

Crime, Desire and Law's Unconscious: Law, Literature and Culture, by David Gurnham

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Book Review

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Abstract

Book review of Crime, Desire and Law's Unconscious: Law, Literature and Culture, by David Gurnham.

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**CRIME, DESIRE AND LAW'S
UNCONSCIOUS: LAW, LITERATURE AND
CULTURE, by David Gurnham¹**

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IN *CRIME, DESIRE AND LAW'S UNCONSCIOUS*, David Gurnham deploys a Freudian model to explore the relationship between narrative and truth in legal judgments concerning sex, desire, and crime. Even though he acknowledges that “a factual enquiry after the event is itself a matter of narrative construction in the light of value judgments, and thus not at all simply ‘factual,’”² it is not always clear whether the model deployed is meant to be heuristic or ontological. He says that psychoanalytical ideas are used “without any claim that [they] represent matters of scientific fact or ... *a priori* truth”³ and that “[r]eading law, literature and culture ‘psychoanalytically’ need not be a matter of imposing prefabricated structures of meaning, but of locating metaphors that offer alternative narratives and explanations.”⁴ Despite these disclaimers, Gurnham reads judgments thematically and sees them as incorporating foundational concepts derived from Freud. To explain these concepts, he takes what he admits is “the thoroughly

* Professor of English at the University of Toronto and author, most recently, of *Creating Legal Worlds: Story and Style in a Culture of Argument* (Toronto: University of Toronto Press, 2015).

1. (New York: Routledge, 2014) 148 pages [Gurnham, *Crime, Desire and Law's Unconscious*].
2. Gurnham, *Crime, Desire and Law's Unconscious*, *supra* note 1 at 2.
3. *Ibid* at 35.
4. *Ibid* at 37.

unfashionable step of including a theory section.”⁵ The issue, however, is not one of fashion; it is one of efficiency. More than a third of this short, 125-page book is devoted to introducing terminology and themes. By the time we get to the main text, all of the arguments have already been made, and their amplification cannot dispel a lingering sense of *déjà vu*.

One of the recurring themes is consent, particularly in sexual assault cases. A number of questions arise: In cases of erotic asphyxiation where sadomasochism (“s/m”) partners have consented to being rendered unconscious, do they also consent to whatever happens in the moments of unknowingness that follow? Or does consent have to be contemporaneous, ongoing, and conscious? In cases where a woman has been subjected to domestic violence in the past, is her supposed consent to s/m practices meaningful? Is what appears to be kinkiness merely a cover for sexual assault? Following Ummni Khan in *Vicarious Kinks: S/M in the Socio-Legal Imaginary*,⁶ Gurnham challenges carceral feminism, a “governance feminism” that allies itself “with a criminalizing state that purports to address systemic and social problems through punishment—with incarceration being its main tool.”⁷ Such feminism “seeks to establish that many sexual practices in which men harm or objectify women can be seen to in fact be acts of domestic abuse when viewed within the context of ‘social conditions that make sexual violence a weapon of choice in the oppression of women.’”⁸ Gurnham demurs:

The solidification of such character types as the “male abuser” and the “battered woman” means that a discussion of the “facts” of a case will become confused with—and sometimes unwittingly replaced by—the *a priori* assumptions made in interpreting them. It must surely be right to say that consent can make little sense unless one understands contextual factors that may constrict opportunities for girls and women to exercise sexual autonomy in any given situation.⁹

This is contentious territory, but the issue of consent and sexual autonomy is indeed complicated by pre-existing stereotypes and seems to be an issue that might repay psychoanalytical intervention. “As is well known,” Gurnham writes, “Freud claimed to have discovered a way of making known the unconscious influences that are repressed and kept away from consciousness because they are fundamentally unacceptable to our mature and civilised sensibilities.”¹⁰ This

5. *Ibid* at 5.

6. (Toronto: University of Toronto Press, 2014).

7. Gurnham, *Crime, Desire and Law's Unconscious*, *supra* note 1 at 2.

8. *Ibid* at 2-3.

