



**Creating Assault & Sexual Assault Policies that Protect
All Minnesota Citizens:
Adopting the New Model Penal Code Section 213.10,
Affirmative Defense of Explicit Prior Permission**

Contents

Executive Summary..... 1
Introduction 2
Current Minnesota Law 2
Model Penal Code Section 213.10, Affirmative Defense of Explicit Prior Permission..... 6
How Explicit Prior Permission Would Change Minnesota Law 8
Recommendations..... 8

Executive Summary

Currently, Minnesota 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- 1) **The criminalization of common, consensual erotic behaviors.** Outdated U.S. case law has established, based on moral objections, that consent is not a defense to the use of force or restraint in an erotic context, including for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. This criminalization causes discrimination and stigmatization, which can lead to mental health issues and barriers to services for many Minnesota 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 Minnesota 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 Minnesota 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 Minnesota, sexual assault is public health issue. The Minnesota Department of Public Safety Bureau of Criminal Apprehension (BCA) reported in the 2021 Uniform Crime Report that there was a 21.6% increase in violent crime in 2021.⁶ There were 10,967 aggravated assaults in 2021, which is 33.7 percent higher than 2020. In addition, the number of rapes increased in 2021, with 71 percent of rapes occurring in a home.

Therefore, it is essential for the Minnesota Legislature 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 Minnesota law.

Current Minnesota Law

Minnesota has five degrees of assault which vary depending on the resulting level of bodily harm, who the force is applied against, and whether a dangerous weapon is used. The

standard for fifth- and fourth-degree assault is “bodily harm”, the standard for third- and second-degree assault is “substantial bodily harm”, and the standard for first-degree assault is “great bodily harm.” “Bodily harm” means physical pain or injury, illness, or any impairment of physical condition. “Substantial bodily harm” means an injury that involves a “temporary but substantial disfigurement” or causes a “temporary but substantial loss or impairment of the function of any bodily member or organ” or a “fracture of any bodily member.” “Great bodily harm” means injury which “creates a high probability of death,” or causes “serious permanent disfigurement,” or a “permanent or protracted loss or impairment of the function of any bodily member or organ” or “other serious bodily harm.”

In general, assault is defined under Minn. Stat. § 609.02, subd. 10 as “(1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another.” These are two distinct forms of assault and are referred to as assault-fear and assault-harm, respectively. The separate crime of battery has been eliminated by incorporation into the definition of assault.

Assault fear is “an act done with intent to cause fear in another of immediate bodily harm or death.” It is a **specific-intent** crime which “requires an intent to cause a particular result.”⁷

Assault-harm is “the intentional infliction of or attempt to inflict bodily harm upon another.” In the case of assault-harm, “[t]he forbidden conduct is a physical act, which results in bodily harm upon another.” It is a **general-intent** crime, meaning that nothing in the definition requires proof that the defendant meant to violate the law or cause a particular result.⁸ All that is needed is for a defendant to intend the act that makes their conduct a battery; in other words, they must intentionally apply force to another person.⁹ The court didn't really deal with the consent issue in this case; it was more about establishing that assault-harm is a general-intent crime.

In both assault-fear and assault-harm cases, “a defendant must voluntarily do an act or voluntarily fail to perform an act.”¹⁰ The volitional requirement is “generally expressed in terms of an exercise of the will...[a] reflex movement is not subject to the control of the will.” Similarly, an act resulting from a person's faultless inability to comply with the law is ordinarily not criminally punishable, because the act is not a result of the actor's will.

In a case involving “mutual combat”, the Minnesota Court of Appeals held that consent to combat is not a defense to assault.¹¹ Further, in another assault case, the Minnesota Supreme Court held that “acquiescence and subsequent refusal to engage in promiscuous conduct is [not a] legal justification or excuse for an assault with intent to inflict grievous bodily harm.”¹²

Domestic assault has the same definition as assault except that the assault is directed against a family member or household member as defined under Minn. Stat. § 518B.01, subd. 2.

Minnesota has a separate offense for domestic assault by strangulation under Minn. Stat. § 609.2247. “Strangulation” is defined as “intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person.”

It’s important to clarify in Minnesota 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.¹³ 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.¹⁴ 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 Minnesota law should specifically address this issue.¹⁵

Current Minnesota Law – Criminal sexual conduct

Minnesota breaks down criminal sexual conduct (CSC) crimes into five degrees based on the degree of force or injury a victim sustains and the distinction between sexual penetration and sexual conduct.¹⁶ Sexual contact and sexual penetration are both considered sexual conduct under Minnesota law. Sexual contact is defined as intentional touching of a victim's intimate parts. Sexual penetration includes sexual intercourse or other acts where the intrusion, however slight, of a body part or object into the genital or anal openings.

