

Whip Me, Beat Me...Now Go to Jail?

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The increase in both frequency and popularity of erotic content depicting fetish activity such as bondage, discipline, sadomasochism and sadism (“BDSM”) warrants some exploration from the legal side. For years, industry producers repeated the urban legend warning against the creation of any material that includes both BDSM and any form of penetration. One or the other may be ok, but mixing the two could get one prosecuted for obscenity, or worse.

Of course, educated erotic content producers know that no such ‘bright line’ distinctions exist in the law of adult entertainment. Instead, the legality of erotic material is determined by application of the *Miller* Test for obscenity. So long as the material is not obscene, it is legal to create and publish, right? Unfortunately, the rules are not quite that simple – especially when it comes to production of BDSM material. Leaving aside the complicated question of whether paying performers to engage in sexually-explicit behavior constitutes solicitation, pandering, assignation or prostitution,¹ the infliction of physical (or possibly even emotional) injury on a performer consenting to a BDSM filming session may result in difficult legal repercussions should the performer have a change of heart – or even if not!

The law generally distinguishes between two different types of ‘injuries’ or invasion of bodily rights: 1) physical injury; and, 2) emotional or ‘trifling’ injury. The latter is generally waived by an effective model release covering claims like intentional infliction of emotional distress. The former type of injury is more difficult to address with a mere model release. Generally, one cannot consent in advance to intentional infliction of physical injury – either verbally or through a contract. The policy reason for this legal principle lies in the concept that crimes like ‘battery’² are not only crimes against a particular individual, but are also crimes against the ‘state’ or the ‘people,’ and therefore even if the individual ‘victim’ consented to the battery, the state still has an obligation to protect that person from their own poor decision-making and punish the perpetrator of the crime.³ This drama often plays out in domestic violence cases, where the victim initially summons the police during the incident but later wants to ‘drop the charges.’ The prosecutors still pursue criminal prosecution against the perpetrator, often forcing the reporting victim to testify against the defendant, unwillingly under subpoena.

¹ See, *People v. Freeman* 250 Cal.Rptr. 589 (Cal. 1988); *New Hampshire v. Theriault*, No. 2007-601 (N.H. Sup. Ct. Dec. 4, 2008), and the author’s previous article on the subject, which can be found at: <http://www.firstamendment.com/site-articles/content-outside-california/>.

² Battery is generally defined as a harmful or non-consensual touching of a human being. Some states impose an injury requirement, and others distinguish between degrees of battery depending on the harm resulting from the touching.

³ This concept has its underpinnings in the government’s perceived need to protect the continued health and viability of its able-bodied soldiers. See also, *People v. Samuels*, 58 Cal.Rptr. 439, 448 (1967).

Ok, what about boxing, martial arts or even cosmetic surgery? They all involve some consent to 'injury' or harm, right? That would seem to be the logical responsive argument to this legal concern. However, the courts have determined, from a public policy standpoint, that consent to battery will be recognized only when it involves some socially desirable activity. "On the other hand, assault involving aberrant behavior or conduct with no apparent social utility is often held to be criminal without regard to the consent of the victim if the force used has as its probable result bodily injury."⁴ This kind of policy-based decision-making, on a case-by-case basis, almost certainly leads to the infection of concepts like morality and decency in what should be a pure legal determination of which activities will be covered by the defense of consent, and which will not.⁵ The BDSM lifestyle is only at the infancy stages of being understood by the general public. Most still assume it is a dangerous, bizarre fetish, or even psychotic personality defect, engaged in solely for the purpose of causing injury to another human being. The more basic, human needs associated with BDSM sex play, like surrender, control, power, and trust, are slowly beginning to be understood; potentially leading to some eventual level of social tolerance.⁶ According to renown author and well-respected sex therapist, Dr. Marty Klein, "[m]illions and millions of people engage in these sorts of erotic activities ("erotic powerplay") on a regular basis. It's been documented that those practicing SM have, on average, better sexual communication than people who do so-called 'vanilla' sex."⁷ Slowly but surely, BDSM concepts are working themselves into the mainstream, where prime time television viewers do not seem to be phased by a commercial showing a dominatrix in full leather gear cracking a pistachio with a whip.⁸

Unfortunately, many prosecutors and law enforcement officials seem to be lagging in their understanding of the BDSM lifestyle; especially the unique nature of the relationships engaged in by the participants.⁹ Raids and other governmental hostility directed to BDSM clubs or 'dungeons' are fairly common, although actual prosecution for criminal activity is less successful.¹⁰ One recent case, however, resulted in serious

⁴ "Assault and Battery - Consent of Masochist to Beating By Sadist Is No Defense To Prosecution For Aggravated Assault," 81 *Harv. L. Rev.* 1339, 1339 (1968).

