

Consent as a Defense to Assault Charges: A BDSM Case Study

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ABSTRACT

This paper investigates the ability for people to use *consent* as a defense to the criminal charge of assault, with a specific lens over the charge's applicability to the sexual practice of BDSM. In doing so, the study reviews applicable statutory laws, case precedent, the BDSM community's conceptualization of consent, and the social contract theory to create a test for BDSM, with the intention of the test being added as a subclause to consent laws.

This review revealed key shortfalls with the legal system's approach towards BDSM, calling into question the lack of enforcement of the Fourth and Fourteenth Amendments' equal protection and privacy laws, as well as the intentions behind criminalization. A common argument made by courts criminalizing BDSM practitioners, being the state's interest in providing physical safety to its constituents, is refuted, citing sport fighting allowances and investigating the intentions behind assault charges. Further, the BDSM community's conceptualization of consent via its use of a version of the social contract is examined, demonstrating how the law can improve.

With these findings in mind, a legal recommendation is made to include consent laws in all fifty state's criminal law codes, with the inclusion of BDSM as a potential qualifier.

INTRODUCTION

On July 7, 2000, the Attleboro Police raided a BDSM dungeon party, making several arrests of dominants and dominatrixes for assault and battery of their submissives, despite the sex party goers' actions having taken place between consenting individuals (The Associated

Press, 2001). This event, later playfully renamed “Paddleboro” by the BDSM community, serves to demonstrate the lack of justice and morality in the legal system, especially towards groups of people who are not socially accepted. This trend, in which a sexual act between two consenting adults can still break the law, can be seen in various forms around the kink and BDSM community, from spanking, to erotic hypnosis, to consensual nonconsent. This paper intends to demonstrate why these laws may be in effect, and how they can be changed to instate a greater level of justice in the legal system.

DEFINING TERMS

In order to investigate the availability and applicability of, and ability to use, *consent* as a defense to assault charges in criminal law for the sexual practice of BDSM, a few key terms -- *BDSM*, *assault*, and *consent* -- must be defined and properly understood in order to fully conceptualize the issues at hand.

BDSM

BDSM is most commonly known as an acronym for **B**ondage and **D**iscipline, **D**ominance and **S**ubmission, and **S**adism and **M**asochism (“BDSM—An Acronym of Acronyms”, 2014). BDSM is a type of erotic sexual *practice* that often involves some form of power exchange. BDSM is also a *community* of adult practitioners who share a common goal, being partaking in erotic acts which bring pleasure, with common rules and standards, such as being safe, sane, and consensual in performing these acts. The community also employs jargon to describe different portions of BDSM (Townsen, 2014), and works to be inclusive of all genders, sexualities, and kinks (Fapman, 2012). The number of BDSM practitioners is difficult to determine, keeping in

mind the range of practices that can be categorized within said term; however, general studies have argued that around fifteen percent of Americans have been whipped during a sexual encounter, twenty percent have been tied up, and around thirty percent have been spanked, all aspects of what can be categorized as BDSM (Herbenick et al., 2015).

Bondage and Discipline

Breaking down the acronym, the first section of BDSM is **B**ondage and **D**iscipline. These two terms both represent a form of restraint -- the first, “**B**ondage,” typically coming in the form of *physical* restraint. Practices can take various forms, from binding someone’s hands using handcuffs, to restraining one’s entire body using rope, chains, harnesses, or any other item that deters normal mobility. The second term, “**D**iscipline,” often represents a form of *mental* restraint. Discipline, as properly understood within the BDSM community, can for instance represent instilling certain rules on what can and cannot be done during a BDSM session, or “scene”, such as calling someone by “ma’am”, sitting in certain positions, or any other task that might hinder someone from doing something they would otherwise like to do.

Dominance and Submission

The next section of BDSM is **D**ominance and **S**ubmission. These two terms often represent the explicit and emphasized power dynamic of a BDSM scene, and the role that each person plays. The ‘dominant,’ (or ‘Dom’), as one might infer, represents the person or people who, during the scene, exercise power and control. On the other hand, the submissive (or ‘Sub’) is the person or people who, during the scene, submit to the dominant, giving up a perceived ‘power and control’. This power dynamic can be altered during a scene however, as the dominant and submissive can switch. Further, these roles are not binary- for instance, power

bottoms are people who ‘submit’ to receiving, but still maintain the power in making rules or guiding actions. There are also ‘brats’, or people who are intended to be submissive, but will push back against the power of the dominant, all within the realm of play. These roles are often predetermined during a discussion of what will transpire and what is consented to.

Sadism and Masochism

Finally, the last section of the acronym of BDSM is **Sadism** and **Masochism**. These two terms are specifically related to pain- a sadist is a person who enjoys giving pain, while a masochist is a person who enjoys receiving the pain. An important point to note when considering all of the aforementioned terms is that one does not need all aspects of the BDSM acronym to be considered practicing BDSM. For instance, bondage does not need to be present during a scene to be considered BDSM, nor does there necessarily need to be a masochist or sadist. Further, these roles are easily warped to what the users feel most comfortable with or are desiring most.

BDSM Holistically

On a more holistic and operational level, the definition of BDSM can be difficult to pin down, seeing that a range of actions can be pursued and still be within the realm of BDSM. One potential definition was suggested by Ali Hébert & Angela Weaver, of the Department of Psychology at St. Francis Xavier University: “a range of sexual preferences that generally relate to enjoyment of physical control, psychological control, and / or pain” (Hébert, & Weaver, 2014). Another potential definition places BDSM as it pertains to a consensual “power exchange” (“BDSM—An Acronym of Acronyms”, 2014). This definition comes more so from within the community, as opposed to the first, which took more of a clinical approach.

Consent in the Community

A key piece to note within the community is that of consensuality. One theme that is within all aspects of the BDSM community, from the people on Discord, Reddit, and Fetlife (social media platforms commonly used by the BDSM community), to that of dungeon parties (gatherings of people who practice BDSM to engage in it together), to munches (casual and typically non-sexual get togethers within the community) is that of consent. Consent is the key qualifier to make an act BDSM- more so than any of the terms within the acronym of the act itself. When people are engaging in these potentially dangerous acts, from handcuffs to brandings, the ensurement that the act is consensual is what differentiates BDSM from assault and torture. Consent is a key feature of BDSM and its community, and can be found being emphasized on all, if not most all, BDSM websites, forums, classes, and meet-ups.

Jargon of Community Consent

To exemplify the idea of consent being a centerpiece of the community, one can explore some of the language used within- for instance, “scene”, and “play”. These terms are often used to refer to when people are engaging in BDSM. The term “scene” refers to a specific session in which BDSM is practiced. Scene implies a few things- namely, it references the more commonly used ‘scene’, being a section of a movie or theatrical show. ‘Scenes’ within the realm of acting are acted out with characters. They are only for a set amount of time, with people who are working together towards the goal of producing entertainment. While BDSM represents real people feeling real emotions, one would not (or should not) expect, for instance, for a sadistic dominant engaging in BDSM to go outside and slap the first passerby they saw. Rather, they are acting within the confines of a scene, with a partner who has consented to said actions. More

often than not, the people within a scene will confer prior to the scene, discussing what they consent to and what they do not consent to, as well as what will happen during the scene. People often also confer once the scene is complete, to ensure that all parties are okay, were okay with what happened, and will be okay moving forward.

The next term often used is “play”. Play is used to denote BDSM acts. This is an important term to note, as this further demonstrates the idea that people are engaging in BDSM consensually, with an end goal of pleasure and enjoyment. This vernacular serves to demonstrate that BDSM is not intended for evil practices, but rather, the mutual pleasure and enjoyment of consenting individuals.

Assault

Assault is another key term to note within the scope of this paper. Assault definitions vary, and the variations will be noted in a later section. However, the most common language found included the idea of one party causing physical bodily injury upon another party. Varying degrees, such as first, second, and third, or simple and aggravated assault were often found within statutory state laws, and assault laws were often paired with battery laws [See Section 1: Review of Statutory Law as it Applies to BDSM]. The difference between assault and battery often stems from one’s intention versus one’s actual action- assault is the intent and attempt to cause bodily injury, whereas battery is the actual result of bodily injury (“Assault and Battery”, n.d.).

Another key distinction to make is that between assault/battery charges, and sex crime charges, such as sexual assault or rape. In these, the charges differ for a few reasons. Firstly, sex crimes are just as they sound- they often are related to sexual acts. However, this cannot be the

only distinction, as BDSM is often a sexually motivated act, yet can still be charged as assault and battery. The key distinction between the two types of charges are that sex crimes are null if consent is present (“Sexual Assault and Consent”, n.d.). For instance, rape is not rape if both parties provided affirmative consent to the entirety of the actions having taken place- in that case, it is just sex. On the other hand, assault does not currently take into account the presence of consent, unless in specific circumstances, such as professional sport fighting [See Section II: Case Review]. Other circumstances regarding the legality of consent and assault, such as bar fights and namely, BDSM, do not accept consent as a defense to assault and battery charges.

Legal Consent

Consent is some interpersonal agreement to do or receive some action (“Consent”, n.d.). In consenting, there are a few qualifiers that must be met, such as the consent being voluntary, informed, having the ability to be revoked, and being free of coercion or intimidation (Mo. Ann. Stat. § 556.061 (West)). In saying this, the people consenting to an action must not be influenced in some way, whether that be by drugs, alcohol, the leverage of some power, or any other substance or act that might hinder a sound mind. Further, consent must be maintained throughout the entirety of the action- if someone revokes consent, the act is no longer consensual. As it is further laid out in a later section [See Section I: Review of Statutory Law as it Applies to BDSM], not all states have defined consent, nor have most included it in their definition of assault.

The question of consent becomes further clouded when considering BDSM in conjunction with its stigmatized appearance amongst those who are not aware of BDSM’s emphasis on the term consent. Within the BDSM community, consent is the most emphasized

and important concept. The community has a clear set of standards in its maintenance, and, when amongst others, will often jump into situations if there appears to be a lack of consent. However, in a court in which stigma and social standards of what is ‘normal’ comes into play, the outside public may see an act of BDSM and assume there must be a lack of consent, as has happened in the past [See Section II: Case Review]. One can understand why the people of a court, who are not accustomed to BDSM, might see a BDSM act assume a lack of consent, as they are unable to understand why one might consent to acts of pain or strict power roles. In these situations, defining consent is vital for proper justice, but could potentially be a feat unto itself, as people could misinterpret something that clearly constitutes consent within the BDSM community, writing it off as clearly nonconsensual. However, loosening the scope of what is considered consent is not the answer- these laws are already difficult enough to prove within the scope of a sexual crimes case.

Section I: Review of Statutory Law as it Applies to BDSM

METHODOLOGY

To gain a comprehensive understanding of state by state assault laws, a systematic review of all fifty states was undertaken. This is not only useful for individuals who may be involved in a BDSM court case, but also contributes towards providing a holistic view over the government’s views towards BDSM. The review primarily examined first degree assault laws. In the absence of first degree assault regulations, the review was then expanded to assault generally, followed by assault and battery laws if the two were combined. If there was no definition of assault to be

found, case law and jury instructions were then examined. Below were the procedures taken to find language on the definitions of assault on a case by case basis.

1. The National Coalition for Sexual Freedom's database, titled "State by State Assault Laws" ("State by State Assault Laws", n.d.) was used to initially find title and section numbers for assault laws. From there, the codes for the language were copied into Westlaw.com's database and searched. If an applicable assault definition was found, checks were made to ensure that the legislation is up to date. Subclauses applicable to using consent as a defense were then copied and pasted into a master document. The determination of applicability was made through reviewing each sub clause and leaving out definitions including public safety workers, those employed by the government, and a few other subclauses that likely did not pertain to assault being used in a private and sexual setting.
2. In the event at which Westlaw did not produce an applicable result, a Google Search was conducted, using "[state name] + [section number]". If this did not produce a result that was determined to have reasonable likelihood to assault law, the search was then changed to "[state name] + assault law]. Upon searches being entered, the first source that was scanned for was a state government website, as found by a ".gov" domain name. If this was not found, other reliable websites used were "justia.com" and "findlaw.com". The definition most applicable to consent as a defense was then copied and pasted into a master document. The determination of applicability was made through reviewing each sub clause and leaving out definitions including public safety workers, those employed

by the government, and a few other subclauses that likely did not pertain to assault being used in a private and sexual setting.

