



Statement on Consent

This Statement is being issued through NCSF’s “Consent Counts” project which seeks to decriminalize consensual BDSM which does not result in the infliction of serious bodily injury. This Statement is presented as a discussion of the ethical and legal concepts of consent that need to be considered in the practice of BDSM activities and in relationships based on BDSM activities. It reflects both the recent extensive study by NCSF of the state of the law in the U.S. and the results of NCSF’s Consent Counts Survey which received over 5,500 responses.

This Statement is intended for two audiences: BDSM practitioners and the general public.

- For the general public, the objective is to increase the understanding of BDSM and the importance of informed consent in BDSM practices and relationships¹.
- For BDSM practitioners, who agree that consent is ethically and legally important², this Statement will clarify some of the legal issues and create a better understanding of the ethical responsibilities.

Consent is... an informed, voluntary agreement by two or more people to engage in a particular BDSM activity or to enter into a BDSM, D/s or M/s relationship. Consent is an essential element in BDSM, both as an ethical concept and as a legal concept, and it is important to distinguish between the ethical principles and the legal rules governing consent.

Consent in the context of BDSM relationships

There are two BDSM relationship contexts in which the issue of consent arises, and the legal and ethical analyses differ somewhat between these two contexts. On the one hand, there is consent to BDSM practices that will be engaged in by the participants in a specific “scene.” The term “scene” is used by BDSM practitioners to refer to a session of BDSM activities, typically defined within a period of time.

Consent is also an important issue in establishing and maintaining a BDSM-based relationship. BDSM relationships can be informal in the context of friendships or romances, and are based either on shared enjoyment of BDSM or on mutual understanding that one person will be receptive (the “bottom”) to the desires of the “top”. This is often referred to as Dominance/submission or D/s.

A relationship can also be more formal, with specific—often written—agreement in which one person consents to obey the other person. This is often referred to as a Master/slave or M/s relationship. These relationships usually involve agreement at the beginning of the relationship as to the types of BDSM practices that the Master/Mistress can do to the slave. The participants

¹ See Appendix: Glossary of Terms for Consent Counts for definitions of words used in this document.

² By percentages of 85-95% in the NCSF Consent Counts Survey.

determine how this consent, that is given in advance and probably in general terms, continues to apply in scenes they do together during the relationship. There is also the issue of whether and how the bottom can withdraw—for a particular scene—the general consent given in the beginning of the relationship (keeping in mind that everyone has the legal right to withdraw consent at any time).

Consent given at the beginning of a relationship should also be considered in the context of the relationship's mutual obligations. In a Master/slave relationship, the participants take on significant responsibilities to care for each other according to the obligations each take on at the beginning of and during the relationship.

Consent as an ethical principle

BDSM activities are based on the ethical principle that what we do—whether it is a specific scene or a relationship—is done by informed agreement amongst all of the participants. Our ethics require that all the participants communicate what they agree to do and not to do, as well as the nature of the relationship that they agree to enter. Each participant has a responsibility to reach as complete an understanding as possible of the desires and limits of the other participants. **In short, consent as an ethical concept is one of mutual and informed consent.**

Consent as a legal principle

The legal issue of consent is more narrow and specific. It relates only to a specific activity or scene and only to the question of whether the person receiving the BDSM stimulation agreed in advance to do that act. The legal issue arises when someone is harmed or injured by a BDSM act, and the person who committed that act denies criminal liability on the ground that the other person gave prior consent to the act in question. The extent to which such consent—even if clearly given—is a defense to criminal prosecution, has been greatly limited by U.S. courts. As discussed below, NCSF is working to change what we regard as overly restrictive judicial interpretations.

All references we make to legal obligations and responsibilities relating to consent are based on the law as currently interpreted by the courts. When we speak in this statement about legal responsibilities and obligations, the legal issue is one of possible criminal prosecution for assault (or, less frequently, for other offenses such as trafficking or battery). In the BDSM context, it is the top/dominant who may be vulnerable to such prosecution, and an injured bottom is viewed in criminal law as the “victim,” not a party that commits a crime. For this reason, the legal responsibilities and obligations fall on the top and not the bottom. However, the fact that the top has the legal obligations does not in any way detract from or lessen the equally important ethical responsibilities and obligations which the bottom shares in completely.

