



Creating Assault & Sexual Assault Policies that Protect All California Citizens:

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

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Executive Summary

Currently, California law is missing a definition of affirmative consent for adults who engage in force or restraint during erotic power exchange and roleplay. This has led to two public health issues that need to be addressed:

- 1) **The criminalization of common, consensual erotic behaviors.** Outdated U.S. case law has established, based on moral objections, that consent is not a defense to the use of force or restraint in an erotic context, including for mild non-injurious activities. Under California case law, consent is also not a defense to battery. This criminalization causes discrimination and stigmatization, which can lead to mental health issues and barriers to services for many California citizens.¹
- 2) **Sexual assault and assault are not prosecuted in this context.** Currently, law enforcement and prosecutors ignore this case law, and assume that someone who is injured or sexually violated during the use of erotic force or restraint “must have asked for it.”² California needs a clear legal framework that differentiates consensual, non-injurious erotic activities from abuse and violence, so that reports of sexual assault and assault can be addressed.

Introduction

The American Law Institute grappled with these issues for six years and recently approved Section 213.10 of the Model Penal Code on Sexual Assault: “Affirmative Defense of Explicit Prior Permission.”³ Explicit Prior Permission requires that everyone involved is informed of the risks and freely agrees to specific acts and the intensity before engaging in erotic force or restraint. Also, there must be a way to stop at any time, and participants must be over 18 and of sound mind. Explicit Prior Permission prohibits serious physical injury, including permanent marks and impairment, or the risk of a life-threatening injury.

Adopting “Explicit Prior Permission” as State law would help protect and educate millions of citizens. A cross-sectional survey found that 20-30% of adults in the U.S. have engaged in roleplay, power exchange, and/or restraint in an erotic context.⁴ However, only a fraction of these adults have received education about consent, with less than 4% of adults having taken an educational workshop on sex, and 4% attending an erotic event where they could learn about consent from other adults.

Adopting Explicit Prior Permission would also reduce harm by providing a framework to prosecute nonconsensual acts. The National Coalition for Sexual Freedom (NCSF) recently surveyed nearly 3,000 adults and found that 15% reported they had been sexually assaulted during erotic roleplay or power exchange, while 12% said they had been assaulted (i.e., slapped, punched, choked) during erotic activities.⁵ However due to the criminalization of erotic force and restraint as well as the attitudes of law enforcement, less than 4% of the respondents reported it to the police, even though 4% said they had been injured when they were assaulted.

In California, more than 86% of women and 53% of men have reported experiencing some form of sexual harassment and/or assault in their lifetime. These reports are higher than the national average of 81% of women and 43% of men reporting some form of sexual harassment and/or assault in their lifetime.⁶

Therefore, it is essential for the California State Assembly to take advantage of this development by the American Law Institute, and adopt the provisions of Section 213:10 of the Model Penal Code on Sexual Assault into State law.

Current California Law

Under California law, affirmative consent is the standard. An individual who is consenting to an act must give that consent freely, voluntarily, and with the knowledge of the act or transaction involved. California Civil Code, Section 1565-1590 states:

(1565) The consent of the parties to a contract must be:

- (a) Free;
 - (b) Mutual; and
 - (c) Communicated by each to the other
- (1566) A consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties
- (1567) An apparent consent is not real or free when obtained through:
- (a) Duress;
 - (b) Menace;
 - (c) Fraud;
 - (d) Undue influence; or,
 - (e) Mistake
- (1580) Consent is not mutual, unless the parties all agree upon the same thing in the same sense.

In 2014, Senate Bill No. 967, nicknamed the “Yes Means Yes” law, was passed, declaring that for educational institutes to receive state funds for student financial assistance, they shall adopt a policy that includes the following:

1. An affirmative consent standard in the determination of whether consent was given by both parties to sexual activity. “Affirmative consent” means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent (California Senate Bill No. 967, Chapter 748, Section 67386).