3. If no search produced reliable results, a search for applicable case law or jury instructions was taken via Westlaw.com. This was completed by searching under the previously specified categories “[state name] + assault”.
4. All definitions were checked a second time by using Westlaw.com and narrowing the search to only produce results of the specific state and their statutes and court rules. The search then was conducted by typing into the search bar “[state name] + assault”.
5. For consent definitions, a search was conducted on Westlaw.com, in which “[state name] + consent definition” was searched for each state. Upon the population of results, a search was taken to determine likeliness to the topic matter. The first page was scanned to find consent definitions under general criminal liability, sexual assault, or kidnapping. If a search was positive for one of these codes, the subsequent page would be searched, for either a definition of “consent”, or a definition of “without consent”.
6. All other definitions (ie. “deadly weapon”, “dangerous instrument”, “serious bodily injury”, and “bodily injury”) were searched for on Westlaw.com, by narrowing the search to a specific state, and to only statutes and court rules, and entering on the search bar “[state name] + [term being searched for]”.

RESULTS AND ANALYSIS

This review and subsequent analysis brought forth a few main conclusions. To begin, based on the results, zero of the fifty states presented a conclusive definition of both assault and

consent, such that consent to the accused assault could be used as a defense to assault charges, nor did any of the fifty states present a strong enough definition of assault to allow for consent to be used as a complete defense. In fact, less than half of the states defined consent in their criminal code [See Figure 1]. Of the states that were more direct in their language on both assault and consent, consent still did not conclusively dismiss assault charges, especially if the assault included serious bodily injury.

Assault

In reviewing state's assault laws, there were twenty two uses of the term "intentionally", seventeen uses of the term "knowingly", and fifteen uses of the word "recklessly" found within the language [See Appendix Figure 1]. An example of this can be found in Alaska's definition of assault, being

"(a) A person commits the crime of assault in the first degree if (1) that person *recklessly* causes serious physical injury to another by means of a dangerous instrument; (2) with intent to cause serious physical injury to another, the person causes serious physical injury to any person; (3) the person *knowingly* engages in conduct that results in serious physical injury to another under circumstances manifesting extreme indifference to the value of human life; (4) that person *recklessly* causes serious physical injury to another by repeated assaults using a dangerous instrument, even if each assault individually does not cause serious physical injury; or (5) that person *knowingly* causes another to become unconscious by means of a dangerous instrument" (Alaska Stat. Ann. § 11.41.200 (West)).

This is notable because the use of the terms "recklessly" and "knowingly" would demonstrate a conscious effort on the part of lawmakers to consider the defendant's level of awareness of the impact of their actions. To this end, the determination of whether the 'victim' therefore consented should be accounted for, as this would significantly impact the headspace and intention of the 'perpetrator'.

Those states that did not include the terms “knowingly”, “intentionally” or “recklessly” often disregarded any mention of the headspace of the defendant, instead beginning with the action, such as “inflicts”, or “an attempt to”. Such an example would include Iowa’s assault definition, being

“Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act”(Iowa Code Ann. § 708.1 (West)).

These states therefore demonstrate more emphasis on the outcome of the action, rather than the intention or headspace of the defendant. This is also notable, as the pure reliance on the outcome of one’s action completely disregards additional information within the case that may morally exonerate a defendant.

Dangerous/Deadly Objects

Another noteworthy term used was “dangerous instrument” or “deadly weapon”, of which, between the two terms, there were fifteen uses found within assault laws [See Appendix Figure 1]. These phrases are commonly found within cases regarding BDSM, as items such as whips, canes, or other objects found at the scene of a BDSM gathering are characterized as dangerous items (Lenius, 2000). Thus, it is important to gain an understanding of what exactly constitutes a dangerous or deadly weapon. An example of the use of these terms can be found in the definition used above for the state of Alaska, as two of the qualifiers for first degree assault include the use of a “dangerous instrument” (Alaska Stat. Ann. § 11.41.200 (West)). Another example of the use of these terms can be found as a qualifier to the assault laws of Kentucky;

“He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument” (Ky. Rev. Stat. Ann. § 508.010 (West)).

Seven states defined either or both of the terms. Deadly weapons definitions were fairly varied from state to state, but generally included various types of knives, such as switchblades and gravity knives (Conn. Gen. Stat. Ann. § 53a-3 (West)), to guns (Ala. Code § 13A-1-2), weapons of mass destruction (Ky. Rev. Stat. Ann. § 500.080 (West)), metal knuckles (N.Y. Penal Law § 10.00 (McKinney)), and many others.

“Dangerous instrument” definitions, on the other hand, were often very similar, with all definitions found including the outcome of the dangerous instrument to cause serious injury or death. Keeping in line with the previous example of Kentucky, their dangerous instrument definition was as follows:

“(3) “Dangerous instrument” means any instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury;” (Ky. Rev. Stat. Ann. § 500.080 (West)).

These definitions, especially those of dangerous instruments or of deadly weapons in which the definition was less specific or more open ended, provide a legal grey area in which it would be possible to characterize a number of tools and items as such objects.

Injuries

By observing both assault laws and deadly and dangerous object laws, a recurring term is that of bodily, or serious bodily injury. The presence of bodily or serious bodily injury is often what differentiates the lack of an assault charge from years in prison for aggravated assault. In total, thirty-four definitions out of forty-six states who used terms such as these were found in state statutes concerning either or both serious bodily injury and bodily injury (or some version of the two) [See Appendix Figure 1]. All definitions found of serious bodily injury include

qualifiers such as an action that risks death, disfigurement, or places bodily functions in jeopardy. An example of this is Hawaii's definition:

“‘Serious bodily injury’ means bodily injury 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” (Haw. Rev. Stat. Ann. § 707-700 (West)).

While these are serious injuries, there are various practices within the BDSM community that would meet these qualifiers- these include actions such as the consensual branding of a subdominant or ‘slave’, which would likely qualify as “permanent disfigurement”, or choking one’s partner, which could constitute “substantial risk of death”.

The other definition noted was that of “bodily injury”. Most definitions included qualifiers such as pain or impairment, as demonstrated by Nebraska:

“(4) Bodily injury shall mean physical pain, illness, or any impairment of physical condition;” (Neb. Rev. Stat. Ann. § 28-109 (West)).

Other states, such as Tennessee (Tenn. Code Ann. § 39-11-106 (West)), include items such as cuts and bruises to constitute bodily injury. Various states, such as Wyoming (Wyo. Stat. Ann. § 6-2-501 (West)), Ohio (Ohio Rev. Code Ann. § 2903.13 (West)), Utah (Utah Code Ann. § 76-5-102 (West)), and Texas (Tex. Penal Code Ann. § 22.01 (West)), employ phrases such as bodily harm, physical harm, and bodily injury within their assault codes. As such, inflicting bodily harm constitutes assault, and is thus punishable by law. With this in mind, and by the definitions used above, there are numerous instances of assault within the kink and BDSM community. Instances of these occurrences can stem from a simple slap, to the use of numerous sex toys from whips to flogs, to tighter restraints used on a sub.

Consent

A key term for the purposes of this study is that of consent. In total, twenty three states defined consent in the codes that were reviewed: criminal liability, sexual crimes, or kidnapping [See Figure 1]. Other codes that consent definitions were found in, such as motor codes and uniform codes, were deemed to have little applicability to the topic at hand, and were therefore not noted. Only twelve of said twenty three consent definitions were a part of criminal liability codes, thus meaning that only those twelve could more conclusively be used in court against assault charges.

Operable Definitions

Of the twelve, seven of the consent definitions discounted consent if the harm that occurred was serious. Tennessee's definition of consent accurately represents this idea:

“The bodily injury consented to or threatened by the conduct consented to is not serious bodily injury (Tenn. Code Ann. § 39-13-104 (West)).

All seven of these also permitted for consent to be used as a defense if the accused assault took place during professional or sport fighting, thus placing someone in a foreseeable position for harm. Another definition, found in Montana, only accounts for consent if the action being consented to is not against public policy;

“it is against public policy to permit the conduct or the resulting harm, even though consented to” (Mont. Code Ann. § 45-2-211 (West)).

For two states, Nebraska and Wisconsin, consent is not defined, but rather, “without consent” is- this was counted within the twelve state definitions, as theoretically, there could be a time in which “without consent” could be drawn upon so as to disprove their contents, and thus demonstrate the presence of consent. These definitions state the terms at which consent is not possible, stating qualifiers such as a lack of coercion or deception, being of a sound mind, actions or words that imply the withdrawal of consent, or being too young (Wis. Stat. Ann. §

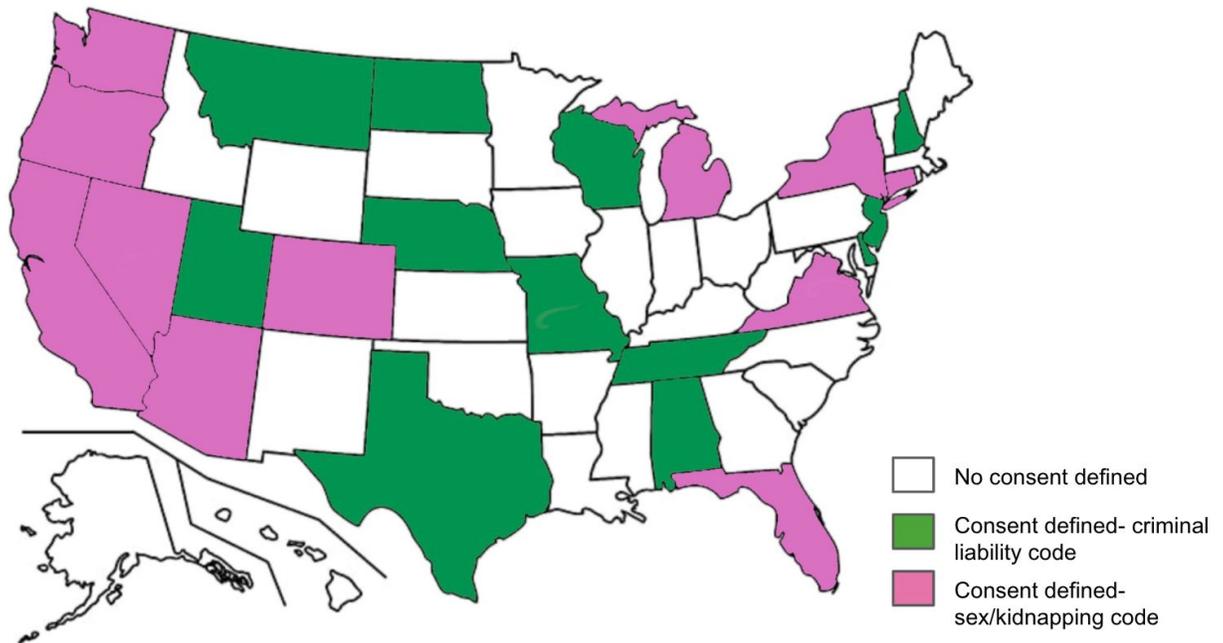
939.22 (West) & Neb. Rev. Stat. Ann. § 28-318 (West)). For the final two states, Missouri and Utah, their consent definitions could constitute a defense against assault. However, all of the aforementioned states do not include consent in their definitions of assault. Thus, Missouri and Utah's definition could not conclusively be said to allow for consent to be used as a defense.

With this in mind, one state, Pennsylvania, includes consent in its definition of what qualifies as simple assault:

“Simple assault is a misdemeanor of the second degree unless committed in a fight or scuffle entered into by mutual consent, in which case it is a misdemeanor of the third degree; attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another” (18 Pa. Stat. and Cons. Stat. Ann. § 2701 (West)).

It is worth noting that even if the instances for assault are deemed consensual, the occurrence can still constitute a misdemeanor. Further, Pennsylvania's definition of aggravated assault does not include any mention of consent. Finally, the phrase “fight or scuffle” is not defined, and thus, one cannot necessarily conclude that the phrase encapsulates that of a kinky BDSM scene. No other state's definitions of assault were found to include language around consent.

