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FOCUS ON Civil Rights

'Commonwealth v. Baker' Poses Novel Question

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If a man engages in kinky sex with consenting adult partners, should the district attorney's judgment that such behavior is "abnormal" and "sexually dangerous" be grounds for the commonwealth, in a civil jury trial, to incarcerate him for life?

This is the novel question posed by *Commonwealth v. Baker*.

It is also a profound civil liberties question that will help determine whether the 40-year trend toward personal and sexual autonomy and privacy — begun when the U.S. Supreme Court invalidated Connecticut's (and therefore our commonwealth's) antiquated criminal laws against the distribution of contraceptives to married couples — will come to an abrupt halt.

This question may well be answered in a civil "Sexually Dangerous Persons" (SDP) trial that commences this week in Middlesex Superior Court before Judge Ralph D. Gants and a jury.

The trial is governed by G.L. c. 123A, which calls for the involuntary detention of SDPs — that is, people who suffer from a "mental abnormality" that makes them likely to commit future sex offenses — by the Department of Correction, for one day to life.

As a practical matter, the period of incarceration is more likely to be closer to life than to a day, according to Alden Baker Jr.'s lawyer, Boston's John G. Swomley, who has handled more SDP cases than almost any other defense lawyer in Massachusetts.

The Middlesex DA's Office moved to civilly commit Baker in mid-2001, arguing that his interest in S&M sex activities, even with consenting adults, constitutes a dangerous mental abnormality within the meaning of the SDP commitment statute.

Baker's case represents the latest frontier in the war for sexual liberation and personal autonomy that began decades ago in both Massachusetts and in the nation: the right of consenting adult men and women to gain sexual pleasure however and with whomever they choose, as long as it is consensual, essentially safe and done in private.

The Baker defense team will argue that what consenting adults do with one another in their bedrooms — whether homosexual or heterosexual, with whips or without — should be their decision and not that of the state, and that people with tastes considered odd or even frightening by most should not thereby be deemed dangerous.

S&M In The Context Of Sexual Liberation

The U.S. Supreme Court first touched upon private sexual decisions when, in the landmark case of *Griswold v. Connecticut*, 381 U.S. 479 (1965), it invalidated Connecticut's anti-contraception statute, citing the privacy rights of married couples who engaged in the practice of "family planning" — now rather commonplace, but back then a crime.

In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Supreme Court expanded that right beyond the marital bedroom, striking down Massachusetts' anti-contraception statute on equal protection grounds because it treated unmarried couples differently than married couples.

Although the Supreme Court refused to take the next logical step — to constitutionalize a right of gays to engage in private consensual sodomy in *Bowers v. Hardwick*, 478 U.S. 186 (1986) — the Supreme Judicial Court did so in *Commonwealth v. Balthazar*, 366 Mass. 298 (1974), based upon the Massachusetts Declaration of Rights.

Now, however, the counter-assault on sexual autonomy appears to have begun, fueled in part by the clinical judgments of psychologists who condemn certain consensual sexual practices as "deviant."

In the Baker case, the commonwealth has gathered expert testimony to support the proposition that S&M sex — behavior that makes some people a bit nauseous or a lot uneasy — is actually abnormal and dangerous within the meaning of the SDP statute. A test case could well be in the making.

The outcome does not appear to be entirely clear or predictable. Under Chapter 123A, consensual but "abnormal" sexual behaviors can with surprising ease arguably become grounds for involuntary detention.

Whether this use of the statute will withstand constitutional scrutiny, under either the state or federal constitutions, remains to be seen.

Using culture-bound psychological judgments to justify legal enforcement of sexual norms is, of course, not a new tactic. In the 1950s and 1960s, the state routinely institutionalized men for engaging in consensual gay sex.

However, in 1973, the American Psychological Association removed homosexuality from its DSM classification of mental disorders, closing the door on that repressive practice.

