



YOUR RIGHTS

YOUR PRIVACY

YOUR FREEDOM

Consent is a Defense

NCSF is delighted to announce an important new initiative as part of our Consent Counts project. In a nutshell, we have a great opportunity to take advantage of an effort by the American Law Institute (ALI) to change the portions of the Model Penal Code—which most states adopt as their criminal law—in a way that would greatly advance our campaign to decriminalize consensual BDSM.

Here's what is going on. The American Law Institute is an independent body made up of influential lawyers from across the United States. The ALI analyzes legal issues and proposes model legislation (known as “codes” or “restatements”) and recommends that states adopt that model legislation as their own law. This requires that each state legislature pass a bill that changes the state law, but most states have in the past adopted ALI model codes without significant changes.

Currently the ALI is studying—and will ultimately recommend—changes in the Model Penal Code provisions relating to sexual assault. As you probably know, cases in which BDSM is prosecuted are now considered as criminal assault, rather than sexual assault. NCSF has always believed this to be unjust. In our view, BDSM is not an attack by one person against another (which is the premise of a criminal assault law). Rather, BDSM is intended to be a mutually pleasurable interaction between two people, in which any pain or stimulation that is consented to is welcomed by that person and is experienced as a form of pleasure.

What the ALI originally set out to do in its current project had nothing to do with BDSM. Instead, their concern rose from the recent public discussion about sexual assault on college campuses and is intended to strengthen the requirement that all forms of sexual contact (from fornication to casual touching) have to be clearly consensual.

In February, NCSF submitted comments to the ALI Committee that is working on sexual assault and related issues. We argued that the same emphasis on strengthening consent should be applied equally in the context of BDSM. We pointed out that the MPC's criminal assault provision allows consent as a defense unless serious injury is caused, but that in case law the courts and prosecutors moralistically have refused to apply that rule because they viewed BDSM simply as violence, not as sex or mutually pleasurable activity.

We urged the ALI Committee to treat BDSM under a category they define as “sexual contact” even if there is no contact with the breasts or genitals. Under the ALI's draft proposal, “sexual contact” is not a crime if consent is given for such contact. If consent is not given, sexual contact is a misdemeanor, not a felony. Such treatment of BDSM—as not a crime if consensual and as a misdemeanor if nonconsensual—would be fully consistent with the concept that BDSM is intended to be a mutually pleasurable activity

rather than an act of violence. If a rape is committed in a BDSM encounter then it can be prosecuted as felony sexual assault and the fact that BDSM activities were also included will reduce the confusion for prosecutors and courts. Judgment can be made solely in the context of whether there was consent for each act that was committed.

A further benefit of our proposal would be that a person who is injured in a nonconsensual BDSM incident would have the shelter of “rape shield” rules, which prohibit introduction of evidence of prior acts and provides the victim anonymity. This protection applies to complaints in sexual assault cases, but not in criminal assault cases. People who are assaulted in a BDSM context typically choose not to report what happened to the police because they will be outed as kinky by the public court documents and they may even face media exposure if their assailant is charged with criminal assault rather than sexual assault.

The reaction from the ALI has been encouraging. We were told that our views will be considered, and NCSF was invited to make further written submissions on the sexual assault and related areas, as well as two other ALI projects that may help advance our goals to decriminalize consensual BDSM, and to assist people who have suffered nonconsensual acts in a BDSM context.

It is far too early to conclude whether this could be a real solution to the problem of BDSM being prosecuted as assault. But if the ALI were to include our proposal—that BDSM should not be regarded as violence, and should be dealt with as “sexual contact” instead of “criminal assault”—it would clearly be a major step in the right direction.

But first we need to persuade the ALI to agree with our proposal, or at least something like our proposal. We need your help! Please sign the petition at (insert link), which we plan to submit to the ALI in September. We hope to collect thousands of signatures urging the ALI to reclassify BDSM prosecutions as “sexual contact” instead of criminal assault. It’s all about consent, and the law should reflect that.

[Link to Petition:](https://www.change.org/p/american-american-law-institute-consent-should-be-a-defense-for-bdsm-activities?just_created=true)

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[Letter to ALI from NCSF:](https://ncsfreedom.org/images/stories/ALI/ALI%20Letter.pdf)

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