THEORISING THE LIMITS OF THE 'SADOMASOCHISTIC HOMOSEXUAL' IDENTITY IN *R v BROWN*

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[This article draws on recent feminist theory that has challenged the authority of the universal male humanist subject. Identity is reconceptualised as an unstable force produced through particular discursive practices. The focus of this article is the House of Lords decision in R v Brown. *The author attempts to illustrate specific socio-historical and psychical conditions that determined the construction of the 'sadomasochistic homosexual' identity in this case. The debate surrounding the ethics and risks of sadomasochistic behaviour is bypassed, the emphasis instead being placed upon the power of legal discourse to produce a vilified and marginalised sadomasochistic homosexual identity, and the internal anxieties that govern judicial narratives.]*

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> Thus it is paradoxically in hiding that the secrets of desire come to light; that hegemonic impositions and their reversals, evasions, and subversions are at their most honest and active; and that the identities and disjunctures between felt passion and established culture place themselves on most vivid display.[1]

I INTRODUCTION

Sadomasochism continues to be one of the more contentious issues plaguing the feminist community both in Australia and abroad. Implicit in many of the criticisms of sadomasochistic practices is the presumption of a fixed sadomasochistic entity that is synonymous with violence. This article seeks to dispel the myth of an immutable and unconditional sadomasochistic experience by analys-

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[1] Joan Cocks, *The Oppositional Imagination* (1989) 141.

ing the sadomasochistic identity as a cultural formation. To do so involves emphasising the historical and institutional factors that contribute to the development of a sadomasochistic identity. I will use the 1993 House of Lords decision of *R v Brown*[2] as a vehicle through which to theorise the limits of the sadomasochistic body.

Using the work of Michel Foucault and Judith Butler, I wish to read *Brown* as a case that generates a 'sadomasochistic homosexual' identity rather than merely using language to reflect transparently a pre-existing entity. 'Homosexuality', 'sadomasochism' and indeed the 'sado-masochistic homosexuals'[3] of *Brown* function as part of a regulatory practice that produces — 'through demarcation, circulation and differentiation' — the bodies that it governs.[4] The House of Lords 'speaks' the appellants into being through complex discursive strategies, allowing no external or objective standpoint from which to view them.

I begin with an examination of a few critical responses to *Brown*, highlighting the risk faced by analysts of the House of Lord's decision of reaffirming the problematic enunciations of homosexuality and sadomasochism which form the basis of a heteronormative discourse. I then go on to suggest an alternative approach to understanding the identities of the appellants in *Brown*. Using Butler's theory of gender performativity, I will argue that the appellants are first *produced* as 'sadomasochistic homosexuals' in order to be penalised for their status on the margins of acceptable heterosexual practice. The second half of the essay attempts to show the specific cultural, psychical and institutional factors that frame the appellants as deviant.

II *R v Brown* — The 'Facts'

The defendants Brown, Laskey, Jaggard, Lucas and Carter were charged with unlawful wounding, assault occasioning actual bodily harm and aiding and abetting the same under ss 20 and 47 of the *Offences Against The Person Act* 1861 (UK). They appealed their conviction by the Central Criminal Court to the Court of Appeal. Lord Lane CJ, Rose and Potts JJ dismissed the appeal, contending that a person could be guilty of assault occasioning actual bodily harm or unlawful wounding in respect of acts carried out in private with the consent of the victim.[5] The appeal to the House of Lords was lost three to two.

The activities are said to have taken place in private at the homes of three of the appellants and it is said that the victims willingly participated in the commission of the acts for the sexual pleasure engendered in the giving and receiving of pain. Despite each of the victims' consent to the acts, it was held that the

[2] [1994] 1 AC 212 ('*Brown*').

[3] Frequent reference is made throughout the House of Lords' decision to 'sado-masochistic homosexual encounters', 'sado-masochistic homosexual activity' and 'homosexual sado-masochism': see, eg, *Brown* [1994] 1 AC 212, 230 (Lord Templeman), 255 (Lord Lowry), 245 (Lord Jauncey).

[4] Judith Butler, *Bodies that Matter: On the Discursive Limits of 'Sex'* (1993) 1.

[5] *R v Brown* [1992] 1 QB 491, 491–2.

appellants could be convicted because '[s]ociety is entitled and bound to protect itself against a cult of violence'.[6]

The Court of Appeal judgment provides the most detailed judicial description of the activities that warranted prosecution.[7] Four of the nineteen counts filed against the appellants are summarily rehearsed below:

> *Count 12:* The victim had his body hair shaved. He was hit with stinging nettles. He had 36 cuts to his back and buttocks causing blood to flow.
>
> *Count 15:* Jaggard aided and abetted by taking a video film whilst a co-accused pushed a safety pin through the head of L's penis.
>
> *Count 17:* Atkinson had his penis nailed to a bench. He was caned, hit and rubbed with a spiked strap, then cut with a scalpel by Lucas. There were five lateral cuts together with further cuts to Atkinson's scrotum. There was a free flow of blood.
>
> *Count 23:* Laskey rubbed thistles into the testicles of M, causing blood to flow and then clamped M's testicles and hit them with nettles, again drawing blood.[8]

The nature of the activities that warranted criminal investigation is spoken about with great reluctance by both the Court of Appeal and the House of Lords. The Lords display a certain squeamishness or child-like shyness when called upon to tell the reader the nature of the appellants' practices. We must make do with an account of the 'facts' formulated by judges who say they would prefer not to have to speak about what happened:

