



American Law Institute Project

The American Law Institute Project is part of our Consent Counts project. The American Law Institute (ALI) is changing 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. The National Coalition for Sexual Freedom (NCSF) is providing important input to that project.

Background

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.

The ALI has set out to revise the Model Penal Code on Sexual Assault. Their concern rose from the public discussion about sexual assault on college campuses and is intended to strengthen the requirement that all forms of sexual contact (from intercourse to casual touching) have to be clearly consensual.

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.

The Model Penal Code’s criminal assault provision currently allows consent as a defense unless serious injury is caused, but according to 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. They regard BDSM as violent assault and have issued rulings that use of nipple clamps or dripping hot wax on someone constitutes “serious bodily injury.”

Current Project

NCSF has submitted comments to the ALI Committee that is working on sexual assault and related issues such as sexual assault on college campuses. We argued that the same emphasis on strengthening consent should be applied equally in the context of BDSM. 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.

NCSF has also made the ALI aware of the importance placed upon consent in the BDSM communities to understand that BDSM scenes may involve (as part of the fantasy) understandings that the usual expressions of unwillingness “no”, “stop”, etc. can be disregarded and instead prearranged “safe words” (“red”, “yellow”, etc.) may be used. NCSF has also explained that consent needs to be “informed consent,” which means participants need to agree (a) who will be involved, (b) what is agreed to be done and not done, (c) the potential risks, (d) where and how the you will be touched, (e) the location or venue where the acts will be conducted and (f) the procedure for stopping or moderating the acts.

Progress

NCSF has been active in the ALI’s deliberations, communicating with the Project Chair, submitting quite detailed legal analyses, providing education to dispel misconceptions about BDSM, and attending the meetings and participating in the discussions of sexual assault issues.

NCSF provided input on the new definition of consent that was approved by the ALI Council on December 21, 2016:

Section 213.0 Definitions

(3) “Consent”

(a) “Consent” for purposes of Article 213 means a person’s willingness to engage in a specific act of sexual penetration or sexual contact.

(b) Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.

(c) Neither verbal nor physical resistance is required to establish that consent is lacking, but their absence may be considered, in the context of all the circumstances, in determining whether there was consent.

(d) Notwithstanding subsection (3)(b) of this Section, consent is ineffective when it occurs in circumstances described in Sections [reserved].

(e) Consent may be revoked or withdrawn any time before or during the act of sexual penetration or sexual contact. A clear verbal refusal—such as “No,” “Stop,” or “Don’t”— establishes the lack of consent or the revocation or withdrawal of previous consent. Lack of consent or revocation or withdrawal of consent may be overridden by subsequent consent.

<https://www.ali.org/news/articles/updated-consent-definition/>

NCSF has also submitted our petition that urged the ALI to reclassify BDSM prosecutions as “sexual contact” instead of criminal assault. We received 1,769 signatures in support of the following:

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https://www.change.org/p/american-law-institute-consent-should-be-a-defense-for-bdsm-activities?just_created=true

Next Steps

The ALI Council may approve the entire Model Penal Code on Sexual Assault at the next annual meeting in May 2020.