 50, at 1876 (citing Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 48 (2003)).

66. Greene, *supra* note 51, at 1927; see also ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996).

67. *Lawrence*, 539 U.S. at 605 (Thomas, J., dissenting).

68. See *id.* (quoting *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting)).

tween sexually transmitted diseases and gay bathhouses has long been a consideration for public health officials.

While public baths have existed for thousands of years,⁶⁹ beginning as early as the late 19th century in the United States Turkish baths, Russian baths, and other public and private health spas and baths began to attract a significant gay clientele.⁷⁰ In the 1970s, bathhouses catering specifically to gay men emerged in the United States.⁷¹ One study found that by 1982, there were over 200 gay bathhouses in the United States and Canada.⁷²

Since the mid-1980s, early in the AIDS epidemic, “gay bathhouses and sex clubs have been the targets of community and public health ire as the cause of the spread of the disease among men who have sex with men.”⁷³ Despite significant literature on the intersection of law and health, generally, and the fact that this topic is widely taught and studied under various terms—health care law, law and medicine, and forensic medicine, to name a few— “[n]otably absent from the extant literature is a theory of public health law and an exploration of its boundaries.”⁷⁴ It is perhaps not surprising then that the emergence and spread of AIDS in the 1980s saw concomitant efforts, often successful, by public officials to use legal means to close gay bathhouses for fear of spreading HIV, the virus that causes AIDS, despite lacking a model or empiric data demonstrating the manner in which such closings would reduce the overall spread of HIV.

Actions by government authorities to close gay bathhouses and other sex venues—at times with the support of powerful gay voices⁷⁵—began in earnest in the early 1980s in an explicit attempt to stem the transmission of HIV. One researcher examining legal cases involving gay bathhouses and other sex venues found eight published and unpublished trial and appellate cases between 1984 and 1995, seven of which saw the state successful in its quest to

69. See, e.g., J.T. PEÑA ET AL., *CARTHAGE PAPERS: THE EARLY COLONY'S ECONOMY, WATER SUPPLY, A PUBLIC BATH AND THE MOBILIZATION OF THE STATE* OLIVE OIL 28 J. ROMAN ARCHAEOLOGY SUPP. SER. 1 (1998) (discussing a bath started between A.D. 146-159).

70. Allan Bérubé, *The History of Gay Bathhouses*, in *GAY BATHHOUSES AND PUBLIC HEALTH POLICY* 33, 34 (William J. Woods & Diane Binson eds., 2003).

71. Chris A. Van Beneden, Kerth O'Brien, Steve Modesitt, Suzanne Yusem, Alan Rose, & David Fleming, *Sexual Behaviors in an Urban Bathhouse 15 Years Into the HIV Epidemic*, 30 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES 522, 522 (2002).

72. William J. Woods, Daniel Tracy, & Diane Binson, *Number and Distribution of Gay Bathhouses in the United States and Canada*, in *GAY BATHHOUSES AND PUBLIC HEALTH POLICY* 55, 62 (William J. Woods & Diane Binson eds., 2003).

73. William J. Woods, Diane K. Binson, Tracy J. Mayne, Robert L. Gore, & Greg M. Rebchook, *HIV/sexually transmitted disease education and prevention in US bathhouse and sex club environments*, 14 AIDS 625, 625 (2000). See also Christopher Disman, *The San Francisco Bathhouse Battles of 1984: Civil Liberties, AIDS Risk and Shifts in Health Policy*, in *GAY BATHHOUSES AND PUBLIC HEALTH POLICY* 71, 74 (William J. Woods & Diane Binson eds., 2003).

74. Lawrence O. Gostin, *Health and the People: The Highest Law?*, 32 J.L. MED. & ETHICS 509, 509 (2004).

75. Disman, *supra* note 73, at 72.

close or limit the activities at bathhouses and other “sex-facilitating businesses” through the courts.⁷⁶ In all of the cases, the targeted venue was eventually put out of business, either through judicial action or subsequent to the resolution of the court case itself.⁷⁷ In none of the cases, however, did the court closely examine whether the closure of the venue in question would “actually reduce the rate of disease transmission.”⁷⁸

