

# THE PSYCHODYNAMICS OF SEXUAL CHOICE

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*The right of sexual autonomy now occupies a central place in the scheme of constitutional liberties. Consensual sexual relations, including fornication, adultery, and sodomy, are understood to lie beyond the reach of law's regulatory power. Yet as described in this Article, some sexual encounters by their very nature are likely to engage unconscious psychological processes that involve troubling levels of vulnerability and coercion. Drawing on psychoanalysis, this Article proceeds by examining three relationships that raise heightened concerns about unconscious impairments in sexual choice. Part I investigates the way in which adult incest may trigger unconscious feelings of submission on the part of the adult child, thus potentially (although not necessarily) justifying legal intervention. Part II examines therapist–patient sexual relations, where transference feelings can raise similar concerns about unconscious impairments in choice and the possibility (although, again, not the inevitability) of legal intervention. Part III addresses the ideal of sexual autonomy as it applies to sadomasochistic relationships, and concludes that these relationships may surprisingly provide a template for the role of conscious reasoned thinking in facilitating sexual desire. Each of these three relationships shows us a different perspective on the right of sexual autonomy and the uneasy balance between choice and desire that underlies every sexual encounter. Exploring the unconscious dynamics in the relationships studied here—adult incest, therapist–patient sex, and sadomasochistic sex—leads us to a deeper understanding of the right of sexual autonomy, and its limits.*

## TABLE OF CONTENTS

INTRODUCTION .....	344
I. ADULT INCEST .....	350
II. THERAPIST–PATIENT SEX .....	358
III. SADMASOCHISTIC SEX.....	371
CONCLUSION .....	381

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## INTRODUCTION

*[A] theory or a politics that cannot cope with contradiction, that denies the irrational, that tries to sanitize the erotic, fantastic components of human life cannot visualize an authentic end to domination but only vacate the field.<sup>1</sup>*

—Jessica Benjamin

The right of sexual autonomy has come to occupy a central place in the scheme of constitutional liberties. The Supreme Court laid the foundation for the principle of sexual autonomy 50 years ago in *Griswold v. Connecticut* by holding that married women have the right to control their reproduction through the use of contraceptives.<sup>2</sup> In *Coker v. Georgia*, the Court affirmed more broadly an individual's "privilege of choosing those with whom intimate relationships are to be established."<sup>3</sup> The Court's most definitive statement came in *Lawrence v. Texas*, a 2003 decision striking down Texas's ban on homosexual sodomy: "Liberty presumes an autonomy of self that includes . . . certain intimate conduct."<sup>4</sup> American constitutional law now appears firmly committed to the principle that "[e]very individual has the right to decide what kind of sex to have, and with what sorts of people, and in what circumstances."<sup>5</sup> Where both parties freely choose to engage in sexual relations, the right of sexual autonomy protects the conduct from governmental interference, whatever the circumstances or character.<sup>6</sup> Consensual sexual relations, including fornication, adultery, and sodomy, presumptively lie beyond the reach of law's regulatory power.<sup>7</sup>

There is, however, one sex law banning consensual relations that remains solidly on the books in every state: the prohibition on adult incest.<sup>8</sup> Most people

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1. JESSICA BENJAMIN, *THE BONDS OF LOVE: PSYCHOANALYSIS, FEMINISM, & THE PROBLEM OF DOMINATION* 10 (1988).

2. See 381 U.S. 479 (1965). While the *Griswold* Court appealed to the woman's right to marital privacy, later cases reformulated the interest in terms of an individual's right to choice in intimate matters. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973) (recognizing a right of privacy "broad enough to encompass a woman's decision whether or not to terminate her pregnancy"); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

3. 433 U.S. 584, 597 (1977).

4. 539 U.S. 558, 562 (2003).

5. Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 *YALE L.J.* 1372, 1395 (2013). Some have observed that the *Lawrence* decision extended protection to sexual activity for certain intimate relationships rather than a more far-reaching protection for consensual sexual activity generally. See Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 *EMORY L.J.* 810 (2010).

6. See *State ex rel. M.T.S.*, 609 A.2d 1266, 1278 (N.J. 1992).

7. Cf. *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting) (contending that the majority views in *Lawrence* would lead to the striking down of laws prohibiting "fornication, bigamy, adultery, adult incest, bestiality, and obscenity").

8. See *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005) (holding that *Lawrence* does not invalidate adult incest laws); *State v. Lowe*, 861 N.E.2d 512, 517 (Ohio 2007)

support the prohibition on adult incest because sex between close relatives—even adult relatives—offends their sensibilities, although moral offense as a basis for sex regulation was exactly what the Supreme Court in *Lawrence* held to be unconstitutional.<sup>9</sup> Many defenders of the laws argue that incest regulations properly guard against genetic abnormalities in children, despite the fact that many other conditions pose similar or even greater risks of genetic deformity or illness.<sup>10</sup> Others identify the “destructive influence of intrafamily, extra-marital sexual contact,” without specifying what those destructive effects actually are.<sup>11</sup> As it turns out, the most convincing modern defense of the sweeping ban on consensual adult incest is psychological: a sexual relationship with one’s mother or father is unlikely to be consensual in any meaningful sense. The law against adult incest supports our intuition that powerful emotional forces deriving from the parties’ close familial relationship render the conscious “choice” to have sex a tragic illusion.<sup>12</sup>

The subject of adult incest opens the door to a new perspective on the right of sexual autonomy and the laws that regulate sexual choice. Adult incest involves sexual behavior that, on the surface, appears fully consensual. The parties themselves consciously experience the encounter as wanted. Yet experience tells us that the appearance of consent in this context may be misleading. We know that sex may be forced in ways that are hard to detect.<sup>13</sup> A victim may not openly resist when she is afraid for her physical safety or the safety of others. She may feel that she has no choice but to submit when the assailant is in a position of authority, such as a police officer. Sex may be coerced by means of psychological pressure, duress, coercion, or implied threats of harm. A domestic abuser may procure “consent” to sex through forms of emotional control.<sup>14</sup> In all these contexts, the

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(same). See generally Rosenbury & Rothman, *supra* note 5, at 816. Forty-seven states criminally ban incest. See Note, *Inbred Obscurity: Improving Incest Laws in the Shadow of the “Sexual Family”*, 119 HARV. L. REV. 2464, 2469–70 (2006) [hereinafter *Inbred Obscurity*]. No states allow parents and children, or siblings, to marry, and incest is punished in a myriad of other contexts. See Rosenbury & Rothman, *supra* note 5, at 817 (noting that prohibitions on sexual conduct are enforced through criminal sanctions but also divorce law, custody law, employment law, and immigration law, among other areas).

9. See, e.g., Carolyn S. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?*, 18 FAM. L.Q. 257, 257 (1984) (“The mere word ‘incest’ triggers strong feelings of revulsion in most people.”).

10. *Id.* at 259.

11. *Lowe v. Swanson*, 663 F.3d 258, 264 (2011).

12. See, e.g., *id.* (“Unlike sexual relations between unrelated same-sex adults, the stepparent–stepchild relationship is the kind of relationship in which a person might be injured or coerced or where consent might not easily be refused, regardless of age, because of the inherent influence of the stepparent over the stepchild.”).

13. See, e.g., SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975); SUSAN ESTRICH, *REAL RAPE* 7–14 (1987).

14. The literature on the psychology of the battered women’s syndrome is immense. For the seminal psychological work, see LENORE E. WALKER, *THE BATTERED WOMAN* (1980). Walker drew from Martin Seligman’s work on learned helplessness theory to explain why women did not leave their batterers. See *id.* Battered women’s syndrome does not lack for critics. See, e.g., Martha R. Mahoney, *Legal Images of Battered Women:*

lack of consent is never really in doubt because the victim consciously experiences the sex as coerced. Although a woman may (unjustly) blame herself for the assault, the subjective experience is one of force.

This Article examines the complexity of choice in sexual relationships involving powerful *unconscious* impairments in sexual choice. The two main relationships explored here—adult incest and the therapist–patient relationship—involve forms of psychological coercion and exploitation not immediately obvious even to the victims themselves at the moment of sexual contact. Law does not typically impose paternalistic restrictions on choice in the absence of external forms of coercion.<sup>15</sup> Law’s general aversion to paternalistic constraints on choice reflects the traditional legal presumption that, whatever the unconscious factors affecting behavior, individuals should be treated as freely choosing actors.<sup>16</sup> The presumption of free choice works well in many contexts, but not all. As described in this Article, some sexual encounters by their very nature are likely to engage unconscious psychological processes involving troubling levels of vulnerability and coercion. Obviously adult incest and therapist–patient sex are not typical sexual encounters. But understanding in close detail the operation of unconscious dynamics in these relationships can help us begin to understand and respond to harms in more common sexual encounters raising heightened concerns about unconscious vulnerability to sexual exploitation.

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*Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) (reviewing the literature on battered women’s syndrome).

15. *But see* *Gonzalez v. Carhart*, 550 U.S. 124, 150–60 (2007) (relying on the “self-evident” proposition that a woman would later come to regret her decision to have an abortion). Many commentators have expressed concern about the Court’s reasoning. *See, e.g.*, Susan Frelich Appleton, *Reproduction and Regret*, 23 YALE J.L. & FEMINISM 255 (2011). Yet a central problem with the Court’s “false consciousness” reasoning in *Carhart* was not the paternalism per se, but its factual inaccuracy. There is no reason to believe that women regret their decision to terminate a pregnancy any more than they regret any other decision relating to childrearing, including the decision to bear a child. Unlike the sexual choices addressed in this Article, there is no clear empirical support for the proposition that most women, or even many, come to regret the decision to terminate a pregnancy.

16. Legal scholars applying insights from cognitive, social, and developmental psychology have begun to refine law’s model of rationality. *See, e.g.*, BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000); DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008); MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE (2013); CASS R. SUNSTEIN & RICHARD H. THALER, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 11–14 (2008); Jody David Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186–1211 (1995); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1544 (1998); Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense*, 7 EMP. RTS. & EMP. POL’Y J. 401 (2003). But psychoanalysis goes well beyond these approaches to challenge the very framework of rationality itself. *See* Anne C. Dailey & Peter Siegelman, *Predictions and Nudges: What Behavioral Economics Has to Offer the Humanities, and Vice-Versa*, 21 YALE J.L. & HUMAN. 341 (2009).

In exploring the unconscious dynamics of sexual choice, this Article draws from psychoanalytic psychology.<sup>17</sup> Psychoanalysis not only gives us important insights into unconscious life; it also draws our attention to the deep tension between desire and choice at the heart of the principle of sexual autonomy. Sexual autonomy references two seemingly irreconcilable aspects of the self: deliberative choice and sexual desire. These dueling dimensions to the principle of sexual autonomy resonate with broader debates within philosophy and literature. Rationalism and Romanticism are understood to offer competing conceptions of the individual: one an autonomous, reasoning actor, and the other a desiring, passionate self freed from the constraints of reason.<sup>18</sup> Yet from a psychoanalytic perspective, the relationship between reason and desire is not necessarily a conflict between two opposing views of human experience and selfhood.<sup>19</sup> While many treat reason and desire as conflicting states of mind, psychodynamic psychology views them as deeply interconnected. From a psychodynamic perspective, the principle of sexual autonomy perfectly captures a necessary psychological equilibrium between rationality and love: a balance between choice and desire,

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17. The terms “psychoanalytic” and “psychodynamic” are used interchangeably in this Article. For representative applications of psychoanalysis to law, see PETER BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LITERATURE AND LAW* (2000); JEROME FRANK, *LAW AND THE MODERN MIND* (1931); JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973); Anne C. Dailey, *Imagination and Choice*, 35 *LAW & SOC. INQUIRY* 175 (2010); Susan R. Schmeiser, *Punishing Guilt*, 64 *AM. IMAGO* 317 (2007).

18. Kant argued that autonomy is achieved only by a rational will transcending appetite and desire. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (1785); Rubinfeld, *supra* note 5, at 1418; see also Frank I. Michelman, *Traces of Self-Government*, 100 *HARV. L. REV.* 4, 26–31 (1986). In contrast, the Romantic poets elevated feeling and imagination over reason. See generally M.H. ABRAMS, *NATURAL SUPERNATURALISM* (1971); ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* (Henry Hardy ed., 1991) (1990); Harold Bloom & Lionel Trilling, *Romantic Poetry*, in *ROMANTIC POETRY AND PROSE* (Harold Bloom & Lionel Trilling eds., 1973); *ROMANTICISM AND CONSCIOUSNESS: ESSAYS IN CRITICISM* (Harold Bloom ed., 1970); M.H. Abrams, *English Romanticism: The Spirit of the Age*, in *ROMANTICISM AND CONSCIOUSNESS*, *supra*; Arthur O. Lovejoy, *On the Discrimination of Romanticisms*, in *ESSAYS IN THE HISTORY OF IDEAS* 228 (1948). Admittedly, both terms are notoriously ambiguous. See, e.g., *id.* at 232 (“The word ‘romantic’ has come to mean so many things that, by itself, it means nothing. It has ceased to perform the function of a verbal sign.”).

19. See Anne C. Dailey, *Holmes and the Romantic Mind*, 48 *DUKE L.J.* 429, 434 (1998). Some Romantics did directly condemn the “murderous” effects of analytic reasoning. See, e.g., William Wordsworth, *The Tables Turned*, reprinted in *ROMANTIC POETRY AND PROSE*, *supra* note 18, at 129 (“Sweet is the love which Nature brings/Our meddling intellect/Mis-shapes the beauteous forms of things:/We murder to dissect.”). But others, like Coleridge, believed that “scientific and critical understanding” needed to be supplemented, rather than displaced, by “intuitive reason.” 8 FREDERICK COPLESTON, *A HISTORY OF PHILOSOPHY* 152 (1966). In law, we can look to Holmes for this integration: “We are all very near despair. The sheathing that floats us over its waves is compounded of hope, faith in the unexplainable worth and sure issue of effort, and the deep, subconscious content which comes from the exercise of our powers.” OLIVER WENDELL HOLMES, *Speech Before the Bar Association of Boston* (Mar. 7, 1900), in 3 *THE COLLECTED WORKS OF JUSTICE HOLMES* 498, 500 (Sheldon M. Novick ed., 1995).

conscious and unconscious, self-reflection and drive, rational thought and wishful fantasy.

The psychoanalytic notion of the dynamic unconscious certainly subverts conventional ideas about the unified, conscious, freely willing self.<sup>20</sup> Indeed, many view the Romantic conception of a hidden interior “chaos” as the philosophical tradition behind psychoanalysis.<sup>21</sup> The psychoanalytic self is unstable and deeply conflicted, constantly disrupted by irrational thoughts and desires intruding in unconscious ways.<sup>22</sup> But psychoanalysis also draws from Enlightenment values in its adherence to the basic principle that, through the exercise of reason, an individual can obtain some measure of control over unconscious aspects of the psyche. Our decision-making may be infused with unconscious desire, fantasy, doubt, or guilt, but the exercise of *relative autonomy*—a capacity for independent, reasoned choice in the face of these underlying factors—comports with both common sense and basic psychological tenets.<sup>23</sup> Despite the discipline’s emphasis on unconscious desires, psychoanalysis is committed to the traditional rationalist

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20. See PSYCHOANALYTIC TERMS AND CONCEPTS 272 (Elizabeth L. Auchincloss & Eslee Samberg eds., 2012) (defining, among other aspects of the unconscious, splitting, ambivalence, repression, and regression). While division of the self derives from conflicts between conscious and unconscious elements, they can also follow from divisions within the ego. See SIGMUND FREUD, THE EGO AND THE ID (Joan Riviere trans., 1927). The idea of the self has a long and complicated clinical and theoretical history in psychoanalysis. See Vann Spruiell, *Self*, in PSYCHOANALYSIS: THE MAJOR CONCEPTS 421 (Burness E. Moore & Bernard D. Fine eds., 1995). Self psychologists tend to posit cohesion and continuity as central aspects of a healthy self identity. See, e.g., HEINZ KOHUT, THE RESTORATION OF THE SELF (1977); EDITH JACOBSON, THE SELF AND THE OBJECT WORLD (1964); Leo Rangell, *The Self in Psychoanalytic Theory*, 30 J. AM. PSYCHOANALYTIC ASS’N 863, 868 (1982).

