



## Overview

### Continuing Legal Education Program on

#### “Criminal Prosecution of Consensual BDSM: Civil Liberties Collide with Morality-Based Judicial Decisions”

It is estimated that over 22 million Americans of all sexes, genders, races, ethnicities and social and economic status have engaged in consensual BDSM. By “BDSM”, we refer to a broad range of practices including: bondage; physical and psychological discipline, flagellation, spanking and other physical infliction of mild to severe painful sensations; and a wide spectrum of sexual fantasy role-playing. The people who engage in such activities—whether as the “top” or as the “bottom”—view this as mutually desirable consensual sexual conduct. But many in society view this in terms of a perceived morality, disapprove of such conduct and characterize it as violent assault, or even sexual abuse, and thus advocate criminal prosecution even where the activity in question is demonstrably consensual.

This Continuing Legal Education program addresses the legal and policy—not moral or political—issues raised by the criminal prosecution of consensual BDSM, principally under assault statutes, but also under criminal laws concerning trafficking, battery and sexual/spousal relationship abuse. Today BDSM conduct is frequently prosecuted under assault statutes and, less commonly, under other criminal laws. In such prosecutions, every appellate court that has addressed the issue has found that consent is not allowed as a defense.

That failure to recognize consent as a defense—thus criminalizing consensual BDSM—is the issue that will be examined in this CLE program. We will consider, among other things:

- The general rules governing consent as a defense in assault prosecutions (as expressed, for example, in the Model Penal Code) and in other types of criminal prosecutions of conduct similar or analogous to BDSM, such as rape, kidnapping and domestic violence.
- The consistent refusal of the courts to apply in BDSM assault cases the Model Penal Code’s “serious harm” criterion for allowing the consent defense, even in cases where the facts seem clearly to support application of that rule.
- Whether the criminal law treatment of consensual BDSM is consistent with the treatment accorded to other activities in which harm is done by one person

- to another (violent sports, tattooing, body modification, etc.) or in which there is substantial risk of physical injury (e.g. skydiving, rock climbing).
- The applicability (or non-applicability) to this issue of such civil liberties concepts as the right of privacy, freedoms of expression and association, discrimination against sexual minorities, the right to die and reproductive rights. Particular attention will be given to the Supreme Court's analysis in Lawrence v. Texas (2003) and its holding that private sexual conduct (at least where non-commercial and non-injurious) may not be made criminal without the need to protect a legitimate societal interest, and moral disapproval is not sufficient to constitute such a legitimate societal interest.

The program will conclude with a discussion of whether and to what extent any criminal law constraints may appropriately and constitutionally be imposed on consensual BDSM activities, not just on the basis of moral views, but in response to concerns about risk of harm, denigration of women, prevention of domestic violence, etc. This discussion will address whether the Model Penal Code's consent criterion needs to be changed and how to promote judicial adherence to that criterion.

The program will feature presentations by recognized experts on BDSM as a social and psychological issue, by experienced criminal law practitioners, and by experts on relevant constitutional law issues. Attendees will receive, in addition to materials developed by the speakers for their presentations, a book of background materials on BDSM, on the case law of criminal prosecutions arising from BDSM practices, sample State and Federal laws, selected law review articles and a glossary of terms relating to BDSM.

### CLE Course Outline

Session I—A Primer on BDSM (approximately 35 minutes, plus 5-10 minutes for audience questions and discussion)

Presenters:

- An experienced practitioner of BDSM, preferably a leader in a local BDSM organization or an NCSF staff member
- A criminal defense attorney
- Commentary by an author or academic who has written/spoken on BDSM

Subjects to be covered:

This session would begin with a general background presentation in BDSM:

