

Sex and the Law in Massachusetts

Prepared by Brian Flaherty
Director of Development, Partners in Sex Education
Newton, Massachusetts 02458

The following is a list of laws that cover various aspects of sexuality, or that might be applicable to BDSM relationships. The laws are broken into broad categories, and reprinted in part or in full with some commentary.

While this serves as a handy reference guide to some of the major laws that you should be aware of, it is not an exhaustive list of the possible laws you may come in contact with. Moreover, it should not be construed as legal advice in any way. While it is important to know the law, and to know your rights in any given situation, if you find yourself on the wrong end of any of these laws, it would be extremely wise to find an attorney.

Assault and Battery laws

There are three “Assault and Battery” statutes that you need to be aware of – more time is spent describing the third here, because it has been used in the context of an S&M relationship:

Chapter 265 s 13A – Assault and Battery

The crux of the law reads:

Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than 2 1/2 years in a house of correction or by a fine of not more than \$1,000.

Important to note here (this will begin to sound familiar) that *consent is not a defense to assault and battery*. There are many cases that repeat this – most importantly Commonwealth v. Appleby cited below.

Chapter 265 s. 13H – Indecent Assault and Battery on a Person Fourteen or Older

The crux of the law reads:

Whoever commits an indecent assault and battery on a person who has attained age fourteen shall be punished by imprisonment in the state prison for not more than five years, or by imprisonment for not more than two and one-half years in a jail or house of correction.

While the statute itself does not define “Indecent assault and battery,” in 1999 a federal court in Massachusetts defined it as: “acts fundamentally offensive to contemporary moral values”

Chapter 265 s 15A – Assault and Battery by Means of a Dangerous Weapon (includes provisions for if the victim is over 60, for subsequent offenses, and for punishment)

The crux of the law reads:

Whoever commits an assault and battery upon another by means of a dangerous weapon shall be punished by imprisonment in the state prison for not more than 10 years or in the house of correction for not more than 2 1/2 years, or by a fine of not more than \$5,000, or by both such fine and imprisonment.

It is very important to note here that *consent is not a defense to assault and battery*. As recently as 1980, the Massachusetts Supreme Judicial Court upheld a conviction for assault and battery in the context of an S&M Relationship. (Commonwealth v. Appleby, 380 Mass. 296, 402 N.E.2d 1051 (1980))

Specifically, the court wrote:

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.

Obscenity

There are several obscenity statutes you need to be aware of. The obscenity statutes fall between Massachusetts General Laws chapter 272 sections 28-31.

Chapter 272 s 28: Matter harmful to minors – dissemination, possession, defenses

This law begins:

Whoever disseminates to a minor any matter harmful to minors, as defined in [section thirty-one](#), knowing it to be harmful to minors, or has in his possession any such matter with the intent to disseminate the same to minors, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one-half years, or by a fine of not less than one thousand nor more than ten thousand dollars

It is important to note here that the definition of disseminate includes to display or exhibit. If you display “matter harmful to minors” (which under the definition is just about anything ‘prurient’) in any way – you can be charged under this law.

Chapter 272 s. 29- Dissemination or Possession of Obscene Matter

The crux of the law reads:

Whoever disseminates any matter which is obscene, knowing it to be obscene, or whoever has in his possession any matter which is obscene, knowing it to be obscene, with the intent to disseminate the same, shall be punished by imprisonment in the state prison for not more

than five years or in a jail or house of correction for not more than two and one-half years or by a fine of not less than one thousand nor more than ten thousand dollars

The language of the law doesn't criminalize mere possession – however, the word Disseminate is defined very broadly (Below) – to include both “exhibit” and “display.”

Obscene is defined in chapter 272 s 31 as:

- (1) appeals to the prurient interest of the average person applying the contemporary standards of the county where the offense was committed;
- (2) depicts or describes sexual conduct in a patently offensive way; and
- (3) lacks serious literary, artistic, political or scientific value.

Which is basically the federal definition as well.

Disseminate is defined in Chapter 272 s 31 as:

“Disseminate”, to import, publish, produce, print, manufacture, distribute, sell, lease, exhibit or display.

Federal Obscenity Laws

There are federal obscenity laws as well, that one should pay attention to – they are found in 18 USC 1460-1470.

18 USC 1461 Mailing Obscene or Crime-Inciting Matter – This criminalizes sending anything obscene through the mail – obscenity is defined quite broadly here, including “Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and-- Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use;”

This statute is the primary reason why Paul Little, aka Max Hardcore, is in prison for nearly 4 years.

Sex Toys

There is a great deal of talk about the criminalization of sex toys. There are some jurisdictions that have laws against the sale of sex toys. Though Massachusetts is technically one of them, the law on “articles for self-abuse” is not enforced, and has been held on numerous occasions to be unconstitutionally invasive.

M.G.L.A. 272 § 21 Instruments or other articles for self-abuse, prevention of conception or abortion, in general

The law in its entirety reads:

Except as provided in [section twenty-one A](#), whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars.

The law effectively criminalizes not only birth control and abortion, but possession of all instruments of “self-abuse.” It has been invalidated several times by courts as unconstitutionally invasive – nevertheless, it was one of the charges brought in Attleboro back in 2000.

Fornication, Adultery, Lewd and Lascivious Behavior, abominable and detestable crimes

These statutes do still exist on the books – in fact, Adultery was amended as recently as 1978. It’s rare that someone is prosecuted for one of these things in isolation – they are usually added on as further offenses to such things as sexual assault, sexual assault of a child, incest, etc. (so in other words, a prosecutor would charge sexual assault AND lewd and lascivious behavior in order to increase the possible sentence).