California law states:

- Penal Code § 261.6 PC
 - (a) In prosecutions under Section 261, 286, 287, or 289, or former Section 262 or 288a, in which consent is at issue, “consent” means positive cooperation in act or attitude pursuant to an exercise of free will. **The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.**
 - (b) A current or previous dating or marital relationship is not sufficient to constitute consent if consent is at issue in a prosecution under Section 261, 286, 287, or 289, or former Section 262 or 288a.
 - (c) This section shall not affect the admissibility of evidence or the burden of proof on the issue of consent.

In regard to California assault and battery case law (People v. Samuels 250 Cal.App.2d 501 (Cal. Ct. App. 1967)), a victim's consent is **“not generally a defense to assault or battery”** because, according to the judges, “it is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force to produce bodily injury.” Consent is only permitted for minor force involved in ordinary physical contact or blows in sports.⁷ Essentially, the court ruled that consent to erotic play is not permitted because a person who consents to this does not encompass full mental capacity, making the consent null.

The Assault laws in California recognize a mutual combat defense, which says that if two people cause bodily harm to one another, prosecution is not likely. While the mutual combat law is applicable for physical assault cases among two adults, there is no mention of mutual combat as a defense for cases involving sexual activity, therefore criminalizing even minor forms of erotic force and restraint. While California 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:

- Penal Code § 240 – Assault.
 - § An unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.
- Penal Code § 242 – Battery.
 - § Any willful and unlawful use of force or violence upon the person of another.

There is no clarification in California law that strangulation/choking is illegal during erotic activities:

- Penal Code § 273.5 – Willful Infliction of Corporal Injury
 - Any person who willfully inflicts corporal injury resulting in a traumatic condition upon a victim
 - As used in this section, “traumatic condition” means a condition of the body, such as a wound, or external or internal injury, including, but not limited to, injury as a result of strangulation or suffocation, whether of a minor or serious nature, caused by a physical force.
 - For the purposes of this section, “strangulation” and “suffocation” include impeding the normal breathing or circulation of the blood of a person by applying pressure on the throat or neck.

It's important to clarify in State law that consent is not a defense to choking during erotic activities due to the risk of serious physical injury. Erotic choking has become a serious public health issue, with 52.4% of the college-age students having been choked at least once during sex according to a recent study.⁸ Nearly 1 in 3 of the students who had ever been choked said that partners had only sometimes asked for consent or if it was okay; while 20.9% reported that they had never been asked for consent or if it was okay, that their partner(s) had just choked them.⁹ Many people are also unaware of the serious mental health and health risks that can result from being choked, including the risk of death, which is why State law should specifically address this issue.¹⁰

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 2021.¹¹

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.”¹²

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."¹³

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 California Law

California 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 California can and should adopt the explicit prior permission standard for assault, as well.

For example, California 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.

Regarding California Penal Code § 273.5, the adoption of Explicit Prior Permission would clarify that strangulation/choking is not allowed during erotic activities.

Recommendations

The NCSF is advocating for California 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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² 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, p. 479.

³ 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.

⁴ 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/>

⁵ 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. <https://doi.org/10.1177/08862605211062999>

⁶ Johns, N.E., Raj, A., Lee, D.S., & Kearl, H. (May 2019). Measuring #MeToo in California: A Statewide Assessment of Sexual Harassment and Assault. [cametooreport.pdf\(ucsd.edu\)](https://cametooreport.pdf(ucsd.edu))

⁷ *People v. Samuels*: 250 Cal.App.2s 501 (Cal Ct. App. 1967).

<https://law.justia.com/cases/california/court-of-appeal/2d/250/501.html>

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⁹ Herbenick D, Patterson C, Beckmeyer J, Gonzalez YRR, Luetke M, Guerra-Reyes L, Eastman-Mueller H, Valdivia DS, Rosenberg M. (2021) Diverse Sexual Behaviors in Undergraduate Students: Findings From a Campus Probability Survey. *J Sex Med*. 2021 Jun;18(6):1024-1041. doi: 10.1016/j.jsxm.2021.03.006.

¹⁰ 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.

¹¹ 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.

¹² 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>

¹³ *Lawrence v. Texas*, 539 U.S. 558 (2003).