Attempts by the state to regulate sexual practice being what they are, it is perhaps not surprising that the number of gay bathhouses in the U.S. and Canada has been slowly climbing since 1990; appearing to grow every year through 1999, the last year for which data is available.⁷⁹ The move to close bathhouses has subsided somewhat, but the 1980-AIDS era controversy over gay bathhouses and other sex venues where men have sex with men (MSM) has been made relevant anew by the new epidemic of syphilis cases among gay men which has emerged in most major U.S. cities.⁸⁰ In fact as this article was being edited, press reports surfaced indicating that a six-page memo, entitled “Policy Regarding Bathhouses and Other Commercial Sex Venues in New York City,” was drafted in November 2007 for New York City Health Commissioner Dr. Thomas R. Frieden with the purpose of exploring a change to the city’s policies for dealing with sex clubs and bathhouses.⁸¹

Syphilis is an ulcerative genital disease which has the particularly nasty ability to actually facilitate transmission of HIV: it increases the chance of infection with HIV three to five times.⁸² The overall rates of syphilis in the United States actually declined between 1990 and 2003, but between 2000 and 2003, there was an increase in the number of syphilis cases reported.⁸³ In that same time period, the number of cases occurring among gay men increased nearly 10 times to 4,387 in 2003, representing 62% of all cases reported to the Centers for Diseases Control and Prevention in that year.⁸⁴

One of the few published studies of sexual behavior in urban bathhouses found that over the study period of 80 days, patrons of a private-membership bathhouse in Portland, Oregon, came from 33 U.S. states and 8 foreign coun-

76. Scott Burris, *Legal Aspects of Regulating Bathhouses: Cases from 1984 to 1995*, in GAY BATHHOUSES AND PUBLIC HEALTH POLICY 131, 134 (William J. Woods & Diane Binson eds., 2003).

77. *Id.*

78. *Id.* at 141.

79. Woods et al., *supra* note 72, at 62.

80. Thomas A. Peterman et al., *The Changing Epidemiology of Syphilis*, 32 SEXUALLY TRANSMITTED DISEASES S4, S4 (2005).

81. Duncan Osborne, *Examining Bathhouse Policy, NYC Says HIV Infections Up*, GAY CITY NEWS, January 7, 2008, available at http://gaycitynews.com/site/news.cfm?newsid=19176542&BRD=2729&PAG=461&dept_id=568864&rft=6.

82. James D. Heffelfinger et al., *Trends in Primary and Secondary Syphilis among Men who have Sex with Men in the United States*, 97 AM. J. PUB. HEALTH 1076, 1076, 1080 (2007).

83. *Id.* at 1079

84. *Id.*

tries.⁸⁵ Eighty-four percent of respondents were white, roughly 5% black, and the balance Native American, Latino, and Asian (10.1%, collectively); 96% of respondents self-identified as gay or bisexual.⁸⁶ Almost all of the respondents in the study reported having anonymous sex at one or more venues, including bathhouses, adult bookstores, parks, beaches, public restrooms, “jerkoff” or sex clubs, movies, and truck or rest stops.⁸⁷ Twenty-one percent of study participants who reported that they had engaged in oral or anal sex at the bathhouse in the previous 30 days had engaged in at least one episode of sex considered to be high-risk for disease transmission.⁸⁸

For present purposes we will take as given that the state’s police power is sufficient to regulate sexual activity in public places and that courts in all but the rarest case will grant local governments wide latitude in restricting activities at private bathhouses, should they seek to do so.⁸⁹ So too, it is quite clear that there is absolutely no “right” to participate in sexual activity in a public venue, even when it is unobserved by anyone else.⁹⁰ Indeed, it appears that the constitutional right to sexual intercourse in the marital bedroom found to exist in *Griswold v. Connecticut*⁹¹ completely evaporates when the “locus of the conduct shifts to a place of public accommodation.”⁹²

Though not explicitly examined by courts in the cases involving the closing of gay bathhouses, the finding that such a closing is a valid exercise of the state’s police powers fundamentally rests upon the representation by the state that such closure will eliminate a threat to the public health and welfare, presumably by decreasing the spread of disease.⁹³ Of course, no court will undertake to pass judgment upon the validity of the scientific evidence used by the state to justify its actions, rather judicial “review goes only to whether the legislative determination of justification and fitness is not facially without factual support, hence not arbitrary and capricious.”⁹⁴

The question for legislative and executive branch agencies remains, however, whether the actual exercise of the state’s police powers to limit activity at bathhouses, or to close them, will reduce the overall occurrence of disease in the community at large. Such action in the absence of data which suggest otherwise, might just as well serve to alienate an at-risk population, driving it underground and beyond the reach of public health resources and monitoring.

85. Van Beneden et al., *supra* note 71, at 523.

86. *Id.*

87. *Id.* at 524.