21. See, e.g., Madeleine Vermorel & Henri Vermorel, *Was Freud a Romantic?*, 13 INT’L REV. PSYCHO-ANALYSIS 15, 20 (1986); SUZANNE R. KIRSCHNER, THE RELIGIOUS AND ROMANTIC ORIGINS OF PSYCHOANALYSIS: INDIVIDUATION AND INTEGRATION IN POST-FREUDIAN THEORY (1996).

22. Freud’s *The Psychopathology of Everyday Life* described slips of the tongue, forgetting, and other trivial missteps that signal the unruly conflicts and resistances operating just below the rational surface. See SIGMUND FREUD, *The Psychopathology of Everyday Life*, in 6 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 8 (James Strachey et al. eds., James Strachey et al. trans., Vintage 2001) (1953–74). Julia Kristeva emphasizes subjectivity as a process rather than a static state, characterized by “contradictions, meaninglessness, disruption, silences and absences.” THE KRISTEVA READER 13 (Toril Moi ed., 1986). Jonathan Lear offers a similar description. See JONATHAN LEAR, OPEN MINDED: WORKING OUT THE LOGIC OF THE SOUL (1998).

23. Even Freud, the most well known skeptic of individual autonomy, nevertheless relied on reasoned choice, limited as it was, as the method and goal of his therapeutic treatment. As Freud famously wrote, “Where id was, there ego shall be.” See SIGMUND FREUD, *New Introductory Lectures on Psychoanalysis*, in 22 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (James Strachey et al. eds., James Strachey et al. trans., Vintage 2001) (1953–74). See also KIRSCHNER, *supra* note 21, at 178 n.92 (referencing “the strong liberal-Enlightenment dimension that Freud retained in his theory” (citing WILLIAM J. MCGRATH, FREUD’S DISCOVERY OF PSYCHOANALYSIS: THE POLITICS OF HYSTERIA 80 (1985) (noting that, while psychoanalysis questioned “the monolithic faith in reason that had long characterized Austrian liberalism,” it also promoted rational understanding and the strengthened ego))).

idea that it is through the exercise of conscious reason and self-understanding that an individual can master the mind's darker, more destructive elements. Psychoanalysis unsettles the idea of a unified, stable, and transparent identity at the same time that it holds fast to the concept of an autonomous ego capable of controlling, even partially, this unruly, contingent self.

Drawing on psychoanalysis, this Article proceeds by examining three relationships that raise heightened concerns about unconscious impairments in sexual choice. Part I investigates the way in which adult incest may trigger unconscious feelings of submission on the part of the adult child, thus potentially (although not necessarily) justifying legal intervention. In the realm of incest between parents and adult children, powerful unconscious desires, beliefs, and fantasies going back to early childhood can operate to undermine the adult child's capacity for reasoned decision-making. Part II examines therapist–patient sexual relations, where transference feelings can raise similar concerns about unconscious impairments in choice and the possibility (although, again, not the necessity) of legal intervention. Although Parts I and II focus on adult incest and therapist–patient sex, the examination of these two unconventional relationships reveals the extent to which unconscious impairments in choice can arise in more common sexual encounters as well. The analysis has special relevance to the legal regulation of professional relationships such as teacher–student, employer–employee, clergy–follower, and lawyer–client, where similarly complex unconscious dynamics can affect sexual choice and potentially (although not inevitably) justify some form of intervention. Part III addresses the ideal of sexual autonomy as it applies to sadomasochistic relationships, and concludes that these relationships may surprisingly provide a template for the role of reasoned thinking in facilitating sexual desire. Each of these three relationships shows us a different perspective on the right of sexual autonomy, illuminating the uneasy balance between choice and desire that defines every sexual encounter.

To be clear, recognizing the unconscious dynamics of choice in the sexual relationships under study here does not necessarily mean law should prohibit these relationships. A psychoanalytic understanding of the unconscious does not automatically overthrow law's baseline assumption of free will. But the theory does ensure that debates about sexual consent in these contexts will be psychologically informed rather than resting on unexamined assumptions about autonomous choice. Clearly the imposition of paternalistic prohibitions on sexual choice must be approached with care. But concerns about paternalism are not a reason to shun psychoanalytic insights into choice altogether. Some sexual relationships might deserve regulation, or not. But the failure to acknowledge unconscious influences on sexual choice means closing our eyes to the psychological complexity, richness, and risk inherent in all sexual encounters, leaving us more vulnerable to situations where sexual relations do in fact cross the line separating desire from coercion.

## I. ADULT INCEST

In the 2005 case, *Muth v. Frank*, an adult brother and sister married and had three children.<sup>24</sup> Based on their incestuous relationship, the state moved to terminate their parental rights with respect to one of their biological children.<sup>25</sup> The parents challenged the termination in federal court. The federal court upheld the state statute that made incestuous parenthood a ground for termination, and affirmed the removal of the child.<sup>26</sup> We may be uncomfortable with a legal system that visits the sins of the parents upon an innocent child. But even more fundamentally, we must question whether the parents should be treated as legal wrongdoers at all.

Sigmund Freud considered the incest taboo to be a universal feature of civilized societies.<sup>27</sup> Anthropologists confirm the widespread existence of the moral sanction against adult incest.<sup>28</sup> A few countries today do not criminalize sexual relations between consenting adult family members, but social disapproval of adult incestuous relations is almost universal.<sup>29</sup> In the United States, criminal laws against adult incest remain firmly entrenched in 47 states, with some states allowing life imprisonment as the penalty for the crime.<sup>30</sup> No state allows marriage between immediate family members. The issue of adult incest is not merely hypothetical. In 2010, a professor at Columbia University was charged with felony

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24. 412 F.3d 808 (7th Cir. 2005).

25. *Id.* The state also prosecuted them for incest. The adult brother and sister were sentenced to eight and five years in prison, respectively. *Id.* at 812.

26. *Id.*

27. See SIGMUND FREUD, *Totem and Taboo*, in 13 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (James Strachey ed., James Strachey & Anna Freud trans., Vintage 2001) (1953–74).

28. See THOMAS HYLLEND ERIKSEN, SMALL PLACES, LARGE ISSUES: AN INTRODUCTION TO SOCIAL AND CULTURAL ANTHROPOLOGY 83 (1995).

29. See *Criminal Prohibition of Incest in International Legal Comparison*, MAX PLANCK INSTITUTE FOR FOREIGN AND INTERNATIONAL CRIMINAL LAW, [https://www.mpicc.de/en/forschung/forschungsarbeit/gemeinsame\\_projekte/inzest/inzeststrafbarkeit.html](https://www.mpicc.de/en/forschung/forschungsarbeit/gemeinsame_projekte/inzest/inzeststrafbarkeit.html) (last updated Dec. 4, 2014) (noting that China, France, Israel, the Ivory Coast, the Netherlands, Russia, Spain, and Turkey do not criminalize adult incest). Criminal incest laws can vary widely. See NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, NAT'L DIST. ATTORNEYS ASS'N, STATUTORY COMPILATION REGARDING INCEST STATUTES, (March 2013), available at <http://www.ndaa.org/pdf/Incest%20Statutes%202013.pdf> [hereinafter STATUTORY COMPILATION]. All states prohibit marriage between parent and child, siblings, and aunts/uncles and nieces/nephews. As of 2011, 20 states and D.C. permit marriage between first cousins. With respect to criminal statutes, all but three states prohibit adult incest. See *id.* Some states ban only relationships based on affinity while others ban stepfamily and adoptive relationships as well; some ban relationship between cousins while others do not; some ban only sexual intercourse while others extend the prohibition to sexual contact. See Courtney Megan Cahill, *Same-sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1562–65 (2005).

30. In the United States, Connecticut, Rhode Island, and New Jersey have decriminalized adult incest. See STATUTORY COMPILATION, *supra* note 29.



incest for sleeping with his 24-year-old daughter over a three-year period.<sup>31</sup> In 1997, Katherine Harrison published her memoir detailing her several-year adult sexual relationship with her father.<sup>32</sup> Persons convicted of adult incest can be fined, sentenced to prison, denied parental rights, and classified as sex offenders.<sup>33</sup>

Since Sophocles, adult incest has captured the literary imagination. The Marquis de Sade covered the topic in several of his works.<sup>34</sup> Among the many modern authors taken with the subject, F. Scott Fitzgerald, Lawrence Durrell, Gabriel Garcia Marquez, Vladimir Nabokov, John Irving, and Jeffrey Eugenides, explore incestuous relationships in their books.<sup>35</sup> Incest also plays a regular part in American films.<sup>36</sup> The relatively frequent presence of the topic in literature and film reflects a cultural fascination with the transgression of this elemental boundary. Is it repulsion, temptation, or both that stands behind the incest taboo? We assume the incest taboo expresses universal disgust for the practice, but perhaps, as Freud believed, the prohibition has a hold on our imagination precisely because it is needed to contain powerful and transgressive unconscious desires. History shows us that the crossing of sexual boundaries with a more powerful figure proves a seductive fantasy. Removing the barrier to adult incest might in fact reduce its transgressive allure.

Given the modern ideal of sexual autonomy, the ban on adult incest requires justification. No one objects to the incest taboo when it comes to sexual relations with children, for obvious reasons. Children are vulnerable, sexually immature, and dependent on their parental caregivers. Sexual conduct at too early an age can result in severe and long-lasting trauma. But few people regard the incest taboo as objectionable when it comes to *adult* incest, either. We may think the reasons for the adult incest prohibition are obvious, but close examination reveals surprising weaknesses in the traditional justifications for the rule.

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31. See Melissa Grace, *Columbia Professor is Charged with Incest, accused of bedding young relative for three years*, N.Y. DAILY NEWS (Dec. 9, 2010), <http://www.nydailynews.com/new-york/columbia-professor-charged-incest-accused-bedding-young-relative-3-years-article-1.472204>.

32. See KATHERINE HARRIS, *THE KISS: A MEMOIR* (1997); see also MACKENZIE PHILLIPS, *HIGH ON ARRIVAL: A MEMOIR* (2011).

33. See, e.g., *Lowe v. Swanson*, 663 F.3d 258, 260 (6th Cir. 2011).

34. See MARQUIS DE SADE, *JULIETTE* (1797); MARQUIS DE SADE, *PHILOSOPHY IN THE BEDROOM* (1795); MARQUIS DE SADE, *THE 120 DAYS OF SODOM* (1785).

35. See SCOTT FITZGERALD, *TENDER IS THE NIGHT* (1934); LAWRENCE DURRELL, *THE ALEXANDRIA QUARTET* (1957–60); GABRIEL GARCIA MARQUEZ, *ONE HUNDRED YEARS OF SOLITUDE* (1967); VLADIMIR NABOKOV, *ADA, OR ARDOR: A FAMILY CHRONICLE* (1969); JOHN IRVING, *THE HOTEL NEW HAMPSHIRE* (1981); JEFFREY EUGENIDES, *MIDDLESEX* (2002); see also IAN McEWAN, *THE CEMENT GARDEN* (1978); DONNA TARTT, *THE SECRET HISTORY* (1992).

36. CALIGULA (Penthouse Films International 1979); CHINATOWN (Paramount Pictures 1974); THE CIDER HOUSE RULES (Miramax 1999); CLOSE MY EYES (Film Four International 1991); CRUEL INTENTIONS (Columbia Pictures 1999); EXCALIBUR (Orion Pictures 1981); GIRL, INTERRUPTED (Columbia Pictures 1999); L.I.E. (Alter Ego Entertainment 2001); THE MANCHURIAN CANDIDATE (M.C. Productions 1962); THE OTHER BOLEYN GIRL (Columbia Pictures 2008); THE ROYAL TANENBAUMS (Touchstone Pictures 2001).

The topic of adult incest provokes near universal disgust. Most people view the act as morally repugnant and unnatural, a perversion rising to the level of bestiality and cannibalism.<sup>37</sup> Yet the principle of sexual autonomy protects individuals from the moral condemnation of society, as we learned from the Supreme Court's decision in *Lawrence* on homosexual sodomy.<sup>38</sup> Many sex acts might be viewed as perversions, but we allow them precisely because we believe individuals have the right to control their intimate lives so long as they do not harm anyone else. In the aftermath of *Lawrence*, moral distaste cannot justify laws regulating private, consensual sexual activity—something more must be at stake.<sup>39</sup>

Defenders argue that incest laws are justified as health measures because they protect against offspring with genetic abnormalities.<sup>40</sup> Yet the scientific support for this proposition remains inconclusive.<sup>41</sup> Even if we accept the point as true, the argument has serious weaknesses. Many people desiring incestuous relations are not biologically able to reproduce, either because of age or reproductive disability, but they are nevertheless included within the scope of these statutes. Homosexual couples fall within the prohibition, as do step-relatives and adoptive relatives in many states.<sup>42</sup> Most problematic, the genetic abnormalities argument goes to the issue of procreation, not sex. Although many people in nonincestuous relationships have an even greater likelihood of having children with hereditary defects, we allow them to engage in sexual relations unrestrained. Equal treatment would require prohibiting all of these relationships as well. Yet banning all sexual relations posing heightened risks for genetic abnormalities or disease in offspring would obviously be an intolerable invasion of individual rights. The idea recalls Justice Holmes' infamous opinion in *Buck v. Bell*, in which he upheld the forced sterilization of a mentally disabled woman with the remark: "Three generations of imbeciles are enough."<sup>43</sup> The Supreme Court has long since abandoned support for eugenics, suggesting that individuals have a fundamental right to procreate, whatever the genetic consequences.<sup>44</sup>

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37. See Cahill, *supra* note 29, at 1573.

38. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

39. See *Inbred Obscurity*, *supra* note 8, at 2467.

40. Edvard Westermarck offered this biological evolutionary explanation. See EDWARD A. WESTERMARCK, *THE HISTORY OF HUMAN MARRIAGE* (1921). In contrast, the anthropologist Claude Lévi-Strauss argued that incest prohibitions developed from a preference for exogamous relationships. See Claude Lévi-Strauss, *The Family, in MAN, CULTURE AND SOCIETY* (Harry L. Shapiro ed., 1956).

41. See Bratt, *supra* note 9, at 267–76; Cahill, *supra* note 29, at 1569–72; Denise Grady, *No Genetic Reason to Discourage Cousin Marriage, Study Finds*, N.Y. TIMES (April 3, 2002), <http://www.nytimes.com/2002/04/03/health/03CND-COUS.html> (noting that children of siblings and parent/child relationships "are thought to be at significantly higher risk of genetic problems. . . but there is not enough data to be sure"). Cf. *Inbred Obscurity*, *supra* note 8, at 2468 n.31.