Figure 1



OVERVIEW

By analyzing the results of these searches, one can find that purely based on the language of statutory law, no single state would permit for consent to solidly constitute a defense against assault laws, and many practices within the kink and BDSM community would result in a legally valid charge. While it is useful that under seven states' consent laws, only serious bodily injury constitutes an assault, that leaves forty-three states under which normal bodily injury can constitute assault, and fifty states under which consent does not cover actions that were undergone consensually.

Section II: Case Review

While statutory law demonstrates the strict legal rules that a court of law may initially follow, case law and legal precedent are both necessary, and often relied upon, to lead a court in

how it should rule moving forward. Thus, case law must be studied to demonstrate what courts have done in the past, and how courts should move forward. The cases selected for this study demonstrate firstly that BDSM, though not explicitly illegal by virtue of statutory law, has been shown to be illegal via case law. Secondly, the cases demonstrate that consent historically has not been permitted to be used as a defense against assault. Finally, the cases demonstrate why BDSM should be legal, via allowing consent to be used as a defense to assault laws in the case of BDSM related charges.

BDSM AS ASSAULT

Numerous cases have demonstrated the illegality of BDSM, from *State v. Van* (*State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004)), to *Govan v. Indiana* (*Govan v. State*, 913 N.E.2d 237 (Ind. Ct. App. 2009)), to *People v. Febrissy* (*People v. Febrissy*, No. C049033, 2006 WL 2006161 (Cal. Ct. App. July 19, 2006)). However, the selected cases below were chosen by virtue of their singularity- they had few outside factors besides simply those of people engaging in BDSM acts. The cases therefore did not influence the decision of the court as a result of perhaps a sexual assault allegation, or any other outstanding factor that may have inwardly effected the biases of the courts views of their moral purity.

Paddleboro

The first case, or cases rather, pertain to individuals Benjamin Davis and Stefany Reed, two individuals arrested during a police raid of a BDSM dungeon party that was occurring in Attleboro, Massachusetts in 2001 (The Associated Press, 2001). The case, later renamed “Paddleboro” by many people within the BDSM community, involved police breaking up a

BDSM dungeon party (a common community event in which people engage in BDSM together) while apparently investigating a nearby area. In doing so, they arrested two people, Benjamin Davis, who was the host of the event, and Stefany Reed, who was allegedly paddling (spanking with an object) another guest. Davis was charged, amongst other items, with multiple counts of possession of dangerous weapons, as well as possession of an item of self abuse (sex toys were characterized as self-abuse instruments), while Reed was charged with assault and battery with a dangerous weapon. Davis' alleged dangerous weapons were riding crops, whips, kitchen knives, and canes, while Reed's was allegedly a wooden spoon (Lenius, 2000).

While the judge eventually dropped all charges as a result of the police not having the right to enter the premises, not reading Miranda Rights to those arrested (Linton, 2001), and the lack of any witnesses willing to come forward, this case demonstrates not only the stigma in society surrounding BDSM, but also the apparent illegality of BDSM as both assault, and potentially, possession of dangerous or deadly weapons. While this case did not result in any charges, legal fees and the public outing of individuals engaging in highly stigmatized acts did come out. Aside from potential legal actions that may ensue, being outed as outside the 'social norm' can be punishment unto itself.

People v. Samuels

Despite the lack of charges involved in Paddleboro, there are numerous examples of cases in which there are resulting punishments. The second case selected involves aspects as such. *People v. Samuels* (*People v. Samuels*, 250 Cal. App. 2d 501, 58 Cal. Rptr. 439 (Ct. App. 1967)) occurred in Santa Clara County in 1967, and involved the camera company Eastman Kodak Company showing film, as sent by an acquaintance of the defendant for processing, to the

police. The film, which involved an allegedly consensual BDSM scene between the defendant and an unidentified individual, was used to gain a search warrant of the defendant's house, and as evidence for the arrest and subsequent assault and battery allegations (amongst others), against defendant Marvin Samuels. Samuels successfully argued that the film was not created with an intent to distribute, but rather, to be sent to the Kinsey Institute for research. Despite this small success, few came after- Samuels was charged with aggravated assault. In response to Samuels' argument that the submissive was consenting, the opinion of the court stated:

“It is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force likely to produce great bodily injury. Even if it be assumed that the victim in the ‘vertical’ film did in fact suffer from some form of mental aberration which compelled him to submit to a beating which was so severe as to constitute an aggravated assault, defendant's conduct in inflicting that beating was no less violative of a penal statute obviously designed to prohibit one human being from severely or mortally injuring another. It follows that the trial court was correct in instructing the jury that consent was not a defense to the aggravated assault charge.” (*People v. Samuels*, 250 Cal. App. 2d 501, 513–14, 58 Cal. Rptr. 439, 447 (Ct. App. 1967))

While this language was of 1967, the negative social stigma surrounding BDSM within the professional realm largely remains the same, as proven by BDSM court cases as late as 2009 (*Govan v. State*, 913 N.E.2d 237 (Ind. Ct. App. 2009)). This case serves to again demonstrate the illegal and stigmatized nature of BDSM. Even without a formal charge being brought forth by an alleged victim, states were able to move forward with charges against the defendants. Assault and battery charges are the most common to be brought forth, seemingly as a go-around of the fact that no statutory laws exist to explicitly outlaw the sexual practice of BDSM.

CONSENT AS A DEFENSE TO ASSAULT

Seeing that it has been established that there is a history of BDSM constituting an illegal and chargeable assault, the next question to consider is, ‘can consent count as a defense to assault charges?’. Seeing that within the BDSM community, the difference between BDSM play and assault is that of consent, the most reasonable path for someone accused of a BDSM related assault is to argue that the alleged victim consented. However, many have pursued these arguments, with few successes found (all successes have since been overturned).

Commonwealth v. Appleby

The first case to look at is that of *Commonwealth v. Appleby*, in which Appleby was sentenced to “eight to ten years” (*Com. v. Appleby*, 380 Mass. 296, 310–11, 402 N.E.2d 1051, 1060–61 (1980)) in a correctional institution for assault and battery with a dangerous weapon (a riding crop). Amongst others, Appleby argued that the charge against him concerning assault and battery was not valid because the alleged victim was consenting to the acts that took place. When taken to appellate court, the court argued the following:

“Appleby was in no way charged with a crime for committing homosexual acts. Rather he was tried for violating a statute that implies, as a matter of public policy, that one may not consent to become a victim of an assault and battery with a dangerous weapon. Farrell, *supra* at 620-621, 78 N.E.2d 697. See also *Commonwealth v. Collberg*, 119 Mass. 350 (1876).

(b) The fact that violence may be related to sexual activity (or may even be sexual activity to the person inflicting pain on another, as Appleby testified) does not prevent the State from protecting its citizens against physical harm. The invalidity of the victim's consent to a battery by means of a dangerous weapon would be the same, however, whether or not the battery was related to sexual activity. The general rule is: ‘It is settled that to commit a battery upon a person with such violence that bodily harm is likely to result is unlawful, and consent thereto is immaterial.’ Farrell, *supra* at 620, 78 N.E.2d at 705.⁹ Regardless of whether sexual activity was involved in the incident in question, Cromer's consent to assault and battery upon him by Appleby by means of a dangerous weapon cannot absolve Appleby of the crime charged

punishable under G.L. c. 265, s 15A.” (*Com. v. Appleby*, 380 Mass. 296, 310–11, 402 N.E.2d 1051, 1060–61 (1980))

This verdict clearly states the court’s unwillingness to accept consent as a defense to assault, as they argue that it impedes the state’s ability to protect its citizens from physical harm.

Woods v. United States

This idea is further proven in a case that does not concern BDSM. The case, *Woods v. United States*, pertains to a street fight, in which the victim encouraged the defendant to assault him, saying phrases such as “hit me” with his hands raised in the air. The defendant then hit the victim, knocking him to the ground. Within the case, *Woods*, the defendant, argued that the victim consented to the assault. Below is the resulting verdict from the appellate court:

Although the defense of consent is applied in the realm of sexual assault, it has been sparingly applied in other areas. This is because society has an interest in punishing assaults as breaches of the public peace and order, so that an individual cannot consent to a wrong that is committed against the public peace. The general view is that consent is not a defense to a criminal prosecution for assault and battery, except in cases of rape because whether or not the victims of crimes have so little regard for their own safety as to request injury, the public has a stronger and overriding interest in prohibiting and preventing such acts as this. The State, not the victim, punishes a person for fighting or inflicting assaults. This is so because these acts, even if done in private, have an impingement (whether direct or indirect) upon the community at large in that the very doing of them may tend to encourage their repetition and so to undermine public morals. (*Woods v. United States*, 65 A.3d 667, *667; 2013 D.C. App. LEXIS 258)

Upon this, *Woods*’ conviction of “assault with significant bodily injury” (*Woods v. United States*, 65 A.3d 667, *667; 2013 D.C. App. LEXIS 258) was upheld. The previous two excerpts from *Commonwealth v. Appleby* and *Woods v. The United States* clearly demonstrate that

consent cannot be used as a defense to physical assault, as, according to the courts, it impedes the state's right to protect its citizens from physical harm.

CASE LAW TO PERMIT THE LEGALITY OF BDSM

Having established both that BDSM counts as assault and battery, and that consent cannot, thus far, be a defense to said assault charges, the next item to consider is if consent should be permitted to stand as a valid defense to an assault charge. To this, two court cases are especially important to consider; *Planned Parenthood v. Casey*, and *Lawrence v. Texas*.

Equal Protection

The first case, *Planned Parenthood v. Casey*, took place in the United States Supreme Court in June of 1992 and centered on the laws that oversee one's ability to gain an abortion. These laws included items such as requiring parental consent if the person is under 18, informed consent, and the consent of the husband if a the person wishing to get an abortion is married. While the court looked into many other cases and aspects of the argument, the argument specifically applicable to this paper concerns that of government intervention in matters of personal liberties and rights. An excerpt of the majority opinion is as follows:

“Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter...

It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other... That theorem, however, assumes a state of

affairs in which the choice does not intrude upon a protected liberty... we have ruled that a State may not compel or enforce one view or the other...

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education... Our precedents “have respected the private realm of family life which the state cannot enter.”... These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.” (*Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 850–51, 112 S. Ct. 2791, 2806–07, 120 L. Ed. 2d 674 (1992))

This excerpt provides a number of important statements, the first of which is centered around the government ruling on aspects of protected liberties and individual moral code. These distinctions are especially important when taking into account BDSM and its intersections with the law.

While not formally illegal by virtue of statutory laws, BDSM has been consistently shown to be illegal in a court of law, via charges of assault and battery, and assault with a deadly or dangerous weapon. This constitutes a form of discrimination, by means of one’s sexual preferences. By consistently categorizing BDSM as a form of assault and battery, and categorizing the items used in the context of consensual play as a dangerous or deadly weapon, the court demonstrates a targeted approach of punitive measures against the BDSM community. This comes into play with the Fourteenth Amendment’s equal protection clause, which states:

“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” (*U.S. Constitution. Amend. XIV, Sec. 1.*)

Under the equal protection clause of the Fourteenth Amendment, the common interpretation would argue that the government, while having the ability to discriminate generally, cannot deny people equal protections under the law (“Equal Protection”, n.d.). As such, by allowing for professional fighters to use consent as a means of a defense against assault charges, the BDSM community should also have the same powers.

Sport Fighting

By breaking down the similarities between professional fighting (ie. Mixed Martial Arts, Ultimate Fighting Championship, Karate, etc.) and BDSM, one will find that from a legal viewpoint, the two hold many similarities. These similarities range from consent being what differentiates assault from the action itself, to the intention of causing physical pain to another. However, the intention of a professional fighter is to make their subject submit to a point in which they no longer believe they can stand the pain. On the other hand, the ultimate goal of BDSM is for mutually derived pleasure. Further, both professional fighting and BDSM provide the ability to ‘tap out’ if too much pain results- either by means of a safeword, or agreed upon action.

