



## **Creating Assault & Sexual Assault Policies that Protect All Illinois Citizens:**

Adopting the New Model Penal Code Section 213.10,  
Affirmative Defense of Explicit Prior Permission

### Contents

Executive Summary.....	1
Introduction .....	2
Current Illinois Law.....	2
Model Penal Code Section 213.10, Affirmative Defense of Explicit Prior Permission.....	4
How Explicit Prior Permission Would Change Illinois Law .....	7
Recommendations.....	7

### Executive Summary

Currently, Illinois law is missing a definition of affirmative consent for adults who use force or restraint during erotic power exchange and roleplay. Under Illinois case law, consent is not a defense to battery, likely qualifying BDSM activities as domestic battery. U.S. case law on the use of force or restraint in an erotic context has also found, based on moral objections, that consent is not a defense to assault (even mild, non-injurious activities).

However, changing social mores and a rising tolerance due to the *Fifty Shades of Grey* phenomenon means that law enforcement and prosecutors typically refuse to prosecute sexual violence and nonconsensual acts if the behavior is mischaracterized as BDSM, kink, or “rough sex.” To be inclusive to all citizens, Illinois statutes should do a better job of distinguishing between desired consensual activities and assault that should be punished.

Establishing a clear legal framework that differentiates consensual, non-injurious erotic activities from abuse and violence would assist law enforcement in addressing reports of sexual assault and assault in intimate violence. The American Law Institute grappled with these issues for six years and recently adopted Section 213.10 of the Model Penal Code, “Affirmative Defense of Explicit Prior Permission.” It is essential for the Illinois General Assembly to take

advantage of this development and adopt the provisions of Section 213:10 of the Model Penal Code into Illinois law.

## Introduction

There is a large number of citizens in Illinois who engage in alternative sexual expressions (alt-sex).<sup>i</sup> Alt-sex behaviors are often stigmatized; therefore, these adults are an underserved population who face barriers to services. Therefore, establishing a law that protects alt-sex practitioners is of the utmost importance. This policy brief identifies the gaps in Illinois's current laws. It shows how adopting Section 213.10 of the Model Penal Code would bridge those gaps, creating policies that benefit all Illinois citizens.

Many people in the U.S. engage in alt-sex practices; a cross-sectional survey found that 20-30% of adult Americans have engaged in roleplay, power exchange, and/or restraint in an erotic context.<sup>ii</sup>

In Illinois, between July 1, 2010, to June 30, 2015, more than 37,000 sexual violence victims received services from a rape crisis center, with 89.4% of these clients being women and 10.6% men.<sup>iii</sup> It is estimated that 14.1% of adult women in Illinois have been victims of one or more completed forcible rapes in their lifetime.<sup>iv</sup>

The National Coalition for Sexual Freedom (NCSF) Consent Survey (2021) of alt-sex practitioners found that 25.5% of nearly 3,000 respondents reported their consent was violated in an alt-sex context.<sup>v</sup> 55% reported sexual assault, while the rest were assaulted without consent (i.e., slapped, punched, choked) during erotic activities. 3.9% were injured, yet only 3.5% of those who experienced nonconsensual acts reported it to the police.

## Current Illinois Law

Illinois Sexual Assault statutes mandate ongoing, affirmative consent during sexual activity, defined as the following:

- (a) A freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent. The manner of dress of the victim at the time of the offense shall not constitute consent.
- (b) A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct (720 ILCS 5/11-1.70).

While this is definition far surpasses many other states' definitions of consent, there is no exception for affirmative consent to the use of erotic force/restraint or threat of force/restraint under Illinois Sexual Assault law:

- 720 ILCS 5/11-1.20. Criminal Sexual Assault.
  - o § A person commits criminal sexual assault if that person commits an act of sexual penetration and:
    - § (1) **uses force or threat of force**; or
    - § (2) knows that the victim is unable to understand the nature of the act or is unable to give knowing consent

In addition, “sodomasochism” is specifically linked to “abuse” without any exception for affirmative consent as per the phrase “in any context”:

- 720 ILCS 5/11-23.5. Sexual Activity.
  - o § “Sexual activity” means any:
    - § (1) knowing touching or fondling by the victim or by another person or animal, either directly or through clothing, of the sex organs, anus, or breast of the victim or another person or animal for purpose of sexual gratification or arousal; or
    - § (2) any transfer or transmission of semen upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or another; or
    - § (3) an act of urination within a sexual context; or
    - § (4) any bondage, fetter, or sadism masochism; or
    - § (5) **sodomasochism abuse in any sexual context**

In regards to Assault case law (People v. Ford 2015 Ill. App. (3d) 130810), a victim’s **consent is “generally not a defense to a criminal prosecution”** because these sorts of crimes are seen to affect the public, at least in some capacity, and consequently cannot be “licensed by the individual directly harmed.” In offense to battery cases, consent is only permitted as a defense when there has been a “minor sort of offensive touching,” medical procedures, and contact incidents in sports.<sup>vi</sup> While People v. Ford did not involve crimes of an erotic nature, the impact is just the same.

The Assault laws in Illinois also don’t recognize a defense of consent, therefore criminalizing even minor forms of erotic force and restraint. In addition, no statute shows an allowance for assault to be dismissed by the mutual agreement of the involved parties. While many Illinois citizens engage in the erotic use of force or restraint without direct sexual contact, there is no method for law enforcement to determine whether affirmative, ongoing consent has been obtained:

Definitions:

- 720 ILCS 5/12-1. Assault.
  - o § A person commits an assault when, without lawful authority he or she knowingly engages in conduct which places another in reasonable apprehension of receiving a battery
- 720 ILCS 5/12-3. Battery.
  - o § Battery consist of insulting or provoking physical contact with another...pushing another person or intentionally causing bodily harm to another, such as hitting or injuring someone with an object.

Under Illinois Sec. 12-3.3, strangulation by applying pressure to another person’s throat or neck is not allowed, due to the risk of serious physical injury and mental health issues, including a risk of death.<sup>vii</sup> However, a recent study found that choking/strangulation during sex is prevalent among young adults in the United States, with 47% of the college-age students who responded having been choked, Half of those reported being choked non-consensually during erotic activities.<sup>viii</sup> There is no clarification in Illinois law that strangulation/choking is illegal during erotic activities:

- 720 ILCS 5/12-3.3. Aggravated Domestic Battery.
  - o § A person who, in committing a domestic battery, knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated domestic battery.
    - § (a-5) A person who, in committing a domestic battery, strangles another individual commits aggravated domestic battery.
      - “Strangle” means intentionally impeding the normal breathing or circulation of the blood of an individual by applying pressure on the throat or neck of that individual or by blocking the nose or mouth of that individual.

## Model Penal Code Section 213.10, Affirmative Defense of Explicit Prior Permission

The Model Penal Code is an influential model act for state criminal laws first issued by the American Law Institute (ALI) in 1962. In 2012, the ALI began a long-term project to revise the portion of the Code which addresses sexual assault, Section 213. To create a legal framework to distinguish consensual adult sexual behaviors from assault and violence, NCSF began assisting the ALI in 2016 with the creation of Article 213.10 to define affirmative ongoing consent for the use of force or restraint. After an exhaustive years-long effort with the input of dozens of subject matter experts, Affirmative Defense of Explicit Prior Permission, Section

213.10 of the revised Model Penal Code on Sexual Assault, was approved by the ALI membership in June 2021.<sup>ix</sup>

A summary of some of the problematic case law involving alt-sex activities and charges of assault or battery (which Section 213.10 would address) can be found in *Consent to Harm* by Vera Bergelson, in Chapter 8 of *The Ethics of Consent: Theory and Practice*. According to Bergelson, criminalization of the erotic use of force and restraint was based on “moral judgments about the iniquity of the conduct,” with courts tending “to inflate the risk and harmfulness of an activity they want to denounce.”<sup>x</sup>

The Reporters’ Notes in the ALI’s MPC on Sexual Assault that accompany Section 213.10 states: “Social disapproval on moral grounds was once, and to some extent still is, widespread. Nonetheless, as long as the person giving consent is a competent adult, and as long as the force poses no risk of serious bodily injury, death, or harm to others, respect for individual autonomy requires deference to these choices, which the person may regard as a cherished vehicle for personal and sexual fulfillment.”