42. See, e.g., *State v. Lowe*, 861 N.E.2d 512 (Ohio 2007); *Israel v. Allen*, 577 P.2d 762 (Colo. 1978).

43. 274 U.S. 200, 207 (1927).

44. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942). See also *Inbred Obscurity*, *supra* note 8, at 2468 ("Even though the risks of birth defects in the most closely related

Some might argue that allowing adult incest would make policing the incest taboo during childhood just that much harder. It is true that the possibility of sexual relations in the future might lead some adults to “jump the gun,” particularly with older adolescents. But this argument could apply just as easily to all relationships, not just incestuous ones. The possibility of future sexual relations might lead any adult so inclined to pursue sexual relations with adolescents regardless of family ties. One might argue that adults in the family have greater access to children, and so the opportunity for developing—and the temptation to develop—sexual relations prematurely is greater. This may be true, but we already have laws in place to address this problem, including statutory rape laws, child sexual assault laws, child abuse laws, and child endangerment laws. Statutory rape is a strict liability crime that does not require the prosecution to prove lack of consent, so it is especially effective at deterring adult sex with minors. It is unclear why a special statute banning all adult incest is needed to restrain individuals who exploit children.

A last justification for the prohibition on adult incest seems more promising, at least initially. Some argue that the possibility of adult incest will encourage adults to regard children as future sexual mates.<sup>45</sup> Parents in the home might be tempted to groom their children to be their adult sexual partners. But again, child welfare laws are already in place that criminalize conduct occurring while the child is a minor. If the argument centers on adult fantasies about future sexual relations, then this argument must identify how fantasy about the future translates into present harm when it does not result in actual sexual conduct. We should want to know more about “grooming” before imposing an absolute lifetime ban on adult incestuous relationships. Moreover, it is unclear why this argument applies only to family relationships, and not to adult-child relationships outside the family. Adults may consider any child a potential future mate. Indeed it may be more likely that unrelated adults would have such thoughts and fantasies, but we do not respond by banning the eventual adult relationships. Coaches, teachers, neighbors, and camp counselors all have close contact with children, but they are not prohibited from entering into relationships once the children reach the age of majority. A defense of incest laws that turns on the harm of sexualizing children must explain why the harm to children is greater in families than in other contexts. The fact that sexual abuse of children may happen most frequently in the family context does not necessarily justify the lifetime ban on adults.

The adult-incest prohibition thus comes across, upon reflection, as an overly broad, morally discriminatory, and unnecessary intrusion on the right of sexual autonomy. We believe that incest between a parent and an adult child is wrong, but we have no justification beyond moral condemnation of a parent who would pursue a sexual relationship with an adult child. But if our focus remains on the transgressing parent, we miss the true source of concern. Instead, by focusing

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family members are significant, eugenics on the basis of physical or mental deformity has long been repudiated.”).

45. See Margaret Mead, *Anomalies in American Post-Divorce Relationships*, in *DIVORCE AND AFTER* 105 (Paul Bohannon ed., 1970) (observing that incest means children can “wander freely, sitting on laps, pulling beards, and nestling their heads against comforting breasts—neither tempting nor being tempted beyond their years”).

on the adult child, we can consider whether incestuous relations should be banned because the adult child's capacity to consent to this relationship is likely to be deeply compromised. Can psychoanalytic psychology help us to understand the extent to which incestuous relations throw the adult child's consent into question, therefore justifying the legal ban?

Incest has been a topic at the center of psychoanalytic thinking for over a century. Freud first became interested in incest when he observed that many of his female patients were reporting memories of incest, specifically childhood sexual abuse by their fathers.<sup>46</sup> Initially he attributed their hysterical symptoms to these childhood "seductions." But he soon abandoned the seduction theory as an explanation for adult neurosis when he found himself discovering neurosis in almost every family, including his own.<sup>47</sup> It could not be the case, Freud concluded, that actual incest was near universal.<sup>48</sup> Freud's abandonment of the seduction theory allowed him to develop a framework that put incestuous longings—rather than real incest—at the center of individual development. As he moved from a theory of actual sexual trauma to a theory about the role of unconscious fantasy in psychological life, psychoanalysis proper was born.<sup>49</sup>

The Oedipus complex was one of Freud's central preoccupations.<sup>50</sup> Although he focused on the young boy's development, infamously relegating girls

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46. See SIGMUND FREUD, *Further Remarks on the Neuro-psychoses of Defense*, in 3 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 162 (James Strachey ed., James Strachey & Anna Freud trans., Vintage 2001) (1953–74); SIGMUND FREUD, *Sexuality in the Aetiology of the Neuroses*, in 3 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD, *supra*, at 263.

47. See SIGMUND FREUD, *Extracts from the Fliess Papers, Letter 69*, in 1 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 261 (James Strachey et al. eds., James Strachey et al. trans., Vintage 2001) (1953–74); PETER GAY, *FREUD: A LIFE FOR OUR TIME* 94 (1988).

48. To some, Freud's abandonment of the seduction theory constituted a fateful denial of the true occurrence of childhood sexual abuse. See JEFFREY MOUSSAIEFF MASSON, *THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY* (1998). Yet after Freud abandoned the seduction theory, he never in fact denied that some women suffer real abuse as children. In his Autobiographical Study, he wrote that "[s]eduction during childhood retained a certain share, though a humbler one, in the aetiology of the neuroses." SIGMUND FREUD, *An Autobiographical Study*, in 20 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 21 (James Strachey et al. eds., James Strachey et al. trans., Vintage 2001) (1953–74); see also Peter Gay, *Freud: A Brief Life*, in SIGMUND FREUD, *INTRODUCTORY LECTURES IN PSYCHOANALYSIS* xiii n.4 (James Strachey ed., 1989) ("All [Freud] abandoned when he abandoned the seduction theory was the sweeping claim that *only* the rape of a child, whether a boy or a girl, by a servant, an older sibling, or a classmate, could be the cause of a neurosis.").

49. Gay, *supra* note 48, at xiii ("Once freed from this far-reaching but improbable [seduction] theory, Freud could appreciate the share of fantasies in mental life, and discover the Oedipus complex, that universal family triangle.").

50. Freud's first mention of the Oedipus complex came in a letter to a close friend, Wilhelm Fliess. See SIGMUND FREUD, *Letter of October 15, 1897*, in THE COMPLETE LETTERS OF SIGMUND FREUD TO WILHELM FLIESS 1887–1904, at 270 (Jeffrey M. Masson ed., 1985). His first published discussion came in *The Interpretation of Dreams*. See SIGMUND FREUD, *The Interpretation of Dreams*, in 4–5 THE STANDARD EDITION OF THE COMPLETE

to a lower developmental status, his theory of parental lawgiving generally still rings true. In Freud's view, the young boy's Oedipal desire for the mother encounters the father's more powerful prohibition on the relationship. A successful resolution of the Oedipus complex for boys involved renouncing the incestuous longings and internalizing the father's law through the development of a self-critical, morally demanding super-ego.<sup>51</sup> Psychoanalysts since Freud have revised his theory of the Oedipus complex, or jettisoned it altogether.<sup>52</sup> Yet despite its obvious shortcomings, Freud's theory of the Oedipus complex has lasting significance as a theoretical construct: it describes a protective framework—as much a metaphor for the internalization of parental law as an actual developmental prohibition—by which desire in the family is both recognized and controlled.

With the development of modern psychoanalytic theory, object-relations theorists have shifted attention away from Oedipal lawgiving to pre-Oedipal caregiving.<sup>53</sup> Focus has moved from conflict over incestuous fantasies to the earlier attachment period of infant care.<sup>54</sup> Sexuality still plays an important role in object-relations theory, but the meaning of childhood sexual fantasies and behavior can differ from that found in traditional Freudian theory. Longing for the parent might be seen as an innate expression of need for comfort and care rather than Oedipal strivings.<sup>55</sup> While Freud focused on the young boy's libidinal desire for the mother, many modern psychoanalysts would be interested in the vicissitudes of the child's early attachment desire for the parents.<sup>56</sup>

What can psychoanalysis teach us about the appearance of incestuous wishes in adulthood? The question goes to the heart of psychoanalytic theory, for a central tenet of all psychoanalytic thought is the unconscious influence of early

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PSYCHOLOGICAL WORKS OF SIGMUND FREUD I (James Strachey et al. eds., James Strachey et al. trans., Vintage 2001) (1953–74).

51. Freud argued that girls undergo a parallel renouncing of instinctual desires, although he believed that the process leaves girls with a much weaker super-ego than boys. See SIGMUND FREUD, *Some Psychological Consequences of the Anatomical Distinction Between the Sexes*, in 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 181 (James Strachey ed., James Strachey & Anna Freud trans., Vintage 2001) (1953–74).

52. See, e.g., NANCY CHODOROW, *FEMININITIES, MASCULINITIES, SEXUALITIES: FREUD AND BEYOND* (1994); JACQUES KEN CORBETT, *BOYHOODS: RETHINKING MASCULINITIES* (2009); JACQUES LACANS, *ÉCRITS: A SELECTION* (1997); HANS LOEWALD, *The Waning of the Oedipus Complex*, in PAPERS ON PSYCHOANALYSIS 384 (1989); Melanie Klein, *The Oedipus Complex in the Light of Early Anxieties*, 26 INT'L J. PSYCHOANALYSIS 11 (1945).

53. See generally JAY R. GREENBERG & STEPHEN A. MITCHELL, *OBJECT RELATIONS IN PSYCHOANALYTIC THEORY* (1983).

54. See PETER FONAGY, *ATTACHMENT THEORY AND PSYCHOANALYSIS* (2001).

55. See, e.g., MARIO MUKULINER & PHILLIP R. SHAVER, *ATTACHMENT IN ADULTHOOD: STRUCTURE, DYNAMICS AND CHANGE* 365 (2007).

56. See PSYCHOANALYTIC TERMS AND CONCEPTS, *supra* note 20 (“[T]he evolution of psychoanalytic theorizing has followed a general trend toward greater emphasis on the impact of real experience, both during development and within the clinical situation.”).

childhood relationships and experience on adult life.<sup>57</sup> Psychoanalysts might disagree about whether adult incestuous relations revive Oedipal longings or early attachment needs, but in either case the adult desire draws its emotional charge from early childhood wishes and longings for parental contact. The risk from adult incest is not simply that powerful attachment feelings will emerge, for such overwhelming emotional longings can surface in any sexual encounter. Rather, the risk is that these feelings will trigger in the adult child a psychological “regression” to more elementary, child-like modes of thinking rooted in the early parent-child relationship.<sup>58</sup> This kind of cognitive regression—where the individual experiences an unconscious breakdown in adult reflective thinking—renders the adult child more psychically vulnerable.<sup>59</sup> Present and past collapse as the adult child loses the capacity for mature deliberative thought brought about by a sexual relationship with a psychologically more powerful figure.

With adult incest, therefore, what looks like free consent to relations with a real father may be simply an unconscious submission to the internal imagined and all-powerful father of an earlier day. It would be nearly impossible to keep a critical distance when the fantasized figure from the past and the real lover in the present are one and the same person. Of course, nonincestuous relationships also carry the risk of a collapse of reflective thinking through submission to a more powerful figure. But partners to nonincestuous relationships are much more likely to maintain a distinction between fantasy and reality. Incestuous relations merge the imagined all-powerful father of the past with the deeply flawed father of the present. When feelings of powerlessness and attachment come into play, the adult child faces the risk of a powerful malignant regression, or even loss of reality. The

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57. See, e.g., Otto F. Kernberg, *Psychoanalytic Object Relations Theories*, in *PSYCHOANALYSIS: THE MAJOR CONCEPTS*, *supra* note 20, at 452 (All object relations theories “focus on the influence of the vicissitudes of early developmental stages in the formation of the psychic apparatus”); Jonathan Shedler, *The Efficacy of Psychodynamic Therapy*, 65 *AM. PSYCHOLOGIST* 98, 99 (2010). Not all analysts support the temporal notion of regression. See, e.g., A. Scott Dowling, *A Reconsideration of the Concept of Regression*, 59 *PSYCHOANALYTIC STUDY OF THE CHILD* 191 (2004); L. Inderbitzein & S. Levy, *Regression and Psychoanalytic Technique: The Concretization of a Concept*, 69 *PSYCHOANALYTIC Q.* 195 (2000). Neuroscientists are coming to the same conclusion. See, e.g., WARREN W. TRYON, *COGNITIVE NEUROSCIENCE AND PSYCHOTHERAPY: NETWORK PRINCIPLES FOR A UNIFIED THEORY* 197 (2014) (concluding that “recent neuroscience evidence regarding epigenetic switches supports the psychodynamic claim that early experience is crucial to subsequent development”); *THE OXFORD HANDBOOK ON DEVELOPMENTAL PSYCHOLOGY: VOL. 1 BODY AND MIND* 115 (Phillip David Zelazo ed., 2013) (discussing rat studies on “licking and grooming” pups); Phyllis Tyson & Robert L. Tyson, *Development*, in *PSYCHOANALYSIS: THE MAJOR CONCEPTS*, *supra* note 20, at 396 (“There is evidence to suggest that early environmental influences contribute to neural patterning . . .”).

58. See Tyson & Tyson, *supra* note 57, at 396 (“Stress, conflict, danger, or frustration evoke modes of functioning more typical of earlier developmental phases. This is usually referred to as ‘regression,’ wherein the individual reverts, or retreats, to safer forms of satisfaction (drive regression), modes of relating (regression in object relations), sets of standards (super-ego regression), or ways of thinking (ego or cognitive regression).”).

59. See *PSYCHOANALYTIC TERMS AND CONCEPTS*, *supra* note 20, at 267 (describing “regressive transference” in the analytic situation).

individual may succumb to the dynamics of authority and dependency that characterized the childhood relationship. In circumstances where the incest taboo is actually violated, the loss of reality may be complete.

Courts recognize that any person who occupies a parental role in the life of the individual can trigger incest concerns. Thus, the Ohio Supreme Court recently interpreted the state's criminal incest laws to apply to stepparents and adult stepchildren.<sup>60</sup> Moreover, a parental figure need not play an active role in the child's life to assume an important psychological meaning for the child. Risks arise when a biological parent who was absent during the individual's childhood reappears in adulthood. Katherine Harris wrote a harrowing memoir about her sexual liaison with a returning father.<sup>61</sup> We might view the absent parent as a distant figure lacking the emotional power of an actual caregiver, but in psychological terms, the absent father can actually loom as large in a child's imagination as a father who was present.<sup>62</sup> Katherine Harris did not meet her father until she was an adult, but her book is a chilling portrait of her slow psychological and physical submission to an idealized father who returns for his daughter.<sup>63</sup> Fantasies in place since early childhood might, as Harrison's story suggests, render someone vulnerable to the seductions of an all-powerful, revenant parent.

