

The Law, S/M and You

BY A. SPENCER BERGSTEDT, ATTORNEY AT LAW

copyright A. Spencer Bergstedt 1994

The law has historically had a large role in how players go about doing S/M play. From police raids of both yesteryear and today to the effect that participation in S/M might have on issues like child custody, the law has always had an interest in that which society deems abnormal or immoral.

This article is designed to highlight some of the areas of the law that you as a leatherman or leatherwoman should be aware of. The actual laws of course will vary from state to state, county to county and city to city, but, hopefully, this article will help point you in the direction of finding more information about the laws where you live.

Law is divided into two categories - criminal and civil. Both have an impact on S/M.

Criminal Civil

CRIMINAL

There are two aspects of criminal law that the S/M player should keep in mind: private and public activity. Private refers to actions that may take place in your home or other private place and public refers to public places, like bars, events, and outdoors.

PRIVATE

There are a number of things that one should be aware of as the law relates to S/M in private. First and foremost is that the (minor) possibility always exists that you may be suspected of committing a crime if it becomes known that you engage in S/M and the cops take an interest. Types of crimes that you could potentially be charged with include (but are not limited to):

- Assault
- Indecent Exposure
- Rape
- Kidnapping
- False imprisonment
- Reckless endangerment

Possession of illegal weapons or substances (e.g., possession of needles for temporary piercing may be illegal in your state) And in some states - the very act of sex and/or the presence of certain sex toys in a certain quantity may leave you open to prosecution under state laws that prohibit the sale of sex toys.

At the outset I should note that (depending on where you live) it is highly unlikely that you would ever have a problem with the cops. But the possibility does exist.

ASSAULT

Technically, assault is defined as a non-consensual touching of a person by another person. Therefore, if scenes are consensual, the likelihood of actual prosecution is slight. By that I mean that the police might arrest you to harass you BUT the prosecutors office would likely decide against filing charges against you because the “victim” consented to the activity. Since prosecutors are in the business of sending criminals to jail, if the “victim” insists there was no crime, the prosecutor generally won’t push it.

HOWEVER - many state’s - including my state of Washington - have enacted domestic violence statutes which can change police and prosecutor protocol. Generally under these types of law, police and prosecutors are encouraged to dismiss the “victim’s” statements about not wanting to press charges and move forward with the case. The law is designed to protect repeat victims of domestic violence/abuse who may be reluctant to press charges against their abusers. More often than not, police are instructed to arrest both parties if a domestic violence call is made.

Assault can be charged as either a misdemeanor or a felony depending on the circumstances. (There are 4 degrees of assault) E.g. the use of weapons, the infliction of great bodily harm, and the intent to inflict such great bodily harm. Depending on what you do with your play, you may very quickly jump into the felony category.

INDECENT EXPOSURE

In Washington, this is a misdemeanor crime unless you expose yourself to someone under the age of 14, in which case it becomes a felony.

You must expose yourself in an open and obscene manner to have committed this crime. Here it has been held sufficient to charge you with indecent exposure if you are in your own house/apartment and someone can see in to your house/apartment.

RAPE

Forced and/or non-consensual sexual intercourse or contact which includes any penetration, however slight, of the vagina or anus, with any object; touching of one person genitals to the anus or mouth of another; any touching of the sexual/intimate parts of another for sexual gratification.

- Rape is a felony crime.
- Consent is a defense to this crime.

KIDNAPPING/UNLAWFUL IMPRISONMENT

These are crimes of restraining another person without their consent and are felonies (in Washington - when in doubt, check your local and state laws).

SODOMY

Sodomy laws are still on the books in many states and the law generally applies to both gays and heterosexual sex that involves either anal-genital contact or oral-genital or oral-anal contact.

OTHER AREAS OF CRIMINAL LAW

Another area that questions come up in is for Pro Dommies. It is quite clear that the main focus of law enforcement in harassing or arresting Pro Dommies is prostitution and child pornography - NOT S/M. If you are a Pro Dommie and you get raided or arrested - chances are the cops are going to bust you for prostitution. However, most prostitution laws limit the definition to engaging in sexual conduct in exchange for a fee. So as long as you're not doing that, you'll likely be OK. This does not mean that the cops won't arrest you to harass you - simply that the prosecutor won't be able to charge you with much of anything. **HOWEVER**, if arrested, you should get an attorney immediately.