The concept of risk

Consent is agreement in advance to something that hasn't happened yet. As a consequence, it is impossible to eliminate entirely the risk that the activity or relationship may turn out differently than everyone involved anticipated when consent was given. In this regard, BDSM is like many other activities—team sports, sky diving, rock climbing, etc. BDSM may also include sexual activity which can involve emotional, psychological and health risks, as is the case with any sexual activity.

Among the risks of BDSM activities there are: innocent mistakes, incidents of incapacity, bad intentions and repercussions from the current state of the law in regards to BDSM activity. Those risks may include:

- The participants may not understand each other's agreement. Or they may misunderstand the nature of the BDSM activities or scene. Or they may misunderstand the other person's limits.
- Even if the participants understand and agree on the nature of the BDSM activities or scene, they may not understand the extent to which those acts could result in physical injury.
- Accidents can happen, causing unanticipated injury even in the most carefully-conducted scene with the most skilled practitioners.
- The physical or emotional intensity of a scene can result in the participants getting carried away, or being unable to revoke or modify consent.
- Someone who claims to respect safewords and established limits may be lying in order to take advantage of someone else.
- Someone who is in a scene to which they gave prior consent may deny that consent was given after the scene.
- Even if consent was given, a court may refuse to accept it as a defense, either on the basis that serious injury was caused or because the judge or jury find the activity morally offensive.
- In a D/s or M/s relationship, a court might conclude that the submissive was "groomed" or brainwashed over an extended period of time to remove their ability to withdraw consent.

The fact that these risks exist, and that it may not be possible to entirely avoid them, does not alter either the ethical or legal responsibility to ensure, to the maximum extent possible, that BDSM activities and relationships are consensual.

Consent is choice

The people giving consent to engage in a BDSM scene or enter into a power exchange relationship must do so voluntarily, without being subjected to threats, fraud, coercion or

deceit. If you are pressured into doing something or entering into a power exchange relationship, you have not given consent in either the ethical or the legal sense. If someone gives consent that you can do something to them or to enter into a power exchange relationship, you have an ethical responsibility to be sure that such consent was given voluntarily and not coerced.

Consent is informed

Everyone involved must know enough so that the consent is given on an informed basis to the BDSM activities that are planned or to the power exchange relationship. Every person has an ethical responsibility (and the top/dominant has a legal obligation) to be sure that consent is given on an informed basis, taking into account such factors as:

- The nature of the BDSM activities or power exchange relationship
- The level of potential risk of harm
- Familiarity with each other's interests and objectives
- Any medical or mental health issues that need to be considered
- Experience with the BDSM skills and techniques that will be involved.

Consent is given by an adult with a sound mind

BDSM takes place among consenting adults. As a matter of law, only an adult can give consent. It is every adult's legal and ethical responsibility to make as sure as possible that their BDSM activities are with people who are of an age that, under applicable laws of the state in question, they can give consent. For the same ethical and legal reasons, a person must have sufficient mental capacity to give consent, and each person has a legal obligation to make sure that this is the case with all of their BDSM partners. Finally, in order to consent you must be in a clear-headed state of mind, not impaired by alcohol, prescription medicine or recreational drugs.

Consent is given within limits

Consent is not a blank check. Consent must be clear as to what BDSM activities and/or what type of power exchange relationship is being agreed to. A person giving consent has an ethical responsibility to make clear what the limits are to their consent. Everyone has the ethical responsibility, and the top/dominant has a legal obligation, to find out and fully understand the consenting person's limits. This obligation to understand and respect the submissive's limits is more complicated in the context of a scene between people who are in a power exchange relationship in which consent was given at the start of the relationship. The top/dominant has an ethical and legal obligation to be sure that the BDSM activities in that scene are within the scope of what was consented to when both entered the relationship. The scope and limits to the previously given consent may have been made clear in the beginning of the relationship, or it may be clear from the participants' previous conduct during the relationship. If there is any doubt at the time of a particular scene, however, there is an ethical responsibility to clarify that doubt before the start of the scene, and a top is at serious legal risk if they do not do so.

Consent is revocable

Anyone can revoke consent to anything at any time. If a pre-negotiated and agreed upon safe word or safe sign—or any other pre-negotiated expression of a withdrawal of consent—is ignored, consent has been violated. This is unethical and, if harm occurs, is a criminal violation. Even when a person is in a power exchange relationship in which they agreed to give up contemporaneous consent for the duration of the relationship, the submissive has the legal right to demand that any activity be stopped at any time. The top/dominant in a scene has both an ethical and a legal obligation to respect that demand and stop the activity.