9. *Ibid* at 3.

10. *Ibid* at 4.

well-known claim is at the core of Gurnham's attempt to show how "Freud's continued significance is to be found in the way that the narratives he finds in his patients link with concerns and anxieties about sex, desire and crime in our own age and culture."¹¹ The object is to "bring law's unconscious to light."¹²

Gurnham's Freud is "Freud the incredible storyteller,"¹³ and the first part of his study is devoted to theory and method in Freudian literary jurisprudence. To include a theory section is not only to incur inefficiency, as I have said, but also to rehearse concepts that are already part of our cultural imaginary—concepts that should have been interpolated into the chapters to which they pertain. The Freudian topography of mind and the depth model that goes with it are familiar, even to those whom have never read a word of Freud. Does anyone likely to be reading this book really need to be told about the Oedipus complex, the primal horde, the primal scene of parental copulation, and other foundational psychoanalytic concepts? Moreover, certain concepts are not precisely explicated. For example, Gurnham argues that

reading a legal or a literary text psychoanalytically means paying attention to the substitutive and displacing effects of metaphor, and clues that the substitution of literal for metaphoric meaning may serve to both conceal and implicate repressed or otherwise unacknowledged ideas. Imagining the law as a patient and its texts as the manifest content of a dream, the aim of analysis is to bring those concealed ideas eventually to the surface, to give themselves up as a train of thought leading back to an otherwise hidden source.¹⁴

Metonymy, however, not metaphor, is the trope of displacement. Metaphor is the trope of condensation. Gurnham mentions neither condensation (the image as more than itself) nor sublimation (the translation of instinctual desires into higher aims), two of Freud's essential concepts. Condensation involves a fusion of unconscious desires whereas displacement substitutes the socially acceptable for the socially unacceptable. As Freud points out, the manifest content of a dream or text has a smaller content than the latent dream or text. Condensation is brought about by fusing latent elements into a single composite image, an image with multiple meanings. Objectionable and unacceptable thoughts are thereby disguised. Graphic descriptions of sexual deviancy allow judges to combine disgust and desire at the same time, thereby fusing the reprehensible with the titillating and allowing us voyeuristic and perhaps vicarious pleasure in

11. *Ibid.*

12. *Ibid* at 5.

13. *Ibid* at 15.

14. *Ibid* at 29.

learning about all of the ways people may deviate from the heterosexual norm of reciprocal, affectionate sexual behaviour. Displacement replaces a latent element not by a component part of itself, but by something more remote. The plucking of bright yellow flowers may disguise and equal the fantasy of deflowering a young girl given to wearing yellow outfits.

Such insights, however, can be arrived at by tropological analysis alone, and the question emerges as to whether the psychoanalytic machinery is necessary. What language is rhetorically doing on the figurative level can undermine and subvert what it is referentially saying on the literal level. The gap between the referential and the rhetorical, between what language literally says and what language figuratively does, is a commonplace of postmodern thought. In the depths of their imagery, writers cannot lie. Where there is eloquence, even of a prurient nature, there is emotional investment. As Gurnham reflects:

[T]he legal process continually invites us to *return* to the scene of the crime. It is an invitation that is always taken up, consciously to condemn and assert distance between “us” and “them” but at the same time unconsciously and hypocritically to enjoy. It is, of course, only natural that we should feel resistant to the idea that our anger, disgust and revulsion at those who commit crimes may actually implicate *us* the “innocent” majority in the terrible behaviour of others. ... [T]he chance to condemn criminally unrestrained sexuality *actually carried out by others* provides an opportunity for us the judging public to enjoy something of the sexual licence which is ordinarily kept repressed, without disrupting the integrity of our moral self-image.¹⁵

No doubt the public gets off on lurid and sensationalist trials. Just as the alibi of science justifies reading Kinsey or Masters and Johnson, the alibi of law justifies reading a detailed description of Paul Bernardo’s sexual crimes. Nothing, however, is being repressed. And most self-styled connoisseurs of erotica know they are not reading their chosen magazines for the articles.