When we consider the incest taboo, we tend to think first of the parent-child relationship. But the legal prohibition on incest extends to sibling relationships as well. Does the nature of the sibling relationship justify restrictions on sexual autonomy for consenting adult siblings as well? Should the brother and sister in *Muth v. Frank* have suffered the termination of their parental rights? Sibling relationships can certainly involve power dynamics stemming from an early age. Birth order, age difference, gender, physical size, and intellectual abilities all define and structure authority relationships among siblings. Siblings can even assume a parental role, particularly in families with neglectful or abusive parents, or where a large age gap exists.<sup>64</sup> Like parents, siblings "often exert a definitive influence on the individual's later identifications, choice of adult love object, and the pattern of object-relating."<sup>65</sup> Sibling rivalry is well known, but psychoanalysts have posited a more complex developmental role for sibling relationships.<sup>66</sup> Some adults may seek love relationships that "mimic the eroticized and dependent relationship they had with older siblings."<sup>67</sup> Common sense, as well as rates of sibling sexual abuse, supports the notion that power dynamics of a

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60. See *State v. Lowe*, 861 N.E.2d 512 (Ohio 2007); see also *Camp v. State*, 704 S.W.2d 617, 619 (Ark. 1986) (observing that "stepchildren and adopted children have been added to the crime of incest").

61. See HARRIS, *supra* note 32.

62. See, e.g., Kim A. Jones, *Assessing the Impact of Father-Absence from a Psychoanalytic Perspective*, 14 PSYCHOANALYTIC SOC. WORK 43 (2007).

63. See HARRIS, *supra* note 32.

64. PSYCHOANALYTIC TERMS AND CONCEPTS, *supra* note 20, at 247.

65. Salman Akhtar, *Early Relationships and Their Internalization*, in TEXTBOOK OF PSYCHOANALYSIS 39, 46 (Ethel S. Person et al. eds., 2005) (quoting S.A. Sharpe & A.D. Rosenblatt, *Oedipal Sibling Triangles*, 42 J. AM. PSYCHOANALYTIC ASS'N 491, 492 (1994)).

66. See PSYCHOANALYTIC TERMS AND CONCEPTS, *supra* note 20, at 247.

67. *Id.*

sexualized nature can be present from an early age.<sup>68</sup> As with incestuous relationships between a parent and an adult child, adult sibling incest certainly risks the mobilization of these early family dynamics, particularly where one sibling assumed a position of authority—or even a parental role—with regard to younger siblings.

Nevertheless, the concern about sibling incest does not necessarily rise to the level of parent–child incest. Adult sibling relationships are unlikely to trigger the same degree of infantile dependency or the same risk of regression. That is not to say that younger siblings as adults are never psychologically vulnerable to seductions by an older sibling. But adult siblings do not obviously suffer from the kind of impairments in choice that would justify overriding their right of sexual autonomy. Moreover, siblings not raised together are no more likely to succumb to unconscious pressures than anyone else.<sup>69</sup> Adult sibling sexual relations may offend our sensibilities, but from a psychological perspective, they do not clearly stir up unconscious parent–child dynamics. However imbued with unconscious meaning, we may reasonably conclude that the choice should be the individual’s to make.

Psychoanalysis raises concerns about the consensual nature of sexual activity between a parent and an adult child. Should we worry about other kinds of choices involving parents and adult children? What makes sexual decision-making deserving of special prohibitions when we allow other kinds of decision-making between an adult child and parent? We can point to the fact that the Supreme Court treats sexuality—and not economic exchange—as the cornerstone of individual liberty under the Due Process Clause. Moreover, the nature of the potential harm obviously differs. For example, an individual’s decision to buy her father’s car may fulfill a childhood desire to please her father, but any potential exploitation here is financial rather than sexual. We are dealing with larceny rather than rape.<sup>70</sup> But most important, incest threatens the loss of deliberative reflection in a way economic transactions usually do not. Parent–adult child incest activates psychological dynamics rooted in a powerful combination of childhood authority and physical desire. These unconscious sexual dynamics of submission and domination going back to early childhood justify prohibiting sexual relations between parents and adult children, but not much else.

## II. THERAPIST–PATIENT SEX

Like the incest taboo, the rule of abstinence in therapy sets limits on sexual freedom for adults. Therapists face serious career-ending penalties when

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68. See David Finkelhor, *Sex Among Siblings: A Survey on Prevalence, Variety, and Effects*, 9 ARCHIVES OF SEXUAL BEHAVIOR 171 (1980) (estimating that the rate of sibling incest may be five times greater than parent–child incest).

69. The Colorado Supreme Court has held that adoptive siblings who met when adults had a right to marry. See *Israel v. Allen*, 577 P.2d 762 (Colo. 1978).

70. In some cases, the economic harm may be great enough to justify regulations on financial decision-making in the family: trust funds for children; fiduciary duties in family businesses; or guardianship of aged parents.



they engage in sex with their patients.<sup>71</sup> Any sexual contact at all between a therapist and a current patient is prohibited both ethically and legally. In the psychoanalytic profession, the rule of abstinence bans sexual contact between therapists and patients, both current and former, as well as family members of patients.<sup>72</sup> While psychoanalysis has the most sweeping prohibition, all mental health professions—psychiatry, psychology, and social work—consider sex between therapists and their current patients to be unethical, and most prohibit sex between therapists and former patients as well.<sup>73</sup> State laws punish therapists who engage in sex with patients through license revocation, malpractice suits, and criminal penalties.<sup>74</sup>

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71. The breadth of these regulations reflects the frequency of the conduct. Some research suggests that as many as 7% of male therapists have sexual relations with their patients. By comparison, 1.5% of female therapists reportedly have sexual relations with their patients. See Kenneth S. Pope, *Sex Between Therapists and Clients*, in 2 ENCYCLOPEDIA OF WOMEN AND GENDER: SEX SIMILARITIES AND DIFFERENCES AND THE IMPACT OF SOCIETY ON GENDER 955 (Judith Worell ed., 2001).

72. See AM. PSYCHOANALYTIC ASS'N, ETHICS CODE § VI.1, available at <http://www.apsa.org/code-of-ethics> (“Sexual relationships involving any kind of sexual activity between the psychoanalyst and a current or former patient, or any member of the patient’s immediate family whether initiated by the patient, the parent or guardian or family member or by the treating psychoanalyst, are unethical.”); *id.* § VI.2 (“Marriage between a psychoanalyst and a current or former patient, or between a psychoanalyst and the parent or guardian of a patient or former patient is unethical, notwithstanding the absence of a complaint from the spouse and the legal rights of the parties.”). See SIGMUND FREUD, *Observations on Transference-Love*, in THE FREUD READER 382 (Peter Gay ed., 1989) (referring to the “fundamental principle of the treatment being carried out in abstinence”); Ellen Pinsky, *The Olympian Delusion*, 59 J. AM. PSYCHOANALYTIC ASS'N 351 (2011).

73. All the major therapeutic professions consider sexual relations between therapist and patients to be unethical. See AM. PSYCHIATRIC ASS'N, PRINCIPLES OF MEDICAL ETHICS § 2:1, available at <http://www.psychiatry.org/practice/ethics/resources-standards> (“Sexual activity with a current or former patient is unethical.”); AM. PSYCHOLOGICAL ASS'N, ETHICAL PRINCIPLES AND CODE OF CONDUCT § 10.05, available at <http://www.apa.org/ethics/code/principles.pdf> (“Psychologists do not engage in sexual intimacies with current therapy clients/patients.”); *id.* § 10.08(a) (“Psychologists do not engage in sexual intimacies with former clients/patients for at least two years after cessation or termination of therapy.”); NAT'L SOC. WORKERS ASS'N, ETHICS CODE § 1.09(a), available at <http://www.socialworkers.org/pubs/code/code.asp> (“Social workers should under no circumstances engage in sexual activities or sexual contact with current clients, whether such contact is consensual or forced.”); *id.* § 1.09(c) (“Social workers should not engage in sexual activities or sexual contact with former clients because of the potential for harm to the client.”). The prohibition on therapist–patient sex has origins in the Hippocratic Oath, which prohibits physicians from engaging in sex with their patients. See AM. MED. ASS'N, CODE OF MED. ETHICS § 8.14, available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion814.page> (“Sexual contact that occurs concurrent with the physician–patient relationship constitutes sexual misconduct. . . . Sexual or romantic relationships with former patients are unethical if the physician uses or exploits trust, knowledge, emotions or influence derived from the person’s professional relationship.”).

74. See, e.g., Jordana Berkowitz Glasgow, *Sexual Misconduct by Psychotherapists: Legal Options Available to Victims and a Proposal for Change in Criminal Legislation*, 33 B.C. L. REV. 645 (1992). Legally, the issue of therapist sexual

What is the justification for banning sex between therapist and patient? To clarify, as we will see below, *talk* about sex is not outside the parameters of good therapy.<sup>75</sup> One cannot defend the prohibition on therapist–patient sex by arguing that the topic does not belong there, for surely it does in some cases. Courts recognize sexual talk as a legitimate aspect of the “transference phenomenon.”<sup>76</sup> So it is not enough to insist that sex does not belong in therapy *at all*. To the contrary, discussion of sexual feelings must be allowed, even cultivated. We will return to this point below. For the moment, it is enough to note that the prohibition on sexual touching cannot be justified on the ground that therapy and sex are inherently incompatible domains.

Another justification for the ban on therapist–patient sex is that sexual relations between therapist and patient inevitably bring therapy to an end. The treatment becomes, in Freud’s words, “an impossibility,” in part because the treatment aims shift from therapy to sex.<sup>77</sup> In legal terms, we could say that sex creates a serious conflict of interest for the therapist, who now pursues his own aims at the expense of the patient. The therapist may be acting out narcissistic needs or delusional rescue fantasies, or he may genuinely be in love. But whatever the reason, by acting on his desire for sex, the therapist’s interests now preempt the patient’s therapeutic goal of psychological healing, and the treatment necessarily comes to an end.

But if harm to the treatment were the only concern, then we might not be justified in imposing an absolute ban, particularly one that extends past the date of termination. The right of sexual autonomy would presumably encompass the patient’s decision to privilege sex over treatment. In the legal context, for example, a lawyer and client may terminate the professional relationship in order to pursue a sexual one. In a similar vein, we might insist on informing the patient of the risks relating to treatment termination, but the patient would then have the right to choose. And once the treatment ended, whether prematurely or not, the right of sexual autonomy would require respecting the patient’s choice. Where informed consent is present, the right of sexual autonomy would compel the conclusion that—however misguided the decision may be—the patient’s choice to engage in sexual relations with her former therapist should stand.

A more compelling justification for the rule of abstinence points to the documented harmful effects of sexual contact on patients. Research indicates that the vast majority of patients suffer adverse psychological effects from sexual contact with their therapists, including an impaired ability to trust, suicidal feelings, anger, and guilt.<sup>78</sup> We should expect such severe consequences because

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misconduct could arise in a variety of contexts, including criminal prosecution under state statutes banning therapist–patient sex; civil suits for damages alleging malpractice, intentional infliction of emotional distress or other tort claims; and divorce litigation.

75. See *infra* text accompanying notes 94–102.

76. *St. Paul Fire & Marine Ins. Co. v. Love*, 459 N.W.2d 698, 700 (Minn. 1990).

77. FREUD, *Observations on Transference-Love*, *supra* note 72, at 383.

78. See Pope, *supra* note 71 (describing ambivalence, cognitive dysfunction, emotional lability, emptiness and isolation, guilt, impaired ability to trust, increased suicidal risk, role reversal and boundary confusion, sexual confusion, and suppressed anger).

people coming into therapy already suffer from psychological ills, in some cases from the effects of early sexual abuse.<sup>79</sup> These documented harms arguably justify overriding the patient's choice since it is assumed that, once the full effects are felt, the patient inevitably will come to regret her decision. Yet while obviously compelling, this argument deserves greater attention. Many sexual acts can have serious ill effects, yet we still allow the conduct. Unprotected sex, sex with strangers, and sex while moderately intoxicated might all risk physical or emotional harm to at least one of the parties, but we do not prohibit the sexual behavior.<sup>80</sup> In the case of sexually transmitted diseases such as AIDs, individuals are sometimes held liable if they fail to disclose their condition, but these prohibitions also raise concerns about sexual autonomy.<sup>81</sup> We might educate, pass out condoms, or even shame, but ultimately the right of sexual autonomy protects bad choices as well as good. Moreover, we should perhaps be concerned about rules that treat a patient (typically female) as being in need of paternalistic protection in a society with a history of denying women the right to control their own sexuality.

Which brings us to the strongest justification for the prohibition on therapist–patient sex: the sexual relationship is not fully consensual. This justification focuses on the therapist's misuse of power to exploit a vulnerable patient.<sup>82</sup> We worry that, despite express consent, the conduct is in fact coerced because the patient lacks full decision-making capacity. However free the patient's choice may seem on the surface, however much the patient may affirm her consent with words and behavior, however autonomous she might be in other spheres of her life—a patient in therapy is not in a position to make this choice. Yet the reasons why the patient lacks full decision-making autonomy are not as straightforward as they first appear. We must delve into the therapist–patient relationship in order to understand why the patient's express consent does not deserve the law's respect.

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79. Therapists working with victims of childhood sexual abuse must be especially wary of recapitulating the earlier abuse in sexual or nonsexual ways. See Jodi Messler Davies & Mary Gail Frawley, *Dissociative Processes and Transference–Countertransference Paradigms in the Psychoanalytically Oriented Treatment of Adult Survivors of Childhood Sexual Abuse*, in 1 *RELATIONAL PSYCHOANALYSIS: THE EMERGENCE OF A TRADITION* 269, 271 (Stephen A. Mitchell & Lewis Aron eds., 1999).

80. For sex to be considered coerced, the intoxicated person must usually be in a state of incapacitation. Many colleges now have policies that treat sex as rape when the intoxicated partner's judgment is substantially impaired by drugs or alcohol. See, e.g., *Preventing Sexual Misconduct through Effective Consent*, OFFICE OF EQUITY CONCERNS, OBERLIN COLLEGE & CONSERVATORY, <http://new.oberlin.edu/office/equity-concerns/sexual-offense-resource-guide/prevention-support-education/preventing-sexual-misconduct-through-effective-consent.dot> (last visited Mar. 27, 2015) [hereinafter OBERLIN COLLEGE].

81. See Kim Shayo Buchanan, *When is HIV a Crime? Sexuality, Gender and Consent*, 99 *MINN. L. REV.* (forthcoming 2015).

82. See, e.g., Phyllis Coleman, *Sex in Power Dependency Relationships: Taking Unfair Advantage of the "Fair Sex"*, 53 *ALB. L. REV.* 95 (1988).

Courts explain that patient consent is lacking because the therapy relationship induces deep feelings of dependency in the patient.<sup>83</sup> Common sense supports this idea. We believe that a patient is especially vulnerable by virtue of the fact that she is seeking help for mental suffering. Her suffering may lead her to invest the analyst with unrealistic curative powers and authority. Her vulnerability may deepen as she exposes private thoughts and feelings in the isolation of the consulting room. The ban on therapist–patient sex seems a reasonable safeguard against a therapist exploiting the patient’s emotional dependency in order to gratify his own desires. Respect for the right of sexual autonomy in this context would only serve to shield the therapist’s sexually predatory behavior.

Yet the assumption that emotional dependency vitiates consent raises some questions. Is the therapeutic relationship really so unique that it requires this special paternalistic prohibition? Poverty, disability, lack of education, and sheer naiveté render many individuals sexually vulnerable, but we do not paternalistically regulate their sexual choices. We treat these encounters as consensual even when one party has exploited the economic or social vulnerability of the other in order to obtain sex. Moreover, in situations where we do regulate choice as a consequence of dependency, the risks are quite concrete: an employee cannot remove herself from the sexual advances of a supervisor without risking serious economic repercussions; a student is similarly constrained from rebuffing a professor given the risk of academic harm; an inpatient psychiatric patient confronts locked doors. In contrast, a therapy patient is not locked in the room, chained to the couch, or restrained in any way. Her job or schooling does not depend on compliance. The patient is perfectly free to walk out the door and never go back, and there will be no economic or social consequences. If she does go back, and engages in sexual relations, particularly *after* the treatment has ended, it is presumably because she has chosen to do so. What makes that choice any more illusory than what takes place outside the consulting room?