> It is, *unhappily*, necessary to go into a little detail about the activities which resulted in the various counts being laid against these men.[9]
>
> Fortunately for the reader, my Lords have not gone on to describe other aspects of the appellants' behaviour of a similar but more extreme kind ... It is sufficient to say that whatever the outsider might feel about the subject matter of the prosecutions — perhaps horror, amazement or incomprehension, perhaps sadness — very few could read even a summary of the other activities without disgust. The House has been spared the videotapes, which must have been horrible.[10]

Finally, it is important to note that the appellants are described as belonging to a group of 'sado-masochistic homosexuals' in the headnotes of both the Court of Appeal's and the House of Lords' judgments. Such a label indicates that from the outset the appellants were not mere perpetrators of particular acts but were viewed as having a specific *identity* — that of the 'sadomasochistic homosexual' — that was held to be at the root of all actions. The fixed, unidimensional

6 *Brown* [1994] 1 AC 212, 237 (Lord Templeman).
7 *R v Brown* [1992] 1 QB 491, 494–7.
8 Ibid 496.
9 Ibid 495 (Lord Lane) (emphasis added).
10 *Brown* [1994] 1 AC 212, 256–7 (Lord Mustill).

identity presumed by these words is similar to that articulated by Foucault regarding the 'advent' of the homosexual identity:

> The nineteenth-century homosexual became a personage, a past, a case history, and a childhood. ... Nothing that went into his total composition was unaffected by his sexuality. It was everywhere present in him: at the root of all his actions because it was their insidious and indefinitely active principle; written immodestly on his face and body because it was a secret that always gave itself away. It was consubstantial with him, less as a habitual sin than as a singular nature ... The sodomite had been a temporary aberration; the homosexual was now a species.[11]

III CRITICAL RESPONSES TO BROWN

A *The Feminist Dilemma*

Feminist legal scholars have been quick to reveal the gap in reasoning between the *Brown* judgment and the doctrine of consent in common law rape.[12] Carol Smart has juxtaposed the irrelevance of consent in *Brown* with the materiality of consent in common law rape cases:

> The *Brown* decision has left Britain with a law on sexuality which states — symbolically at least — that when women say 'No' to rape they mean 'Yes' but when men say 'Yes' to homosexual sex they mean 'No'.[13]

Clearly, such a partial application of consent casts a very large shadow of doubt over consent as a functional category within the realm of sexualised violence. Adrian Howe outlines the rather awkward position that *Brown* has put feminists in with regard to the consent question. She asks how feminists who have struggled to have rape recognised as a crime of (patriarchal) violence that cannot be afforded the protection of a consent defence now respond to a fact situation such as in *Brown*, where the consensual agreement of the defendants is overridden by a judicial reading of sadomasochism as violence.[14] Do we disregard consent as a threshold issue in heterosexual instances of male-to-female violence but support it in all other gendered encounters? Or do we dismantle the category of consent altogether and compose an analysis of power relations on a case-by-case basis?

In order to avoid the inevitable inconsistencies and compromises that such solutions would entail, I would prefer to shift the emphasis away from consent. Instead, I would reconceptualise consent as a necessary correlate of the issue of violence in cases of sexual encounters. It is the designation of an act as violence

[11] Michel Foucault, *History of Sexuality Volume 1: An Introduction* (1978) 43.

[12] See, eg, Carol Smart, 'Law, Feminism and Sexuality: From Essence to Ethics?' (1994) 9 *Canadian Journal of Law and Society* 15; Sheila Duncan, 'Law's Sexual Discipline: Visibility, Violence and Consent' (1995) 22 *Journal of Law and Society* 326; Adrian Howe, 'Fictioning Consent in Sexual Assault Cases' (1997) 1(3) *Critical inQueeries* 35.

[13] Smart, above n 12, 32.

[14] Howe, above n 12, 37.

that immediately invokes consent as a relevant consideration. Rape, in the minds of our law enforcers, occupies an ambiguous position where it is presumed to be a sexual encounter between equally empowered partners unless proven otherwise through the doctrine of consent. 'Homosexual sadomasochism' as conceived by the House of Lords can only be viewed as violence, and hence an act to which one cannot agree. The determinative factor in both of these cases is the criterion of violence; the application of consent derives from this central question. Thus, the central problem for feminists is to theorise the complex network of associations that produce certain encounters as violent and others as non-violent. The issue of consent is useful for the illustration of its uneven application in homosexual and heterosexual instances, but to change the rules of consent will not necessarily challenge the underlying stereotypes that lead to the asymmetric invocation of consent in sexualised encounters.

In addition, a focus upon the uneven relationship between consent in rape law and in the *Brown* judgment risks unwittingly assuming a certain commensurability between the two encounters, that being the common standard of 'violence'. In comparing rape and sadomasochism within a framework of consent, there is a tendency to position both as acts of violence that unfairly receive differential treatment from the judiciary. Instead, perhaps a better approach is to position heterosexual rape and 'homosexual sadomasochism' on a continuum of violence, where their location is ascertainable not by any *a priori*, axiomatic features but by the discursive means employed in the narration of these encounters. In this way, it is the complex sexual stereotypes used by law enforcers that will come under scrutiny, rather than the more superficial legal doctrines that are drawn upon. Most importantly, 'sadomasochism' will operate as an ever shifting signifier that cannot be restricted to singular definitions of violence or non-violence.