While it is true that professional fighting provides an equal footing at the beginning of the match to both competitors, the only reason BDSM does not do that is because the submissive agreed and assumedly desired to take the seemingly ‘lower’ position. Further, it must be noted that at the core of a proper BDSM scene, the submissive is actually the person with the power- the people involved have spoken beforehand and both speak about what they are okay with and not okay with, and the submissive should always have the ability to stop the scene or play. Thus,

the submissive both determines what happens during a scene, and when to stop the scene. Thus, BDSM represents a safe arena during which consensual partners are aiming at, yes, delivering or exchanging physical pain, but also pleasure. The person receiving the pain has the power to stop, and is receiving pain that they have deemed good.

With these ideas in mind, one can see that people engaged in BDSM are taking similar, if not more precautions than those involved in professional fighting, with similar actions and intentions. As stated previously in *Woods v. United States* and *Commonwealth v. Appleby*, the government has an obligation to protect its citizens from non-consensual assault. The government would not be doing their due diligence if they allowed for someone to get punched in the street. However, as the government has shown via consent laws through allowing professional fighters to consent to what appears to otherwise be assault, consent is a key concept to differentiate what is assault, and what is not. The arguments made within the two aforementioned cases against consent constituting a defense all become invalid when considering that the government allows for sport fighting to be an exception. For instance, in the *Woods v. United States* case, the court says the following:

“...whether or not the victims of crimes have so little regard for their own safety as to request injury, the public has a stronger and overriding interest in prohibiting and preventing such acts as this... these acts, even if done in private, have an impingement (whether direct or indirect) upon the community at large in that the very doing of them may tend to encourage their repetition and so to undermine public morals. (*Woods v. United States*, 65 A.3d 667, *667; 2013 D.C. App. LEXIS 258)

The *Commonwealth v. Appleby* case follows suit by citing the following:

““It is settled that to commit a battery upon a person with such violence that bodily harm is likely to result is unlawful, and consent thereto is immaterial.”” (*Com. v. Appleby*, 380 Mass. 296, 310–11, 402 N.E.2d 1051, 1060–61 (1980))

If this is truly the case, then professional or sport fighting should not exist as a legal pastime under the law, as it would be a demonstration of people who “have so little regard for their own safety”, taking part in actions that “may tend to encourage their repetition and... undermine public morals” (*Woods v. United States*, 65 A.3d 667, *667; 2013 D.C. App. LEXIS 258). Often, the resulting bodily injuries from professional fighting can include bruises, blood, open wounds, or even broken bones. Despite this, many of the states that define consent allow for sport fighting to use consent. This, for instance, can be seen in the case of North Dakota, in which their consent law contains a sub clause stating:

“When conduct is an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury by all persons injured or threatened by the conduct is a defense if:... b. The conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport;” (N.D. Cent. Code Ann. § 12.1-17-08 (West))

Consent, as such, should be “immaterial” (*Com. v. Appleby*, 380 Mass. 296, 310–11, 402 N.E.2d 1051, 1060–61 (1980)). However, professional fighting is more than legal- it is a socially acceptable and encouraged means of getting exercise, entertaining the public, and represents a common sport that is engaged in by all types of people.

Stigma

With this in mind, BDSM should not be illegal under assault and battery laws. One potential explanation for the continuing accusations of assault and battery include that BDSM is not socially accepted, or is against some people’s moral codes. A long history of shaming those practicing BDSM exists, both in courts of law and in social systems. For instance, the language used in the *People v. Samuels* case demonstrates this, as the official opinion argued that people

engaging in BDSM have a “mental aberration” (*People v. Samuels*, 250 Cal. App. 2d 501, 58 Cal. Rptr. 439 (Ct. App. 1967)) if they consent to BDSM acts. This can further be seen in a court of law in the United Kingdom, when during Operation Spanner, a police investigation into same-sex BDSM groups, Judge James Rant stated that people must be “protected” from themselves if they are engaging in and consenting to BDSM acts (Langdridge & Butt, 2004).

Socially, BDSM was characterized as a mental disability for many years by the Diagnostic and Statistical Manual of Mental Disorders, or DSM. While it is now characterized as a paraphilia and not directly a mental disorder or disability, these characterizations represented the viewpoints of many, as backed by various news sources and groups encouraging the narrative that those engaging in BDSM are terrible people. This is where the *Planned Parenthood v. Casey* case comes into play, with the first line of the original excerpt being:

“Our obligation is to define the liberty of all, not to mandate our own moral code.” (*Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 850–51, 112 S. Ct. 2791, 2806–07, 120 L. Ed. 2d 674 (1992))

If personal morals are not to interfere with the decisions of a court of law there should be no reason that consent counts in some arenas, but not others. Unless a proper answer can be found to the question of why consent is only permitted in some arenas, the Fourteenth Amendment and subsequent equal protection clause should cover BDSM in a court of law.

Privacy

The second aspect of the case concerning consent as a defense to assault in the context of BDSM cases is that of *Lawrence v. Texas*. In the landmark case surrounding sodomy and sexual freedom, Justice Kennedy makes the statement:

“Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other

spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.” (*Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003))

This opening statement, in conjunction with the statement from *Planned Parenthood v. Casey*: “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment” (*Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 850–51, 112 S. Ct. 2791, 2806–07, 120 L. Ed. 2d 674 (1992)) both allude to the idea of privacy within the scope of personal decisions. Therefore, it is important to determine whether BDSM constitutes protection under privacy laws.

A common thread heard throughout the debate of consent in these cases is whether the right to privacy should trump charges surrounding BDSM and assault. For instance, this theme can be seen in the *Woods v. United States* case: “Acts, even if done in private, have an impingement (whether direct or indirect) upon the community at large in that the very doing of them may tend to encourage their repetition and so to undermine public morals” (*Woods v. United States*, 65 A.3d 667, *667; 2013 D.C. App. LEXIS 258). Thus, according to the *Woods v. United States* case, certain charges, such as assault, should not be permitted to take into consideration one’s right to privacy.

Establishing the Right to Privacy

The concept of one’s right to privacy originates from the Fourth Amendment:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but

upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” (*U.S. Constitution*. Amend. IV.)

However, the Fourth Amendment pertains more so to physical locations than personal privacy-- for this, one would have to visit the case of *Katz v. United States*. This court case set precedent which expanded a person’s right to privacy to what can reasonably be expected to be private- not just a house or building. A test was thus created to help the court determine whether someone should have a reasonable expectation, and subsequent right to privacy, by asking two main questions:

“first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” (*Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967))

If this test is successful, then one can expect that they are covered by the Fourth Amendment.

The first aspect of the test is whether the individual has an expectation of privacy. For those practicing BDSM in the safety of their own home or building, or as an invited guest in the space of another’s home or building, any person would hold a reasonable expectation of privacy. The second aspect of the test is that of whether society will accept this expectation. Just as stated in *Lawrence v. Texas* and *Planned Parenthood v. Casey*, not only should individuals be protected from governmental intervention into such personal matters as sexual activity, but society has demonstrated a societal expectation of said privacy. Thus, *Lawrence v. Texas* set not only legal precedent, but societal precedent, in what one can expect when conducting consensual sexual practices.

Overview

It is demonstrated that BDSM acts that take place within the privacy of an owned establishment should be protected under one's right to privacy by virtue of the Fourth Amendment and *Katz v. United States*. *Lawrence v. Texas* and *Planned Parenthood v. Casey* show that the government should not intervene in these consensual, and highly personal decisions and actions, and by doing so, the government infringes upon the Fourteenth Amendment's equal protection clause. Thus, so long as consent is present within a BDSM act (which, by nature, qualifies it as a BDSM act), the government pressing charges violates an individual's right to privacy, as well as the equal protection Fourteenth Amendment laws. As such, there is no reason why BDSM acts should not qualify to have consent count as a defense to assault laws.

Section III: Social Conceptualization of Consent

While under the law, consent may be a muddled and difficult concept to define and enforce, the idea of consent is a clear and paramount part of the BDSM community. To the BDSM community, consent is demonstrated as the most important part of a scene, and is clearly reiterated throughout social media, how-to's, and gatherings of the community. Thus, it is useful to understand how the community conceptualizes consent, and how their definition may differ, whether in language or practice, from that of the law. By reviewing this, the information yielded provides important insights as to where the laws may be lacking. As a note, the blanket term of "safety" used within this section entails any aspect of the BDSM community that relates specifically to having a safe and healthy BDSM scene or play. This often includes ideals of

positive communication, consent, the use of safewords, aftercare, education, or acronyms such as SSC, meaning safe, sane, and consensual, or RACK, meaning risk aware consensual kink.

AN INFORMAL STUDY

To begin, one must establish whether or not the BDSM community assigns importance to safety and ideals such as consent. To do this, an informal study was conducted using social media to determine how many BDSM groups found consent or similar concepts surrounding the safety of a scene of notable importance. Google, Reddit, and FetLife, all prominent engines that one may go to if they are wishing to learn more about BDSM or find others practicing it, were used to conduct this study. These sites were searched under the guise of someone new to the community, wanting to learn more. This approach was taken to find introductory information- therefore, if consent is included, it can reasonably be concluded that consent or some form of safety is foundational to the community (according to the author of the articles selected), and noteworthy to novices in the community.

Google

First, a search for “starting bdsm” was entered into Google, and the first page of results were used. Of the ten sites shown on the first page of the Google Search, all ten of them included ideas surrounding safety within BDSM. These sites include a mixture of news sites, such as GQ (Thomas et al., 2020) and The Independent (Hosie, 2019), blog articles (Walansky, 2015), and how-to’s by sex education websites (Adriana et al., 2020). All ten websites spoke to safety within the community, from open communication, to consent, to the popular mantra of “safe, sane, and consensual” somewhere within their article or list. A second phrase was searched for

on Google, being “intro to bdsm”. Again, the first page of results were used. Of these ten sites produced, four were the same as the previous search. Of the six new sites produced, all six include aspects of BDSM safety, with a similar spread of news sites, blog posts (“Kinks and Tricks: An Intro to BDSM”, 2017), and sex education resources (Lords, n.d.), as well as one resource for psychotherapists who might be interacting with people who engage in BDSM (“An Introduction to BDSM for Psychotherapists”, n.d.).

Reddit

Following the Google searches, the next site reviewed was Reddit, a popular website used to ask questions, from cooking, to sports, to BDSM. These questions are open to be answered by any user, but questions are often, and can be considered to be, answered by people involved in the BDSM community. This is assumed because many of these questions were posted on BDSM focused reddit pages with many community members frequenting the page, and those answering felt the confidence in their knowledge to provide an adequate response. To search Reddit questions, a Google search was conducted, with the phrase “reddit intro to bdsm”. The first ten results were surveyed, all of which were links that led to Reddit posts and questions. Of the ten results found, one result was stricken from the study, as the link led to a subreddit page, or a page of links to questions (“A place for advice on topics relating to BDSM”, n.d.), rather than a specific question asked. Thus, of the nine viable results, seven of the nine spoke on BDSM safety. Of the two posts that did not include any ideals of safety, one was asking specifically for podcasts or websites that could help them learn more (B0iledpnut, 2018), and the other was asking where BDSM equipment could be found (Summersauce23, 2015).

Fetlife

Finally, FetLife was reviewed. FetLife is a popular BDSM social media site, allowing people to ask questions, post pictures or videos, and overall find community. Various pages exist for people to selectively sort themselves into, but the page that was focused on for means of this study was titled “Novices and Newbies”, a popular page for those just starting out. Similar to Reddit, the portion of FetLife focused on was that of people asking questions. The link “Safewords, Limits, Consent, and Negotiation” (Cowhideman, “Safewords”, n.d.) was listed as a “sticky”, or a grouping of questions that was stuck to the top of the page, selected either because “some questions get asked very commonly”, or because they might be “discussions that are interesting,[or] have good advice” (Cowhideman, “What is a sticky”, n.d.). Under the listing of “SafeWords”, there were fifty-five links to various questions, many of which had over twenty responses. Under “Safe, Sane, Consensual and other philosophies”, there were 8 links to questions. “Limits” had fifty-two links, and “Negotiations and Consent” had fifty-five. (Cowhideman, “Staying Safe”, n.d.) There were also other sticky pages concerning safety, including “Health and Physical Safety”, and “Personal Safety and Privacy” (Cowhideman, “Staying Safe”, n.d.).

