ties, made by members of the group for their private viewing only, came into the hands of police involved in investigating unrelated matters. The defendants were convicted and their convictions were upheld by the Court of Appeal. However, that court took the further step of certifying a question for consideration by the House of Lords. The question asked of the Law Lords was whether the prosecution had to prove lack of consent to establish guilt. As all the passive partners had, in fact, consented, the issue really was would the law give effect to that consent or render it irrelevant?

Lords Templeman, Jauncey of Tullichettle and Lowry answered the question in the negative; the prosecution did not have to prove lack of consent. In Lord Templeman's view, consent can be a defence to assault where no actual harm is caused, for example, to a summary offence involving common assault. However, consent could only result in acquittal where actual or serious harm was intended or caused, if the activity involved was 'lawful', for example during surgery, or in the course of a violent sport, including boxing. Where the activity was unlawful such as duelling or prize-fighting, consent could not exculpate the accused. Whether sado-masochistic activities fell into the former or latter category could only be decided by consideration of policy and public interest. Despite recognising that Parliaments are better equipped for such tasks, able as they are to call on expert advice from doctors, psychiatrists, criminologists and others, his Lordship decided such activities are unlawful. He was not he said, 'prepared to invent a defence of consent for sado-masochistic encounters which breed and glorify cruelty' . . . 'sex is no excuse for violence' . . . 'cruelty is uncivilised' (at pp.83-84). His Lordship was concerned that there was no way of foretelling the degree of harm which might result from such an encounter, and that there was no evidence before him to support an assertion that sado-masochistic activities were essential to the happiness of the participant.

With respect, it can just as easily be said that sport is no excuse for the violence which takes place in a boxing ring. There is also no way of foretelling the harm, and boxing can equally be said to be an activity which glorifies cruelty. There is, at least some evidence to suggest sado-masochistic activities have a therapeutic value.[3] Can the same be said of boxing?

Lord Jauncey concluded, 'it was not in the public interest that deliberate infliction of actual bodily harm during the course of sado-masochistic activities be held lawful'. In his view 'it is for Parliament with its accumulated wisdom and sources of information to declare them to be lawful' (at 92). This is rather odd, as one would usually expect activities to be lawful unless rendered unlawful, not the other way around.

Lord Lowry completed the trio in the majority. In his view there was no good reason to add sado-masochistic acts to the recognised exceptions in which consent could afford a defence to actual or serious harm. Such activities are not, he stated, 'conducive to the enhancement or enjoyment of family life or conducive to the welfare of society' (at 100). Again, with respect, it does not necessarily follow that private consensual activities conducted in extreme secrecy will have any effect on family life, or society in general, whereas public spectacles of violence in the boxing ring, with the seal of societal and judicial approval may indeed have such an effect. Boxing could easily be described as the very 'civilised cruelty' Lord Lowry condemns.

The judgments of the majority reveal an underlying disgust for the activities in question which is understandable. However, revulsion is not a sound basis for a legal judgment.

Lord Mustill in his dissenting judgment in no way defends sado-masochism. However, he does recognise that the real issue is not consent to violence, but the 'criminality of sexual deviation'. In his view, it is not for the courts to punish 'repugnant sexual conduct' under laws aimed at violence. The issue is not one of morality, but whether defendants are properly charged. Citizens, he commented should be able to conduct their private lives 'undisturbed by the criminal law' in so far as that is possible. The question to be asked was not whether another special category of viable consent to a charge of assault be recognised to cover sado-masochistic activities, the answer to which must be no; it was whether such activities should be criminalised. That question, he resolved, was for Parliament to answer with a wealth of resources at its disposal which were not available to the court. His Lordship fully recognised that the risk such activities could get out of hand, result in the spread of infection or disease, or encourage the young and impressionable to become involved, may well provide strong reasons to take such a course. If Parliament wished to fill the gap in available legislation to protect society from such harm — so be it — however, he concluded, these private, consensual, sexual acts, were not offences against present law.

Lord Slynn took up this point also. He said:

> If society takes the view that this kind of behaviour, even though sought after and done in private, is either so new or so extensive or so undesirable that it should be brought now for the first time within the criminal law, then it is for the legislature to decide. It is not for the courts in the interests of 'paternalism' . . . or in order to protect people from themselves, to introduce, into existing statutory crimes relating to offences against the person, concepts which do not properly fit there. [at 122]

Conclusion

While this article in no way seeks to support or encourage the practice of sado-masochism, it must be said that the minority judgments in this case, especially that of Lord Mustill, have much to recommend them. The majority judgments display a willingness to engage in legal moralism or paternalism,[4] to again resort to 'intuitive references to public policy considerations', whereas the minority judges recognise that assault laws were not enacted to punish private consensual sexual acts and should not be manipulated to achieve that result. Sado-masochistic acts may well be said to be committed *with* a person or *on* a person but are hardly offences *against* the person when done with full consent.

If such activities are to be criminalised in Australia it should be achieved directly, through legislation, after full and well informed consideration of what is in the public interest.

References

1. Attorney General's Reference (No. 6 of 1980) [1981] 2 All ER 1057. Derrington J took a contrary view in Raabe [1985] Qld R 115 at 125-126, adopting the view that assault under the Queensland Code required the absence of consent.
2. East's Pleas of the Crown, 1 East PC (1803) ch V, 41-42, pp. 268-70.
3. See the valuable discussion in Leigh, L.H., 'SadoMasochism, Consent, and the Reform of the Criminal Law' (1976) 39 *MLR* 130.
4. See a further discussion by Kell, David, *The Law Quarterly Review*, Vol.109, pp.149-328 at 199.