And that is my main reservation about this book. What is being repressed? Even if in *The Merchant of Venice*, when Bassiano is trying to persuade Portia to marry him, we see his choice of the lead casket over the gold and the silver casket as a metaphor for death transformed into an object of desire, a “desire to overturn death’s immutability,”¹⁶ the inference Gurnham draws from this transformation is questionable, namely,

that the uncanny return of that same wish to be able to control death may also be operational in statutes and legal judgments on HIV exposure and transmission,

15. *Ibid* at 20-21 [emphasis in original].

16. *Ibid* at 7.

which, by exaggerating the degree of control that an HIV seropositive person can have over the life of a complainant by failing to disclose his HIV status, construct the former as fulfilling that wish.¹⁷

Building on his identification of law as displacing and concealing unconscious impulses, Gurnham suggests “that the *condemnation* of the non-disclosing HIV lover symbolises the desire to have that kind of control over mortality, albeit disguised by reversal.”¹⁸

Gurnham identifies three misperceptions: that HIV is highly transmissible, that HIV is likely fatal, and that HIV is a matter of harm perpetrated on a victim, not a matter of mutual risk-taking. For him, criminal sanctions on a person who has unprotected sex and fails to disclose his or her HIV status make no sense: “[C]riminalisation ... is better understood in terms of its unconscious cultural symbolism: as the expression of a collective wish to be able somehow to conquer death and bring it under human control.”¹⁹ This proposition seems implausible. Surely such criminalization reflects our desire not to get HIV from a reckless partner and our desire to punish and deter those who are indifferent to their partners’ health and safety. This is a desire to avoid preventable death, not a desire to conquer death. That the odds of infection are infinitesimal is not the point. Leaving aside whether Bassiano’s choice of the lead casket in *The Merchant of Venice* really represents “*the fulfilment of a wish to defy the power of inevitable death by reshaping it as something desirable*,”²⁰ it is hard to see unprotected sex as desirable if its wages are possible infection or maybe even death.

For Gurnham, the frightening or intolerable situation with respect to HIV “is not the infection or its consequences themselves, but rather the fear that something that we believe to be terrible may visit us when we are least equipped to defend ourselves, that is to say, in the abandon of sexual enjoyment.”²¹ That the latter fear is real seems indisputable, but it is hard to see our revulsion toward reckless fornicators as a “conscious condemnation of that which is unconsciously wished for.”²² Exactly what are we wishing for? The criminalization of reckless sexual behaviour does not target something that is merely symbolic; it targets actual deliberate conduct by an individual who really does pose a danger by failing to take steps to reduce risk.

17. *Ibid.*

18. *Ibid* [emphasis in original].

19. *Ibid* at 50.

20. *Ibid* at 51 [emphasis in original].

21. *Ibid* at 53.

22. *Ibid* at 59.

It is also difficult to see how “the criminalisation of HIV is in vain if we expect to find a convincing reason either in the usual aims of criminal justice (deterrence, incapacitation, etc) or in those of public health (the reduction in the spread of HIV).”²³ Criminalization may not deter a prospective offender and, given the low probability of infection, it may not significantly reduce the spread of HIV—but it would certainly seem to incapacitate, denounce, and punish the particular offender. I agree that we must distinguish between “the *actual* choice made by the defendant (to have sex without disclosing one’s infection) and the ‘choice’ *as it is constructed in legal narrative* (namely, to kill or seriously harm one’s partner).”²⁴ I also agree that portraying the defendant as a callous homicidal person deliberately seeking to infect his or her victim and inflict grievous bodily harm is mistaken, as is failing to distinguish “an enduring myth of high transmissibility” and “the offence of recklessly inflicting grievous bodily harm.”²⁵ But what we are talking about here is how to characterize a defendant and how to determine an appropriate penalty for an offence. True, as Gurnham points out, the failure to take necessary precautions is mutual. It is not merely a question of “cruel non-disclosers and passive innocent victims.”²⁶ Nevertheless, it seems incredible to suggest that punishing a sex offender who exposes an underage sexual partner to HIV serves as “a useful vehicle for the reversal of an unconscious wish into condemnation.”²⁷ What is the unconscious wish? Are we all repressed pedophiles? Are we all condemning what we ourselves secretly want to do? This does not make much sense to me. No doubt we are vicarious voyeurs condemning while at the same time indulging dangerous sexuality, but we are more or less conscious of what we are doing.