Conceptualization

Some examples of language from the sources found above include popular magazine GQ, who wrote on consent, stating:

“BDSM is all about enthusiastic consent. The dominant partner won’t step on their submissive’s head and then shove it into a toilet without a big ole’ ‘yes, please!’” (Thomas, 2020).

A sticky on FetLife also speaks on “safewords, limits, consent and negotiations” within the BDSM community, stating:

“many people consider them to be a[t] the heart of what it is we do and what separates BDSM from abuse and sociopathic behavior” (Cowhideman, “Safewords”, n.d.).

A Reddit post that also went into BDSM included the posting of a live eight-page document titled “Intro to Kink”. It delved deeply into the importance of safety within the community, stating:

“BDSM *requires* communication, trust, and consent. Without all three, what you have isn’t BDSM/kink. It’s abuse. To that end, talk to your partner(s). Tell them what you like, find out what they like, decide what to do and how to do it. If you still have questions, keep talking. Don’t do ANYTHING that all participants don’t agree to” (JustAnotherDom, 2014).

The same document also spoke on the importance of education before taking actions, as well as the acronym “safe, sane and consensual” (SSC), and “risk aware consensual kink” (RACK).

Literary Review

As demonstrated, for many of the most popular sites used by the BDSM community, consent and safety are key ideas that were touched upon in almost every link found. Emphasis on consent, however, does not stop at social media. Others, such as academics and authors, have also taken note of the key theme within the community, adding to its conceptualization and demonstration of importance. This can be seen in many arenas, such as in Professors’ Trevor Butt and Darren Langdrige’s “A Hermeneutic Phenomenological Investigation of the Construction of Sadoomasochistic Identities”, in which they state:

“We see subscription to ‘safe, sane and consensual’ practice is the key condition for membership of the broader (public) S/M community” (Langdrige & Butt, 2004).

Yet another example of the centrality of consent can be found in famed LGBTQ+ author Meg Barker's research article on consent, in which they state:

“Since the foundation of any form of organized BDSM communities, consent has occupied a place of central importance” (Barker, 2013).

These numerous examples demonstrate the importance that safety and consent hold to the people engaging in these sexual, and otherwise potentially dangerous activities.

Consent within the BDSM community does not necessarily begin and end as it might according to the world of law. For instance, those engaging in BDSM often do not simply ask “is this okay?”. Rather, consent often takes many forms, such as within a series of negotiations and conversations. It is common practice that when people decide to engage in a scene, pre-scene negotiations take place, allowing those involved to determine where hard and soft limits lie, what the safeword will be, and the potential actions that might take place. This is all enveloped in the expansion of the term “consent”, as these negotiations depart from asking a binary question, to opening a world of various possibilities and determining exactly what is consented to and what is not.

Phases of Negotiation

This concept is largely researched and analyzed by PhD candidate Ayesha Kaak's study titled “Conversational Phases in BDSM Pre-Scene Negotiations” (Kaak, 2016), as found in the *Journal for Positive Sexuality*. In this study, Kaak delves into the flow of typical pre-scene negotiations, arguing that there are four main sections: Style, Body, Limits, and Safewords. The first section, Style, is labelled as negotiations concerning the type of play that can or will occur, what would be used, and sensations that would occur. The next aspect of these conversations is that of Body, in which aspects of play, such as where on the body these actions would go,

positions for play, and types of touches, are spoken on. Following this is Limits, or discussing where each persons' hard and soft limits are. That is, what is a hard no, and what people may be hesitant about. Finally, Safewords are discussed. Safewords are paramount to play, as they are what enable people to pause or end a scene. These safewords can range from a word or phrase to a physical action if, for instance, a person is gagged or unable to verbally say something. These safewords can also range from one word to stop play, to groupings of words, such as “green, yellow, and red”, either meaning to continue, to pause or regroup, or to stop completely.

Consent Holistically- BDSM Community and Law

At its heart, consent is quite simple. It is either there, or is not. However, the BDSM community works to ensure that any potential changes to consent are addressed. The thorough evaluation of what is okay versus not represents a departure from the typical actions taken by other, more ‘normal’ sexual encounters, in which consent is often represented by an absence of “no”. The community places emphasis on the importance of in-depth negotiations, continual check-ins, and pre and post conversations. To them, consent is not a side or after thought, but rather, is paramount to the encounter at every stage. To many in the community, consent and safety are incorporated as yet another form of foreplay, not a hindrance to sex appeal. It is in these ways that the BDSM community conceptualizes consent.

Consent, when discussed under the law, takes on a much simpler approach. This is exemplified by the narrower view law takes in what can be consented to. Within the scope of the law, consent is only applicable as it applies specifically to actions that include primary and secondary sexual organs, such as intercourse, fellatio, and cunnilingus (La. Stat. Ann. § 14:42). This diverges from the BDSM community’s approach to consent, in that the community’s

approach is much more encapsulating of acts outside of what is often regarded as sex, including foreplay or other acts that may not explicitly be sexual, but are pertaining to pleasure.

Another point to consider in the law's conceptualization of consent is the simplistic nature of legal consent itself. Consent, under the law, often is the simple lack of a "no". This is contrasted with the BDSM community, in which consent is often a discussion, expanded to include safewords or safe actions. Individuals involved often negotiate what might occur in the play, and what each person is comfortable with. This is furthered by the common safewords of "green", "yellow", and "red", or actions such as dropping an object, a certain movement of the leg, or squeezing a specified object ("Safeword", 2014). In these ways, the BDSM community has expanded the definition and use of consent into areas that the law has failed to do so. These expansions allow for greater safety of individuals, and demonstrates some of the shortcomings of the heightened stigma against the BDSM community within the legal and political communities.

Section IV: Social Contract Theory and the Legal Regulation of BDSM

While the legal qualities of this study are key in determining the shortcomings and strengths of the law in relation to BDSM and consent, yet another vital field of study is that of philosophy. Philosophy has often been used as a compass in guiding the law and structure of government, and the questions it poses aid in finding a just path for people to pursue. Seeing that the social contract is often used as a justification for the government's decisions, whether in court cases (Allen, 1999) or the United States Constitution, this study would be remiss to not include an analysis of how it may view the forthcoming recommendations.

OVERVIEW OF THE SOCIAL CONTRACT

The social contract theory prescribes an interpretation of, at its core, why one would choose to enter into society from a state of nature. From John Locke and Thomas Hobbes, to Carole Pateman and Immanuel Kant, the social contract divulges into a number of different, yet related, theories on how a social contract takes shape and why one would assimilate into its rules. The contract is intended to provide some item, perhaps safety or peace, in return for giving up certain freedoms, such as one's ability to kill another human being. Thus, one can find simplified versions of the social contract everywhere, from raising one's hand in class to speak ("Social Contract Theory, 2018), to giving up certain privacy in return for ensuring a flight free of weapons (Dees, 2017). People voluntarily choose to enter into these contracts, such as that of the government's contract with its citizens; thus, the contract must be worthy of being entered into-- otherwise, people would not agree to said contract.

APPLICATION OF THE SOCIAL CONTRACT

Under current statutory laws and case precedent, those who practice BDSM are breaking the law, via committing assault. In this way, those practicing BDSM are giving up all the liberties associated with exploring and engaging with one's sexual desires, in return for no protections- rather, if caught, an individual could be sentenced to time in prison, or a slurry of other punishments pertaining to assault. State interests, however, should mirror the interests of its constituents- otherwise, people would be opposed to opting into a contract under said state. This idea, however, becomes much more complicated in our current day, seeing that it is likely that most all other countries have similar regulating laws surrounding BDSM, often as a result of

religious and conservative influences, as well as stigma. Therefore, a person interested in BDSM has few places to turn for the safety that is provided under the government. As stated previously, a sizable portion of American citizens have a desire for BDSM acts to some extent. This sizable group should be listened to, so as to create a more stable society.

Harm

The argued protections that the government provides in criminalizing BDSM practices is that of a state interest in protecting the physical safety and well-being of its constituents. With this in mind, one must consider why an individual has a desire to be protected from assault and physical harm. At the core of assault is the idea of a nonconsensual affliction. That is, if someone were to approach an individual on a street and punch them, that would be a clear example of when a person would want the state to intervene. On the other hand, if two friends are wrestling in their house, they would likely not desire for state intervention, even if a few bruises come as a result. If consent is present, why do people need to be protected from the act itself? The presence of consent differentiates assault from play. Thus, there is nothing to gain from this portion of the contract between the state and the people, leaving no reason for an individual to agree to the set rules.

Liberties

It is argued by Anita Allen in “Social Contract Theory in American Case Law” that within the realm of the social contract, “the liberty of persons whose conduct does not injure the essential rights and interests of others may not be infringed” (Allen, 1999). As such, and seeing that there is no studied correlation between the level of assaults committed and the number of people engaged in BDSM, the liberties of those outside are in no way infringed. There is,

however, evidence that people engaged in BDSM have lower levels of neuroticism, depression, and psychological sadism, as well as increased levels of extrovertedness, amongst other traits (Magliano, 2015). Further, the liberties of those within are being infringed upon; they are policed in being told that what they are doing is wrong, immoral, and implies a lack of ability in other realms of their life.

Community Social Contract

As a result of these flaws, the BDSM community has taken it upon themselves to generate a system of engaging with social contracts, so as to ensure mutual safety and pleasure. The social contract, again, is giving up some freedom, X, in return for some liberty, Y. In the case of BDSM, the individuals engaged give up certain freedoms, such as selfishly doing whatever they want to another individual (X). The liberties provided in doing this then become mutual consent and the mutual pursuit of pleasure (Y). This system generates a stable and safe agreement in their goal, and contains the one of the key discursive models, being bargaining (D'Agostino & Gaus, 2019). As bargaining implies, those involved in a scene discuss what is acceptable and not. If no agreement can be reached, the scene does not occur. In this way, the consent involved, acting as a sort of contract for the play, serves as a social contract to be followed, ensuring the pleasure and safety of the people involved. Thus, the BDSM community has found a way of filling the perceived gaps of the state, ensuring safety and stability in the presence of a legal system that fails to do so.

These points all serve to shed light to a flaw in the social contract and legal system of the United States. While this flaw may seem fairly insignificant to those outside of the BDSM community, it has large impacts on the stigma that is generated around these sexual practices,

and has the ability to hurt the livelihood of many. The social contract serves as a vessel to remind people of the intention behind laws and social structures within a legal system, and can again, work to guide the legal system in making tangible change towards greater societal stability.

Section V: Legal Recommendation

With the breadth of information stated prior to this in hand, one must consider the importance of change. However, this change must be taken with proper precaution, as there exist many potential ramifications to change, both positive and negative. To make consent a complete defense to assault may prove to result in many negative outcomes. For instance, a noted potential outcome could include domestic abusers getting away from legal charges because the victim of abuse states “it is okay” (McArthur, 2016), thus consenting to the harmful acts. However, there is another side to this argument- the danger of not defining BDSM. By failing to set a precedent of what can and cannot be consented to would allow for domestic abusers, rapists, or people sexually assaulting others to argue that what they are doing constitutes consensual BDSM, as is common with the rough sex argument (Buzash, 1989). Thus, a proper solution must be found to ensure the safety of all people, and the freedom of privacy and action.

The solution to this issue can be found in instilling consent definitions in all state’s criminal liability codes, and creating a qualifier in the definition of consent, similar to qualifiers found for professional or sport fighting. This qualifier is that of BDSM, accompanied by a test to determine if the act that transpired properly constitutes BDSM. This solution is beneficial as it prevents all consent from becoming a defense to assault, thus preserving the state’s need to protect its citizens from unlawful and nonconsensual harm. Further, it defines BDSM, thus

hindering those actually committing assault or sexual assault from using BDSM as a tool for the justification of a potentially heinous crime. Finally, by not defining BDSM within consent laws, it continues the rhetoric of discrimination against an ever-growing population of people who are engaging in safe and consensual sex, legitimizing hatred and a social stigma that results in tangible legal ramifications.

TEST AND LANGUAGE

The test is threefold and intended to encapsulate the acts within the BDSM community. It aims to not limit the vast number of actions that could take place during a scene, but maintain a level of specificity that helps avoid some of the personal biases and prejudices that those in power may hold.