- An overview of the varieties of conduct encompassed under the heading of “BDSM”, including: bondage; the wide range of scene “play” from mild to “heavy”; humiliation, age play, equestrianism and other fantasy role play
- The variety of BDSM relationships, including: episodic encounters at parties, munches etc.; steady or even marital relationships with a significant BDSM component; lifestyle BDSM relationships; Master/slave relationships, etc. This should include a discussion of the roles of the top and the bottom, touching on the concept of people exchanging power and on the counter-intuitive fact that, in the last analysis, it is the bottom that is in control. Mention should also be made of the fact that either gender may be the dominant or the submissive.
- The organizational nature of BDSM communities, in which much activity centers on social/educational organizations that both host parties and conduct educational programs on consensual BDSM techniques that usually emphasize “safe, sane and consensual” practices. This discussion should also give an overview of safety techniques, such as pre-negotiation of scenes, safe words, party rules and monitors, etc.
- A very brief overview of the evolution of the psychiatric profession’s view of BDSM, as shown by the successive changes in the DSM criteria.

The session would then discuss the types of interactions in which criminal prosecution may arise out of BDSM incidents. The discussion would begin with statistics, compiled by the National Coalition for Sexual Freedom, on the increasing incidence of BDSM-based criminal charges. Then the following types of situations would be discussed:

- The bottom withdraws consent during a BDSM scene, but the top continues the activities.
- The BDSM activities turn out to be more harmful than the submissive participant anticipated, and she or he goes to the hospital.
- The activities exceeded the limits set prior to the beginning of the BDSM encounter or prior to the beginning of the relationship.
- Injury is caused that is sufficiently serious or sufficiently visible that it is brought to the attention of the police by an observer or by a friend or relative of the submissive participant.
- The police raid a BDSM event and observe conduct that they interpret as unlawful.
- A BDSM relationship ends, leaving the submissive partner with bad feelings, and he or she complains to the police about assault or abuse.
- Pictures, videos, emails, film or sound recordings of BDSM conduct somehow come into the hands of the police.
- Someone with a grudge against a participant in a BDSM scene or relationship makes a complaint to the police.

[NOTE: There have been questions raised by commenters on how frequently some of these types of situations actually occur.]

Session II—Criminal Prosecution of BDSM Activities or Incidents (approximately 50 minutes, plus 15 minutes for audience questions and discussion)

Presenters:

- Criminal defense attorney
- Police officer or prosecutor
- Academic (law professor or sociology professor)

This presentation would begin with a discussion of relevant state and federal statutory provisions and case law, including:

- Representative state, statutory provisions on assault, battery, strangulation, etc.
- Federal trafficking legislation
- Provisions of the Model Penal Code relevant to the availability of consent as a defense.
- A review of the case law in the various states, to the conclusion that, the Model Penal Code notwithstanding, state appellate decisions uniformly refuse to permit consent as a defense in BDSM-based cases: People v. Samuels (CA 1967), Commonwealth v. Appleby (MA 1980), Iowa v. Collier (1985), People v. Jovanovic (NY 1999), State v. Van (NE 2004), People v. Febrissy (CA 2006), State v. Gaspar (RI 2009), Govan v. State (IN 2009).
- A somewhat shorter discussion of the use of the relatively recent federal trafficking legislation to bring prosecutions for BDSM conduct in the context of Master/slave relationships, including the Marcus decision and the Bagley prosecution.

This session will discuss the reasons that courts have declined to apply the Model Penal Code consent criteria and the question whether BDSM conduct really falls within the intended scope of trafficking and strangulation statutes, as well as some of the factual complexities that arise in assessing the issue of consent in a BDSM context, including:

- BDSM/fantasy scene play often includes a tacit or overt agreement that a physical “discipline” will be continued even if the bottom partner protests, complains of pain or asks the top to stop—it is often part of the fantasy. A “safeword” or other method of communication is often established to enable to allow the bottom to communicate that the fantasy/scene should stop.
- In certain BDSM relationships—notably Master/slave relationships—the individuals enter a long-term “agreement” pursuant to which the bottom or “slave” agrees to obey all wishes of the top or Master without any need to give further consent to BDSM activities. That agreement remains in effect until consent to the relationship is revoked.