B *Good Violence/Bad Violence and the Practice of Sadomasochism*

There is a tendency, when critiquing the *Brown* decision, to outline a prediscursive identity for sadomasochism that is in direct conflict with the House of Lords' stereotype. Leslie Moran characterises the Lords' representation of sadomasochism as a display of 'systematic blindness', and so positions himself as privy to a more representative 'truth' about sadomasochism.[15] Moran uses a variety of sources to strengthen his claim that sadomasochism is actually not about (bad) violence at all. Instead, he insists that consensual sadomasochism is

> a practice without animosity, without aggression, devoid of personal rancour, without hostility. ... It is a world of spoken and unspoken preparatory negotiations, of agreements, of contracts, where activities are undertaken in a well ordered and highly controlled manner.[16]

[15] Leslie Moran, 'Violence and the Law: The Case of Sado-Masochism' (1995) 4 *Social and Legal Studies* 225, 237.

[16] Ibid.

The judicial reading of sadomasochism as a practice regulated by a 'logic of violence'[17] is neatly transformed into a 'sanitised' practice by Moran. Sadomasochism occupies the dominant position of a newly constructed binary opposition of good violence/bad violence, where 'bad violence' occurs through the functioning of the law. Moran argues that '[i]n the context of the display of the unruly and unbounded nature of legal practice in *R v Brown*, S/M [sadomasochism] appears as a social practice that is antithetical to the arbitrary violence of the law.'[18] Moran is unequivocal in his criticism of the law; the law's 'logic of violence' works to obliterate those identities that are marginal to the hegemonic order: 'law's violence is concerned with coercion, terror, fear, domination, hostility, subordination, silence and inequality.'[19]

Far from being a disruption of the dominant reading, Moran's 'reverse' discourse of sadomasochism as 'good violence' is already inscribed within the judicial abomination of sadomasochism as an irreducible opposite.[20] In other words, Moran's attempts to authenticate a sadomasochist identity involves the exclusion of its condemned opposite, *an identity upon which it is based in the first place.* Moran is simply containing sadomasochism within the oppositional framework that he claims to contest.

C *Disputing 'Sadomasochism' as a Prediscursive Identity*

The approach by Moran to the issue of sadomasochism is problematic on two counts. The first is the representation of sadomasochism as a fixed practice or identity that can be contained within the framework of 'good violence'. The second is the location of the law in a superstructural position capable only of prohibiting or authorising sexual practices.

[17] Ibid 226, see generally 226–8.

[18] Ibid 238. Throughout the section 'S/M as Victim' of his article, Moran seems unable to commit himself to a judgment of sadomasochism as violence. His use of the phrase 'good violence' is an attempt to distance himself from the House of Lords' rhetoric of violence. However, he also tries to formulate a sado-masochistic practice that is *beyond* violence, arguing that '[t]he body and desire that is S/M appears as an ethical space of social relations where the fundamental problems of pleasure, participation, dialogue, respect, trust, community, are explored and resolved. Law appears in contrast to this as a practice of domination, subordination, fear, silence, unwilling victims, and of potentially unlimited violence.': ibid 238.

[19] Ibid 246.

[20] Foucault, *History of Sexuality*, above n 11, 96. Foucault's notion of an 'irreducible opposite' is based upon an understanding of binary oppositions that work to sustain meta-narratives of Truth, Presence and Reality within the framework of Western metaphysics. Concepts such as violence derive their meaning through the agonistic combination of two opposed terms, that being good violence–bad violence. Within this structure, one term, that of bad violence, exists in a relation of superior force to the other. The subjugated term, far from being redundant, is actually necessary to define the authoritative term of bad violence. It is only by disavowing the inferior term that the first term gains ascendancy. Thus, meaning and identity is only made visible through the combative forces of terms in opposition. Hence, it can be seen that the judicial conception of (bad) violence contains traces of a repudiated 'good violence'. Moran's argument plays into this dichotomised structure of language without any self-conscious evaluation of the process. This is not to suggest that the opposition could have been avoided, for even using Jacques Derrida's complex movements of deconstruction the traces of the original dichotomy will always remain. Nevertheless, Moran fails firstly to displace the category of 'good violence' from its dependent position and locate it as the condition of the primary term 'bad violence'. Secondly, he fails to critique the restrictive nature of this binary logic.

Following Michel Foucault's seminal work on sexuality and power, desire has been regarded not as an indisputable biological entity that is reacted to by state authorities, but as an unstable force that is configured within a specific socio-historical context:[21]

> Sexuality must not be thought of as a kind of natural given which power tries to hold in check, or as an obscure domain which knowledge tries gradually to uncover. It is the name that can be given to a historical construct: not a furtive reality that is difficult to grasp, but a great surface network in which the stimulation of bodies, the intensification of pleasures, the incitement to discourse, the formation of special knowledges, the strengthening of controls and resistances, are linked to one another, in accordance with a few major strategies of knowledge and power.[22]

Thus, sadomasochism is a concept, a dynamic that is always in a state of flux. Its current position as a vilified form of sexual violence within certain strands of feminist (and non-feminist) discourse cannot be generalised as the 'essence' of sadomasochism. The complex meanings of sadomasochism are generated within a myriad of power relations, the law being just one of these sites of struggle. It is the variability and complexity of these vectors of power that produce as well as prohibit particular meanings. To speak of this power as merely repressive is to mask the enabling effects of power:

> In itself the exercise of power is not violence; nor is it a consent which, implicitly, is renewable. It is a *total structure of actions* brought to bear upon possible actions; it incites, it induces, it seduces, it makes easier or more difficult; in the extreme it constrains or forbids absolutely; it is nevertheless always a way of acting upon an acting subject or acting subjects by virtue of their acting or being capable of action. A set of actions upon other actions.[23]

Equipped with an understanding of sexuality as unstable and power as productive, I now wish to present an alternative method of conceptualising sadomasochism in *Brown.*

D *Productive Power, Performed Identities*

The application of Moran's repressive hypothesis fails to explain why the Lords do in fact invest a lot of time elaborating and identifying the 'evil' practice of sadomasochism. Why write so much about a practice that is deemed unacceptable and worthy of punishment? Why develop an entire judicial discourse around the practice of 'sadomasochistic homosexuals', a practice that was previously (relatively) silent within the House of Lords' sphere of reference? Indeed, why frame the appellants' activities within the rubric of 'homosexual sadomasochism', thus consolidating and unifying a set of practices of which the House of Lords violently disapproves?

[21] Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' in Carole Vance (ed), *Pleasure and Danger: Exploring Female Sexuality* (1984) 267, 274.

[22] Foucault, *History of Sexuality*, above n 11, 105.

[23] Michel Foucault, 'The Subject and Power' in Hubert Dreyfus and Paul Rabinow (eds), *Michel Foucault: Beyond Structuralism and Hermeneutics* (1983) 208, 220 (emphasis added).

The answer to these questions can be found in a theory of language that takes account of both the prohibitive and productive capacity of judicial discourse. Using the groundbreaking work of Judith Butler in *Gender Trouble*,[24] I would suggest that the Lords *perform* (as opposed to identify) a 'sadomasochistic homosexual' identity. In other words, rather than denouncing a self-evident sexual identity, the Lords colonise a series of varied acts, gestures and desires and construe them as an interior essence or identity. This essence is naturalised through the constant repetition of the fixed category 'sadomasochistic homosexuals' within the regulatory framework of the law. The 'sadomasochistic homosexual' identity is described as performative in nature because of the requirement that it be constantly re-articulated within particular social discourses in order to be sustained.

Butler's notion of performativity is based upon a view of the categories of sex and gender as indeterminate, arbitrary significations that do not correspond to an axiomatic reality. The body can be thought of as matter, however it is matter that is *always* materialised through a system of signification.[25] The body cannot be accessed in its prediscursive state. The system of language that governs the body functions according to the limitless principle of *'differance'*, a term coined by Derrida to refer to a process of differentiation and deferral.[26] Derrida begins from the structuralist assumption that a concept is a product of the difference between two signifiers; the signifier 'tree' produces the concept of a tree because it differentiates itself from the signifier 'key'. He goes on to expand this thesis by suggesting that this process of differentiation is endless; 'tree' can be distinguished from 'key', but in order to ascertain the meaning of 'key' another differentiation must occur. In other words, meaning is not only differential, it is also deferred.

Differance suggests that language is a temporal process. The meaning of a concept is suspended, relying in turn on another signifier which relies on yet another for its meaning, never actually fully resolving the meaning. If this system of language is indissociable from the production of thought, then thoughts and concepts themselves are never determinate. Thus the very notion of a body, let alone a sexed or gendered body, is an unstable concept that will vary according to its pattern of reproduction along the chain of signifiers. Within this framework, a body connotes a certain heterogeneous and amorphous quality. The process of rendering a body coherent is performed through a variety of discursive strategies.

Butler posits the binarism of male/female sex as the product of a dominant heterosexual matrix.[27] For bodies to cohere, that is, to 'make sense', there must

[24] Judith Butler, *Gender Trouble* (1990).

[25] Butler, *Bodies that Matter*, above n 4, 32.

[26] '*Differance*' is a play upon the dual meaning of the French verb *differer*: to defer and to differ. Derrida replaces the 'e' with an 'a' to produce '*differance*' in order to give the sense of an active deferring and an active, polemical difference. See generally Jacques Derrida, *Margins of Philosophy* (1982).

[27] Butler, *Gender Trouble*, above n 24, 17. The origins of heterosexual dominance are located within the pre-œdipal and œdipal stages of development. Unfortunately, a psychoanalytic analysis is not within the scope of this essay and the heterosexual matrix will be assumed, not proven. For a more thorough investigation of the origins of patriarchy and heteronormativity, see gener-

be a stable sex expressed through a stable gender that is oppositionally and hierarchically defined through the compulsory practice of heterosexuality.[28] The heterosexualisation of desire requires the distinct categories of a male and female sex/gender. In fact, the failure to assume a gendered 'identity' renders one 'unspeakable' and incapable of existing.[29] Butler cites Foucault's discussion of 'Herculine Barbin', a hermaphrodite, whose joint possession of female and male attributes completely confounds the system of linguistic conventions that requires a gender to produce a culturally intelligible subject.[30] Herculine represents the sexual impossibility of an identity for un-gendered bodies.

If gender is necessarily unstable, by what process does it achieve the status of the 'natural'? For Butler, gender is not a noun, rather it is always a *doing*.[31] The persistent recitation of the dyadic male/female identity through socio-historical contexts has resulted in a 'reification of performance into essence'.[32] The inner 'truth' of gender is thus a fabrication, a structure of artifice, 'ontologised' or naturalised through the sedimentation of convention within a regulatory framework of compulsory heterosexuality. Gender is *produced* within juridical systems of power by 'speaking' the male and the female into being. The nature of this enabling power is far more complex than a repressive model would suggest.