Presumably, this step by the psychology profession also made it easier for the SJC to decide *Balthazar* in favor of the defendant.

Today, S&M enthusiasts are stuck where gays once were, straddling the legal and clinical fault lines between sexual freedom and sexual authoritarianism. Even when they engage in S&M play exclusively with consenting adult partners, S&M enthusiasts are frequently diagnosed as suffering from the paraphiliac disorders "sexual sadism" and "sexual masochism."

Yet within the S&M community, boundaries can actually be clearer than in most heterosexual, non-S&M sexual encounters. Partners agree beforehand who will be the "top" (dominant) and the "bottom" (submissive) partner, and often decide on special "safe words" that can be used to end the encounter if things appear to be going too far.

When pain is imposed, it is done within mutually accepted limits and for purposes of mutual gratification. Law enforcement officials generally ignore these distinctions, assuming that nobody could ever truly consent to pain (however temporary) or find it sexually exciting.

This leads to incidents like the "Spanner" case in Britain, in which British authorities classified S&M play as "assault" even though there was no permanent injury, and the "bottoms" had consented to the temporary injury that took place, and raids like Massachusetts' "Paddleboro" case, in which a dominatrix's wooden spoon formed the basis for "assault and battery with a dangerous weapon" charges.

The Spanner case was appealed to the House of Lords and then to the European Court of Human Rights, which in 1997 ruled in favor of the government (*Laskey, Jaggard and Brown v. United Kingdom*, Reports 1997-I).

Meanwhile, the Paddleboro case, heard in 2001 in the Attleboro District Court, never actually confronted the issues surrounding consensual S&M. After the court suppressed all statements and evidence arising from the police's illegal entry and search, ADA Roger Ferris dropped all of the S&M-related charges.

Alden Baker's case may therefore be the first judicial test of whether the battle over consensual S&M will trigger a new erosion of sexual autonomy in Massachusetts.

The Paddleboro case did not demonstrate that S&M sex could be prosecuted as criminal assault and battery, but the Baker case may test the proposition that such behavior can be the basis for a civil commitment for up to life.

Who Is Alden Baker?

As Baker explained to his lawyers, as a young man growing up in the pre-Stonewall era, he reacted to virulent homophobia by lashing out.

Once an Eagle Scout and an honor student, his grades dropped as he struggled to come to terms with his nascent homosexual identity. A turbulent time followed, in which he dropped out of high school and spent his time stealing cars, as well as accumulating a litany of petty theft convictions on his juvenile record.

By 1990, as he approached middle age, Baker finally managed to build both a successful business and a social situation with which he was comfortable. The president of a successful trucking and management-side labor relations business, Baker spent weekends hitting the gay bar scene in Boston, seeking out men who shared his sexual interests.

An active member of Boston's gay S&M ("leather") community, Baker also ran a computer bulletin board service (BBS), a precursor to Internet websites, that featured discussion areas, file trading and chat rooms focused on gay issues.

Following the practices of others in the S&M community, Baker had set up a "play room" in his house, outfitted with a jaw-dropping collection of sex toys and bondage gear. There, Baker and his lovers would stage sexual submission/dominance routines — acts of willing compliance or feigned resistance.

Then a dispute involving Baker's on-again, off-again sexual relationship with his limousine driver showed Baker how fragile his prosperity was. Baker and the driver had sex several times. Two of those times, the driver said, had been coerced, yet he had continued to pay social visits to Baker to, among other things, give him Christmas presents. But the driver nonetheless went to the police and pressed charges.

On Feb. 28, 1991, the Medford police obtained a search warrant and entered Baker's house. They seized the computer equipment used to host his BBS and then proceeded downstairs to Baker's play room.

Det. John Brady, the officer leading the search, described it as a "torture room." Another officer accompanying Brady reportedly exclaimed during the search that the place was a "f—ing faggot palace."