88. *Id.*

89. Burris, *supra* note 76, at 137.

90. *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243, 1247-48 (9th Cir. 1982).

91. 381 U.S. 479 (1965).

92. *Ellwest*, 681 F.2d at 1248 (*citing* *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65-67 (1973)).

93. *See Broadway Books, Inc. v. Roberts*, 642 F. Supp. 486, 491 (E.D. Tenn. 1986).

94. *Wall Distributors, Inc. v. City of Newport News*, 782 F.2d 1165, 1169 (4th Cir. 1986).

Central to the apparent post-1990 détente between gay bathhouses and public health officials is the fact that people at high risk for HIV do not tend to seek out testing in clinics,⁹⁵ and “bathhouses have long been recognized as venues where prevention interventions could reach MSM at high risk for sexually transmitted diseases (STDs).”⁹⁶ In short, bathhouses are seen by some as places where public health officials might successfully intervene to prevent the spread of STDs. Finding a way to accomplish such intervention clinically has seen significant hurdles, not least of all, I suspect, because of the official discomfort arising from the government dispatching government employees to offer testing and other intervention services at a gay bathhouse where men are having sex with men.⁹⁷ Despite the difficulties, interventions at bathhouses have shown some measure of success at consistently reaching men who have sex with men and at least providing HIV testing.⁹⁸ Unfortunately, there is no available evidence on the disease-reduction effect of these interventions.⁹⁹

One thing that is abundantly clear, however, is that bathhouses are far from the only venue where men seeking to have sex with men search for partners. Sex between men, as noted above, has been documented in a large number of venues, including “tearooms” (public restrooms), parks, beaches, alleys, adult bookstores, pornographic movie houses, backrooms of bars, and traditional Turkish or Japanese bathhouses.¹⁰⁰

Recent studies report a trend away from gay venues toward online sites as the place where MSM search for partners;¹⁰¹ more than one study has also suggested that MSM who find partners on the web tend toward sexually risky behavior, including a significant percentage participating in unprotected sex.¹⁰² These trends are reflected by the fact that authorities in San Francisco were able to track the initial outbreak of syphilis in the summer of 1999 (resulting

95. John E. Anderson, James W. Carey, & Samuel Taveras, *HIV Testing Among the General U.S. Population and Persons at Increased Risk: Information From National Surveys, 1987-1996*, 90 AM. J. PUB. HEALTH 1089 (2000).

96. Freya Spielberg et al., *Designing an HIV Counseling and Testing Program for Bathhouses: The Seattle Experience with Strategies to Improve Acceptability*, in GAY BATHHOUSES AND PUBLIC HEALTH POLICY 203, 205 (William J. Woods & Diane Binson eds., 2003).

97. See generally *id.* at 208.

98. *Id.*; see also Woods et al., *supra* note 72, 56-57.

99. Diane Binson et al., *Differential HIV Risk in Bathhouses and Public Cruising Areas*, 91 AM. J. PUB. HEALTH 1482, 1485 (2001).

100. *Id.* at 1482; Van Beneden, *supra* note 71, at 523.

101. Graham Bolding, Mark Davis, Graham Hart, Lorraine Sherr, & Jonathan Elford, *Where Young MSM Meet Their First Sexual Partner: The Role of the Internet*, 11 AIDS & BEHAV. 522, 522 (2007).

102. David McKirnan, Eric Houston, Marina Tolou-Shams, *Is the Web the Culprit? Cognitive Escape and Internet Sexual Risk among Gay and Bisexual Men*, 11 AIDS & BEHAV. 151, 151 (2007); see also Adrian Liau, Gregorio Millett, & Gary Marks, *Meta-analytic Examination of Online Sex-Seeking and Sexual Risk Behavior Among Men Who Have Sex With Men*, 33 SEXUALLY TRANSMITTED DISEASES 576, 576 (2006).

in the syphilis case rate doubling every six months until 2002) to the men participating electronically in one particular America Online chat room.¹⁰³

As has been previously observed in the context of the relationship between public health law and combating disease transmission, law inherently “validates the exercise of power. It educates. It tends often to define the prerogatives and options of health authorities.”¹⁰⁴ Certainly, any argument must fail that suggests the force of law is not rightly invoked by “exercise of the police power to define the qualifications for one who engages in an occupation affecting the public health, safety, morals or welfare.”¹⁰⁵ If the state chooses to exercise that power to close bathhouses, however, it must be validated by some evidence that the closure with work to reduce the overall rate of STD infection in the community.