Surprisingly, the courts offer a relatively sophisticated psychoanalytic explanation as to why therapist–patient relationships are prohibited. Let us take *St. Paul Fire & Marine Insurance v. Love* as an example.<sup>84</sup> In December 1985, Mary Anderson began treatment with a licensed psychologist, the aptly named Dr. Love. Mary’s husband Robert began treatment with Dr. Love as well. Soon after, Mary and Dr. Love began a sexual affair; Robert discovered the relationship several months later. Mary and Robert then brought suit against Dr. Love for professional malpractice, among other claims. On appeal to the Minnesota Supreme Court, the issue was whether the harm to Mary resulted from the delivery of professional services or from a personal relationship unconnected to the therapy.<sup>85</sup> Dr. Love

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83. See *Thierfelder v. Wolfert*, 52 A.3d 1251, 1269 (Pa. 2012) (“[T]ransference magnifies the patient’s mental and emotional vulnerability; it is for that reason that some courts have held that the therapist must refrain from taking advantage of the circumstances to engage in what would otherwise be non-actionable (albeit ethically questionable) consensual sexual conduct with a patient.”).

84. 459 N.W.2d 698 (Minn. 1990).

85. As in many of the cases from this era, the issue was relevant to whether Dr. Love’s professional liability insurance would cover the claim. The question of insurance

argued that the relationship was a purely consensual personal relationship that fell outside of the therapy services, and in support noted that he had stopped billing Mary once the affair began. Mary argued that the sex resulted from Dr. Love's "mishandling of the transference," and thus the conduct constituted the negligent provision of professional services.<sup>86</sup>

The Minnesota Supreme Court ruled in Mary's favor.<sup>87</sup> The court relied on the general legal rule that "a psychiatrist's mishandling the transference phenomenon during treatment and taking sexual advantage of his patient is malpractice or gross negligence."<sup>88</sup> The court boldly entered into psychoanalytic territory: "To better understand this case, we need to describe transference." Quoting from *A Dictionary of Psychotherapy*, the court laid out the theory of transference, "whereby the patient displaces on to the therapist feelings, attitudes and attributes which properly belong to a significant attachment figure of the past, usually a parent, and responds to the therapist accordingly."<sup>89</sup> The Minnesota Supreme Court was not alone in identifying transference as central to the legal claim of therapeutic malpractice. In an early case recognizing therapist negligence, the Missouri Supreme Court affirmed that "[t]ransference 'is perhaps regarded as the most significant concept in psychoanalytical therapy, and one of the most important discoveries of Freud.'"<sup>90</sup> Other courts have taken the same view.<sup>91</sup>

The concept of transference is one of the most important contributions that psychoanalysis has made to clinical psychology.<sup>92</sup> A patient's experience of

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coverage has largely become moot because professional liability policies now provide exclusions for sexual conduct.

86. *Love*, 459 N.W.2d at 700.

87. *Id.* at 699.

88. *Id.* (quoting LOUISELL & WILLIAMS, 2 MEDICAL MALPRACTICE § 17A.27, at 85–86 (1989)); see also *Thierfelder*, 52 A.3d at 1269–70; *Simmons v. United States*, 805 F.2d 1363, 1365 (9th Cir. 1986) ("Courts have uniformly regarded mishandling of transference as malpractice or gross negligence."); *Benavidez v. United States*, 177 F.3d 927, 930 (10th Cir. 1999) ("In order to manage the transference phenomenon properly a therapist must avoid emotional involvement with a patient who transfers feelings of affection to him." (citing *Aetna Life & Cas. Co. v. McCabe*, 556 F. Supp. 1342, 1346 (E.D. Pa. 1983))).

89. *Love*, 459 N.W.2d at 700 (quoting *DICTIONARY OF PSYCHOTHERAPY* 364 (Sue Waldron-Skinner ed., 1986)). One court correctly defined transference as "the projection of feelings, thoughts and wishes onto the analyst, who has come to represent some person from the patient's past." *Simmons*, 805 F.2d at 1364 (citing *STEDMAN'S MEDICAL DICTIONARY* 1473 (5th Lawyers' ed. 1982)). See also *PSYCHOANALYTIC TERMS AND CONCEPTS*, *supra* note 20, at 266 (transference means "the patient's conscious and unconscious experience of the analytic situation as it is shaped by the patient's internalized early life experience.").

90. *Zipkin v. Freeman*, 436 S.W.2d 753, 755 n.1 (Mo. 1968) (quoting *NOYES & KOLB, MODERN CLINICAL PSYCHIATRY* 505 (6th ed. 1963)).

91. See *Thierfelder*, 52 A.3d at 1269; *Simmons*, 805 F.2d at 1364; *L.L. v. Med. Protection Co.*, 362 N.W.2d 174, 177 (Wis. Ct. App. 1984); *Smith v. St. Paul Fire & Marine Ins. Co.*, 353 N.W.2d 130, 132 (Minn. 1984); *McCracken v. Walls-Kaufman*, 717 A.2d 346, 352 n.3 (D.C. 1998); *Benavidez*, 177 F.3d at 930; *Carmichael v. Carmichael*, 597 A.2d 1326, 1329 (D.C. 1991).

92. Transference was first recognized by Freud in 1901, in the context of the failed treatment of his patient, Dora. See SIGMUND FREUD, *Fragment of an Analysis of a*

the therapist as either withdrawn or comforting, or any other number of possible qualities—judgmental, disappointed, interested, angry, dangerous—is not likely limited to the relationship with the therapist, and therein lies the therapeutic mission. The therapist’s work on transference feelings promises to improve life outside the therapy. Transference feelings are ubiquitous, often in ways that frustrate conscious goals. We are compelled to find disappointment in love despite a conscious desire for romance. We are driven to outbursts of anger at work despite a conscious desire to perform well on the job. Sometimes other people in our lives are in a better position to see our destructive life-long patterns derived from early childhood relationships. But even when pointed out to us, we have difficulty acknowledging irrational feelings, beliefs, and motives. We resist knowing. Our attachment to these early patterns—our ever reliable need to feel disappointment or guilt or shame—proves difficult to loosen. We unconsciously cling to our familiar view of the world, however much a burden it might be. Therapeutic treatment aims to break these lifelong patterns by analyzing the transference patterns as they arise in the therapist–patient relationship.<sup>93</sup>

While transference feelings come in all varieties, they are frequently erotic. Freud first discussed the erotic transference in his early paper on transference love.<sup>94</sup> The erotic transference “refers to a patient’s intense wish that the analyst respond to his erotic longings; the patient does not treat these wishes as complex expressions of his inner life but rather as urgent demands regarding current reality.”<sup>95</sup> Freud then described the centrality of this transference love to the treatment: the analyst “has evoked this love . . . . [I]t is an unavoidable consequence of a medical situation, like the exposure of a patient’s body or the imparting of a vital secret.”<sup>96</sup> Freud was quite clear that the analyst “must recognize that the patient’s falling in love is induced by the analytic situation and is not to be attributed to the charms of his own person.”<sup>97</sup> The patient’s transference love for the therapist is well known as an artifact of the therapeutic relationship.

The erotic transference lies at the center of the therapeutic malpractice cases.<sup>98</sup> In *Love*, the Minnesota Supreme Court observed that “the professional

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*Case of Hysteria*, in 7 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 1 (James Strachey ed., James Strachey & Anna Freud trans., Vintage 2001) (1953–74).

93. See SIGMUND FREUD, *Remembering, Repeating, and Working Through*, in 12 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 47 (James Strachey ed., James Strachey & Anna Freud trans., Vintage 2001) (1953–74).

94. See FREUD, *Observations on Transference-Love*, *supra* note 72, at 378 (“What I have in mind is the case in which a woman patient shows by unmistakable indications, or openly declares, that she has fallen in love, as any other mortal woman might, with the doctor who is analyzing her.”).

95. PSYCHOANALYTIC TERMS AND CONCEPTS, *supra* note 20, at 269 (citing Harold P. Blum, *The Concept of Eroticized Transference*, 21 J. AM. PSYCHOANALYTIC ASS’N 21 (1973)).

96. FREUD, *Observations on Transference-Love*, *supra* note 72, at 388.

97. *Id.* at 379.

98. See, e.g., *Simmons v. United States*, 805 F.2d 1363 (9th Cir. 1986); *Bladen v. First Presbyterian Church*, 857 P.2d 789, 794 (Okla. 1993) (“[T]he basis of the

services provided by a therapist require him to enter into a therapeutic alliance with the patient that invariably induces love-transference.”<sup>99</sup> The court recognized that the intimacy and isolation of the therapeutic setting stimulate the patient’s fantasies about the therapist: “The patient, required to reveal her innermost feelings and thought to the therapist, develops an intense, intimate relationship with her therapist and often ‘falls in love’ with him.”<sup>100</sup> Erotic transferences look consensual because the patient actively wants sexual relations.<sup>101</sup> She may even talk freely and obsessively about her wishes. For the patient, the demand for love is real. Properly “handling the transference” means resisting the patient’s erotic demands.<sup>102</sup>

Remarkably, courts understand that transference is not simply evoked by the therapeutic relationship, but is actually the mechanism for psychological change.<sup>103</sup> Courts recognize that transference forms part of the treatment proper.<sup>104</sup>

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malpractice claim as a therapist generally is because of a breach of the ‘trust relationship’ between the therapist and patient, and that this ‘trust relationship develops because of the emotional bond that forms between a therapist and his patient, known as the transference phenomenon.” (quoting *Sisson v. Seneca Mental Health Council*, 404 S.E.2d 425, 429 (W.Va. 1991)).

99. *Love v. St. Paul Fire & Marine Ins.*, 459 N.W.2d 698, 700 (Minn. 1990).

100. *Id.*

101. See FREUD, *Observations on Transference-Love*, *supra* note 72, at 380 (“She suddenly loses all understanding of the treatment and all interest in it, and will not speak or hear about anything but her love, which she demands to have returned.”).

102. *Love*, 459 N.W.2d at 700. The *Love* court identified “countertransference” as the source of therapist misconduct, describing the phenomenon as being “when the therapist transfers his own problems to the patient.” *Id.* at 701. See also *McNicholes v. Subotnik*, 12 F.3d 105, 106 n.3 (8th Cir. 1993) (“Unfortunately, countertransference also often occurs.”). Not all courts understand countertransference correctly. See *Simmons*, 805 F.2d at 1365 (9th Cir. 1986) (“The proper therapeutic response is countertransference, a reaction which avoids emotional involvement and assists the patient in overcoming problems.”).

103. See HANS LOEWALD, *The Transference Neurosis: Comments on the Concept and the Phenomenon*, in *PAPERS ON PSYCHOANALYSIS*, *supra* note 52, at 305 (“Intellectual insight is not enough; fruitful and effective self-understanding cannot be achieved unless the significant experiences and inner conflicts which led to the neurosis become alive again in the present and regain a measure of immediacy and urgency in the transference neurosis.”). Although analysts of different stripes might differ in their perspectives on transference, they all see transference as integral to the therapeutic process. More classical psychoanalysts refer to “transference neurosis” to designate the specific occurrence of transference feelings toward the analyst, and view the aim of treatment as resolving the transference neurosis. See, e.g., *id.* (“But does transference neurosis not mean repetition of the infantile neurosis, reactivation of it, with the assumption that in the course of the analysis a new and healthier outcome can be achieved?”). Modern relational analysts would emphasize the present interplay between therapist and patient more than the reliving of past experience. See Arnold M. Cooper, *Changes in Psychoanalytic Ideas: Transference Interpretation*, 35 J. AM. PSYCHOANALYTIC ASS’N 77 (1987). Some write about transference as the construction of a present narrative rather than a reconstruction of the past. See Roy Schafer, *The Relevance of the “Here and Now” Transference Interpretation to the Reconstruction of Early Development*, 63 INT’L J. PSYCHOANALYSIS 77 (1982); DONALD P. SPENCE, *NARRATIVE TRUTH AND HISTORICAL TRUTH: MEANING AND INTERPRETATION IN PSYCHOANALYSIS* (1982).

“It is through the creation, experiencing and resolution of these feelings that [the patient] becomes well.”<sup>105</sup> The *Love* court explained:

The therapist must encourage the patient to express her transferred feelings, while rejecting her erotic advances; at the same time, he must explain to the patient that her feelings are not really for him, but that she is using him in a symbolic role to react to some other significant person in her life. In short, the therapist must both encourage transference and discourage certain aspects of it. This may be difficult to do and presents an occupational risk.<sup>106</sup>

In legal terms, proper handling of the transference means that “[t]he therapist must reject the patient’s erotic overtures and explain to the patient the true origin of her feelings.”<sup>107</sup> Thus, courts treat sexual feelings for the therapist as falling within the terrain of treatment; when sex happens, it is part of the professional services rather than a personal affair. As the *Love* court held, “[t]he sexual conduct, to be sure, is aberrant and unacceptable, but it is so related to the treatment contemplated” that professional liability insurance will cover it.<sup>108</sup> The court rightly observed that the patient’s request for sex is what propels the therapeutic process forward.

Yet understanding the erotic transference still does not clarify why the legal standard of consent is not met. How *exactly* does transference vitiate the patient’s consent to sex with her therapist? Courts maintain that what extinguishes consent is the dependency resulting from the mobilization of these intense transference feelings: “The ‘transference phenomenon’ refers to the tendency of patients to become emotionally dependent upon, and trusting of, their psychologist or psychiatrist.”<sup>109</sup> From a psychoanalytic perspective, the patient’s dependency derives from the authority structure of the early childhood relationships evoked in the transference. Freud might have looked to the erotic transference as a likely expression of early incestuous longings for the parent, or a defense against powerful feelings, or resistance to the work; Kleinian analysts might see transference love as a defense against guilt or inner fragmentation; object-relations theorists might be sensitive to the erotic transference as a sexualized form of early attachment needs.<sup>110</sup> Whatever the specific theory, all psychoanalytic schools would see the structure of treatment as stimulating the development of an

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104. *Love*, 459 N.W.2d at 701–02. See THE KRISTEVA READER, *supra* note 22, at 15 (“The psychoanalytic situation is one in which such love (transference love) is allowed to establish itself . . . . It is, then, this transference love which allows the patient tentatively to erect some kind of subjectivity, to become a subject-in-process in the symbolic order.”).

105. *L.L. v. Medical Protective Co.*, 362 N.W.2d 174, 177 (Wis. Ct. App. 1984) (quoting DONALD J. DAWIDOFF, *THE MALPRACTICE PSYCHIATRIST* 6 (1973)).

106. *Love*, 459 N.W.2d at 701.

107. *Id.*

108. The recognition of transference as part of the treatment proper was central to early cases holding that the sexual behavior was covered by professional liability insurance policies. *Id.* at 702. This particular issue is now moot because insurance policies now explicitly exclude coverage for sexual conduct.

109. *Benavidez v. United States*, 177 F.3d 927, 930 (10th Cir. 1999).