In order for heterosexuality to remain intact, it requires an intelligible conception of its boundaries and that which lies beyond its limits. Thus, homosexuality, as the counter-structure of heterosexuality, emerges as a desire that must be produced in order to be repressed.[33] Far from being outside of discourse, the continuous exclusion of homosexuality is integral to the formulation of a dominant heterosexual identity. Moreover, the 'homosexual' produced through a particular discourse is a provisional identity: one whose 'core' is legible only within a dichotomous structure of heterosexuality/homosexuality, and one whose identity can only be maintained through a process of continuing rearticulation.

IV EXPLORING THE BOUNDARIES OF THE 'SADOMASOCHISTIC HOMOSEXUAL' BODY IN *BROWN*

In the following section, I attempt to show how the notion of performativity works within the context of *Brown*. The judgments demarcate and differentiate their subjects in a number of ways in order to produce a 'sadomasochistic homosexual' identity. Much critical work has already been devoted to the judicial formulation of a vilified gay male subject in *Brown* and I will not attempt to

ally Luce Irigaray, *This Sex Which is Not One* (1985); Butler, *Gender Trouble*, above n 24, 35–72; Elizabeth Grosz, *Jacques Lacan: A Feminist Introduction* (1990) 115–40.

28 Butler, *Gender Trouble*, above n 24, 151.

29 Ibid 17.

30 Ibid 23–4.

31 Ibid 24–5.

32 Sagri Dhairyam, 'Racing the Lesbian, Dodging the White Critics' in Laura Doan (ed), *The Lesbian Postmodern* (1994) 25, 28.

33 Butler, *Gender Trouble*, above n 24, 77.

reproduce that work.[34] Instead I would like to focus upon three other ways in which the 'sadomasochistic homosexual' in *Brown* is performed as a marginal identity that threatens the stability of the heterosexual matrix. Firstly, I will examine the presumption of a fixed and coherent body within heteronormative discourse and show how the appellants in *Brown* were seen as a threat to this structure. Secondly, I will argue that within the heterosexual/homosexual dichotomy, women are not constituted as agents. Though *Brown* was a case that did not involve female participants, implicit in the judgment is the assumption of a silent and subservient womanhood. Thus, vilification of the gay male must always be viewed with reference to the figure of the unspeakable and absent lesbian. Finally, I will draw attention to the homosexual/homosocial distinction in *Brown* that is necessary to produce a realm of unacceptable male-to-male behaviour and to maintain the boundaries of an 'authentic' heterosexual space.

A *Policing the Boundaries of the Body in* Brown

The heterosexual matrix is founded upon the notion of a stable and coherent subject whose status can be easily categorised according to the principles of reproductive heterosexuality. The leaking fluids, expelled products and variety of surfaces and orifices subject to erotic signification must be regulated by establishing the impermeable boundaries of the body.[35] The very markings of the body, the conception of a layer of skin that separates inside from outside, are never merely material; the surface of the body is culturally constructed so as to naturalise certain taboos. These transgressive practices are alienated from the heterosexual regulatory system by positioning them always as the inferior term within the oppositions that construct the human body, such as within/without, above/below, male/female, with/against.[36]

In contrast to Moran's presumption of an *a priori* sexed body that is *written upon* or 'made sense of' by judicial narratives, I argue that the body does not exist in a prediscursive space. Instead, the body is made intelligible through discourse. In fact, in order to become a speaking subject, that is to enunciate oneself as 'I', one must assume this speaking position as a bounded and impermeable body. Any challenge to the interior/exterior binary of the body renders one mute within the limits of a heteronormative discourse. The discussion in *Brown* of sadomasochism as violence should be read as a strategy of displacement. The real fear faced by the Lords is of confronting unnameable matter, that is, acts and practices performed by beings whose very existence cannot be accommodated within the heteronormative system of language.

[34] See generally Carl Stychin, 'Unmanly Diversions' in Carl Stychin, *Law's Desire* (1995) 117; Leslie Moran, *The Homosexual(ity) of Law* (1996) 180–91; Terry Hoople, 'Conflicting Visions: SM, Feminism and the Law. A Problem of Representation' (1996) 11 *Canadian Journal of Law and Society* 177.

[35] Butler, *Gender Trouble*, above n 24, 132.

[36] M Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (1966) 4.

In *Powers of Horror*, Julia Kristeva terms that which must fall outside the limits of the body as the 'abject'.[37] The abject, she argues, originates in a prediscursive space called the 'maternal chora', ie the symbiotic union between mother and child occurring in the pre-œdipal stage. Kristeva, in accordance with Lacan, regards the repudiation of the primary relationship between mother and child as necessary in order to instate a social order based upon the imperatives of paternal authority. The application of this law enables the child to communicate meaningfully within the signifying system. The subject who emerges as a consequence of this repression becomes implicated within the workings of the repressive law. Kristeva's location of the abject within a space 'prior to culture' and 'prior to language' is problematic because it precludes an analysis of the cultural construction and variability of this relationship; the maternal chora becomes immune to challenge.[38] Nevertheless, Kristeva's concept of the abject can be made to work if the 'femaleness', deemed to be external to cultural norms, is seen to be produced through repression. If law is viewed as both prohibitive and generative, it is possible that the female body which Kristeva sees as free from paternal intervention is in fact an identity that originates out of the act of repression. The meaning of female (and thus mother) is intricately connected with the dominant concept of the male. The abject functions as the border term that maintains the distinction between self/other, male/female. It is a difficult force to isolate and identify; simultaneously inside and outside, dead and alive.[39]