While the direct impact of screening for STDs at non-medical facilities like bathhouses may be negligible,¹⁰⁶ the fact remains that bathhouses provide a venue to target MSM for educational outreach which, at minimum, increases knowledge and awareness of STDs, including syphilis and HIV, among MSM.¹⁰⁷ Surely no one would suggest that closing bathhouses would stop MSM from seeking and finding partners, given the myriad other options available for finding willing partners, from Internet to Tearoom. Closing bathhouses does significantly diminish public health practitioners’ face-to-face access to MSM for the purpose of providing educational outreach.

That is not to say that it is not possible for public health officials to regulate individuals who intentionally spread disease without concern for their partners. This can be accomplished without resort to regulating bathhouses out of existence, thereby depriving public health practitioners the access to and opportunity to educate MSM which they provide. There are criminal statutes on the books which provide, for example, that “[n]o person, knowing or having reasonable cause to believe that he is suffering from a dangerous, contagious disease, shall knowingly fail to take reasonable measures to prevent exposing himself to other persons, except when seeking medical aid.”¹⁰⁸ This general sentiment—that a person who negligently exposes another to an infectious or contagious disease, which such other thereby contracts, is therefore liable—has long been recognized in the civil context as well.¹⁰⁹ The civil

103. Jeffrey D. Klausner et al., *The Public Health Response to Epidemic Syphilis, San Francisco, 1999-2004*, 32 SEXUALLY TRANSMITTED DISEASES S11, S16 (2005).

104. Burris, *supra* note 76, at 133.

105. *Broadway Books*, 642 F. Supp. at 492 (citing *Airport Book Store, Inc. v. Jackson*, 242 Ga. 214, 248 (1978)).

106. Carol Ciesielski et al., *Control of Syphilis Outbreaks in Men Who Have Sex with Men: The Role of Screening in Nonmedical Settings*, 32 Sexually Transmitted Diseases S37, S41 (2005).

107. *Id.*

108. OHIO REV. CODE ANN. § 3701.81(A) (LexisNexis 2007).

109. See *Earle v. Kuklo*, 98 A.2d 107, 108 (N.J. Super. Ct. App. Div. 1953) (exposure to tuberculosis); *Jones v. Stanko* 160 N.E. 456, 456-57 (Ohio 1928) (smallpox); *Skillings v. Allen*,

“spreading contagion” cause of action has been specifically extended to venereal diseases.¹¹⁰

CONCLUSION

It is often the case that governments are implored by members of the community to, in effect, referee morality. Whether there is a dispute between two neighbors which ends up in the municipal prosecutor’s office or a disagreement over how taxpayer dollars are spent, individuals often expect the government to do the “right” thing, with an honest and absolute ignorance that what constitutes the “right” thing can vary greatly depending on whose ox is being gored. The author of the emails warning the city about gay bathhouses no doubt intended the city officials to whom they were sent to take action to close the bathhouses. I have no doubt that the author of the emails thinks it obvious, to anyone who cares to think about it, that bathhouses are dens of deviance and bad conduct.

Sadomasochistic conduct in a cesspool of sexually transmitted diseases is certainly great imagery if your goal is to stir-up trouble and provide for good copy. Certainly public officials are not immune from an inclination to respond to public complaints lest they be perceived as supporting a given activity simply because they do not actively prohibit it. But public officials have a duty to actually improve citizens’ health and welfare, not to appear to be doing so while causing harm.

At first blush it seems to make sense to conclude that shutting down a bathhouse will stop the spread of sexually transmitted disease, but the evidence demonstrates that the bathhouse is not any more responsible for disease transmission among MSM than the internet. The bathhouse represents one of the few remaining places where persons engaged in high-risk sexual activity can be targeted for intervention and education. As with the prosecution of consensual sexual violence, using the power of the state to implement policies which are not evidence based but which will play well in the political marketplace is an ill-advised strategy which can ultimately lead only to higher rates of disease, whether biologic or social.

173 N.W. 663, 663 (Minn. 1919) (scarlet fever); *Crim v. Int’l Harvester Co.*, 646 F.2d 161, 162-63 (5th Cir. 1981) (valley fever).

110. *E.g.*, *Crowell v. Crowell*, 105 S.E. 206, 207, 210 (N.C. 1920); *De Vall v. Strunk*, 96 S.W.2d 245, 246 (Tex. Civ. App. 1936); *Mussivand v. David*, 544 N.E.2d 265, 268, 274 (Ohio 1989).