At the rape trial, prosecutors used videotapes of Baker's consensual S&M play (seized during the search of Baker's house) and Det. Brady's descriptions to create a negative impression of Baker, even though all of the lovers pictured in the tapes testified that the activities had been consensual.

The prosecution also claimed, using quotes lifted from the decade-old written evaluations of his high school teachers, that the 29-year old driver was "borderline retarded" and therefore could not have been anything but an unwilling victim in the sexual encounters in question.

Baker was convicted of raping the driver and sentenced to six to 10 years in prison.

On top of this, subsequent searches of the seized computers revealed that some users of Baker's BBS had used the site to trade explicit photographs of underage teenagers.

The child pornography statutes operate on a type of strict liability/possession basis, meaning that Baker was criminally liable for his users' activities. Any such photos stored on his servers, even if he had never viewed the material, could lead to a near-automatic conviction.

The situation was further complicated for Baker by the use by the prosecution of a suggestive (but not obscene) photograph, unearthed by prosecutors, of Baker and a young man whom a state-retained photo analyst claimed to have been under the 18-year-old legal cut-off, a proposition later contested by Baker.

Already in prison, Baker was offered a 43-month concurrent sentence if he pled guilty to 82 charges relating to the BBS file trading and one charge relating to the photo with the unidentified young man.

Realizing that he would be held responsible for his users' activities, and advised by legal counsel that it wasn't worth it to challenge the state photo analyst on something that wouldn't even affect the total amount of time he spent in prison, Baker chose to accept the deal.

He would later regret this decision.

How The Mass. CivilCommitment System Works

Chapter 123A, which governs the civil commitment of "sexually dangerous persons," was enacted in 1999, a last-minute addition to legislation creating a sex offender registration system for Massachusetts.

Although the old sex offender civil commitment statute, enacted more than half a century ago, had been repealed in 1990 because of its ineffectiveness in reducing recidivism, the new statute is not very different from the old one.

Part of the reason for this re-enactment was that in 1999, such statutes were becoming increasingly popular, having recently obtained the imprimatur of the U.S. Supreme Court.

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), the court affirmed, by a 5-4 vote, the constitutionality of Kansas' "sexually dangerous predator" statute. Writing for the majority, Justice Clarence Thomas declared that the involuntary civil commitment of "sexually dangerous predators" is "nonpunitive" in intent and therefore does not implicate constitutional protections against double jeopardy and ex post-facto punishment.

The standard for "sexual dangerousness" in the new Massachusetts statute uses language similar to that of the statute in *Hendricks*. Under G.L. c. 123A, the key element of being a "sexually dangerous person" is that one "suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexual offenses if not confined to a secure facility." (G.L. c. 123A, Sect. 1).

In Baker's case, state experts have argued that his desire to engage in S&M play with consenting adults is a sign of dangerous mental abnormality. This supposedly scientific claim goes to the heart of the effort to imprison Baker for life.

The process begins when the DA, toward the end of an inmate's sentence, petitions the court to civilly commit that inmate. A probable cause hearing follows, in which a judge hears psychological testimony and decides whether the petition should proceed further.

If the DA is successful at the probable cause stage, then the defendant is transferred to the temporary custody of the Nemanskel Correctional Center. There, the defendant awaits a trial by jury.

If the jury returns a verdict of "sexually dangerous," the defendant is returned indefinitely to Nemansket, where he is held until the Department of Correction decides it has successfully neutralized the "mental abnormality" that led to the determination of dangerousness.

The DOC will not recommend release of its detainees unless they participate in intensive psychological reprogramming — and even then the facility's operators usually declare their detainees unfit for release.

Already, Baker has refused to participate in treatment to "cure" him of his "abnormal" sexual preferences, arguing that his interest in S&M is not harmful to others. If he loses his trial, however, these refusals will likely be used to designate him as incorrigible, making it unlikely that he would ever be released.