The fear of the abject produces a body that is deemed 'clean and proper'.[40] This body cannot know of ambiguity; pleasure and pain, the interior and exterior, are all strictly delineated within the limits of the heterosexual body. The practice of the appellants in *Brown* radically disrupts the socially sanctioned bodily territories by opening previously sealed surfaces to erotic signification. Significantly, the mere articulation of these practices performs the sadomasochistic identity that threatens to reinscribe the boundaries of the body along new cultural lines. The Lords' reluctance to discuss the details of the appellants' activities exhibits a fear of destabilising the heteronormative markings of the body.

The charges laid in *Brown* show a preoccupation with the appearance of blood.[41] The presence of blood is then used by three of the Lords in the majority to signify the absolute threat of the spread of HIV (or AIDS, to use Lord Lowry's careless terminology);[42] 'the possibility of infection' is synonymous with blood-letting. The judicial hysteria surrounding HIV is quite obviously linked to a pathologising of the homosexual, positioning homosexuality within a discourse of

37 Julia Kristeva, *Powers of Horror: An Essay on Abjection* (Leon Roudiez, trans; 1982) 1–6.

38 Butler, *Gender Trouble,* above n 24, 80. For a full critique of Kristeva's position, see Butler, *Gender Trouble,* above n 24, 80–92.

39 Kristeva, above n 37, 61–2.

40 Ibid.

41 Counts 12, 17, 21 and 25 feature a reference to the flow of blood resulting from the appellants' actions: *R v Brown* [1992] 1 QB 491, 496.

42 *Brown* [1994] 1 AC 212, 236 (Lord Templeman), 246 (Lord Jauncey), 255–6 (Lord Lowry).

disease and contagion.[43] In addition, I would suggest that the evocation of the 'grim-reaper' figure is a displacement of anxiety resulting from a horror at the indistinguishability of the interior and exterior of the body when the skin is pierced:

> The body must bear no trace of its debt to nature: it must be clean and proper in order to be fully symbolic. In order to confirm that, it should endure no gash other than that of circumcision, equivalent to sexual separation and/or separation from the mother. Any other mark would be the sign of belonging to the impure, the non-separate, the non-symbolic, the non-holy.[44]

Lord Templeman and Lord Jauncey of Tullichettle are confronted with a bodily territory, a liminal zone, where the distinction between the Self and the world outside (an opposition constantly elaborated through language) is called into question. The subject, constituted as unified and coherent, is undermined by the abject which actually seeks to expel that which must remain 'inside'.

Similar to the terror of blood-letting is the spectre of human faeces. Lord Templeman states that '[s]ome activities involved excrement',[45] suggesting the further possibility of infection. Whilst 'internal' waste products are absolutely critical to the survival of the body, once expelled and 'external' they become unclean and defiled. In their transformation through the body, these once-consumed objects traverse the boundaries of the internal and external. This imprecise status renders faeces abject and they must be disavowed by the social order. Even the hint of the involvement of excrement in the appellants' activities is enough to threaten paternal law with the spectre of the uncontrollable and impure substance that bears no connection with the body.

The appellants' activities were euphemistically processed as crimes of violence. In fact, the real 'violence' posed by the appellants was the threat to the stable contours of the heterosexual body. The appellants' homosexuality signalled the probability of a breach of these boundaries of corporeal permeability; anal and oral sex by male couples already enacts erotogenic zones not sanctioned by the (heterosexual) social order. The so-called 'sadomasochistic' practices confirmed beyond doubt the possibility of reconstructing the zones of the body according to a completely different cultural matrix.

B *'Homosexuality' in* Brown

Both in the *Brown* judgment and in subsequent critiques of *Brown*, the term 'homosexuality' looms large as a source of anxiety. In my mind, the 'homosexual' described in *Brown* can only ever be a gay male. Women do not participate within the discursive boundaries of *Brown* and the lesbian, assimilated within the term 'homosexual', is deafeningly silent.

[43] See also Stychin, above n 34, 134 for a clear description of the rhetorical manoeuvres that produce the homosexual as the disseminator of disease and the site of contagion.

[44] Kristeva, above n 37, 102.

[45] *Brown* [1994] 1 AC 212, 236.

The construction of the 'sadomasochistic homosexual' identity in *Brown* affords women no agency, making women valuable only in their 'namelessness'. The unspoken female body infiltrates the text of *Brown* only as an object of exchange. The heteronormative beliefs of the Lords presume the complicity of women (as wife, nurse, mistress) within the patriarchal order. Likewise, when Moran defends 'consensual S/M' as a practice 'without animosity, without aggression, devoid of personal rancour',[46] women are assumed to participate in this model. The ease with which lesbian women are subsumed into these claims to truth stands in stark contrast to the un-ease experienced by women (especially lesbians) who attempt to speak as an autonomous sex. Luce Irigaray terms the social order as guaranteed by male-to-male relations of exchange as a 'ho(m)mosexual' economy.[47] Within this economy, women function only as objects of exchange:

> Commodities can only enter into relationships under the watchful eyes of their 'guardian'. It is out of the question for them to go to 'market' on their own, enjoy their own worth amongst themselves, speak to each other, desire each other, free from the world of the seller-buyer-consumer subjects.[48]

The category of woman exists only to stabilise and consolidate an oppositional relation to men within the heterosexual order.[49] The heterosexual imperative is based not on the active subjugation of women, but upon the presumed *absence* of women.