110. See *supra* Part I.



eroticized transference relationship that has roots in the dependency of the earliest parent-child relationship.<sup>111</sup>

But is transference dependency in the therapeutic context really so different from transference experiences in our everyday lives? The effort to work through transference in the therapy relationship presumes its operation in the patient's real life as well. The concept of transference as the phenomenon whereby past relationships influence our experience of present relationships applies generally to our interactions with others in the world; as noted above, these transference patterns are what drive patients into therapy in the first place.<sup>112</sup> But if transference is universal, how are we to distinguish the patient's love for the analyst from "real" romantic love, with its sometimes near delusional transference idealizations and power imbalances stemming from money, social status, fame, and beauty? Where individuals set out to seduce and use all the weapons at their disposal—including deception—to win over the beloved object? Fantasy, dependency, and idealization imbued with early childhood feelings characterize these relationships, too. We might want to argue that transference dynamics in our love relationships enrich rather than distort reality, but this just begs the question of how we distinguish enrichment from distortion. What is it that makes the transference in a therapeutic relationship the vehicle for sexual assault whereas transference feelings outside of therapy strengthen and deepen the romantic bonds of affection? The existence of strong erotic transference feelings does not alone suffice to differentiate the therapeutic relationship from other relationships where sexual choice operates unimpeded by law.

Upon closer examination, what distinguishes therapeutic sex from other sexual relationships is not transference dependency per se, but rather transference feelings of a type strong enough to collapse reality-based thinking. With adult incest, we saw that deliberative thinking becomes impaired as the imagined all-powerful childhood father merged with the sexualized father of the present.<sup>113</sup> The intensity of an erotic transference in the therapeutic setting risks a similar collapse of fantasy and reality. The regressive intensity of the desire derives from the intimacy, frequency, and isolation of the treatment, but also from a powerful combination of authority, attention, and reserve. This combination normally produces a fruitful therapeutic encounter. The therapist's abstinence allows the transference to deepen by creating a metaphoric space freed from the constraints of the reality of the analytic relationship. With little knowledge of the therapist, the patient can fantasize freely about who he or she might be. Therapy thus opens up the possibility for a loosening of reality through the exploration of fantasy and desire. The rule of abstinence generates this space for metaphor by allowing the patient to bring her transference feelings to the surface without any possibility that the therapist will respond.

This one-sidedness, where the therapist remains a relatively unknown authority figure, can bring regressive pressures to bear on present day, reality-

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111. See *Simmons v. United States*, 805 F.2d 1363, 1365 (9th Cir. 1986).

112. See PSYCHOANALYTIC TERMS AND CONCEPTS, *supra* note 20, at 266 (observing that "the experience of transference is a universal tendency").

113. See *supra* Part I.

based thinking to a point that is typically not reached in relationships outside therapy. Romantic relationships retain the possibility of reality testing.<sup>114</sup> They may be intimate and even isolated, but they generally involve information sharing by both parties. When mystery deepens, questions can be asked; feelings can be verified through behavior; friends and family can be consulted. The reciprocity of the relationship with a romantic partner helps to keep the beloved person situated in the present. Of course, the relationship might be similar to, or reminiscent of, past relationships. But in contrast, sex between therapist and patient collapses the imagined into the real, as erotic longings turn into an actual sexual encounter.<sup>115</sup> The projection of past relationships onto the present casts the therapist in the role of parent and the patient in the role of adult child.<sup>116</sup> In one analyst's words, sex between therapist and patient constitutes a "professional form of incest."<sup>117</sup> When an eroticized transference is acted on, therapist–patient sex is not *like* incest; for a patient in the throes of an erotic transference, it has the psychological meaning and effect of *actual* incest. Sex between therapist and patient can constitute a transference–countertransference enactment with the devastating psychological consequences of a sexual assault, one that mirrors child sexual abuse in its psychological operation and effect.<sup>118</sup>

Thus therapist–patient sex resonates with the meaning (and harm) of adult incest. Yet however incestuously damaging the relationship is during treatment, when the patient is under the sway of transference feelings, what explains the absolute ban on sex between therapists and their *former* patients? The American Psychoanalytic Association bans these relationships for a lifetime.<sup>119</sup> But not all the professional organizations agree. The American Psychological Association only categorically bans them for a period of two years, thus suggesting that termination brings with it the waning of the transference intensities and distortions. As transference subsides, it is assumed, then reason returns. Once the treatment ends, and the patient has presumably attained an increased capacity for reflective

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114. Anonymous sexual encounters, the most mysterious of all, would not typically generate impairing transference feelings because they are so short-lived. Rapid transference reactions occur, but they are not usual. See Pamela A. Foelsh & Otto F. Kernberg, *Transference-Focused Psychotherapy for Borderline Personality Disorders*, 4 IN SESSION: PSYCHOTHERAPY IN PRACTICE, no. 2, 1998, at 67.

115. As Freud described, the patient "has become quite without insight and seems swallowed up in her love." FREUD, *Observations on Transference-Love*, *supra* note 72, at 380.

116. See *L.L. v. Med. Protection Co.*, 362 N.W.2d 174, 177 (Wis. Ct. App. 1984) ("Transference is crucial to the therapeutic process because the patient 'unconsciously attributes to the psychiatrist or analyst those feelings which he may have repressed toward his own parents.'" (quoting Dawidoff, *supra* note 105)); *Thierfelder v. Wolfert*, 52 A.3d 1251, 1269 (Pa. 2012) (noting that transference occurs "when a therapist encourages a mental health patient to 'displace' feelings regarding other figures in the patient's life, often parents, onto the therapist").

117. SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS xi (Glen O. Gabbard ed., 1989).

118. See *Simmons v. United States*, 805 F.2d 1363, 1365 (9th Cir. 1986) ("[W]ere a therapist to be sexual with a client it would be replicating at a symbolic level the situation in which a parent would be sexual with a child.").

119. See AM. PSYCHOANALYTIC ASS'N, *supra* note 72.

thinking and distance from the therapist, why should we not respect her choice? Certainly a prohibition on sexual relations 5, 10, or 20 years later raises a serious concern about encroachments on the right of sexual autonomy. Particularly when the therapy was short-lived, we should question the denial of an individual's sexual freedom years into the future.

A more promising defense of the lifetime ban rests on the position that a therapist holds in the patient's mind as termination approaches. Freud believed that therapeutic change happens by the therapist strictly adhering to the task of interpretation. Once the transference neurosis was resolved by interpreting and working through the feelings, including the erotic feelings, the relationship would come to a natural termination.<sup>120</sup> Yet many modern analysts think differently about the psychoanalytic process, focusing on the internalization of the therapeutic relationship with the therapist.<sup>121</sup> As with an adult child encountering a returning parent, reengagement with a former therapist even years later risks reactivating the internalized parent-child configuration. Yet the paternalism of a lifetime ban may not be justified when weighed against the patient's interest in sexual autonomy. The right of sexual autonomy would be consistent with some temporary waiting period, perhaps even years, but not necessarily with a flat prohibition on sexual relations with former patients many years or decades after the treatment has ended. In imposing a lifetime ban, psychoanalysts may fail to weigh the individual's legitimate interest in sexual autonomy. At the very least, the lifetime ban needs to be justified in light of these sexual autonomy concerns.

The scope of the ban on sexual relations should be considered as well. Does the prohibition on sexual relations extend to less intense forms of therapy that do not aim to use the transference to bring about psychic change? Medication therapy, cognitive behavioral therapy, and even once-a-week supportive therapy do not intentionally utilize the transference as part of the treatment, nor does religious counseling or other lay treatments. Some courts have found that sexual relations constitute malpractice whenever the professional relationship has a counseling component.<sup>122</sup> Yet not all courts agree. In *Bladen v. First Presbyterian Church*, the Oklahoma Supreme Court held that liability does not extend to clergy members because this form of counseling does not focus on transference as part of the treatment.<sup>123</sup> The court held:

The crucial factor in the therapist-patient relationship which leads to the imposition of legal liability for conduct which arguably is no more exploitative of a patient than sexual involvement of a lawyer with a client, or a priest or minister with a parishioner, or a gynecologist with a patient is that lawyers, ministers and

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120. See FREUD, *Remembering, Repeating, and Working Through*, *supra* note 93.

121. This may happen through the provision of a holding environment, or the possibility of a new object relationship, or empathic attunement, or reflective thinking. See T. Byram Karasu & Sylvia R. Karasu, *Psychoanalysis and Psychoanalytic Therapy*, in 2 KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2746 (Benjamin J. Saddock et al. eds., 9th ed. 2009).

122. See *McCracken v. Walls-Kaufman*, 717 A.2d 346 (D.C. 1998).

123. *Bladen v. First Presbyterian Church*, 857 P.2d 789 (Okla. 1993).

gynecologists do not offer a course of treatment and counseling predicated upon handling the transference phenomenon.<sup>124</sup>

The *Bladen* court found that, while transference arises in many professional relationships, it is not the mechanism of treatment in nontherapy contexts. “[P]rofessionals who do not use the transference mechanism are not subject to the same claim of counseling malpractice arising from the consensual sexual conduct of adults.”<sup>125</sup> But the court’s reasoning did not resolve the question whether the presence of intense transference feelings alone—even if not the subject of therapeutic treatment—impairs sexual consent.

Other courts have addressed this issue, including most recently the Pennsylvania Supreme Court, in *Thierfelder v. Wolfert*.<sup>126</sup> In 1996, David Thierfelder began treatment with Irwin Wolfert, a family practitioner. A month later, his wife Joanne began treatment as well. Dr. Wolfert treated both David and Joanne for many years on a range of issues including, *inter alia*, sexual problems. In addition, Dr. Wolfert treated Joanne for depression, anxiety, and other emotional problems. In 2002, Joanne and Dr. Wolfert began a sexual affair that lasted almost a year. Joanne became increasingly depressed and anxious. After she ended the affair, she and David filed suit against Dr. Wolfert for medical malpractice. Eventually, the Pennsylvania Supreme Court heard the case, and held in favor of Dr. Wolfert. The court concluded that medical practitioners do not commit malpractice in Pennsylvania when they sleep with their patients. In the court’s view, “a general practitioner is less likely than a mental health professional to recognize, understand, and employ transference as a conscious therapeutic method.”<sup>127</sup>

On its face, the *Thierfelder* decision upholds the general principle that sex is allowed in professional counseling relationships where transference is not the mechanism of the treatment. But the court misconstrues the nature and operation of transference. From the perspective of the patient in the throes of an erotic transference, the unconscious constraints on choice are no different whether the counseling was psychoanalytic or cognitive. Even where a therapist does not consciously employ transference, it still comes into play. All counseling relationships benefit from the patient’s positive emotional attachment to a more distant authority figure, whether psychiatrist, psychologist, clergy member, or family practitioner. Whatever the treatment modality, the patient’s emotional investment in the treatment plays a role in its outcome. A positive therapeutic alliance, which is essential to counseling in almost all its forms, will always have strong transference derivatives. Indeed, we should perhaps have *greater* concerns about a treatment structure that stimulates strong transference emotions but does not address them directly.

The implications of the patient–therapist ban extend beyond the counseling setting. Many other kinds of professional relationships involve intimacy, vulnerability, and counseling: divorce lawyers and their clients; medical

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124. *Id.* at 794.

125. *Id.*

126. *Thierfelder v. Wolfert*, 52 A.3d 1251 (Pa. 2012).

127. *Id.* at 1275.

doctors and their patients; teachers and their students. Are sexual relations to be prohibited in all these contexts as well? Perhaps. Clients and medical patients may all harbor transference fantasies of an all-powerful parental figure able to rescue them not only from the practical problem at hand, but also, at an unconscious level, from deeper feelings of unhappiness or fear. Although transference in these contexts is only incidental to other aims such as treating disease or legal counseling, it can exert a powerful influence over the parties. The American Bar Association Model Rules and many state laws prohibit sexual relations between lawyers and their current clients. While the reasons given do not expressly reference transference, the comments to the Model Rules explain that “the client’s own emotional involvement renders it unlikely that the client c[an] give adequate informed consent” to the sexual relations.<sup>128</sup> Yet under the Model Rules, a lawyer and client can terminate their professional relationship to pursue a sexual relationship without any waiting period. Law could learn from psychoanalysis that the client’s decision to end the professional relationship will not itself be free from transference dynamics. Requiring a waiting period addresses this concern while respecting the client’s right to sexual autonomy.

The rules governing professional abstinence are at best a pragmatic attempt to capture the ever-elusive equilibrium between sexual desire and deliberative reason that defines the right of sexual autonomy. No line drawing will satisfy all interests. Some will be concerned about a legal regime that fails to recognize the distorting effects of transference in professional relationships generally. And psychoanalysts are not likely to be happy with a rule that opens the door to allowing sex between therapists and former patients, even after a waiting period. Law necessarily presumes a baseline capacity of free will and autonomous choice.<sup>129</sup> Psychoanalysis helps us to modify law’s presumption of free choice in limited cases where sexual encounters mobilize exceptionally powerful regressive feelings from early childhood, rendering individuals uniquely vulnerable to sexual exploitation. As we have seen, the line separating nonconsensual from consensual sex—incestuous surrender from adult passion—should be drawn with careful consideration of the psychological dynamics of desire as well as the value of choice. Each plays a necessary role in defining the legal contours of sexual autonomy as a fundamental legal right.

### III. SADOMASOCHISTIC SEX

The legal regulation of sadomasochistic sex opens up yet another dimension of the complex relationship between reason and desire.<sup>130</sup> If we did not already know firsthand, we learn from psychoanalysis that the pursuit of suffering

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128. MODEL RULES OF PROF’L CONDUCT R. 1.8(j) cmt.17 (2013). These sexual relationships might be understood to give rise to a conflict of interest on the part of the professional, thus requiring either a cessation of the sexual activity or the termination of the professional relationship. But a prohibition justified on the grounds of a conflict of interest should not extend beyond the termination of the professional relationship.

129. See *Thierfelder*, 52 A.3d at 1277 (“Ours is a fluid and complex society, where concepts of free will and personal responsibility hold some sway.”).

130. See Susan R. Schmeiser, *Forces of Consent*, 32 STUD. IN LAW, POL., & SOC’Y 3 (2004).

is a common—perhaps even universal—feature of psychic life.<sup>131</sup> Everyday forms of masochism include self-criticism, self-reproach, self-denial, and self-defeating behavior, as well as bodily forms of self-injury such as excessive nail biting or piercings.<sup>132</sup> Among these manifestations of self-directed injury can be found the phenomenon of sexual masochism, a type of intimate encounter involving enjoyment in erotic restraint, domination, and pain inflicted by another.<sup>133</sup> Sexual masochists, as they are sometimes called, seek, and perhaps need, physical suffering and degradation in order to achieve sexual pleasure or gratification.<sup>134</sup> In contrast to adult incest or the therapist–patient relationship, sadomasochistic sexual relations on the surface look nonconsensual. The submissive partner may be bound, chained, or gagged. He may be whipped, genitally pierced, bitten, smothered, injected with liquid, or covered in hot wax.<sup>135</sup> Most people might find it difficult to imagine that anyone would consent to such acts, but a minority of people engage in these intimate enactments of sexual submission.