For the author, “a notion of ‘shared’ responsibility for HIV transmission is useful as a way of showing how law’s constructions of criminal responsibility assist in the fulfilment of an ancient unconscious wish ... embedded deep within our culture”²⁸—the impossible wish to master death and bring it under our control. That said, I really do not see how sending an infector to jail involves the impossible wish to master death and bring it under our control. Society may want to punish the infector—excessively and vindictively no doubt—but

23. *Ibid* at 60.

24. *Ibid* at 61 [emphasis in original].

25. *Ibid*.

26. *Ibid.* at 65.

27. *Ibid* at 65.

28. *Ibid* at 66.

revenge, however ignoble and however irrelevant to what the law should be, is not an unconscious motive here.

Nor is class an unconscious motive in Gurnham's chapter, "'Our Girls are [Not] Halal Meat!'" This chapter deals with metaphor and meaning in the reporting of sexual exploitation trials. The repressed eroticism of consumption, Gurnham argues, may return via food and sex metaphors. The problem for me is where the repression resides. Such vulgar expressions as "eating pussy" or "sucking cock" make the connection between food, sex, and animality obvious. The literal and the metaphorical are both at play. Nevertheless, "[t]he chapter argues that the British media's identification of 'on-street' sexual exploitation as a racial and/or cultural problem (*i.e.*, of Asian males preying on white girls) may have served to displace and disguise something much more generally incriminating: that working class adolescent girls and young women are indeed 'meat' (white or otherwise) for male consumption."²⁹ Gurnham "analyses the way that the mainstream British media understood the issue to be a racial or a cultural problem, namely about Asian men, mostly of Pakistani and Muslim backgrounds preying on vulnerable white female victims."³⁰ This focus displaces and represses another much more widespread and incriminating prejudice based on the girls' own class identities: "[T]he 'white meat' of young girls feeds the sexual appetites of the judged criminals and judging public alike."³¹

Again, an element of voyeuristic pleasure and vicarious pornography may come into play. But where is the repression? To say that "the (unconscious) sexualised class prejudice ... underlies the (conscious) race discourse, the latter displacing and censoring the former"³² is to beggar belief. Just as our own authorities have been lax in their investigation of crimes involving sex workers or Aboriginal women, the British authorities, despite having copious evidence of harm at their disposal, waited months before acting simply because they did, at bottom, regard the working-class victims as white trash or white meat. The underlying misogynist assumption that some women are cheap and consumable meat, even if disguised or elided, is certainly not repressed. It is simply mistaken to say that "the overtly expressed worries about race and culture served to repress an arguably much more troubling and widespread set of class-based assumptions about sex and sexuality."³³ More troubling to me is the slogan, "Our girls are

29. *Ibid* at 7-8.

30. *Ibid* at 71.

31. *Ibid.*

32. *Ibid* at 73.

33. *Ibid* at 91.

not Halal Meat”—not, that is to say, food that is permissible for Muslims to eat under Islamic sharia law. Is this to say that the girls are *haram* and therefore not fit to be eaten because unhygienic? If Halal meat is meant to be a metaphor, it does not parse in any obviously relevant or flattering way.