Consent

Consent is the primary qualifier of what constitutes BDSM. Consent should be “voluntary, informed, having the ability to be revoked, and being free of coercion or intimidation. In saying this, the people consenting to an action must not be influenced in some way, whether that be by drugs, alcohol, the leverage of some power, or any other substance or act that might hinder a sound mind. Further, consent must be maintained throughout the entirety of the action- if someone revokes consent, the act is no longer consensual” (Section 0, page 7). As previously stated, consent is of the utmost importance to BDSM, and without it, an act often would cross the threshold into assault.

Predetermined Safeword

The next qualifier of the test is the presence of a predetermined safeword or safe action. This provides players within a scene the ability to end the scene at any point, no matter what position they are in. To be predetermined, those involved in the scene must have had some type of discussion or negotiation prior to the scene concerning how to stop the play if necessary. This, similar to ‘tapping out’ in a sport fight, allows for consent to be revoked and ensures the safety of everyone involved. This is the key to differentiating, for instance, a street brawl in which the victim prior to the assault states “hit me”, as occurred in the *Woods v. United States* case (*Woods v. United States*, 65 A.3d 667, *667; 2013 D.C. App. LEXIS 258).

Mutual Pleasure

The final qualifier in determining whether an act constitutes BDSM is that of the desire from all involved individuals for mutual pleasure. That is, the desire from an individual within the scene both to gain pleasure and to provide pleasure in some way to the others involved. This point could foreseeably be multi-faceted. For instance, if an individual communicates with another individual stating “It's going to hurt, but you're going to be a good boy and let Daddy train you” (FrattyHungStud, 2020) this may appear, at face value, to imply a lack of desire for the pleasure of the other individual in the scene. However, this is inextricably linked to the first point, being consent. A knowledge of consent would imply a knowledge and presence of pleasure- otherwise, a safeword or communication concerning the revocation of consent could be used to stop the play. With this knowledge of pleasure comes a derivation of pleasure in knowing that the other individual(s) is gaining pleasure. While perhaps verbose, this denotes an important point- while BDSM acts are not always explicitly pertaining to sex organs or what is commonly perceived to be sexual acts, they are aimed at mutual pleasure on the basis of consent.

OVERVIEW

If this test is passed, BDSM is present. As such, it would qualify for consent to be used as a defense in a court of law. This is reliant, however, on states placing consent within their criminal liability (or applicable) code, thus allowing for consent to apply to assault laws. If this is in order, the state would have the ability to be more intentional in their policing of an individual's safety, rather than charging people despite those people taking every precaution of safety and ensuring the presence of consent. This test, while perhaps not perfect, is intended to help guide courts of law in determining when consent should be applied to a potentially wrongful charge that can result in the ruin of an individual's wellbeing and life.

CONCLUSION

Laws both create and reflect societal norms. Just as laws against people of the LGBTQ+ community created larger space for discrimination and homophobia, and anti-immigration laws create space for anti-immigration sentiment, laws against the BDSM community creates space for greater discrimination and social stigma. An important point to note is that at the end of the day, there are not many cases criminalizing BDSM. After extensive research, just over ten cases were found within the past seventy or so years in the United States. However, the practice of indirectly criminalizing BDSM via assault charges and the negation of consent as a defense provides a platform from which discriminatory statements can be yelled. And they are. These statements, however, are more than just words. The hate that is exclaimed by those against the BDSM community leads to real and tangible outcomes. Verbally stated stigma translates into

being fired from one's livelihood (McArthur, 2016), social ostracization, jail time, or custody battles lost on the claims of BDSM making someone unfit for parenthood.

The current system of charging those involved in BDSM with assault while disregarding consent as a proper defense results in the government unconstitutionally stigmatizing the BDSM community. From this flaw, however, came the BDSM community adopting its own set of principles, informal laws, and contracts amongst themselves, so as to ensure the safety and wellbeing of those involved in what would otherwise be a dangerous activity. The alleviation of this issue on a legal scale, however, is one that can be solved by a simple addition in the language of consent laws, including BDSM as a qualifier.

The safety of citizens is one of the primary interests and duties of the state, and by indirectly criminalizing BDSM, the state continually disregards systematic evidence, instead promoting false ideals of BDSM acts instigating violence. The impacts of these fallacies are heavy, but can be diminished via the language changes suggested in this paper.

Bibliography

- BDSM—An Acronym of Acronyms, FRISKY BUS. BOUTIQUE (Oct. 25, 2014), <https://friskybusinessboutique.com/bdsm-an-acronym-of-acronyms/> [https://perma.cc/U95X-BDH9] (describing Bondage/Discipline, Domination/Submission, and Sado-Masochism).
- Towsen, Nat. “The Hidden Language of Kinksters.” *Vice*, 12 May 2014, www.vice.com/en_us/article/3b7ap9/the-hidden-language-of-kinksters.
- Fapman, Anna, et al. “BDSM a Unique Mode of Identity Exploration.” *The Trail*, 12 Oct. 2012, trail.pugetsound.edu/?p=6718.
- Herbenick, Debby, et al. “Sexual Diversity in the United States: Results from a Nationally Representative Probability Sample of Adult Women and Men.” *Plos One*, vol. 12, no. 7, 2017, doi:10.1371/journal.pone.0181198.
- Ali Hébert & Angela Weaver, An Examination of Personality Characteristics Associated with BDSM Orientations, 23 CANADIAN J. HUM. SEXUALITY 106, 106 (2014).
- “Assault and Battery.” *Legal Information Institute*, Legal Information Institute, www.law.cornell.edu/wex/assault_and_battery.
- “Sexual Assault and Consent.” *Sexual Assault Resources*, www.washington.edu/sexualassault/reporting/police/sexualassault/.
- “CONSENT: Definition in the Cambridge English Dictionary.” *CONSENT | Definition in the Cambridge English Dictionary*, dictionary.cambridge.org/us/dictionary/english/consent.
- State By State Assault Laws. National Coalition for Sexual Freedom. Accessed April 13, 2020. <https://ncsfreedom.org/state-by-state-assault-laws-2/>.
- Ala. Code § 13A-6-20
- Alaska Stat. Ann. § 11.41.200 (West)
- Ariz. Rev. Stat. Ann. § 13-1204
- Ark. Code Ann. § 5-13-205 (West)
- Cal. Penal Code § 240 (West)
- Colo. Rev. Stat. Ann. § 18-3-202 (West)
- Conn. Gen. Stat. Ann. § 53a-59 (West)
- Del. Code Ann. tit. 11, § 613 (West)

Fla. Stat. Ann. § 784.011 (West)

Ga. Code Ann., § 16-5-20 [Simple Assault] Ga. Code Ann. § 16-5-21 (West) [Aggravated Assault]

Haw. Rev. Stat. Ann. § 707-710 (West)

Idaho Code Ann. § 18-901 (West)

720 Ill. Comp. Stat. Ann. 5/12-1; Battery: 720 Ill. Comp. Stat. Ann. 5/12-3; Aggravated Battery: 720 Ill. Comp. Stat. Ann. 5/12-3.05

Ind. Code Ann. § 35-42-2-1.5 (West) [Aggravated Battery] Ind. Code Ann. § 35-42-2-1 (West) [Battery definition]

Iowa Code Ann. § 708.1 (West)

Kan. Stat. Ann. § 21-5412 (West)

Ky. Rev. Stat. Ann. § 508.010 (West)

La. Stat. Ann. § 14:36

Me. Rev. Stat. tit. 17-A, § 207

§ 3-202. Assault in the first degree, MD Code, Criminal Law, § 3-202

Mass. Gen. Laws Ann. ch. 265, § 13A (West)

Mich. Comp. Laws Ann. § 750.81a (West)

Minn. Stat. Ann. § 609.02 (West)

Miss. Code. Ann. § 97-3-7 (West)

Mo. Ann. Stat. § 565.050 (West)

Mont. Code Ann. § 45-5-201 (West)

Neb. Rev. Stat. Ann. § 28-308 (West)

Nev. Rev. Stat. Ann. § 200.471 (West)

N.H. Rev. Stat. § 631:1

N.J. Stat. Ann. § 2C:12-1 (West)

Assault: N.M. Stat. Ann. § 30-3-1 (West); Battery: N.M. Stat. Ann. § 30-3-4 (West)

N.Y. Penal Law § 120.10 (McKinney)

Misdemeanor Assault: N.C. Gen. Stat. Ann. § 14-33; Assault inflicting serious bodily injury [not noted]: N.C. Gen. Stat. Ann. § 14-32.4; Felonious assault with deadly weapon [not noted]: N.C. Gen. Stat. Ann. § 14-32

N.D. Cent. Code Ann. § 12.1-17-01.1 (West)

Ohio Rev. Code Ann. § 2903.13 (West)

Okla. Stat. Ann. tit. 21, § 641 (West)

Or. Rev. Stat. Ann. § 163.185 (West)

Simple Assault: 18 Pa. Stat. and Cons. Stat. Ann. § 2701 (West); Aggravated Assault: 18 Pa. Stat. and Cons. Stat. Ann. § 2702 (West)

Felony assault: 11 R.I. Gen. Laws Ann. § 11-5-2 (West); [simple assault definition not found]

S.C. Code Ann. § 16-3-600

Simple Assault: S.D. Codified Laws § 22-18-1; Aggravated Assault: S.D. Codified Laws § 22-18-1.1

Tenn. Code Ann. § 39-13-101 (West)

Tex. Penal Code Ann. § 22.01 (West)

Utah Code Ann. § 76-5-102 (West)

Vt. Stat. Ann. tit. 13, § 1023 (West)

§ 46:3.Assault—Definition, Va. Prac. Jury Instruction § 46:3

Wash. Rev. Code Ann. § 9A.36.011 (West)

W. Va. Code Ann. § 61-2-9 (West)

Wis. Stat. Ann. § 940.19 (West)

Wyo. Stat. Ann. § 6-2-501 (West)

Ala. Code § 13A-2-7

Ariz. Rev. Stat. Ann. § 13-1401

Cal. Penal Code § 261.6 (West)

Colo. Rev. Stat. Ann. § 18-3-401 (West)

Conn. Gen. Stat. Ann. § 53a-91 (West)

Del. Code Ann. tit. 11, § 452 (West)

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People v. Khan, 80 Mich. App. 605, 264 N.W.2d 360 (1978)

Mo. Ann. Stat. § 556.061 (West)

Mont. Code Ann. § 45-2-211 (West)

Neb. Rev. Stat. Ann. § 28-318 (West)

Honeycutt v. State, 118 Nev. 660, 56 P.3d 362 (2002), overruled by Carter v. State, 121 Nev. 759, 121 P.3d 592 (2005)

N.H. Rev. Stat. Ann. § 626:6

N.J. Stat. Ann. § 2C:2-10 (West)

N.Y. Penal Law § 130.00 (McKinney)

N.D. Cent. Code Ann. § 12.1-17-08 (West)

Or. Rev. Stat. Ann. § 163.215 (West)

Tenn. Code Ann. § 39-13-104 (West)

Tex. Penal Code Ann. § 22.06 (West)

Utah Code Ann. § 76-5-104 (West)

Va. Code Ann. § 18.2-61 (West)

Wash. Rev. Code Ann. § 9A.44.010 (West)

Wis. Stat. Ann. § 939.22 (West); Second definition: Wis. Stat. Ann. § 940.225 (West)

Ala. Code § 13A-1-2

Alaska Stat. Ann. § 11.81.900 (West)

Conn. Gen. Stat. Ann. § 53a-3 (West)

Ky. Rev. Stat. Ann. § 500.080 (West)

La. Stat. Ann. § 14:2

N.Y. Penal Law § 10.00 (McKinney)

Or. Rev. Stat. Ann. § 161.015 (West)