⁵ British Law Commission Report ('BLCR') 134 (comparable to a congressional report, often used when Parliament considers changing a law); Report of the European Commission of Human Rights on the Spanner Appeal, available at <http://www.spannertrust.org/documents/eurodissent.asp> (last visited Feb. 9, 2010) (Loucaides, dissenting) (On October 15, 1985 two professional boxers died as a result of a boxing match. "It appears that the treatment of activities that may cause physical injury by the legal system of the respondent State is not consistent. Apart from the example of boxing one may refer also to cosmetic surgery and tattooing where consent is sufficient to preclude offences [sic] being brought.").

⁶ See, "Understanding BDSM," <http://www.articlesbase.com/sexuality-articles/understanding-bdsm-745518.html>; "General BDSM & Sex Information," <http://www.leathermroses.com/generalbdsm/generalbdsm.htm>; "BDSM?," <http://www.xeromag.com/fvbdsm.html>; and, "BDSM Powertronics," <http://www.powerotics.com/bdsm-lifestyle.htm>.

⁷ Dr. Klein published several books including *America's War on Sex*, www.WaronSex.com, and publishes a popular newsletter dealing with sexual issues at www.sexualintelligence.org.

⁸ The full commercial, using the slogan "Dominatrix do it on command," can be seen here: <http://www.youtube.com/watch?v=mdsAD-sSM4Y>.

⁹ That is not to say that some law enforcement types do not enjoy, and regularly participate in BDSM activity. Quite the opposite appears to be true based solely on anecdotal evidence.

¹⁰ E.g., "Raid finds alleged 'sex dungeon,'" *Tampa Tribune* (Feb 19, 2005); http://www.sptimes.com/2005/02/19/Hillsborough/Raid_finds_alleged_s.shtml; "Town Looks to Shut

criminal charges where an underground Hungarian film production studio was raided by authorities after a participant in a BDSM film claimed the producers committed sexual battery by going too far with their beatings and failed to honor her 'safe word' letting them know when to stop.¹¹ At the same time, Paul Little's (a/k/a Max Hardcore) federal obscenity convictions were upheld by the appellate court, reaffirming the legally obscene nature of the videos and web content charged in that case, which involved (apparently consensual) dominance and humiliation of women.¹² Publicity surrounding cases like this contribute to the overall remaining societal prejudice, and thus, the producers of BDSM content are far more likely to have their activity deemed 'dangerous' or 'immoral' as opposed to 'socially desirable,' when evaluating whether the participants can legally consent to spankings, beatings and other potential physical damage during the filming of an erotic work.

This conclusion is supported by existing court decisions addressing the issue. Numerous cases involving various forms of BDSM activity have come out against the 'dominant' defendant and in favor of the 'submissive' victim. The earliest case holding that the victim's consent is no defense to S&M assault appears to be *People v. Samuels*.¹³ The California Supreme Court affirmed the conviction for aggravated assault and held that a consent defense was inapplicable. The court believed the S&M beating "was no less violative of a penal statute obviously designed to prohibit one human being from severely or mortally injuring another." In *Samuels*, Dr. Samuels produced films depicting S&M behaviors, specifically whipping a naked man who was gagged and suspended from the ceiling with a riding crop. There was no breaking of the skin, and there was evidence that cosmetics were used to enhance this S&M depiction. Dr. Samuels intended to donate these films to Dr. Gebhardt of the Kinsey Institute, who had expressed an interest in obtaining S&M films, and there was no discussion of making these films available to the general public.¹⁴ Despite this early California case, a substantial amount of BDSM content continues to be produced in that state.