That the defence lawyers saw willful self-abasement on the part of the girls, that the authorities saw no crime and deemed exploitation to be tolerable, and that the girls themselves came to believe that they were rightly to be seen as objects of sexual ownership—these are the most troublesome aspects of the British sexual exploitation cases, and, as Gurnham cogently points out, they impinge upon our idea of sexual citizenship, an idea that in principle seems tolerantly egalitarian but is in practice coercively normative. “Fantasies such as sexual citizenship,” he writes,

are necessary because they are the means by which we may reassure ourselves that the traumatic sexual violence that we learn about ... is but an aberration of human sexuality rather than expressive of it. Their utility is to provide the “cover story” that spares us having to perceive the bruised corporeality of sexuality—raped, beaten and confined bodies—as too close or more generally incriminating.³⁴

For Gurnham, “criminal trials involving bodily violations are, indeed, merely iterations of some much deeper and primal traumatic event.”³⁵ The aim of psychoanalysis is to inaugurate a return of the repressed, to plot “a route from current ‘iterations’ of trauma back to the so-called primal scene and its interpretation.”³⁶

For me, the question is not whether we can profit by thinking about unconscious trauma and the primal scene. The question is whether these concepts have any pragmatic value when it comes to interpretation. If we can reach the same conclusions through rhetorical and narratological means, then the concept of the unconscious, in its psychoanalytic sense, is both empirically and critically dispensable. This is not to dispute the existence of unconscious intentions. Rather, it is to say that such intentions are best understood as implications of meaning—implications generated by both what a text says on the referential or literal level and what it does on the rhetorical or figurative level. Implications are part of an intentional verbal act even if the utterer is unaware of them. The temporal character of both communicating and understanding makes unsurprising the fact that an utterer is sometimes unaware of the full implications of what he or she intended to communicate until some time later (if ever). It is almost as if there

34. *Ibid* at 97.

35. *Ibid* at 98.

36. *Ibid* at 99.

is a terminological compulsion in language that eludes the conscious control of the speaker or writer. There is what the language says and implies, which is not necessarily what the speaker or writer intends to say or imply. Our discourse generates implications that go well beyond our conscious intentions. What we want to say is often overshadowed by what our language says. In the depths of our imagery and figurative language, we reveal ourselves. Strange as it may seem, rhetorical language is a more reliable indicator of truth than referential language precisely because what language does rhetorically is often at odds with what it says referentially. Where a person is eloquent, there reside his or her deepest interests, values, and passions. When judges eloquently evoke what they morally revile, they convey a mixed message.

In *Vicarious Kinks*, Ummni Khan points out that judicial writing about pornography inevitably becomes “a form of vicarious pornography.”³⁷ When judges write about deviant practices, they often create “a vicarious dynamic that reproduces the taboo sexuality.”³⁸ Their anti-deviancy arguments sometimes manifest as what Khan calls “vicarious kink,” where the forbidden pleasures of abnormality are inadvertently reproduced in conjunction with vehement expressions of disgust. Pushing against what the judgment is saying referentially is a rhetorical undercurrent that reveals the deviant practice to be dangerously attractive. Khan notes:

While often being repressive and punitive, socio-legal discourses on s/m effectively proliferate pleasure as they traffic in the excitement and the incitement of new knowledges of sex. In other words, not only is knowledge power, knowledge is also pleasure. But this indulgence in the voyeuristic process of meaning-making still creates abject anxiety, which is often followed by a pronouncement of disgust and the expulsion of the sexual deviant from the social body.³⁹

Khan, however, does not simply make conclusory statements. She shows, through patient rhetorical and narratological analysis, how judicial language and storytelling unconsciously embrace what they consciously condemn. She thereby uncovers the law's unconscious without invoking psychoanalysis at all.

Gurnham's book ends with a critique of the criminalization of unconscious sex. In *R v JA*, as Khan explains,

[t]he legal question of consent was particularly contested because the fact scenario involved a male partner who had been convicted of violent offences in the past, including domestic violence-related assault, and a complainant who gave conflicting

37. Khan, *supra* note 6 at 12.

38. *Ibid* at 13.