[NOTE: Some comments we have received express puzzlement at why we include trafficking laws in this CLE program. In addition, the issue of consent in the Master/slave context continues to be one in which there are divergent views within our communities.]

Session III—Constitutional and Policy issues Arising from the Courts’ Unwillingness To Allow Consent as a Defense in BDSM Cases (approximately 45 minutes, plus 15 minutes for audience questions and discussion)

Presenters:

- A constitutional law professor
- A civil liberties or criminal defense lawyer

This session will begin with a discussion of the various constitutional law doctrines—most particularly, the line of sexual privacy cases from Griswold v. Connecticut through Lawrence v. Texas, but also including other constitutional issues—that relate to the criminal treatment of consensual BDSM:

- In Lawrence v. Texas (2003), the Supreme Court ruled that private consensual sexual activity may not be made criminal unless necessary to protect in important societal interest, and moral disapproval is not such an important societal interest. However, the opinion stated that its decision did not apply to activity that resulted in physical harm. Should the Lawrence ruling be applied to the criminalization of consensual BDSM?
- Lawrence was a right of privacy decision. Are other constitutional principles, such as equal protection of law, freedom of association and freedom of assembly, applicable to prosecution of consensual BDSM?
- In some jurisdictions, courts have invoked a “right to die” to defeat or overturn prosecutions of persons who assist others to commit suicide. If assistance to bring about another person’s death is protected on the ground that a person can legitimately desire death, does it not follow logically that providing to a person a desired (i.e. consensual) harm less serious than death must also be permissible? The “right to die” also includes the right to refuse medical treatment that would prolong life.
- Can it be argued that the BDSM community is a sexual minority entitled to protection against discrimination?
- In the area of reproductive rights, courts have recognized—within limits—a woman’s right to control her own body. Why would the same logic not lead to the conclusion that a person has the right to decide—again within limits—what harm to the body that person will accept from another person?

This session will also discuss several contexts in which, although harm—perhaps serious harm—is caused by one person to another person, consent is or may be permitted as a defense. These include:

- Rape in which absence of consent is a necessary element of the crime
- Battery, as to which it has been held that consent is normally a defense, especially in cases involving “sexual overtones” Helton v. State (IN 1993), Govan v. State (IN 2009)
- Violent sports, tattooing, body modification

- Assisted suicide (the right to die)

#### Session IV—Roundtable Discussion (45-60 minutes)

The presenters from the previous sessions will discuss the issues raised. Audience participation will be encouraged. Among the subjects to be discussed:

- Should consent be permitted as a defense in criminal assault or abuse cases arising from BDSM activities?
- To what extent are safety-promoting and consent-promoting measures prevalent in the BDSM community—educational programs, pre-negotiation of scenes, use of “safewords”, monitors at BDSM events, etc.—relevant to this issue?
- Should the Lawrence exception (for private sexual conduct that results in harm) be read in light of the Model Penal Code definition of “serious physical injury”?
- Assuming that the Model Penal Code approach would be taken—i.e., that consent is permitted except where the resulting harm rises to the level of serious physical injury—what are the appropriate criteria of “serious” injury?
- What ways should be considered to address the apparent proclivity of courts to apply their perception of societal mores to conclude that quite minor harms meet the “serious” standard?: More detailed elaboration of the Model Penal Code standard? Supreme Court guidance? State legislation?
- What practical problems may arise in analysis of consent in the BDSM context? For example, scenes in which it is mutually understood that “No! Please stop!” is to be ignored as part of the fantasy role-playing? Or the use in the Master/slave community of agreements in which consent is supposedly irrevocable?
- Can allowing consent as a defense in BDSM-based prosecutions for assault, abuse or trafficking be reconciled with the strongly held convictions of those who advocate for strong criminal enforcement against: domestic partner abuse, sex trafficking and denigration of women?