Nevertheless, as was the case in Attleboro, old and unused (& unconstitutional) laws are sometimes revived for the convenience of the prosecutor.

Chapter 272 s 14 Adultery

Reads in its entirety:

A married person who has sexual intercourse with a person not his spouse or an unmarried person who has sexual intercourse with a married person shall be guilty of adultery and shall be punished by imprisonment in the state prison for not more than three years or in jail for not more than two years or by a fine of not more than five hundred dollars.

This statute was upheld as constitutional in 1983, where someone was fined \$50 for Adultery, *Commonwealth v. Stowell*, (1983) 449 N.E.2d 357, 389 Mass. 171.

Chapter 272 s 16 Open and Gross Lewdness

A man or woman, married or unmarried, who is guilty of open and gross lewdness and lascivious behavior, shall be punished by imprisonment in the state prison for not more than three years or in jail for not more than two years or by a fine of not more than three hundred dollars.

Courts have held that one of the elements of open and gross lewdness is the intention to shock or alarm. In this respect it is one giant step beyond “indecent exposure”

Chapter 272 s 18 Fornication

Whoever commits fornication shall be punished by imprisonment for not more than three months or by a fine of not more than thirty dollars.

Chapter 272 s 34 Crime Against Nature

This is the best text of a law ever. It is the sodomy statute – note, though, that sodomy laws were overruled by the recent U.S. Supreme Court case *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472 (2003). If you still commit the “abominable and detestable crime” with a beast, though, it’s a pretty hefty penalty to pay.

The law in its entirety:

Whoever commits the abominable and detestable crime against nature, either with mankind or with a beast, shall be punished by imprisonment in the state prison for not more than twenty years.

Chapter 272 s 35 Unnatural and Lascivious Acts

Also still on the books, though declared unconstitutionally invasive:

Whoever commits any unnatural and lascivious act with another person shall be punished by a fine of not less than one hundred nor more than one thousand dollars or by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years.

Prostitution

Chapter 272 s 53A – Engaging in sexual conduct for a fee (includes provisions for sexual conduct with person under 14)

The crux of the law reads:

Whoever engages, agrees to engage, or offers to engage in sexual conduct with another person in return for a fee, or whoever pays, agrees to pay, or offers to pay another person to engage in sexual conduct, or to agree to engage in sexual conduct with another natural person, shall be punished by imprisonment in the house of correction for not more than 1 year or by a fine of not more than \$500 or by both such imprisonment and fine, whether such sexual conduct occurs or not.

“Sexual conduct” is not defined for this section, however in *Commonwealth v. Levigne*, the court held that in determining whether something was sexual conduct, “The judge could properly evaluate the challenged conduct in light of the entirety of the circumstances; apply common understanding reflecting contemporary mores.” In other words, the court looks at the ‘entirety of the circumstances’ to determine whether something offered for a fee is “sexual conduct.”

Chapter 272 s 24 – Keeping a house of ill fame

The law in its entirety reads:

Whoever keeps a house of ill fame which is resorted to for prostitution or lewdness shall be punished by imprisonment for not more than two years.

This law has been used as recently as 2006, against someone who owned a massage parlor where he knew there was prostitution. It was also one of the charges in Attleboro.

There is no definition of what keeping a house or “lewdness” would entail.

The Good News:

The Massachusetts case Commonwealth vs. Balthazar, **366 Mass. 298, 318 N.E.2d 478**, held that MGL 272 section 35, Unnatural and Lascivious Acts did not apply to private consensual conduct between adults. In doing so, the court seemed to say some things that might apply to many of the laws above. Specifically, the court writes:

In light of these changes and in light of our own awareness that community values on the subject of permissible sexual conduct no longer are as monolithic as...they were in 1954, we conclude that [s 35](#) must be construed to be inapplicable to private, consensual conduct of adults. We do so on the ground that the concept of general community disapproval of specific sexual conduct, which is inherent in [s 35](#), requires such an interpretation.

There is also a nice footnote in Balthazar, decided as far back as 1974, that lays out the court cases that hold that there is some right to privacy in consensual adult sexual contact. That footnote, which lists the cases, reads:

[Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 \(1965\)](#) (the right of married couples to use contraceptives); [Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 \(1969\)](#) (the right to possess obscene materials privately); [Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 \(1972\)](#) (the right of single persons to obtain contraceptives); [Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 \(1973\)](#) (a woman's right to terminate her pregnancy before the fetus attains viability). See also [California v. LaRue, 409 U.S. 109, 132, n. 10, 93 S.Ct. 390, 34 L.Ed.2d 342 \(1972\)](#) (Marshall, J., dissenting) (questioning the existence of a State interest in regulating any sexual act between consenting adults); [Cotner v. Henry, 394 F.2d 873, 875 \(7th Cir. 1968\)](#), cert. den., [393 U.S. 847, 89 S.Ct. 132, 21 L.Ed.2d 118 \(1968\)](#) (private consensual marital relations said to be protected from regulation by State criminal law); [Buchanan v. Batchelor, 308 F.Supp. 729 \(N.D. Texas, 1970\)](#), vacated and remanded for reconsideration on jurisdictional grounds sub nom. [Wade v. Buchanan, 401 U.S. 989, 91 S.Ct. 1221 28 L.Ed.2d 526 \(1971\)](#) (the right of married couples to practice consensual ‘sodomy’ in private);

Finally, added to this list is the U.S. Supreme Court case of Lawrence v. Texas, Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472 (2003), which holds that an individual’s right to liberty under the due process clause of the constitution gives them a right to engage in consensual sexual activity.