The ALI’s reasoning is based on *Lawrence v. Texas*, 539 U.S. 558 (2003), which holds that competent adults have constitutionally protected privacy and autonomy rights to engage in mutually consensual sexual activity, as long as it doesn’t involve “persons who might be injured or coerced or who are situated in relationships where consent might not be easily refused.”<sup>xi</sup>

The Reporters’ Notes to Section 213:10 also cites evidence that police and prosecutors are especially reluctant to investigate and file charges for sexual assault when the complainant has engaged in erotic use of force or restraint “because they assume that a person who is injured or sexually violated in such a case ‘must have asked for it.’”

Section 213:10 states that under specific conditions and subject to specific limitations, Explicit Prior Permission from an individual to use or threaten to use physical force or restraint, or threaten to inflict harm on that individual, is an affirmative defense to criminal allegations of assaulting that individual in the manner specifically agreed to:

- (1) It is an affirmative defense to a charge under this Article that the actor reasonably believed that, in conjunction with the charged act of sexual penetration, oral sex, or sexual contact, the other party personally gave explicit prior permission to use or threaten to use physical force or restraint, or threaten to inflict harm.
- (2) Permission is “explicit” under subsection (1) 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 of extent of force, restraint, or threats that are permitted; and
- (c) Stipulating the specific words or gestures that will withdraw the permission.

Permission given by gestures or other nonverbal conduct signaling assent is not “explicit” under subsection (1).

In summary: under Explicit Prior Permission, there must be an agreed-upon safe word or safe signal, which are specific words or gestures that withdraw the prior permission. There also needs to be a prior discussion and agreement if someone wants to mock-protest during roleplay and not have those protests stop the action. Participants also have to discuss what they will do together and the risks involved before receiving consent to those specific acts. The level of intensity also needs to be discussed and agreed to, for example, spanking with hands or a paddle, or specifying light taps that don’t leave a mark.

This is shown in Illustration #1 in the ALI’s Reporters Notes: “Before a date, the accused sends the complainant a text asking, ‘r u into BDSM?’ The complainant responds, ‘Maybe tonight?’” This would **not** be considered Explicit Prior Permission because the specific acts of force and restraint are not discussed and consented to before starting. In addition, there was no agreed-upon safe word to stop what is happening at any time.

Therefore, adopting Explicit Prior Permission would address the problematic “rough sex” defense, wherein currently an accused person can sometimes successfully argue that they obtained blanket consent for a wide range of behaviors that could cause serious physical injury, including choking (strangulation), punching, and slapping simply by asking “Are you into rough sex?” and being told “yes.” Adopting Section 213.10 would make clear that in a variety of situations in which a person might have agreed vaguely to “rough sex,” the affirmative defense of Explicit Prior Permission would not apply:

- (3) The defense provided by this Section is unavailable when:
  - (a) the act of sexual penetration, oral sex or sexual contact occurs after the explicit permission was withdrawn, and the actor is aware of, yet recklessly disregards, the risk that the permission was withdrawn;
  - (b) the actor relies on permission to use force or restraint or ignore the absence of consent when the other party will be unconscious, asleep, or otherwise unable to withdraw permission;
  - (c) the actor engages in conduct that causes or risks serious bodily injury and in doing so is aware of, yet recklessly disregards, the risk of such injury; or
  - (d) at the time explicit permission is given, the other party is, and the actor is aware of, yet recklessly disregards, the risk that the other party is:

- i. younger than 18;
- ii. giving permission while subjugated to physical force or restraint;
- iii. giving permission because of the use of or threat to use physical force or restraint or extortion if that party does not give the permission;
- iv. lacking substantial capacity to appraise or control his or her conduct due to intoxication, whether voluntary or involuntary, and regardless of the identity of the person who administered the intoxicants;
- v. incapacitated, vulnerable or legally restricted;
- vi. subjected to prohibited deception;
- vii. subject to trafficking.

## How Explicit Prior Permission Would Change Illinois Law

Illinois has an extensive consent definition, including requirements of affirmative consent throughout a sexual situation. While the established definition is appropriate, adopting Explicit Prior Permission would assist law enforcement in determining whether ongoing, affirmative consent was obtained for the erotic use of force or restraint, or threat of force and restraint. It would also define exceptions to this definition, such as disallowing risk of serious physical injury or engaging in the erotic use of force or restraint with someone under 18.