One state-retained psychological examiner, Dr. Stephen DeLisi, has already made this argument in his report: "[T]here is no data to indicate he has any interest in addressing, in a therapeutic way, his sexual deviancy, or that he even sees himself as having a sexual deviancy. It is likely, therefore, that his antisocial lifestyle and deviant sexual interests and behaviors will continue if he is released from custody."

What Do The Experts Say?

The first person to evaluate Baker was Dr. Ira Silverman, a state-retained psychologist whose diagnosis formed the basis for the commonwealth's initial determination of Baker's alleged dangerousness at the probable cause hearing in March-April 2002.

At the hearing, Dr. Silverman testified that if an individual derives his "primary or exclusive source of sexual pleasure" from encounters involving sex toys such as butt plugs, whips and handcuffs, that is per se a sign of sexual deviancy.

In this seemingly Victorian worldview, even explicit consent to the use of such toys is no excuse. Dr. Silverman asserted that the use of bondage gear is "clinically deviant" regardless of whether or not one's partner consents.

Further, Dr. Silverman found dressing up in leather, chains, jackboots and a leather hat to cruise the city's gay bars to be suspect. While Dr. Silverman admitted that such behavior is "not illegal,"

he opined: "[I]f this is how he derived his primary or exclusive source of sexual pleasure, then I think there would be a question there [as to whether such behavior is deviant]."

After Dr. Silverman's evaluation, Dr. Daniel Kriegman, an independent forensic psychologist retained by Swomley, conducted his own evaluation of Baker. In this report, Kriegman made pointed criticisms of Silverman's report, charging that Silverman selectively ignored crucial portions of the DSM-IV's definitions of "sexual sadism" and "antisocial personality disorder" in order to arrive at his diagnoses.

Despite these deficiencies, Superior Court Judge Jane S. Haggerty found sufficient grounds to bring the case to trial.

For the trial, the DA's Office ordered another round of evaluations, this time from Drs. Niklos Tomich and Stephen DeLisi.

Meanwhile, the defense retained three additional experts: forensic psychologist Dr. Leonard Bard; Dr. Fred Berlin, director and co-founder of the National Institute for the Study, Prevention and Treatment of Sexual Trauma at The Johns Hopkins University School of Medicine; and Dr. Charles Moser, a specialist in sadomasochism who has made more than 100 presentations and published 12 scientific articles and book chapters on the subject. All four defense experts expect to be testifying.

The defense experts disagree over whether or not Baker's interest in S&M is abnormal, which reflects a fundamental division within the psychological profession as a whole.

Dr. Moser, who asserts it is not abnormal, is arguably the foremost critic of the pathologization of unusual but consensual sexual practices like S&M; he is pushing the profession to focus less on particular forms of desire and more on how both common and uncommon desires can create pathological situations.

Meanwhile, Dr. Berlin believes the existing conceptual framework is sound, but draws the line between dangerous and non-dangerous manifestations of abnormal sexual desires.

But despite these differences, Moser and Berlin both agree on the most important point: Baker's interest in S&M, whether abnormal or not, fails to pose a danger to society.

Much of the expert testimony will present the ancillary question of whether this area of the law has been infected with what is known as "junk science" — members of the medical and psychiatric communities who proffer their personal tastes and preferences as "normal" and are too quick to label very different tastes as "abnormal" and therefore "dangerous."

There is, however, a larger theme to this case. It can be seen as the latest frontier in the battle for sexual liberation. Does our society value individual freedoms enough that we can accept the oddities of consensual S&M activities? Or are we now living in an era when the "sex police" are staging a comeback?

The battle for consensual gay sex has been fairly successful, but it re-ignites now and again, especially in the public schools.

The campaign against "deviant" S&M sex seems to be another battle in that larger war theatre, enhanced, as it is, with the "junk science" — personal preferences disguised as scientific truths — that is all too common when members of the "mental health" establishment get to the witness stand.

On Feb. 24, the Baker trial opens the next phase of this conflict.

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