Prostitution is generally a misdemeanor.

WHAT TO DO IF THE COPS COME KNOCKING ON MY DOOR

1. Stay calm.
2. You do not need to consent for the cops to come into your house. You can force them to come back with a search warrant. **HOWEVER**, if they believe someone is in immediate harm, they have probable cause to enter without a warrant.
3. Explain calmly to the cops what the noise was all about - E.g., just good loud sex.
4. If you are arrested, **DON'T** say anything. You are not under any obligation to make a statement without an attorney present. Keep track of the officers names, badge numbers, and whether or not they read you your rights.
5. Call a lawyer immediately.
6. Remember, if they book you, you'll likely have to remove all your piercing.
7. Stay calm.

WHAT TO DO IN CASE A SCENE BECOMES NON-CONSENSUAL OR ABUSIVE

1. Stay calm.
2. Call the police.
3. Call an attorney for yourself. The legal system can be hard to negotiate and the last thing you want is for the cops to treat you like the criminal
4. Do not shower or clean up if there has been physical damage or rape. Physical evidence - cuts, bruises, semen, blood, hair or skin samples, and even clothing fibers can be very important evidence. Take pictures if you can.
5. Get medical assistance if you need it. This should be done before step 2 if you need immediate assistance. Plus, the hospital can help get hold of the police.
6. Tell the truth about what happened.
7. Contact a friend who can either stay with you or that you can stay with.

PUBLIC LAW

What we're talking about here is what happens when you leave your house - in bars, at events, on the street.

The same laws that are discussed above still apply, but now we have some new things to contend with as well.

- Liquor control board rules.
- Impersonation an officer (for you uniform enthusiasts)
- Carrying weapons

As to the crimes discussed above the main thing to remember is this - when you are out in public, not everyone is aware of the negotiations you and your partner have engage in and therefore, what you know to be consensual may not look very consensual from the outside. That 3rd party may decide to call the cops because what you are doing doesn't look consensual.

WEAPONS

If you carry a gun, make sure you have a concealed weapons permit and a licensed and registered weapon.

If you carry a knife, check to see what size blade your local law allows you to carry.

UNIFORMS

You may not impersonate a police or fire official. Basically what this means is don't wear an exact replica of a law/fire enforcement agency whose jurisdiction you are in and do not ever hold yourself out to be a police officer/fire fighter. Do not put any real or fake weapons in a gun holster if you are out and about. You might also choose to wear an overcoat/jacket when going from car to bar

LIQUOR CONTROL BOARD

Please don't put our friendly bar owners out of business by doing something that violates the liquor control board rules. These rules are much stricter than you might imagine and the penalties for violation are stiff.

In Washington, it is unlawful in a bar for staff to expose their nipples, any portion of pubic hair, anus, cleft of the buttocks, vulva or genitals.

To encourage or permit anyone on the premises to touch, caress or fondle the breasts, buttocks, anus or genitals or another person. (this rule has been used to fine a bar owner for two customers slow dancing together where the one person rubbed his hand over his partner's ass)

To permit anyone in the bar to wear a device which simulates any of the areas not allowed to be exposed. (This is why we don't see dildos involved in fantasies at contests here)

To permit anyone to perform acts of: intercourse, masturbation, sodomy, oral copulation, flagellation (flogging), touching, caressing, etc. **UNLESS** - the performance/entertainer is on a stage at least 18 inches in height and at least 6 feet from the nearest patron.

Definitely check the laws of your own state, county and city as well as administrative rules propagated by the state liquor control board to find out what's legal and not where you live.

CIVIL LAW AND S/M

Civil law applies to things that are not criminal in nature. It covers everything from contracts to divorce to personal injury suits. Here we'll cover:

- Using civil law if something goes wrong.
- Are S/M contracts legally binding?
- What can we do to protect ourselves?

IF SOMETHING GOES WRONG

If something goes wrong with a scene or the relationship and non-consensual activity/violence/abuse happen the victim can take two courses of action:

1. Talk to the police, file a report and press for criminal charges; and/or
2. File a civil lawsuit for damages.

CIVIL SUITS

Civil lawsuits can be an excellent way of seeking compensation for damages inflicted by someone who misuses S/M as an excuse for violence. Damages can be had for things like: actual physical damage; emotional damage; psychological impairment; assault; false imprisonment; etc..