Because Section 213.10 was drafted as part of the section of the Model Penal Code on sexual assault, by its terms it only applies to incidences which involve “sexual penetration, oral sex, or sexual contact.” However, the problems which gave rise to Section 213.10 also apply to some charges of assault, not just sexual assault, and Illinois can and should adopt the explicit prior permission standard for assault, as well.

For example, Illinois law does not recognize consent to assault, nor does it accept dismissals of assault based on mutual party agreement. If adopted, the Explicit Prior Permission criteria could be used to determine whether affirmative, ongoing consent has been obtained for the erotic use of force and restraint in cases that don’t include sexual contact and don’t result in serious physical injury.

In regards to Illinois Section 12-3.3, the adoption of Explicit Prior Permission would clarify that strangulation/choking is not allowed during erotic activities.

## Recommendations

The NCSF is advocating for Illinois to adopt the substance of Model Penal Code Section 213:10, Affirmative Defense of Explicit Prior Permission, into the state's laws of assault and sexual assault. This will allow those who engage in alternative sexual expression to follow the legal framework of Explicit Prior Permission and avoid the risk of criminal charges, while helping police and prosecutors to distinguish and focus on truly non-consensual acts.

## For Further Reading

### [Consent and BDSM: The State of the Law](#)

#### [Article 213.10. Affirmative Defense of Explicit Prior Permission](#)

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<sup>i</sup> Alternative Sexual Expression (alt-sex) includes a variety of behaviors between consenting adults, including power exchange, BDSM, fetishes, and polyamory to name a few.

<sup>ii</sup> Herbenick, D., Bowling, J., Fu, T. J., Dodge, B., Guerra-Reyes, L., & Sanders, S. (2017). Sexual diversity in the United States: Results from a nationally representative probability sample of adult women and men. *PloS one*, 12(7), e0181198. <https://pubmed.ncbi.nlm.nih.gov/28727762/>

<sup>iii</sup> Hiselman, J. (2016 March 7). An Examination of Illinois Sexual Violence Victims. ICJIA. <https://icjia.illinois.gov/researchhub/articles/an-examination-of-illinois-sexual-violence-victims>

<sup>iv</sup> Illinois Coalition Against Sexual Assault (2020). Adult Victims of Sexual Assault. <https://icasa.org/uploads/documents/Stats-and-Facts/adult-victims-of-sexual-assault-2020.pdf>

<sup>v</sup> Wright, S., Bowling, J., McCabe, S., Benson, J. K., Stambaugh, R., & Cramer, R. J. (2022). Sexual Violence and Nonconsensual Experiences Among Alt-Sex Communities' Members. *Journal of interpersonal violence*, 8862605211062999. Advance online publication.

<https://doi.org/10.1177/08862605211062999>

<sup>vi</sup> *People v. Ford* 2015 Ill. App. (3d) 130810. <https://casetext.com/case/people-v-ford-518>

<sup>vii</sup> Bramlett, H. M., & Dietrich, W. D. (2004). Pathophysiology of cerebral ischemia and brain trauma: similarities and differences. *Journal of Cerebral Blood Flow & Metabolism*, 24(2), 133–150.

<sup>viii</sup> Herbenick, D., Fu, T. C., Kawata, K., Eastman-Mueller, H., Guerra-Reyes, L., Rosenberg, M., & Valdivia, D. S. (2022). Non-Fatal Strangulation/Choking During Sex and Its Associations with Mental Health: Findings from an Undergraduate Probability Survey. *Journal of sex & marital therapy*, 48(3), 238–250. <https://doi.org/10.1080/0092623X.2021.198502>

<sup>ix</sup> American Law Institute. (2022). Model penal code on sexual assault : Tentative Draft No. 5. and explanatory notes : Section 213.10. Affirmative Defense of Explicit Prior Permission was adopted at the 2021 annual meeting of the American Law Institute at Washington, D.C., June, 2021. Philadelphia, Pa. :The Institute, 462-480.

<sup>x</sup> Bergelson, Vera, '7 Consent to Harm', in Franklin Miller, and Alan Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (New York, 2009; online edn, Oxford Academic, 1 Feb. 2010).

<https://doi.org/10.1093/acprof:oso/9780195335149.003.0007>

<sup>xi</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).