Ala. Code § 13A-1-2
Alaska Stat. Ann. § 11.81.900 (West)
Ark. Code Ann. § 5-1-102 (West)
Colo. Rev. Stat. Ann. § 18-1-901 (West)
Conn. Gen. Stat. Ann. § 53a-3 (West)
Del. Code Ann. tit. 11, § 222 (West)
Haw. Rev. Stat. Ann. § 707-700 (West)
Ind. Code Ann. § 35-31.5-2-29 (West)
Ky. Rev. Stat. Ann. § 500.080 (West)
Me. Rev. Stat. tit. 17-A, § 2
Md. Code Ann., Crim. Law § 3-201 (West)
Minn. Stat. Ann. § 609.02 (West)
Mo. Ann. Stat. § 556.061 (West)
Mont. Code Ann. § 45-2-101 (West)
Neb. Rev. Stat. Ann. § 28-109 (West)
Nev. Rev. Stat. Ann. § 0.060 (West)
N.H. Rev. Stat. Ann. § 625:11
N.J. Stat. Ann. § 2C:11-1 (West)
N.Y. Penal Law § 10.00 (McKinney)
N.C. Gen. Stat. Ann. § 14-32.4
N.D. Cent. Code Ann. § 12.1-01-04 (West)
Ohio Rev. Code Ann. § 2901.01 (West)
Or. Rev. Stat. Ann. § 161.015 (West)
18 Pa. Stat. and Cons. Stat. Ann. § 2301 (West)
11 R.I. Gen. Laws Ann. § 11-5-2 (West)
S.C. Code Ann. § 16-3-600

S.D. Codified Laws § 22-1-2

Tenn. Code Ann. § 39-11-106 (West)

Tex. Penal Code Ann. § 1.07 (West)

Utah Code Ann. § 76-1-601 (West)

Vt. Stat. Ann. tit. 13, § 1021 (West)

Wash. Rev. Code Ann. § 9A.04.110 (West)

Wis. Stat. Ann. § 939.22 (West)

Wyo. Stat. Ann. § 6-1-104 (West)

State v. Van, 268 Neb. 814, 688 N.W.2d 600 (2004)

Govan v. State, 913 N.E.2d 237 (Ind. Ct. App. 2009)

People v. Febrissy, No. C049033, 2006 WL 2006161 (Cal. Ct. App. July 19, 2006)

The Associated Press. “Charges May Be Dropped in Sadomasochistic Club Case after Evidence Tossed.” *Southcoasttoday.com*, *Southcoasttoday.com*, 12 Jan. 2011, www.southcoasttoday.com/article/20010622/news/306229979.

Lenius, Steve. “BDSM Party Raid in Massachusetts.” *Leather Life*, 11 Aug. 2000, leathercolumn.blogspot.com/2000/08/bdsm-party-raid-in-massachusetts.html.

Linton, David. “S&M Case Dropped.” *The Sun Chronicle*, 28 June 2001, www.thesunchronicle.com/s-m-case-dropped/article_7ffd79a0-aa20-5d92-8fdf-8a2fccf5d798.html.

People v. Samuels, 250 Cal. App. 2d 501, 58 Cal. Rptr. 439 (Ct. App. 1967)

Com. v. Appleby, 380 Mass. 296, 310–11, 402 N.E.2d 1051, 1060–61 (1980)

Woods v. United States, 65 A.3d 667, *667; 2013 D.C. App. LEXIS 258

Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 850–51, 112 S. Ct. 2791, 2806–07, 120 L. Ed. 2d 674 (1992)

U.S. Constitution. Amend. XIV, Sec. 1.

“Equal Protection.” Legal Information Institute, Legal Information Institute, www.law.cornell.edu/wex/equal_protection.

Langdrige, Darren, and Trevor Butt. “A Hermeneutic Phenomenological Investigation of the Construction of Sadomasochistic Identities.” *Sexualities*, vol. 7, no. 1, 2004, pp. 31–53., doi:10.1177/1363460704040137.

Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)

U.S. Constitution. Amend. IV.

Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)

Thomas, Sophie Saint, et al. "A Very Sexy Beginner's Guide to BDSM Words." GQ, www.gq.com/story/bdsm-a-to-z.

Hosie, Rachel. "I Went to a 'BDSM for Beginners' Workshop and This Is What I Learnt." The Independent, Independent Digital News and Media, 14 Jan. 2019, www.independent.co.uk/life-style/love-sex/bdsm-beginners-workshop-sex-class-bondage-dominance-sado-masochism-master-dominic-a7656896.html.

Walansky, Aly. "The Most Important Thing BDSM Beginners Must Know." Bustle, Bustle, 4 June 2015, www.bustle.com/articles/81383-how-do-i-get-into-bdsm-a-guide-for-beginners-because-t-he-most-important-thing-you.

Adriana, et al. "BDSM for Beginners: What, Why and How." Bad Girls Bible, 24 May 2020, badgirlsbible.com/bdsm-for-beginners.

"Kinks and Tricks: An Intro to BDSM." Intimates Adult Boutique - Best in Adult Products, intimatesadultboutique.com/blogs/news/kinks-and-tricks-an-intro-to-bdsm.

Lords, Kayla. "BDSM 101." Kinkly.com, www.kinkly.com/6/8829/sex-tips/bdsm/bdsm-101.

"An Introduction to BDSM for Psychotherapists." Society for the Advancement of Psychotherapy, societyforpsychotherapy.org/an-introduction-to-bdsm-for-psychotherapists/.

r/BDSMAdvice. "A place for advice on topics relating to BDSM". Reddit, <https://www.reddit.com/r/BDSMAdvice/>.

B0iledpnut. "Beginners Guide for BDSM?". Reddit, 10 April, 2018, https://www.reddit.com/r/BDSMAdvice/comments/8bb2o9/beginners_guide_for_bdsm/.

Summersauce23. "BDSM Beginner's Guide?". Reddit, 10 November, 2015, https://www.reddit.com/r/BDSMcommunity/comments/3sbfig/bdsm_beginners_guide/.

Cowhideman. "'Safewords, Limits, Consent, and Negotiation". FetLife, <https://fetlife.com/groups/347/posts/1177203>.

Cowhideman. "What is a sticky and why do I need to know about them?". FetLife, <https://fetlife.com/groups/347/posts/6725614>.

Cowhideman. "Staying Safe, Limits, Consent, Privacy & Health". FetLife, <https://fetlife.com/groups/347/posts/6724336>.

- JustAnotherDom. "Checklist/Questionnaire for Intro to BDSM". Reddit, 10 March 2014, https://www.reddit.com/r/BDSMcommunity/comments/201hs1/checklistquestionnaire_for_intro_to_bdsm/.
- Barker, Meg. "Consent Is a Grey Area? A Comparison of Understandings of Consent in Fifty Shades of Grey and on the BDSM Blogosphere." *Sage Journal*, vol. 16, no. 8, 1 Dec. 2013, pp. 896–914., doi:<https://doi.org/10.1177/1363460713508881>.
- From: Kaak, Ayesha. "Conversational Phases in BDSM Pre-Scene Negotiations ." *Journal of Positive Sexuality*, Nov. 2016, pp. 47–52., doi:<https://journalofpositivesexuality.org/wp-content/uploads/2016/12/Conversational-Phases-in-BDSM-Pre-Scene-Negotiation-Kaak.pdf>.
- "Safeword." *Safeword - BDSM Wiki*, bdsmwiki.info/Safeword.
- McArthur, Neil. "It's a Travesty That BDSM Isn't Technically Legal." *Vice*, 2 Aug. 2016, www.vice.com/en_us/article/vdqem4/its-a-travesty-that-bdsm-isnt-technically-legal.
- Safronova, Valeriya, and Katie Van Syckle. "The Boundary Between Abuse and B.D.S.M." *The New York Times*, *The New York Times*, 23 May 2018, www.nytimes.com/2018/05/23/style/bdsm-kink-consent.html.
- Allen, Anita L. "Social Contract Theory in American Case Law ." *University of Pennsylvania Carey Law School Penn Law: Legal Scholarship Repository*, vol. 51, no. 1, Jan. 1999, pp. 30–33., doi:https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1787&context=faculty_scholarship.
- "Social Contract Theory." *Ethics Unwrapped*, 12 Dec. 2018, ethicsunwrapped.utexas.edu/glossary/social-contract-theory.
- Michael Dees. "What is an example of social contract theory?". *Quora*, 25 January 2017, <https://www.quora.com/What-is-an-example-of-social-contract-theory>.
- Magliano, Joseph. "The Surprising Psychology of BDSM." *Psychology Today*, Sussex Publishers, 5 Feb. 2015, www.psychologytoday.com/us/blog/the-wide-wide-world-psychology/201502/the-surprising-psychology-bdsm.
- D'Agostino, Fred, Gaus, Gerald and Thrasher, John, "Contemporary Approaches to the Social Contract", *The Stanford Encyclopedia of Philosophy* (Fall 2019 Edition), Edward N. Zalta (ed.), URL = [<https://plato.stanford.edu/archives/fall2019/entries/contractarianism-contemporary/>](https://plato.stanford.edu/archives/fall2019/entries/contractarianism-contemporary/).
- Buzash, George E. "The 'Rough Sex' Defense." *Journal of Criminal Law and Criminology*, vol. 80, no. 2, 1989, pp. 557–560.

FrattyHungStud. "College Boy, Neighborhood Daddy (true story)". Reddit, 18 April 2020, https://www.reddit.com/r/gaystoriesgonewild/comments/g4307i/college_boy_neighborhood_daddy_true_story/.

Appendix

Figure 1: 50 State Statutes

	Assault Code	Consent Code	Deadly Weapon; Dangerous Instrument Codes	Serious ___ Injury; ___ Injury Code
Alabama	Ala. Code § 13A-6-20	Ala. Code § 13A-2-7	Ala. Code § 13A-1-2*	Ala. Code § 13A-1-2*
Alaska	Alaska Stat. Ann. § 11.41.200 (West)		n/a; Alaska Stat. Ann. § 11.81.900 (West)	Alaska Stat. Ann. § 11.81.900 (West)*
Arizona	Ariz. Rev. Stat. Ann. § 13-1204	Ariz. Rev. Stat. Ann. § 13-1401†		
Arkansas	Ark. Code Ann. § 5-13-205 (West)			Ark. Code Ann. § 5-1-102 (West)*
California	Cal. Penal Code § 240 (West)	Cal. Penal Code § 261.6 (West)†		
Colorado	Colo. Rev. Stat. Ann. § 18-3-202 (West)	Colo. Rev. Stat. Ann. § 18-3-401 (West)†		Colo. Rev. Stat. Ann. § 18-1-901 (West)*
Connecticut	Conn. Gen. Stat. Ann. § 53a-59 (West)	Conn. Gen. Stat. Ann. § 53a-91 (West)†	Conn. Gen. Stat. Ann. § 53a-3 (West)*	Conn. Gen. Stat. Ann. § 53a-3 (West)*
Delaware	Del. Code Ann. tit. 11, § 613 (West)	Del. Code Ann. tit. 11, § 452 (West)		Del. Code Ann. tit. 11, § 222 (West)*
Florida	Fla. Stat. Ann. § 784.011 (West)	FL ST CR JURY INST 11.4†		
Georgia	Ga. Code Ann., § 16-5-20 [Simple Assault] Ga. Code Ann. § 16-5-21 (West) [Aggravated Assault]			
Hawaii	Haw. Rev. Stat. Ann. § 707-710 (West)			Haw. Rev. Stat. Ann. § 707-700 (West)*
Idaho	Idaho Code Ann. § 18-901 (West)			
Illinois	720 Ill. Comp. Stat. Ann. 5/12-1; Battery: 720 Ill. Comp. Stat. Ann. 5/12-3; Aggravated Battery: 720 Ill. Comp. Stat. Ann. 5/12-3.05			

