

Consent Counts!

An NCSF Educational Workshop

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National Coalition for Sexual Freedom

- The NCSF is committed to creating a political, legal and social environment in the US that advances equal rights for consenting adults who engage in alternative sexual and relationship expressions.
- The NCSF aims to advance the rights of, and advocate for consenting adults in the BDSM/Leather/Fetish/Kink, Swing, and Polyamory Communities.
- We pursue our vision through direct services, education, advocacy, and outreach, in conjunction with our partners, to directly benefit these communities.



Consensual BDSM Can Be and Is Prosecuted as Assault.

BDSM itself is not a crime, but with increasing frequency BDSM incidents give rise to criminal prosecutions for assault, abuse, trafficking, and other crimes.

This is a serious problem. NCSF's incident response line recorded 204 criminal cases in 2010, and that is probably the "tip of the iceberg".

Criminal Prosecutions Arise From All Sorts of Situations...

- **A scene goes wrong and an injured or frightened bottom goes to the police.**
- **A slave breaks away from a M/s relationship.**
- **A BDSM or D/s relationship ends with one party having bad feelings toward the other.**
- **A nosy neighbor, relative or friend sees wounds or scars, or sees or hears BDSM activity, and calls the police.**

Criminal Prosecutions Arise From All Sorts of Situations... (more)

- **Police enter a dungeon party in response to complaints about noise, illegal parking, etc.**
- **Medical personnel see an injury that they perceive resulted from abuse/assault.**
- **A person who hates you makes allegations to the police out of spite or for revenge.**
- **Or, pictures, videos, emails, film, or sound recordings of BDSM conduct somehow come into the hands of the police.**

And the fundamental problem is that the courts do not allow consent as a defense in these criminal prosecutions of BDSM conduct.

History of “Consent Counts”

Consent Counts Timeline...

2006 – NCSF hosted a leather leadership roundtable at the Creating Change Conference. It was determined that the number one priority of the BDSM/Leather/Fetish/Kink communities was the decriminalization of BDSM.

2007 – A second roundtable met at the Leather Leadership Conference to determine priorities and responsibilities.

Consent Counts Timeline... (more)

2008 – A lengthy public process was organized and initiated, gathering information with standardized questionnaires that were completed and gathered by groups and at events nationwide.

2009 – The NCSF agreed to lead this effort going forward and Judy Guerin volunteered to direct the project.

Consent Counts Timeline... (more)

2010 to Present – NCSF continues its outreach and education on the topic of consent:

- **developing educational programs and materials,**
- **drafting policy and best practice statements for consensual BDSM activity, and**
- **developing thoughts on various strategic approaches.**

Consent and BDSM: The State of the Law

The State of the Law...

- The sad fact is that criminal law treats consensual BDSM as violence, not as mutually pleasurable sex.
- It is prosecuted as criminal assault – one person causing physical harm – injury or intense pain – to another person.
- Because BDSM is treated as violence, consent is not allowed as a defense.

This then is the key issue for our campaign: to persuade the courts and society that “Consent Counts” and that consent should be allowed as a defense to a criminal prosecution based on BDSM activity.

How Did the Law Become So Bad for Us?

If You Look at Criminal Statutes...

- You might conclude that we don't have a problem.
- The Model Penal Code (MPC), for example, seems to allow consent unless the bodily injury consent to is "serious". The MPC is developed by the American Bar Association and is widely used by states in crafting their own legislation.
- And, it defines "serious bodily injury" as "injury which creates a substantial risk of death or which causes permanent disfigurement."

But, Unfortunately...

- Statutory language has to be interpreted by courts. This is not done in trials, but rather in appellate courts, whose job is to decide whether the trial judge correctly interpreted the law.
- And that is where our problem lies. Even where the statutory language seems to favor us, *every single appellate court decision has rejected consent as a defense in BDSM cases.*

But “Serious Injury”?

- Even where we would regard the “injury” as trivial – dripping hot wax, attaching nipple clamps, etc. – the courts find it to be “serious” and reject the consent defense.

How About My Privacy?

- You might also think that we would have the sort of privacy protection that the Supreme Court established for sodomy and other sexual practices in the 2003 Lawrence v. Texas decision.
- But the courts have refused to apply Lawrence to BDSM. Why? Lawrence dealt with sex, and BDSM is violence and the crime is “criminal assault”.

But Why?

- All of this goes back over 40 years, to a California decision in the 60's (People v. Samuels) and an 80's Massachusetts case (Commonwealth v. Appleby).
- Those cases found BDSM to be criminal assault and ruled that consent is no defense to assault charges.

Context is Important...

- These initial cases involved BDSM and gay men.
- In the 60's the DSM criteria of the American Psychiatric Association defined both homosexuality and BDSM as mental illnesses.
- In the 80's, homosexuality was no longer defined by the AMA as a mental illness, but this was the beginning of the AIDS crisis and anti-gay prejudice was intense. And the AMA's DSM criteria still defined BDSM as a mental illness.

And Now?

- Much has changed since then in our society and in our laws. Gay sex is now widely tolerated and, under Lawrence, no longer criminal.
- The DSM criteria, while far from perfect, changed in 1994 to define BDSM so that it was not automatically a mental illness (but still can be and frequently is defined that way.)