39. *Ibid* at 305-06.

accounts at the police station and in the courthouse. ... At the heart of this controversial case was the issue of whether the s/m activities in question engaged the right to sexual autonomy, or the need to protect against sexual exploitation.⁴⁰

With K.D.'s supposed consent, J.A. choked her until she passed out. She was unconscious for around three minutes and woke up to find a dildo in her anus, an object that was immediately removed upon her request. The parties then engaged in vaginal intercourse, after which K.D. uttered the safety word, and the ties that bound her were cut. Seven weeks later, with a custody battle for their son looming, she went to the police and said that she had not given her consent to what happened in the bedroom, and J.A. was charged with aggravated sexual assault. At trial, K.D. changed her story and said that everything that happened was consensual. The trial judge found J.A. guilty of sexual assault for the anal insertion—because one cannot legally consent to sexual activity that occurs while one is unconscious—but not guilty of aggravated sexual assault for choking his partner—because there was no bodily harm. Due to his prior convictions for drug trafficking, weapons, assault, and domestic assault (two of these assault convictions involving K.D.), J.A. was portrayed as an unsympathetic accused and publicly stigmatized as a sex offender.

The Ontario Court of Appeal overturned the sexual assault conviction on the grounds that K.D. consented and that one can legally consent to sexual activity expected to occur while one is unconscious. Reversing the Court of Appeal, the Supreme Court of Canada held that one cannot legally consent to sexual activity that occurs while one is unconscious; consent must be contemporaneous, ongoing, and conscious.

Because of J.A.'s criminal record, especially his convictions for assault, and because of K.D.'s inconsistent statements that make her testimony seem as if it might be a product of battered spouse syndrome, *R v JA* is a hard case. According to Khan, J.A.'s guilt is premised on linking s/m with harm, degradation, danger, and exploitation.⁴¹ The judicial ruling ignores the s/m subcultural context and the possibility of edgeplay as an experience of desire, intimacy, trust, and sexual autonomy. The majority opinion of the Court insists that risk is one reason one cannot be allowed to consent to unconscious sexual activity.⁴² The judges, Khan suggests, do not understand the nature of risk let alone the nature of queer time. She goes on to say that

40. *Ibid* at 252-53.

41. *Ibid* at 255.

42. *Ibid* at 258.

[a] queer approach may find such risk irrelevant, or even exciting. For the submissive edgeplayer, time is queered, such that immediate physical sensation and the possibility of monitoring one's partner is exchanged for the psychic satisfaction of imagining what will happen during future unconsciousness, and what did happen during past unconsciousness Some people may have a sexual bent that creates an entirely different relationship to risk and desire Wanting something dangerous *despite* or *because of* the lack of a guaranteed safety could be a valid version of an ethics of pleasure.⁴³

Risk-aware consensual kink is not part of the mainstream socio-legal imaginary.

The relationship between J.A. and K.D. has a history of what might be viewed as kinky s/m as well as a history of assault convictions. How then can we adjudicate between the conflicting scenarios of domestic violence and s/m practice? None of J.D.'s violent offences were sexual, yet he is portrayed as the abuser and she is portrayed as the victim. In alliance with what Elizabeth Bernstein calls "carceral feminism,"⁴⁴ many judges address problems of alleged violence through punishments, especially incarceration. J.D. received an eighteen-month sentence, had a DNA sample taken, and was registered as a sex offender. The one thing not considered, Khan maintains, is male vulnerability and victimization within a decontextualized and neoliberal punishment scheme.

Whether or not one agrees with Khan's characterization of the case, the carceral feminist approach she decries does entail that "any consent that women may give to submissive or risky sexual behaviour ... can only be the product of 'larger systems of oppression.'"⁴⁵ Gurnham follows Khan's line of reasoning but gives the issue a Freudian spin:

The ruling that a sexual act should be prohibited despite the consent of the "complainant" and the carceral feminist commentary that supports the Court's view indicate that the dangers of sexuality are not to be regarded merely as personal violations of individual autonomy, but rather as a much more unspecific and opaque dread that in some important ways rehearses the rebellious political dimension of Freud's anarchic primal murder.⁴⁶

That is to say, *R v JA* is about erotic asphyxiation and unconscious sex and is linked, first, with *The Tempest*, a play in which Caliban wants to overthrow

43. *Ibid* at 262 [emphasis in original].