These cases should be handled only with the advice and assistance of an attorney.

ANTI-HARASSMENT/PROTECTIVE ORDERS

To be used if there is a threat of immediate danger/harm, protective orders are a means to keep someone away from you. They can be obtained either through superior or district court.

CONTRACTS

Contracts for sexual services are not legally binding. However, if yours is a service-oriented contract, it might be enforceable.

In any event, I believe written contracts are a great way to clearly communicate what it is that you've negotiated with your relationship or a scene. The contract could potentially be useful in a situation where one player steps over the line of what was negotiated and engages in non-consensual abusive behavior.

Be prepared that if you want to make it legally binding that you must follow principles of contract. If you are unclear about what these are - you might wish to consult with a lawyer.

- **PROTECTIONS**
- Wills
- Living wills
- Powers of attorney
- Authorizations for hospital visits
- Instructions on what to do with your S/M stuff if you get sick, hurt or die

****NOTE:** With all of these documents it is important to execute them before serious injury or illness sets in as you may then be termed incompetent to execute them.

WILLS

A Will is a document by which you designate how you want your property distributed upon your death; who will act as your executor; whether you wish to be buried or cremated; if you desire funeral services; establish certain types of trusts; and establish a guardian for your children).

If you die without a Will your estate will be divided according to the statute related to descent and distribution. What this statute says is that the first person in priority is your surviving legal spouse, then your children. If you have neither, then it goes to your parents, brothers and sisters, grandparents, etc.. Unless they can't find anybody, in which case it goes to the state.

The only way you can designate where your property goes is by doing estate planning. A Will, joint property agreement, payable on death accounts, beneficiary designations in life insurance policies, and/or a trust are all ways that you can leave your estate. **HOWEVER**, a Will should almost always be used in conjunction with any of the other types of estate planning methods to ensure that certain details are handled.

LIVING WILLS

These are technically referred to as Directives to Physicians. This document sets forth your desires to not be kept on life support systems if you are terminally ill. Provision can also be made for specific types of medical treatments and, although a right to die law currently only exists in Oregon, you can make your philosophy known in the document that assisted death might be an option for you once it becomes legally viable.

POWERS OF ATTORNEY

A Power of Attorney is a document in which you designate someone else to act on your behalf. They can be for specific acts like selling a house or more general. In terms of estate planning, we generally talk about 2 different - but similar - types.

FUTURE DURABLE POWER OF ATTORNEY

This POA goes into effect when the person executing the document (the principal) becomes either incapacitated or incompetent and last during the period of incapacitation or incompetency.

The POA gives the attorney-in-fact the ability to handle business and financial affairs for the principal and can include making medical decisions.

The POA also nominates the attorney-in-fact to act as guardian if a guardianship should become necessary.

FUTURE DURABLE POWER OF ATTORNEY FOR HEALTH CARE

This is similar to the document above except that it is directed specifically toward health care and authorizes health care professionals to give information about you to your attorney-in-fact and authorizes your attorney-in-fact to make medical decisions for you.

AUTHORIZATION FOR HOSPITAL VISITS

This document ensures that the person you designate can visit you in the hospital.

INSTRUCTIONS FOR WHAT TO DO WITH MY TOYS AND LEATHERS

This becomes critical if you are not out to your biological family about your S/M. Give a trusted friend or family member instructions on what to do with your toys and leathers in the event of a medical emergency or death.

The other way to handle these issues - if you are out or you don't care what your family thinks - is to include instructions for disposition of these items in your Will.

DISSOLUTION/CHILD CUSTODY

S/m play can impact on divorces and child custody actions as well. In the event that you are getting divorced and have children and the terms won't be mutually agreed upon, you should get the advise of an attorney if you think your spouse will use your S/M against you.

Similarly, in child custody modifications, you should hire an attorney at assist you if your ex brings up the issue of S/M as a reason to limit your access to your children.

Should you have any questions not answered in this article, you can contact me at:

Spencer Bergstedt
1211 Smith Tower
506 Second Ave.
Seattle, WA 98104
206-682-4267

www.spencelaw.com