Indiana	Ind. Code Ann. § 35-42-2-1.5 (West) [Aggravated Battery] Ind. Code Ann. § 35-42-2-1 (West) [Battery definition]			Ind. Code Ann. § 35-31.5-2-29 (West)*
Iowa	Iowa Code Ann. § 708.1 (West)			
Kansas	Kan. Stat. Ann. § 21-5412 (West)			
Kentucky	Ky. Rev. Stat. Ann. § 508.010 (West)		Ky. Rev. Stat. Ann. § 500.080 (West)*	Ky. Rev. Stat. Ann. § 500.080 (West)*
Louisiana	La. Stat. Ann. § 14:36		La. Stat. Ann. § 14:2	
Maine	Me. Rev. Stat. tit. 17-A, § 207			n/a; Me. Rev. Stat. tit. 17-A, § 2
Maryland	§ 3-202. Assault in the first degree, MD Code, Criminal Law, § 3-202			Md. Code Ann., Crim. Law § 3-201 (West)
Massachusetts	Mass. Gen. Laws Ann. ch. 265, § 13A (West)			
Michigan	Mich. Comp. Laws Ann. § 750.81a (West)	People v. Khan, 80 Mich. App. 605, 264 N.W.2d 360 (1978)†		
Minnesota	Minn. Stat. Ann. § 609.02 (West)			n/a; Minn. Stat. Ann. § 609.02 (West)
Mississippi	Miss. Code. Ann. § 97-3-7 (West)			
Missouri	Mo. Ann. Stat. § 565.050 (West)	Mo. Ann. Stat. § 556.061 (West)		Mo. Ann. Stat. § 556.061 (West)*
Montana	Mont. Code Ann. § 45-5-201 (West)	Mont. Code Ann. § 45-2-211 (West)		Mont. Code Ann. § 45-2-101 (West)*
Nebraska	Neb. Rev. Stat. Ann. § 28-308 (West)	Neb. Rev. Stat. Ann. § 28-318 (West)		Neb. Rev. Stat. Ann. § 28-109 (West)*
Nevada	Nev. Rev. Stat. Ann. § 200.471 (West)	Honeycutt v. State, 118 Nev. 660, 56 P.3d 362 (2002), overruled by Carter v. State, 121 Nev. 759, 121 P.3d 592 (2005)†		Nev. Rev. Stat. Ann. § 0.060 (West)
New Hampshire	N.H. Rev. Stat. § 631:1	N.H. Rev. Stat. Ann. § 626:6		N.H. Rev. Stat. Ann. § 625:11

New Jersey	N.J. Stat. Ann. § 2C:12-1 (West)	N.J. Stat. Ann. § 2C:2-10 (West)		N.J. Stat. Ann. § 2C:11-1 (West)*
New Mexico	Assault: N.M. Stat. Ann. § 30-3-1 (West); Battery: N.M. Stat. Ann. § 30-3-4 (West)			
New York	N.Y. Penal Law § 120.10 (McKinney)	N.Y. Penal Law § 130.00 (McKinney)†	N.Y. Penal Law § 10.00 (McKinney)*	N.Y. Penal Law § 10.00 (McKinney)*
North Carolina	Misdemeanor Assault: N.C. Gen. Stat. Ann. § 14-33; Assault inflicting serious bodily injury [not noted]: N.C. Gen. Stat. Ann. § 14-32.4; Felonious assault with deadly weapon [not noted]: N.C. Gen. Stat. Ann. § 14-32			N.C. Gen. Stat. Ann. § 14-32.4
North Dakota	N.D. Cent. Code Ann. § 12.1-17-01.1 (West)	N.D. Cent. Code Ann. § 12.1-17-08 (West)		N.D. Cent. Code Ann. § 12.1-01-04 (West)*
Ohio	Ohio Rev. Code Ann. § 2903.13 (West)			Ohio Rev. Code Ann. § 2901.01 (West)*
Oklahoma	Okla. Stat. Ann. tit. 21, § 641 (West)			
Oregon	Or. Rev. Stat. Ann. § 163.185 (West)	Or. Rev. Stat. Ann. § 163.215 (West)†	Or. Rev. Stat. Ann. § 161.015 (West)*	Or. Rev. Stat. Ann. § 161.015 (West)*
Pennsylvania	Simple Assault: 18 Pa. Stat. and Cons. Stat. Ann. § 2701 (West); Aggravated Assault: 18 Pa. Stat. and Cons. Stat. Ann. § 2702 (West)			18 Pa. Stat. and Cons. Stat. Ann. § 2301 (West)*
Rhode Island	Felony assault: 11 R.I. Gen. Laws Ann. § 11-5-2 (West); [simple assault definition not found]			11 R.I. Gen. Laws Ann. § 11-5-2 (West)*
South Carolina	S.C. Code Ann. § 16-3-600			S.C. Code Ann. § 16-3-600*

South Dakota	Simple Assault: S.D. Codified Laws § 22-18-1; Aggravated Assault: S.D. Codified Laws § 22-18-1.1			S.D. Codified Laws § 22-1-2
Tennessee	Tenn. Code Ann. § 39-13-101 (West)	Tenn. Code Ann. § 39-13-104 (West)		Tenn. Code Ann. § 39-11-106 (West)*
Texas	Tex. Penal Code Ann. § 22.01 (West)	Tex. Penal Code Ann. § 22.06 (West)		Tex. Penal Code Ann. § 1.07 (West)*
Utah	Utah Code Ann. § 76-5-102 (West)	Utah Code Ann. § 76-5-104 (West)		Utah Code Ann. § 76-1-601 (West)*
Vermont	Vt. Stat. Ann. tit. 13, § 1023 (West)			Vt. Stat. Ann. tit. 13, § 1021 (West)*
Virginia	§ 46:3. Assault—Definition, Va. Prac. Jury Instruction § 46:3	Va. Code Ann. § 18.2-61 (West)†		
Washington	Wash. Rev. Code Ann. § 9A.36.011 (West)	Wash. Rev. Code Ann. § 9A.44.010 (West)†		Wash. Rev. Code Ann. § 9A.04.110 (West)*
West Virginia	W. Va. Code Ann. § 61-2-9 (West)			
Wisconsin	Wis. Stat. Ann. § 940.19 (West)	Wis. Stat. Ann. § 939.22 (West); Second definition: Wis. Stat. Ann. § 940.225 (West)		Wis. Stat. Ann. § 939.22 (West)*
Wyoming	Wyo. Stat. Ann. § 6-2-501 (West)			Wyo. Stat. Ann. § 6-1-104 (West)*
		†Indicates consent definition outside of general criminal liability codes		*Indicates both definitions under same code

Figure 2: BDSM Community Consent Source Notes

Search:	Website Links:
(Google: "starting bdsm")- 10 total sites; all talk abt BDSM safety	

	https://www.bustle.com/articles/81383-how-do-i-get-into-bdsm-a-guide-for-beginners-because-the-most-important-thing-you
	<ul style="list-style-type: none"> • Safe words, communication
	https://www.gq.com/story/bdsm-a-to-z
	<ul style="list-style-type: none"> • Speaks on aftercare, enthusiastic consent, hard limits, safe/sane/consensual, and risk aware consensual kink (RACK)
	https://www.bustle.com/articles/133513-13-things-to-try-if-youre-new-to-bdsm
	<ul style="list-style-type: none"> • Speaks on good communication prior to a scene
	https://www.healthista.com/beginners-guide-bdsm/
	<ul style="list-style-type: none"> • “Top Tips: consent, safe words” • Speaks on importance of communication
	https://badgirls bible.com/bdsm-for-beginners
	<ul style="list-style-type: none"> • Addresses safe/sane/consensual and RACK • Focus on consent • Safe words
	https://www.allure.com/story/bondage-sex-tips-for-bdsm-beginners
	<ul style="list-style-type: none"> • Addresses consent, effective communication, and safe words first
	https://unboundbabes.com/blogs/magazine/bdsm-basics-how-to-start-the-conversation
	<ul style="list-style-type: none"> • Enthusiastic consent, open communication, safe words
	https://www.womenshealthmag.com/sex-and-love/a19957328/bdsm-beginners-guide/
	<ul style="list-style-type: none"> • Consent, communication, education
	https://carasutra.com/2020/01/beginners-guide-bdsm-tips-complete-bdsm-101/
	<ul style="list-style-type: none"> • Consent, communication, safe words, safe/sane/consensual, RACK
	https://www.independent.co.uk/life-style/love-sex/bdsm-beginners-workshop-sex-class-bondage-dominance-sado-masochism-master-dominic-a7656896.html

	<ul style="list-style-type: none"> • Research, education, safe words/actions
Google “intro to BDSM”- 10 total sites (some repeats from above); all talk about safety	
	https://unboundbabes.com/blogs/magazine/88733764-your-no-bs-intro-to-bdsm
	<ul style="list-style-type: none"> • SSC, RACK, negotiation, consent, communication
	https://wildflowersex.com/blogs/sex-education/intro-to-bdsm
	<ul style="list-style-type: none"> • SSC, RACK, negotiation/communication, safe words
	https://www.gq.com/story/bdsm-a-to-z
	<ul style="list-style-type: none"> • Speaks on aftercare, enthusiastic consent, hard limits, safe/sane/consensual, and risk aware consensual kink (RACK)
	https://www.bustle.com/articles/133513-13-things-to-try-if-youre-new-to-bdsm
	<ul style="list-style-type: none"> • Speaks on good communication prior to a scene
	https://intimatesadultboutique.com/blogs/news/kinks-and-tricks-an-intro-to-bdsm
	<ul style="list-style-type: none"> • SSC, consent, safety, communication
	https://societyforpsychotherapy.org/an-introduction-to-bdsm-for-psychotherapists/
	<ul style="list-style-type: none"> • SSC, safe words, communication, education
	https://www.independent.co.uk/life-style/love-sex/bdsm-beginners-workshop-sex-class-bondage-dominance-sado-masochism-master-dominic-a7656896.html
	<ul style="list-style-type: none"> • Research, education, safe words/actions
	https://www.kinkly.com/6/8829/sex-tips/bdsm/bdsm-101
	<ul style="list-style-type: none"> • Within the links: Consent, safety, SSC, RACK, communication
	https://www.healthista.com/beginners-guide-bdsm/
	<ul style="list-style-type: none"> • “Top Tips: consent, safe words”

	<ul style="list-style-type: none"> • Speaks on importance of communication
	https://domcoaching.com/introduction-to-kink-being-dominant/
	<ul style="list-style-type: none"> • Communication
Reddit: Google “reddit intro to bdsm”: 10 total sites; 1 nixed, 7 talking about safety	
	https://www.reddit.com/r/BDSMcommunity/comments/6ma4ky/beginners_to_bdsm/
	<ul style="list-style-type: none"> • Communication, consent, education
	https://www.reddit.com/r/BDSMAdvice/comments/8bb2o9/beginners_guide_for_bdsm/
	<ul style="list-style-type: none"> • Was asking for podcasts, blogs, etc. for advice • No notable consent/communication/ etc. advice
	https://www.reddit.com/r/bdsm/comments/3wu51z/bdsm_basics_help/
	<ul style="list-style-type: none"> • Communication, education
	https://www.reddit.com/r/BDSMcommunity/comments/3sbfig/bdsm_beginners_guide/
	<ul style="list-style-type: none"> • Asked for pieces of equipment • No notable consent/communication/ etc. advice
	https://www.reddit.com/r/sex/comments/13tu08/my_howto_guide_for_men_on_how_to_dominate_a_woman/
	<ul style="list-style-type: none"> • Communication, safe word
	https://www.reddit.com/r/BDSMcommunity/comments/201hs1/checklistquestionnaire_for_intro_to_bdsm/
	<ul style="list-style-type: none"> • SSC, RACK, communication, consent, education
	https://www.reddit.com/r/BDSMcommunity/comments/7yryc1/extreme_beginners_question/
	<ul style="list-style-type: none"> • Communication, safe words, ssc
	https://www.reddit.com/r/BDSMAdvice/
	<ul style="list-style-type: none"> • Subreddit- not specific question- nixed

	https://www.reddit.com/r/BDSMcommunity/comments/7und5z/new_to_bdsm_what_should_i_try_first/
	<ul style="list-style-type: none"> ● Education, safety
	https://www.reddit.com/r/sexover30/comments/5kkzj4/bdsm_for_beginners/
	<ul style="list-style-type: none"> ● Communication, education
Fetlife: Novices and Newbies page	
	Safewords, Limits, Consent, and Negotiation (is a sticky- means there are a lot of questions abt it, or it is important)
	Safewords section: 55 pages
	Safe, Sane, Consensual and other philosophies: 8
	Limits: 52
	Negotiations and Consent: 55
	Also stickies on “Health and Physical Safety” and “Personal Safety and Privacy”