



American Law Institute Project

The American Law Institute Project is part of NCSF’s Consent Counts project, which aims to decriminalize sexual conduct between consenting adults. In June, 2021, the American Law Institute (ALI) voted to approve the new Model Penal Code: Sexual Assault—which most states adopt as their criminal law—in a way that decriminalizes consensual BDSM in section 213:10: Affirmative Defense of Explicit Prior Permission. Since 2015, the National Coalition for Sexual Freedom (NCSF) has been providing important input on the revision of the MPC: Sexual Assault.

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 set out to revise the Model Penal Code on Sexual Assault in 2015. 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 historically were prosecuted 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. Violations of consent in a BDSM context is Interpersonal Violence, which is more properly dealt with under Sexual Assault law.

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.”

BDSM and Consent

NCSF’s Legal Counsel, Dick Cunningham, was an active participant in the ALI’s deliberation on sexual assault and related issues such as sexual assault on college campuses from 2015 to 2021. This involved communicating with the Project Chair, submitting quite detailed legal analyses, attending the meetings and participating in the discussions of sexual assault issues, and providing education to dispel misconceptions about BDSM along with the data and information NCSF gathered from the kink communities through Consent Discussions and consent surveys.

NCSF 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 the consent violation was not sexual in nature.

A further benefit of our proposal was 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 already 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 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 roleplay) understandings that the usual expressions of unwillingness “no”, “stop”, etc. can be disregarded and instead prearranged “safewords” (“red”, “yellow”, etc.) may be used. NCSF has also explained that consent to BDSM 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.

NCSF 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:

NCSF has 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.

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

Definition of Consent to Sex

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/>

Definition of Consent to BDSM

The new Model Penal Code: Sexual Assault Article 213 was approved on June 8, 2021 at the ALI general meeting. The text has to be approved by each State Legislature to become law, however the text of the model law can be introduced into any court case or cited in briefs.

Under the MPC Article 213 Section 10: AFFIRMATIVE DEFENSE OF EXPLICIT PRIOR PERMISSION, you may personally give another person explicit prior permission to use or threaten to use physical force or restraint, or to inflict or threaten to inflict any harm in connection with an act of sexual penetration, oral sex, or sexual contact, as long as it doesn’t cause serious injury. Permission is “explicit” when it is given orally or by written agreement:

(a) specifying that the actor may ignore the other party’s expressions of unwillingness or other absence of consent;

(b) identifying the specific forms and extent of force, restraint, or threats that are permitted; and

(c) stipulating the specific words or gestures that will withdraw the permission.