Brown has been widely regarded as a judgment that threatens the autonomy of gay males. This may well be the case. However, the *Brown* judgment is unthinkable without the presumed subservience of women. I wish to focus on the 1996 Court of Appeal case of *R v Wilson*,[50] which makes visible the exclusionary silences that pervade the *Brown* judgment.

In *Wilson*, the Court of Appeal was faced with an appellant who branded his initials onto his wife's buttocks with a hot knife. We are told that the wife consented to this conduct.[51] However, she did not give evidence herself, and it appears that the issue of consent was accepted by the judges on the evidence of a doctor who saw Mrs Wilson subsequent to the alleged acts of assault. According to Dr McKenna, this was not the first time that she had been branded in such a way. Following *Brown*, the case rested on the issue of consent: were the appellant's actions such that, despite the wife's consent, it would be in the public interest to convict for assault?[52] The court found in favour of the appellant by aligning the appellant's actions with the socially sanctioned practice of tattooing, and on the grounds that '[c]onsensual activity by a husband and wife, in the

[46] Moran, above n 15, 237.
[47] Irigaray, above n 27, 171. Also see generally Irigaray, above n 27, 170–97; Elizabeth Grosz, *Sexual Subversions* (1989) 146–50.
[48] Irigaray, above n 27, 196.
[49] Monique Wittig, 'The Mark of Gender' (1985) 5(2) *Feminist Issues* 1, 3.
[50] [1997] QB 47 ('*Wilson*').
[51] Ibid 49.
[52] Ibid 50.

privacy of the matrimonial home' should not be a matter for criminal investigation.[53]

The unanimous judgment delivered by Russell LJ is notable for its failure to conceive of the appellant's conduct within the realm of the sexual. Indeed, the terms 'pleasure and pain', so integral to the *Brown* judgment, do not even feature. The use of the word 'tattooing' to describe the appellant's actions works to remove any residual notions of moral culpability or sexual deviance. By aligning the appellant's actions within a practice of body inscription that has attained social approval, the alleged activities are desexualised. The body is thus not seen as being reinscribed with alternative erotic zones, it is merely being tattooed, which is a practice that the heterosexual body can accommodate within its system of signification.

The unifying force that protects the appellant from the scrutinising gaze of the bench, I would argue, is the immunity granted to the (heterosexual) marital union. The appellant's activities are barely even relevant, given the wholesale protection granted to acts occurring within the matrimonial bedroom. Within this realm of unfettered pleasure and play, women function merely as signifiers within an economy of male desire. There is no need for Mrs Wilson to speak because the conditions of the marital union are already predetermined and pre-approved. Whereas Brown and his co-accused could not escape the relevance of their sexual desire,[54] Wilson and his wife's bedroom activities, protected by the law's approval of heterosexual desire, do not even require explanation. In contrast to *Brown*, where the Lords expressed great concern for the young men who participated in the activities (they were termed 'victims') and saw it necessary to speak on their behalf, the judges in *Wilson* claimed that the facts were not in dispute, even though 'Mrs Wilson, a woman of mature years, did not give evidence'.[55] Similarly, the appellants in *Brown* are granted no privilege of expression throughout the judicial text, whereas the appellant in *Wilson* is permitted to articulate his case within the body of the judgment, where his statement to the police is quoted.[56]

Wilson is a disturbing case because it indicates that despite a conception of sadomasochism as violence, acts involving similar 'violence' within an authorised heterosexual relationship are not subject to the same level of public interference. This would seem to cast doubt on feminist arguments which presume that judicial approval of sadomasochism will lead to immunity from acts of domestic violence. If gay male sadomasochism is denounced while activities such as those in *Wilson* are approved, one can only assume that the definition of 'violence' is actually meaningless beyond the specific context in which it is applied. The

[53] Ibid.

[54] Even Lord Mustill, who dissented in *Brown* on the grounds of the appellants' right to perform consensual activities within the privacy of their own homes, saw it necessary to express his dismay at the nature of the defendants' activities: *Brown* [1994] 1 AC 212, 256–7.

[55] *Wilson* [1997] QB 47, 48.

[56] It appears that Wilson's statement to the police was the only evidence the judges could use to support a claim of consensual activity.

blanket restriction upon 'sadomasochism' does not actually tackle the patriarchal structures within which these identities are articulated.