44. Elizabeth Bernstein, "Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns" (2010) 36:1 *Signs* 45.

45. *Ibid* at 267.

46. Gurnham, *Crime, Desire and Law's Unconscious*, *supra* note 1 at 109.

his harsh and overbearing master and to sexually violate his master's teenage daughter, and, second, with

Freud's myth of the 'primal horde' of brothers who killed their tyrannical father in order to gain sexual access to all of the women of the tribe (their mothers and sisters), and the symbolic 'return' of the murdered father in the form of guilty self-reproaches, taboo, morality and (finally) law that collectively prohibit repetition of that crime. ... [It is a] myth of primal murder, incest, desire, and guilt.⁴⁷

According to Gurnham,

law seeks to isolate the sexual deviant as fundamentally different to ordinary people, and hence as abnormally susceptible to urges the latter would condemn. ... [L]egal judgments appropriate the "victim" for laws cause by denying or marginalising her consent and thus the extent to which the prohibited sexual violence might already have been "sanctioned" as a private act.⁴⁸

Gurnham sees "a fantasy of primal enjoyment as part of the law's unconscious and an anxiety about sexually motivated crime as part of a deeper concern to suppress the 'repetition' of that primal episode of anarchic (sexually motivated) rebellion."⁴⁹

I quote Gurnham at length because whereas the general claim linking prohibited sexual violence to a fantasy of primal enjoyment seems plausible, the particular claim about primal anarchy and its repression seems unfounded. Is J.A. one of the primal horde of brothers who killed their tyrannical father in order to gain sexual access to all of the woman of the tribe? If so, who is the tyrannical father he killed in order to gain access to K.D.? If he is Caliban, who is the overbearing master he wishes to overthrow? The law? Vanilla sex? Hetero-normative compulsion? The Court says K.D. could not give consent. Carceral feminists say that she did not give consent, that what might be construed as a progressive attitude toward non-normative sexuality is just an alibi for the male exploitation and oppression of women, and that the supposed intimacy of heterosexual relationships is predicated on violence against women. Gurnham says the case has to do with the affective power of the primal scene: "[W]hile modern law draws attention to the conscious desire of certain perverted individuals to exploit others, it shields from view the dark heart of sexuality itself which embraces violation and unbounded enjoyment."⁵⁰

47. *Ibid* at 11.

48. *Ibid* at 110.

49. *Ibid*.

50. *Ibid* at 114.

Gurnham and Khan are right, I think, in their contention that kinky sex often involves the possibility of not knowing what one's partner is going to do and that the very surrender of control is what creates excitement. As Gurnham notes, "In consenting to being reduced to the status of pure object for J.A.'s sexual enjoyment, K.D. effectively sanctions the rejection of sexuality as involving a *mutual exchange between equal subjects*."⁵¹ They are also right in their contention that legal rhetoric and the judicial gaze often seek to repress the contagion of sexual transgression by pathologizing what is deemed to be perversion. "By emphasizing the victimhood of the person on whom the defendant acts," Gurnham writes, "procriminalisation rhetoric undergirds the justifiability of the prohibition by denying or downplaying that victim's sexual agency."⁵² The alleged victim is seen to be incapable of giving valid consent.

Of course, no one knows what really happened in the case of J.A. and K.D. No one knows whether they are sophisticated sexual adventurers penetrating the dark heart of sexuality so as to experience transgressive and unbounded *jouissance* or whether they are impoverished addicts acting out the all too familiar scenario of male abuser and battered woman. Both Gurnham and Khan may be a little optimistic in embracing the former, which is not to say that law should not recognize the legitimacy of s/m practices when the sex in question is consensual, mutual, and safe. Where valid consent and autonomous sexual agency exist, the law has no place in the bedrooms of the nation. But one can arrive at such a conclusion without invoking Caliban and the primal horde. And this is the major problem with this book. The literary examples and case histories illuminate each other but fail to connect with the legal analyses, analyses that would seem to require little more than the tools of rhetoric and narratology.

51. *Ibid* at 116 [emphasis in original].

52. *Ibid* at 122.