Consent is communication

It is ethically and legally important in any scene that there should be a mutually understood means of communication between the participants, whether you use plain speech and/or a safe word and/or safe sign. Communication is important so consent can be clearly withdrawn, or to alert other participants that a change in activities goes beyond the scope of consent that was given. In any change of limits during a scene, it is important that all participants are in a clear-headed state of mind and that thinking has not been impaired by the intensity of scene sensations. After a scene if someone feels distressed, regretful or didn't like what happened, that does not necessarily mean that consent was violated unless consent was withdrawn or activities occurred that went beyond what was agreed to. It is important that everyone involved has a good understanding of the consent that was given, and the ability to communicate during the scene, so they do not afterwards disagree as to whether consent was violated.

Consent is not a defense for causing serious injury

When “serious bodily injury” occurs during a scene, it is possible that criminal prosecution for assault will take place even when consent was clearly and validly given for the BDSM activity that caused the injury. Here the ethical and legal obligations are different. Ethically, each BDSM participant has a duty not to violate the other participants' limits or to cause injury that was not anticipated and consented to. The law, however, will punish BDSM actions that cause serious bodily injury regardless of consent.

The Model Penal Code, which has been adopted in some form by many states, defines serious bodily injury as harm “which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” Any actions that result in injury fitting that definition create a risk of criminal prosecution even if consent was given.

It is not safe to assume that BDSM activities which cause lesser injury will not result in criminal prosecution EVEN if consent was given. The courts have ignored the Model Penal Code

definition and have found that minor harm—redness from dripping hot wax or the pain of nipple clamps, for example—is enough to be “serious bodily injury.”

This is the legal issue that NCSF’s “Consent Counts” project seeks to correct.

Until then, any participant in a BDSM scene should assume that there is some legal risk if a participant or an observer complains to the police. It is always important to communicate and be sensitive to and aware of the other participants’ feelings, needs and limits.

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February 15, 2013

To give input on this Consent Statement, go to www.ncsfreedom.org or email consent@ncsfreedom.org Public commentary will be taken until July 1, 2013

The National Coalition for Sexual Freedom is committed to creating a political, legal, and social environment in the United States that advances the equal rights of consenting adults who practice forms of alternative sexual and relationship expression. NCSF advances the rights and advocates for consenting adults in the SM-Leather-Fetish, swing, and polyamory communities. We pursue our vision through direct services, education, advocacy, and outreach in conjunction with our partner organizations to directly benefit these communities.

Appendix

Glossary of Terms for Consent Counts

BDSM - an acronym for Bondage, Discipline, Dominance and Submission, Sadism, Masochism.

Bondage - any practice involving tying or securing a person, as with ropes, cuffs, chains, or other restraints.

Discipline - any activity in which one adult trains another adult to act or behave in a specified way. For example, rules of etiquette, i.e. table manners.

Sadism - a tendency to derive gratification and/or pleasure from inflicting physical and/or emotional pain on other adults within negotiated boundaries.

Masochism - a tendency to derive pleasure and/or gratification from receiving physical and/or emotional pain from another adult within negotiated boundaries.

Dominance - having control over a scene, situation, and/or aspects of a relationship.

Submission - giving up control over a scene, situation and/or aspects of a relationship.

Scene - a term used by BDSM practitioners to refer to a session of BDSM activities, typically defined within a period of time; ie, the play (action) that happens after a negotiated start time and before the negotiated stop time.

Bottom - “the receiver,” the person in the receiving role of a scene, the acceptor in a scene.

Top - “the doer,” the person in the active role of a scene, the facilitator of action in a scene.

Dominant/submissive (D/s) - a relationship dynamic in which a negotiated hierarchy is established. D/s dynamics do not necessarily include SM, but when they do, the dominant is commonly the top and the submissive is commonly the bottom.

Master/slave relationship - a more formal dynamic, with specific—often written—agreement in which one person consents to obey the other person.

Master/Mistress - common terms used for the dominant person in an M/s relationship.

Power exchange relationships - consensual, negotiated non-egalitarian relationship dynamics, i.e. D/s and M/s.