Subsequent cases have likewise rejected the consent defense to a charge of S&M assault. In *Commonwealth v. Appleby*, the Supreme Judicial Court of Massachusetts sentenced the defendant to ten years in jail for beating his homosexual partner with a riding crop.¹⁵ The court reasoned that the state's ability to proscribe violent behaviors includes brutality occurring in private, consensual sexual relationships. The fact that the activity was sexual in nature did not appear to impact the outcome of the case. The court held that

Down Club in West Babylon," *The Beacon* (NY) (Sept. 11, 2008); http://www.babylonbeacon.com/news/2008-09-11/Front_Page/Town_looks_to_shut_down_adult_club_in_West_Babylon.html; "Atlanta Eagle Raided By Cops; Why?" *The Bilerico Project* (Sept. 16, 2009) http://www.bilerico.com/2009/09/atlanta_eagle_raided_by_cops_why.php.

¹¹ "Bizarre Hungarian Movie Company Ends in Sexual Battery Arrests," *Wizbang Pop!* (Feb. 1, 2010), <http://wizbangpop.com/2010/02/01/bizarre-hungarian-movie-company-ends-in-sexual-battery-arrests.php>

¹² *Little v. United States*, 2010 WL 357993 (11th Cir, Feb. 2, 2010) (unpublished). Note, the author does not concede that the material depicted in this case is, in fact, obscene, and the appellate court concedes that no determination has been made whether it would be obscene in any district outside the location where the defendant was tried and convicted.

¹³ 58 Cal. Rptr. 439, 448 (1967).

¹⁴ *Id.*

¹⁵ *Commonwealth v. Appleby*, 402 N.E.2d 1051, 1056 (1980).

because assault is a general intent crime (in Massachusetts), the only intent required to violate the law is an intent to do the act causing the injury; a showing of hostile purpose or motive is not required. Moreover, given the claimed 'vicious nature' of this sexual act; "[a]ny right to sexual privacy that citizens enjoy would be outweighed in the constitutional balancing scheme by the States' interest in preventing violence by the use of dangerous weapons upon its citizens under the claimed cloak of privacy in sexual relations."¹⁶ Similar decisions upholding battery convictions in the S&M context have come from other courts including in Iowa.¹⁷

Accordingly, the law across the country is not particularly favorable should a BDSM participant or producer be targeted for civil claims by the participant, or criminal prosecution by the state. Under accomplice theories like conspiracy, or 'aiding and abetting,' others involved in setting up the production, arranging for the talent, or even paying the models, may be dragged into a civil or criminal proceeding along with the actual producer or performer engaging in the offending, violent activity. Relying on 'consents' obtained in standard model releases typically used by adult industry producers before an erotic film shoot may not be sufficient to address the unique concerns identified in this article.¹⁸ Since this issue varies from state to state, the particular statutes and court decisions in the state where the production is to occur should be considered before shooting begins, and legal counsel should be consulted if necessary. Modifications to either the terms of the model release, or the entire rights-acquisition procedure might be desirable, as ways to reduce potential liability. Alternate locations might also be considered, depending on existing local law and enforcement policies.

As traditional legal concepts are forced to give way to the reality of human affairs, some unfortunate individuals will unwittingly become trapped in the process of change. Criminal battery or assault prosecutions against those involved with the production of BDSM material may result in a change in the law, but someone may be forced to go through the process, or even spend time in jail to move the law in a certain direction. These freedom fighters have always earned the respect of our firm and First Amendment lawyers throughout the country. However, for the time being, legal risks may be minimized with some advance planning and careful attention to details such as the release procedure and evaluation of local battery laws. In the mean time, continued progression in societal attitudes toward unconventional sexual expression is expected to occur, potentially rendering those laws outmoded, unenforceable, and outright silly to any prosecutor, judge or jury considering such a case.

¹⁶ Note, however, that the continued viability of this line of reasoning may be in question after the U.S. Supreme Court case of *Lawrence v. Texas*, 539 U.S. 558 (2003), which found a constitutional right of privacy in intimate human relations.

¹⁷ E.g., *State v. Collier*, 372 N.W. 2d 303, 307 (Iowa Ct. App. 1985).

¹⁸ For an interesting discussion of the current legal issues associated with BDSM play, and the various "stages" of consent, see, L. Marborough, "The Legal Dangers of Rough Sex," *The Daily Beast* (Dec. 13, 2009); <http://www.thedailybeast.com/blogs-and-stories/2009-12-13/the-legal-dangers-of-rough-sex/full/>.

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