But?

- The courts have not changed their view that BDSM is violent criminal assault and that consent is no defense. Every single appellate court decision has followed the rule established in the Samuels and Appleby cases.

So, How Do We Go About Changing the Law?

By Educating Society

- **What we do is not a violent assault, but mutually pleasurable consensual erotic activity.**
- **We support safeguards and educate our own on best practices, including: safe words, negotiation, monitors, guidelines and – most importantly – that there be informed prior and ongoing consent, and any withdrawal of that consent must be respected.**
- **There are millions of tax paying and law-abiding Americans who engage in BDSM.**

By Changing the DSM Criteria

- In 1994, DSM IV made BDSM a mental illness only for those people in whom it causes “clinically significant distress”. Although an improvement, the diagnosis is used against BDSM practitioners in healthy relationships and continues the stigma attached to consensual BDSM.
- The NCSF is working to influence the forthcoming DSM V, lobbying for an explicit distinction between consensual and non-consensual BDSM.

Building on Allied Principles

- Applying the right of privacy and its application to sexual practices in Lawrence v. Texas and previous rulings on reproductive rights and birth control.
- Making the distinction between “assault” – which is intentional violence and to which consent is no defense – and “battery”, which is simply the infliction of harm in which consent is generally allowed as a defense, and which is generally not prosecuted in the context of sexual activities.

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Building on Allied Principles (more)

- **“Right to Die” (and control your body) arguments, as the “harm” that may be done in BDSM should not be treated more harshly than sports injuries, body modification, tattooing, etc.**
- **Freedom of speech, expression, and assembly.**
- **And possibly... treating BDSM practitioners as a sexual minority with the application of assault laws to consensual BDSM as discrimination against that minority.**

The Consent Counts Project

Consent Counts Tasks

- **Work to change the DSM criteria of the American Psychiatric Association to eliminate the stigma associated with BDSM, cross-dressing, and fetishism.**
- **Provide analysis of the case law and law review articles.**
- **Developed a resource database, potential strategies, and suggested approaches for community discussion.**

Consent Counts Tasks (more)

- **Developing educational and outreach programs for our communities, the public, law enforcement, attorneys (including a Continuing Legal Education program for attorneys, prosecutors, corporate law offices and law students), medical and mental health professionals, and anti-domestic violence programs and shelters.**
- **Developed “Best Practices” statement/workshops to stimulate dialogue and increase awareness.**

Consent Counts Tasks (more)

- **Developed a community discussion guide to assist local communities in holding discussions on the issue of consent. Results will be incorporated into a draft statement on consent to be presented at LLC 2013 in Seattle.**
- **Developed a Victim's Primer to assist victims of domestic violence and/or abuse in BDSM situations. Developed a primer for those accused of assault or rape in BDSM situations.**

Consent Counts Tasks (more)

- File amicus briefs in selected legal cases.
- Cooperate with other organizations to advance our cause.
- Promote and refine the “model laws” as they apply to us.
- And, eventually, work to pass legislation if necessary.

How You and Your Community Can Help

What You Can Do...

- **Organize a community meeting on the subject of consent using NCSF's Discussion Guide.**
- **Join NCSF as a Coalition Partner, Supporting Member, or Individual Member.**
- **Be involved in local politics and monitor legislation, particularly state congressional public safety committees (who frequently develop and introduce this type of criminal legislation) and notify the NCSF of potentially problematic activity.**

More You Can Do...

- **Educate your community on these issues and develop a local plan for activism and education.**
- **Do local outreach and education to elected and appointed officials, develop relationships with law enforcement, sex-positive groups, and businesses that might be potential allies and anti-domestic violence advocates and shelters.**
- **Volunteer your time or talents for this project.**
- **Donate to or hold a fundraiser for the NCSF.**

Questions/Answers And Discussion

Discussion – *Legal/Current Status*

1. What are your local laws that could be used to criminally prosecute BDSM activity—assault, prostitution, play parties with cover charges, polyamory?
2. Have there been any cases in your local community where the laws or the fear of the law have been used against the BDSM community or activities (not just arrests or raids but possibly lack of access – hotels not willing to book our events or cancelling them when they find out what we do)?
3. How would you respond if there was an arrest, raid, or lack of access situation that came up in your community (do you have resources that are kink friendly/supportive/involved)?

Discussion – *Community Perception*

1. How do you think the community is perceived by the general public?
2. What about our activities makes the general public nervous or that they don't want to see us doing?
3. Do we want to be mainstream or keep our own niche?

Discussion – *Consent*

1. What does consent mean in terms of BDSM?
2. What are the limits of consent? Are there things you should not be able to consent to?
3. Who can give consent? What limits do we draw about age, mental ability, health, etc.?
4. How do we distinguish the difference between consensual BDSM and domestic violence or domestic abuse?

Discussion – *Community Involvement*

1. What can we do as a community to better educate BDSM practitioners about the importance of informed prior and ongoing consent?
2. What can we do as a community to better educate the public about the difference between consensual BDSM and domestic violence or domestic abuse? (outreach to DV programs, GLBT centers and groups, etc.)