Most states prohibit sadomasochistic practices that cause or have a risk of causing serious physical injury.<sup>136</sup> The dominant partner can be prosecuted for physical assault, generally defined as intentionally causing serious bodily injury to

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131. See Jules Glenn & Isidor Bernstein, *Sadomasochism*, in *PSYCHOANALYSIS: THE MAJOR CONCEPTS*, *supra* note 20, at 252, 254; *PSYCHOANALYTIC TERMS AND CONCEPTS*, *supra* note 20, at 145; Arnold M. Cooper, *The Narcissistic-Masochistic Character*, in *Masochism: Current Psychoanalytic Perspectives*, in *MASOCHISM: CURRENT PSYCHOANALYTIC PERSPECTIVES* 117 (Robert A. Glick & Donald I. Meyers eds., 1988). For an early analysis, see THEODOR REIK, *MASOCHISM IN MODERN MAN* (1941).

132. These are the most common manifestations. See *PSYCHOANALYTIC TERMS AND CONCEPTS*, *supra* note 20, at 145 (noting that masochism may also be “characterized by contempt, injustice collecting, self-recrimination, self pity, and suicidal behavior” (citing Anna Ornstein, *The Dread to Repeat: Comments on the Working Through Process in Psychoanalysis*, 39 J. AM. PSYCHOANALYTIC ASS’N 377 (1991))).

133. Sadomasochism can be defined as “erotic activities between consenting adults that incorporate power exchange, pain and sensation play, role-playing, restraint, and some elements of fetishism.” Jill D. Weinberg, *Contextualizing Consent in the Shadow of the Law: Developing a Typology of the Rules of Violence in Close-Knit Communities* (2013) (unpublished manuscript) (on file with author). In general, sadomasochistic sex “is difficult to define precisely because of the wide range of activities involved and the paucity of research on the subject.” Monica Pa, *Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex*, 11 TEX. J. WOMEN & L. 51, 58 (2001). The term masochism was first used by von Krafft-Ebing in 1892, which he derived from the novel *Venus in Furs* by von Sacher-Masoch. See RICHARD VON KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS* (1892).

134. See Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 116–17 (2014) (“BDSM encompasses a range of sexual activities between consenting adults that includes bondage, domination and submission, and sadomasochistic activity.”); *PSYCHOANALYTIC TERMS AND CONCEPTS*, *supra* note 20, at 45.

135. See Pa, *supra* note 133 (describing sadomasochistic behavior as including “(1) infliction of physical pain, usually by means of whipping, spanking, slapping or the application of heat and cold; (2) verbal or psychological stimulation such as threats and insults; (3) dominance and submission, for example, where one individual orders the other to do his or her bidding; (4) bondage and discipline, involving restraints such as rope and chains and/or punishment for real or fabricated transgressions”).

136. See Kaplan, *supra* note 134, at 121.

another person.<sup>137</sup> Consent is not a defense to the charge of assault because, “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.”<sup>138</sup> Although consensual sadomasochism does not usually result in serious injury, courts in practice “exaggerate or mischaracterize [sadomasochistic] activities in order to force the resulting injuries into the category of ‘serious bodily injury.’”<sup>139</sup> Moreover, even where sexual harm is threatened, the “no consent” policy as applied to sadomasochism is not entirely consistent with the treatment of certain athletic activities such as boxing, mixed marital arts, and football.<sup>140</sup> Finally, we allow consent as a defense to rape because we understand that consent is what distinguishes pleasurable sexual activity from violation. Why then do we rule out consent as a defense to sadomasochistic sex? Given the fundamental right of sexual autonomy, what justifies the prohibition on consensual sadomasochistic relations?

We already know that the prohibition on sadomasochistic sex cannot be based solely on our revulsion at the practice, for *Lawrence* eliminates moral condemnation as a basis for denying individuals the right to sexual autonomy.<sup>141</sup> But more plausible justifications for the absolute ban should be considered. For example, we might prohibit sadomasochistic sex because we do not consider the submissive partner in these encounters to be a fully willing participant.<sup>142</sup> Given the intensity of the degradation and pain, we assume that no rational person would consent.<sup>143</sup> The submissive partner might appear to be willing, but we think that at

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137. See Weinberg, *supra* note 133. See also, e.g., NEB. REV. STAT. § 28-308(1) (2009). Dominant parties can also be civilly sued for assault, as well as intentional infliction of emotional distress. See, e.g., *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993). Generally, bodily injury is required for sadomasochism to be charged as assault. See Pa, *supra* note 133, at 64.

138. *State v. Van*, 688 N.W.2d 600, 614 (Neb. 2004) (quoting *People v. Jovanovic*, 263 A.2d 182, 198 n.5 (N.Y. 1999)). See also *People v. Samuels*, 250 Cal. App. 2d 501 (1967); *State v. Collier*, 372 N.W.2d 303, 305 (Iowa Ct. App. 1985) (sadomasochism does not fall within the exception for “sport, social or other activity”); *Commonwealth v. Carey*, 974 N.E.2d 624 (Mass. 2012); *Commonwealth v. Appleby*, 402 N.E.2d 1051 (Mass. 1980).

139. Kaplan, *supra* note 134, at 122.

140. See, e.g., *id.* (“Although [sadomasochism] is classified as a ‘serious bodily injury,’ it may still merit a consent defense if the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law.”); MODEL PENAL CODE §2.11(2)(b) (1985). See also Annette Houlihan, *When “No” Means “Yes” and “Yes” Means Harm: HIV Risk, Consent and Sadomasochistic Case Law*, 20 LAW & SEXUALITY 31, 41 (2011) (identifying exceptions to the no consent rule as “reasonable surgery, ritual circumcision, tattooing, body piercing, organised sports, parental chastisement, dangerous exhibitions and bravado, rough and undisciplined horseplay, and religious flagellation”).

141. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

142. See Kaplan, *supra* note 134, at 131.

143. See *Samuels*, 250 Cal. App. 2d at 513–14 (“It is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force likely to produce great bodily injury.”); Schmeiser, *supra* note 130, at 11 (“In the reasoning of the courts that have considered

some level he is driven by a pathological need for punishment.<sup>144</sup> The facts of some cases suggest as much. In *State v. Van*, for example, the submissive partner testified that he felt himself to be a “fundamentally . . . bad person,” that he was looking for a “very physically and mentally abusive punishment relationship,” and that “he expected to be tortured, humiliated, and to eventually die as a result of his relationship with [his master.]”<sup>145</sup> Cases such as *Van* support a common inference that the submissive partner must be psychologically ill because no rational person would willingly submit to such pain and degradation, and even risk of death. Thus, we deny the submissive partner the right to choose because we believe it is no choice at all. We position the submissive partner in the same way as the adult incestuous partner. Indeed, the masochist looks to be acting out exactly the kind of surrender to a more powerful other that we deemed indicative of the absence of choice with both adult incest and the therapist–patient relationship.

Yet upon closer examination, the “no rational person would consent” argument does not hold up. The law routinely accepts the idea that rational people consent to pain and injury. Football players, boxers, hockey players, and mixed martial-arts fighters all lawfully consent to risk of serious injury; skydivers and mountain climbers regularly risk death as well. The public generally admires players and athletes who risk serious injury or death for the mastery of the sport. We see these players and athletes as demonstrating exceptional courage and a sense of adventure, living life at a heightened level of energy, excitement, and skill. Moreover, all of us are implicated in the enjoyment of these games as spectators. As Robert Cover observed, “almost all people are fascinated and attracted by violence, even though they are at the same time repelled by it.”<sup>146</sup> We might want to argue that the pain and injury are just secondary to our real interest: the athleticism or skill. But the fact is that gratuitous pain and risk of injury are exactly what draw many people to these spectator sports.

The “no rational person would consent” argument has deeper problems as well. While not talked about in polite company, many people are specifically drawn to violence in sex. The idea that no rational person would willingly submit to sexual pain constructs a false barrier between “normal” sex and “perverse” sadomasochistic sex.<sup>147</sup> We shut our eyes to the truth when we deny the physical

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S/M . . . the consent of the masochist to the sadist’s infliction of violence is pure illusion or delusion, since no reasonable person—no autonomous, rational male subject—would deliberately invite sexualized violence.”)

144. See, e.g., PSYCHOANALYTIC TERMS AND CONCEPTS, *supra* note 20, at 145–46.

In contrast, Theodor Reik argued that masochism reflects the individual’s unconscious desire to demonstrate his strength as well as an unconscious desire to induce guilt in others. REIK, *supra* note 131.

145. 688 N.W.2d 600, 609 (Neb. 2004) (internal quotations omitted).

146. NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 218 (Martha Minow et al eds., 1995).

147. See Pa, *supra* note 133, at 59 (citing research suggesting that 5%–10% of the U.S. population has experimented with sadomasochistic sex). Early in his thinking, Freud identified the existence of sadistic feelings in young children struggling to master their Oedipal frustrations and fears. See SIGMUND FREUD, *Three Essays on Sexuality*, in 7 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD, *supra* note 92, at 125. He revised his pleasure-seeking theory of the libidinal drive in the aftermath



aggression present in many, more ordinary, sexual encounters. Whatever their normative status and cultural derivations, fantasies of violent sex are not uncommon. Culturally, sadomasochistic sex has come out of the closet.<sup>148</sup> Novels depicting sadomasochistic sex are bestsellers;<sup>149</sup> sadomasochistic films are box office successes;<sup>150</sup> artists depicting sadomasochistic activities enjoy widespread acclaim.<sup>151</sup> Of course, sadomasochistic practices often cross the line into a realm of pain and degradation beyond what most people would ever imagine or desire.<sup>152</sup> But sadomasochism lies along a continuum of consensual sexual aggression, running from conventional sex play at one end to severe pain and degradation at the other. Without overly romanticizing physical degradation and domination, the point here is that taking pleasure in rough play, bondage, or pain—whether mild or severe, real or fantasied—is not in itself an indication of impaired choice. We cannot use the presence of violence alone to infer the absence of consent.

Nevertheless, the absence of consent in sadomasochistic sex might be measured by considering the degree of aggression.<sup>153</sup> Fantasy or rough play in conventional sex hardly compares to genital piercing and hot wax. But we have already identified the popular participation in extreme sports as an obvious example of a fully consensual activity posing an equally, if not sometimes higher, risk of injury or death.<sup>154</sup> We might try to distinguish sadomasochism by focusing

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of World War I, when he came to realize that something more was operating in the realm of the unconscious than the drive for sexual gratification. See SIGMUND FREUD, *Beyond the Pleasure Principle*, in 18 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD *supra* note 92, at 1. He called this aggressive impulse the “death instinct.” Although many later analysts have repudiated the idea of a death instinct, the existence of universal aggressive and sadistic feelings continues as a central thread in psychoanalytic thinking. See, e.g., MELANIE KLEIN, THE SELECTED MELANIE KLEIN (Juliet Mitchell ed., 1987). While some theorists, like Freud and Klein, considered aggression to be innate, others view aggression as a “secondary” force, arising as a defense against frustrations and disappointments. See, e.g., W. RONALD D. FAIRBAIRN, AN OBJECT-RELATIONS THEORY OF PERSONALITY (1954); HEINZ KOHUT, THE RESTORATION OF THE SELF (1977).

148. See Pa, *supra* note 133, at 54–55.

149. See, e.g., E. L. JAMES, FIFTY SHADES OF GREY (2011).

150. See, e.g., FIFTY SHADES OF GREY (Focus Features 2015); VENUS IN FUR (Lionsgate 2013).

151. See, e.g., Christopher Knight, *L.A. the Right Home for Robert Mapplethorpe Collection*, L.A. TIMES (Feb. 9, 2011), <http://articles.latimes.com/2011/feb/09/entertainment/la-et-mapplethorpe-notebook-20110209>.

152. Moreover, public fascination does not always indicate endorsement of the practices. Monica Pa describes the sensationalist publicity surrounding the Robert Chambers’ “preppy” rape–murder, and the Columbia student Oliver Jovanovic’s kidnapping and rape of a 20-year-old Barnard student, both of which had sadomasochistic elements. See Pa, *supra* note 133, at 55.

153. See Kaplan, *supra* note 134, at 125–26.

154. See *Commonwealth v. Carey*, 974 N.E.2d 624, 631 (Mass. 2012) (recognizing that “the government has a legitimate interest in discouraging violent behavior between and against its citizens”). Courts and commentators try to distinguish sports from sex by observing that “[a]pppearances . . . are often deceiving, as this leap disregards the vast gulf that exists between the organized, regulatory apparatus of sports competitions, and the intensely personal and private negotiations outlining the permissible bounds of sexual

on the submissive partner's pleasure in the extreme pain, but it could actually be the case that many athletes, for example long-distance runners or bikers, similarly take pleasure in pushing their bodies beyond comfortable bounds. Finally, we might try to distinguish sadomasochistic sex on the ground that extreme sports bring social honor, fortune, and a sense of accomplishment, whereas sadomasochistic sex elicits social degradation and shame.<sup>155</sup> But the right of sexual autonomy prevents us from imposing moral judgment through law on adult, consensual sexual practices.<sup>156</sup> Moreover, shame and disgrace arising from sexual practices is hardly confined to sadomasochism. History has shown us that powerful people are often brought to ruin because of far less exotic sex practices. Top political leaders' careers have ended in disgrace after adulterous sexual liaisons have come to light.<sup>157</sup> Socially condemned sexual behavior is hardly a road that the sexual masochist travels alone.

But the real problem with the argument that submissive partners do not consent is that it simply does not fit the facts. It turns out that submissive partners *do* consent, deliberately and carefully. In fact, sadomasochistic partners are exemplary in their commitment to consensual practices.<sup>158</sup> Setting clear limits defines the community's culture.<sup>159</sup> The partners may work out the terms of the sexual encounter together and in writing, injecting an element of reasoned deliberation into the process.<sup>160</sup> Safe words are identified, which, when spoken, will put a stop to the activity.<sup>161</sup> Furthermore, partners are careful not to engage in activities that pose a risk of serious, permanent injury. As author Pat Califia explains:

Sadomasochism is not a form of sexual assault. It is a consensual activity that involves polarized roles and intense sensations. An S/M scene is always preceded by a negotiation in which the top and bottom decide whether or not they will play, what activities are likely to occur, what activities will not occur, and about how long

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conduct." *Id.* at 632 n.12; see also Cheryl Hanna, *Sex is Not a Sport: Sex and Violence in Criminal Law*, 42 B.C. L. REV. 239, 247–48, 255–56, 287–90 (2001).

155. See Kaplan, *supra* note 134, at 129.

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

157. For a recent example, see Devlin Barrett, *Weiner Calling it Quits*, WALL ST. J. (June 17, 2011), <http://www.wsj.com/articles/SB10001424052702304186404576389422646672178>.

158. See Kaplan, *supra* note 134, at 132–33; Schmeiser, *supra* note 130, at 12 (noting that “the masochist’s apparent surrender to the will of the sadist is only possible because of a prior act of authorization on the part of the masochist”); Thomas S. Weinberg, *Sadomasochism and the Social Sciences: A Review of the Sociological and Social Psychological Literature*, in MASOCHISM: POWERFUL PLEASURES 17, 19 (2006) (“The standard BDSM agreement takes on the form of a contract in which the rules of engagement are negotiated and often memorialized in writing.”).

159. See Weinberg, *supra* note 158; WILLIAM A. HENKIN & SYBIL HOLIDAY, *CONSENSUAL MASOCHISM: HOW TO TALK ABOUT IT AND HOW TO DO IT SAFELY* (2d ed. 2003).