C *Homosocial/Sexual Desire in* Brown

Eve Sedgwick, in *Between Men: English Literature and Male Homosocial Desire*, hypothesises a continuum of male-to-male relationships that encompasses what she terms the homosocial, meaning social bonds between persons of the same sex, and the homosexual.[57] The ease with which socially-unacceptable homosexual desire can be mapped on to socially-sanctioned homosocial practices is a source of much homophobic anxiety.[58] This anxiety stems from the need to isolate eroticism only within a heterosexual framework. Those points where desire can be imposed on to male-to-male relations represent a threat to compulsory heterosexuality. To ward off this threat, a distinction must be drawn between the homosocial and the homosexual. As a result, particular historical and institutional forces work to disrupt this unbroken chain of meaning, so as to demarcate a sexual, and hence unacceptable, (homosexual) space and an oppositional asexual (homosocial) space.[59]

According to Sedgwick's continuum of homosocial desire, there is no axiomatic formula for distinguishing between non-sexual and sexual male-to-male relations. 'Desire' is a description that Sedgwick employs with regard to both the homosocial and homosexual, thus freeing the two terms of an oppositional inference. The dichotomy of homosocial/homosexual is therefore a historical construct, an act of force that works in the service of a heterosexual norm. Sedgwick emphasises that within the patriarchal economy of the homosocial, women are always excluded from exercising any power.[60]

In *Brown*, the Lords are at pains to delineate a zone of acceptable 'consensual violence', particularly that of 'properly conducted games and sports'.[61] This definition would seem to include 'rough horseplay', which Lord Mustill describes as particularly prevalent in male community life, 'in the school playground, in the barrack-room and on the factory floor'.[62] The distinction drawn between the homosocial and the circumstances in *Brown* preserves a neat opposition between the non-sexual and the sexual. Indeed, the structure of sexuality is produced

57 See generally Eve Sedgwick, *Between Men: English Literature and Male Homosocial Desire* (1985).

58 Ibid 2.

59 David Van Leer, *The Queening of America: Gay Culture in Straight Society* (1995) ch 3, provides a thorough critique of Sedgwick's works *Between Men*, above n 57, and *The Epistemology of the Closet* (1990). Van Leer argues, amongst other things, that Sedgwick's tendency to view 'homosocial' desire, 'homosexual thematics' and 'the homosexual' within the context of a textual analysis does not pay enough attention to sexual preference as a historical reality. In particular, Sedgwick's reluctance to label male-to-male desire as 'homosexual' prior to the second half of the nineteenth century, which marked the 'advent' of the homosexual identity, does not account for the earlier empirical reality.

60 Sedgwick, *Between Men*, above n 57, 2–3.

61 *Brown* [1994] 1 AC 212, 233 (Lord Templeman), 243 (Lord Jauncey), 254 (Lord Lowry), citing *A-G's Reference (No 6 of 1980)* [1981] QB 715, 719 (Lord Lane CJ).

62 *Brown* [1994] 1 AC 212, 267.

through the articulation of these categories. That the Lords see it as necessary to elaborate the 'normality' of heterosexual relations, through the production of a homosocial/homosexual divide, is evidence that heterosexuality is not the axiomatic and undeniable way of being that is argued. Rather, heterosexuality is a claim to truth that must be clearly differentiated from its enemy, homosexuality, and consistently repeated in order to gain the status of that which is natural. In *Brown,* the unexpected similarities between a 'homosocial' and 'homosexual' practice represents a moment of real anxiety. The artifice that attempts to control all possible significations of sexual (and non-sexual) activity is almost undone by an unavowed sexual practice that resembles (too closely) the authorised behaviour of same-sex sociality. The resulting panic exhibited by the Lords, whereby they furiously attempt to elevate 'properly conducted games and sports' beyond the realm of the sexual, is evidence that the zones of appropriate sexual and non-sexual behaviour are perpetually at risk and must be vigilantly policed at all times. The hyperbolic nature of the Lords' judgments evinces an awareness (albeit unconscious) of the fragile and fluid character of sexuality, and the persistent threat that this poses to a heteronormative paradigm.

V Conclusion

The appellants' activities in *Brown* were said to have been conducted 'in secret and in a highly controlled manner, whereby code words were used by the receiver when he could no longer bear the pain'.[63] This highly regulated forum for punishment bears an uncanny resemblance to the courtroom in which they were finally sentenced to imprisonment. The appropriation of the characteristics of ritual, force and subjection (usually the domain of state-sanctioned authorities) for the purpose of engaging in acts of sexual pleasure contains all the ingredients of irony. The legal system, constantly occupied with the reinforcement of appropriate modes of heterosexual behaviour, is confronted with a group of gay males who employ the same tactics for an entirely different end. It is no wonder that the House of Lords' reaction to the appellants' behaviour was one of outrage and shock. Indeed, it is not hard to see how the appellants' behaviour functioned as parody within the context of the trial and thus provoked the full force of the law.

Brown is a case that draws attention to the margins of culturally produced meanings. Depicted as 'sadomasochistic homosexuals', the appellants in *Brown* walk the tightrope between the nameable and unnameable within heteronormative discourse. Their identity is constructed on the border of socially acceptable behaviour, and is thus viewed as a constant threat to the coherent and stable body that establishes compulsory heterosexuality.

Any comprehensive philosophical critique of the *Brown* decision cannot afford to leave the terms 'homosexuality' and 'sadomasochism' unchallenged. To do so is to risk reinforcing the structures of power that govern the formulations of these

[63] Ibid 238 (Lord Jauncey).

identities. Whilst the heteronormative framework of *Brown* cannot simply be overturned or 'written over' by way of a subversive reading, for those of us interested in understanding the complex causes of judicial narrow-mindedness, the self-conscious interrogation of seemingly essential identities is a discipline well worth pursuing. At the same time, I acknowledge that such a critique may never be capable of implementation through a 10-point plan or a submission to Parliament, nor is it particularly accessible to those persons working within strict legal structures who empathise with the plight of the appellants in *Brown*. Its political effectiveness lies in the potential that it has to encourage people to rethink the boundaries of their existence that are naturalised through particular historical and institutional discourses, and to find innovative ways to disrupt these meta-narratives.