160. See Weinberg, *supra* note 158, at 31.

161. See Pa, *supra* note 133, at 61.

the scene will last. The bottom is usually given a “safe word” or “code action” she can use to stop the scene.<sup>162</sup>

These negotiated parameters and safe words demarcate the continuing consensual nature of the sexual activity. A masochistic contract, as it is sometimes called, reflects the submissive partner’s control over the terms of the sexual encounter.<sup>163</sup> As psychoanalyst Theodor Reik argued, to the extent coercion operates at the psychological level, it may in fact be the masochist who overtakes the will of his partner.<sup>164</sup> Optimally, the exchange of pleasure rather than malignant domination defines the experience.<sup>165</sup> Upending our expectations, therefore, sadomasochistic sex actually provides a template for the role of reasoned deliberation in safeguarding consensual sexual activity.

The sadomasochistic encounter highlights the importance of treating “no” as performative rather than communicative, an utterance signaling the end of consent and triggering legal responsibility for the immediate cessation of sex.<sup>166</sup> Yet is the choice to engage in masochistic sex compromised by a relationship that so obviously engages the dynamics of domination and submission? While sadomasochistic sex enacts a scene of sexual domination and submission, the actual psychodynamics of the relationship are not structured around forced compliance. Sadomasochism is understood to be theater. As Califia emphasizes, “[t]he key word to understand S/M is *fantasy*.”<sup>167</sup> When the parameters of the encounter are expressly consented to, the sadomasochistic scene of domination and submission remains staged. The scenes are typically scripted.<sup>168</sup> Indeed, the “victim” often designs the scene and maintains control over how it will unfold.<sup>169</sup> Safe words are performative rather than communicative, triggering an immediate

162. PAT CALIFIA, *Feminism and Sadomasochism*, in PUBLIC SEX: THE CULTURE OF RADICAL 165, 168 (1994).

163. See SALMAN AKHTAR, COMPREHENSIVE DICTIONARY OF PSYCHOANALYSIS 166 (2009); Schmeiser, *supra* note 130, at 12 (quoting Gilles Deleuze’s description of “a process of persuasion and education in which [the masochist] brings his despotic counterpart into being”).

164. See Schmeiser, *supra* note 130, at 13–14 (“Far from being the passive recipient—much less the victim—of another’s brutality, or a pliant being of compromised will, the masochist in Reik’s formulation emerges as an active, even tyrannically forceful, agent of his own submission.”).

165. See William N. Eskridge, Jr., *The Many Faces of Sexual Consent*, 37 WM. & MARY L. REV. 47, 64 (1995).

166. Some colleges have adopted policies that establish “no” as a safeword for all sexual relations. See, e.g., OBERLIN COLLEGE, *supra* note 80 (“A verbal ‘no’ even if it might sound indecisive or insincere should be treated as a withdrawal of consent.”).

167. CALIFIA, *supra* note 162, at 31; see Patrick D. Hopkins, *Rethinking Sadomasochism: Feminism, Interpretation, and Simulation*, 9 HYPATHIA, Spring 1994, at 116, 116 (“Like a Shakespearean duel on stage, with blunted blades and actors’ training, violence is simulated, but is not replicated.”); Pa, *supra* note 133, at 53 (“Prosecutors confuse the presence of traditional symbols of violence (whips, chains, handcuffs), utilized in a theatrical and self-conscious simulation of power relationships, as the presence of real domination and exploitation.”).

168. See Weinberg, *supra* note 158, at 33 (“SM scenes are both consensual and collaboratively produced.”).

169. See Pa, *supra* note 133, at 60.

cessation to the activity. Domination retains its fantasized character up to the point where safe words are ignored and the scene goes beyond the agreed-upon terms.

At a deeper level, of course, unconscious desires may drive the masochist's choice. Undeniably, many individuals are motivated by powerful unconscious desires for punishment. There are certainly unconscious components to requiring pain for the experience of sexual pleasure. Freud wrote regularly on the topic of masochism, linking it to both instinctual aggression and super-ego guilt over Oedipal desires.<sup>170</sup> In his work on beating fantasies, for example, Freud described masochism as providing both sexual satisfaction and punishment for forbidden wishes.<sup>171</sup> Since Freud, "theorists have emphasized the interpersonal, attachment, and (predominantly preoedipal) object relations aspects of masochism," locating the origins of masochism in "the need to preserve a tie to an object at whose hands one has suffered in childhood."<sup>172</sup> In this view, the adult love of suffering has its roots in the child's adaptive response to an abnormal environment.<sup>173</sup> Sadomasochism may also reflect the human need to master a psychic trauma, a process that leads individuals to return to the traumatic event in thoughts, dreams, or repetitive actions.<sup>174</sup> This repetition compulsion, as Freud called it, represents the individual's wish to redo the traumatic event, this time with the experience of mastering its overwhelming effects by evoking a sense of agency.<sup>175</sup>

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170. See, e.g., SIGMUND FREUD, "A Child is Being Beaten": A Contribution to the Study of the Origin of Sexual Perversions, in 17 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 175 (James Strachey ed., James Strachey & Anna Freud trans., Vintage 2001) (1953–74); SIGMUND FREUD, *The Economic Problem of Masochism*, in 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 159 (James Strachey ed., James Strachey & Anna Freud trans., Vintage 2001) (1953–74).

171. See FREUD, "A Child is Being Beaten": A Contribution to the Study of the Origin of Sexual Perversions, *supra* note 170; MASOCHISM: CURRENT PSYCHOANALYTIC PERSPECTIVES, *supra* note 131, at 5; AKHTAR, *supra* note 163. By the end of his career, Freud posited the existence of "erotogenic masochism," linked to the death drive, as well as "moral masochism," tied to unconscious feelings of guilt and the need for punishment, clearly linked to the super-ego. PSYCHOANALYTIC TERMS AND CONCEPTS, *supra* note 20, at 146. In *The Economic Problem of Masochism*, Freud argued that the need for punishment can become sexualized, thus turning an attempt at super-ego retribution into an instinctual gratification. See AKHTAR, *supra* note 163, at 184.

172. PSYCHOANALYTIC TERMS AND CONCEPTS, *supra* note 20, at 146.

173. See Bernhard Berliner, *The Role of Object Relations in Moral Masochism*, 27 PSYCHOANALYTIC Q. 38 (1958).

174. See PSYCHOANALYTIC TERMS AND CONCEPTS, *supra* note 20, at 273; JUDITH HERMAN, TRAUMA AND RECOVERY 40 (1997) ("[T]raumatized people find themselves reenacting some aspect of the trauma scene in disguised form, without realizing what they are doing.").

175. See PSYCHOANALYTIC TERMS AND CONCEPTS, *supra* note 20, at 273; Schmeiser, *supra* note 130, at 34 n.22. Some disagree that repetition brings relief. Schmeiser notes that Jessica Benjamin, for example, argues that masochistic repetition "causes the violent rupture of the self, a profound experience of fragmentation and chaos." *Id.* (quoting BENJAMIN, *supra* note 1, at 61).

Yet despite the fact that sexual masochism may be motivated by unconscious needs and desires, we may not be justified in imposing paternalistic limits on the behavior. With masochism, we are not dealing with the kind of totalizing psychological submission to authority and loss of reality testing that we have seen characterize adult incest and therapist–patient sex. Unlike adult incest and the therapist–patient relationship, there is nothing inherent in the sadomasochistic relationship that distinguishes it from the kinds of vulnerabilities and exploitation we find in many non-sadomasochistic relationships. Certainly, masochists are not any more likely to be psychologically ill than anyone else.<sup>176</sup> The Diagnostic and Statistical Manual of Mental Disorders now requires personal distress about the sexual masochism or harm to others in order for a diagnosis to be given, reflecting the current belief that people with “atypical sexual interests do not have a mental disorder.”<sup>177</sup> As one commentator puts it: “At the core of the [S/M] community are mostly sensible, rational, respectable, otherwise quite ordinary people.”<sup>178</sup> The fact that sadomasochistic partners negotiate the terms of their sexual scene in advance only makes it more likely that the individual chooses, rather than blindly submits to, physical subjugation. While recognizing the extent to which choice is determined by unconscious factors, psychoanalysis nevertheless does not rule out human agency in the sadomasochistic encounter. For while it appears that sadomasochistic sex can be infused with unconscious super-ego fantasies of guilt and punishment, it is nevertheless explicitly and consciously bounded by and within reason.

Of course there are limits to the sexual activities to which an individual may consent. No civilized society need tolerate sexual practices that involve death, mutilation, or other severe long-term bodily injury in the name of sexual pleasure. But we must be clear about the justification for prohibiting this behavior. It is not because sexual autonomy is lacking. Rather, the ban on extreme forms of self-injury reflects a social norm that irrevocable bodily injury outweighs the individual’s right to sexual freedom. We see this balancing of values in other contexts involving self-injury. Prohibitions on suicide reflect limits on self-injury deriving from the competing value of human life. In the case of suicide, countervailing normative commitments lead us to conclude that the social harm outweighs the individual’s fundamental right to choose.<sup>179</sup> But in the context of sadomasochistic sex, no countervailing social values against non-life-threatening injury clearly outweigh the fundamental right of sexual autonomy. If legal limits are to be set, then balancing the right to sexual autonomy against perceived social harms must take place.

In this regard, some feminists have raised legitimate concerns that sadomasochism risks sexualizing violence in ways that promote unconsented-to

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176. See PSYCHOANALYSIS: THE MAJOR CONCEPTS, *supra* note 20, at 145–46 (“[S]ome degree of masochism is a feature of everyone’s psychological life.”).

177. *Paraphilic Disorders*, AM. PSYCHIATRIC ASS’N (2013), <http://www.dsm5.org/Documents/Paraphilic%20Disorders%20Fact%20Sheet.pdf>.

178. See Pa, *supra* note 133, at 60.

179. Although in the case of suicide, one might dispute that countervailing values outweigh the individual’s autonomy interest in choosing how to end his or her life.

violence and rape among intimate partners.<sup>180</sup> In fact, many of the published cases on sadomasochism do appear to involve nonconsensual sexual activity.<sup>181</sup> In *Twyman v. Twyman*, for example, Sheila Twyman brought suit for intentional infliction of emotional distress against her husband for coercing her into bondage activities despite his knowing that she had been raped at knifepoint before their marriage.<sup>182</sup> The absence of a consent defense in sadomasochism prosecutions provides the state with an easy way to prosecute dominant partners who violate the agreed upon terms. But the same could also be said about rape statutes generally; it would certainly be easier for prosecutors if consent were not a defense to rape, but we do not take that fact to be a reason to do away with the consent defense to rape charges. Some feminists argue, in fact, that because sadomasochistic sex highlights power dynamics in a self-conscious way, it allows for social critique and transformation of prevailing gender and sexual norms.<sup>183</sup>

Given concerns about sexual autonomy, sadomasochistic sex should lead to criminal liability only when clearly negotiated consent was lacking or exceeded, or the injuries are truly severe or life threatening.<sup>184</sup> However, because of the heightened risk of injury, we might impose a higher standard of care for establishing that the submissive partner consented to the specific activity. We might require that consent be in writing. We might insist that safe words be identified. We might be vigilant in prohibiting sexual imprisonment of any kind because it runs the risk of “traumatic bonding,” a type of dependency relationship experienced by individuals physically controlled by another over a period of time.<sup>185</sup> But an absolute ban on sadomasochistic sex would appear to run afoul of the fundamental right to sexual autonomy. In the absence of serious mental impairment, no compelling basis exists to deny individuals the right to engage in sadomasochistic sex.

Sadomasochistic sex provides insights into the balance between reason and desire that lies at the core of sexual autonomy. Some might resist the loss of spontaneity and freedom that reason brings when the terms and conditions of the sexual encounter are negotiated in advance. Reason may be viewed as destroying

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180. See Kaplan, *supra* note 134, at 133–34; Hanna, *supra* note 154, at 285. See also Pa, *supra* note 133, at 88 (reviewing literature); Schmeiser, *supra* note 130, at 27 (quoting Didi Herman for the point that sadomasochistic pornography and sex are “‘immoral’ because they trivialize, exploit, and eroticize ‘real’ pain and degradation.”).

181. See, e.g., *Commonwealth v. Carey*, 974 N.E.2d 624 (Mass. 2012).

182. See *Twyman v. Twyman*, 855 S.W.2d 619, 620 n.1 (Tex. 1993).

183. See Schmeiser, *supra* note 130, at 20–21 (noting “the ways in which S/M’s highly ritualized functions . . . perform power relations in a manner that often self-consciously attempts to deconstruct the dichotomy of public and private”).

184. See Pa, *supra* note 133, at 53 (“Criminal prosecution for S/M sex should occur only where the victim claims he or she was sexually assaulted because there was no clear consent to the S/M encounter, consent was revoked, or the perpetrator exceeded the scope of consent.”).

185. Traumatic bonding involves “the development and course of strong emotional ties between two persons where one person intermittently harasses, beats, threatens, abuses, or intimidates the other.” Don Dutton & Susan Lee Painter, *Traumatic Bonding: The Development of Emotional Attachments in Battered Women and Other Relationships of Intermittent Abuse*, 6 VICTIMOLOGY: AN INT’L J. 139 (1983).

the authenticity and spontaneity of romantic encounters, turning them into dry contractual arrangements. Law extinguishes love, we readily assume. But the culture of consent within the sadomasochistic community highlights how the exercise of reason, and the resulting deliberated limits and terms of the encounter, openly allows for the fulfillment of desire. Many people oppose negotiated sex because they assume it destroys desire, but it turns out that parameters and safe words may be what make romantic flights of passion possible. Far from deromanticizing relations, negotiated consent can establish the conditions under which romantic desire can be fully and safely experienced.<sup>186</sup> While we see this deep connection between reason and desire most clearly in the contracts entered into by sadomasochistic partners, all sexual relationships are founded on an agreement, stated or unstated, that the outer boundaries of desire—whatever they might be—will not be crossed.

### CONCLUSION

This Article examined the tension between reason and desire that underlies the ideal of sexual autonomy in American law. The Article explored the unconscious dynamics of choice in three types of sexual relationships regulated by law: adult incest, therapist–patient sex, and sadomasochism. The discussion of adult incest drew on psychodynamic psychology to describe from a psychological point of view how these relationships run an unacceptable risk of sexual coercion in light of unconscious factors undermining the individual’s capacity to consent. Adult incest opens the door to thinking about unconscious factors leading to the breakdown of reasoned choice in other intimate relationships. Some of these relationships, like the therapist–patient relationship, justify legal intervention based on factors such as transference and internalization. Others, like the sadomasochistic relationship, do not. A psychoanalytic perspective helps generate new ways of thinking about sexual vulnerability and domination in more common sexual relationships as well. Exploring the unconscious factors affecting choice in the relationships under study here—adult incest, therapist–patient sex, and sadomasochistic sex—leads us to a deeper understanding of the right of sexual autonomy, and its limits.

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186. Many colleges have established “affirmative consent” regulations on campus that require partners to obtain express consent to sexual activity. *See, e.g., Consent, ORIENTATION, UNIVERSITY OF COLORADO AT BOULDER*, <http://orientation.colorado.edu/familyconversations/consent> (last visited Feb. 23, 2015); *YALE UNIVERSITY, PROMOTING DIVERSITY AND EQUAL OPPORTUNITY AT YALE UNIVERSITY 2012–2013 (2012)*, available at [www.yale.edu/equalopportunity/documents/annual-supplement.pdf](http://www.yale.edu/equalopportunity/documents/annual-supplement.pdf). Unlike sadomasochistic contracts, which implement safe words signaling the withdrawal of consent, these new standards may be logistically impracticable to the extent they require both partners to obtain affirmative consent at every step of the way.