Within the context of CSC laws, “consent” is defined as “words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor.” The statute goes on to say that “[c]onsent does not mean the existence of a prior or current relationship between the actor and the complainant or that the complainant failed to resist a particular sexual act.” Further, a person who is “mentally incapacitated or physically helpless as defined by this section cannot consent to a sexual act.” Finally, “[c]orroboration of the victim’s testimony is not required to show lack of consent.”

Fifth-degree CSC is the base CSC offense and does not require additional elements aside from nonconsensual sexual contact. Fourth-degree CSC adds to nonconsensual contact the additional element of force or coercion. “Force” means either “(1) the infliction by the actor of bodily harm; or (2) the attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the complainant or another,

which causes the complainant to reasonably believe that the actor has the present ability to execute the threat.”

Third-degree CSC prohibits sexual penetration by force or coercion and prohibits sexual penetration when the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless. “Physically helpless” means that a person is “(a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate non-consent and the condition is known or reasonably should have been known to the actor.”

Second- and first-degree CSC prohibit sexual contact or penetration, respectively, by force or coercion, resulting in personal injury. “Personal injury” is defined as “bodily harm as defined in section 609.02, subdivision 7, or severe mental anguish or pregnancy.” “Bodily harm” means physical pain or injury, illness, or any impairment of physical condition. The injuries need not necessarily be coincidental with actual sexual penetration, they need only be sufficiently related to the act to constitute “personal injury”.¹⁷ If the victim testifies, they felt a “minimal amount of physical pain or injury” the personal injury element is satisfied.¹⁸

Relevant Minnesota Statutes

- A. General Principles
 - a. Minn. Stat. § 609.02 “Definitions”
 - b. Minn. Stat. § 609.06 “Authorized use of force”
- B. Crimes Against the Person
 - a. Minn. Stat. § 609.221 “Assault in the first degree”
 - b. Minn. Stat. § 609.222 “Assault in the second degree”
 - c. Minn. Stat. § 609.223 “Assault in the third degree”
 - d. Minn. Stat. § 609.2231 “Assault in the fourth degree”
 - e. Minn. Stat. § 609.224 “Assault in the fifth degree”
 - f. Minn. Stat. § 609.2242 “Domestic assault”
 - g. Minn. Stat. § 609.2247 “Domestic assault by strangulation”
- C. Sex Crimes
 - a. Minn. Stat. § 609.325 “Defenses”
 - b. Minn. Stat. § 609.326 “Evidence”
 - c. Minn. Stat. § 609.341 “Definitions”
 - d. Minn. Stat. § 609.342 “Criminal Sexual Conduct in the First Degree”
 - e. Minn. Stat. § 609.343 “Criminal Sexual Conduct in the Second Degree”
 - f. Minn. Stat. § 609.344 “Criminal Sexual Conduct in the Third Degree”
 - g. Minn. Stat. § 609.345 “Criminal Sexual Conduct in the Fourth Degree”
 - h. Minn. Stat. § 609.3451 “Criminal Sexual Conduct in the Fifth Degree”

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 2021.¹⁹

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.”²⁰

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.”²¹

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 Minnesota Law

While Minnesota has a consent law that requires consent to be “freely given,” the definition is broad and says little about affirmative consent. 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 Minnesota can and should adopt the explicit prior permission standard for use of erotic force or restraint in assault law, as well.

For example, Minnesota 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 Minnesota § 609.2247, the adoption of Explicit Prior Permission would clarify that strangulation/choking is not allowed during erotic activities.

Recommendations

The NCSF is advocating for Minnesota 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](#)

¹ Meyer, I. H. (2003). Prejudice, social stress, and mental health in lesbian, gay, and bisexual populations: Conceptual issues and research evidence. *Psychological Bulletin*, 129(5), 674–697.

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 The Minnesota Department of Public Safety Bureau of Criminal Apprehension (BCA) (2021). 2021 Uniform Crime Report, <https://dps.mn.gov/divisions/bca/bca-divisions/mnjis/Documents/2021-Minnesota-Uniform-Crime-Report.pdf>

⁷ *State v. Fleck*, 810 N.W.2d 303, 308 (Minn. 2012). (emphasis added)

-
- ⁸ Fleck at 309 (emphasis added)
- ⁹ *State v. Dorn*, 887 N.W.2d 826, 831 (Minn. 2016) (emphasis added)
- ¹⁰ Fleck at 308 quoting 9 Henry W. McCar & Jack S. Nordby, *Minnesota Practice—Criminal Law and Procedure* § 44.5 (3d ed.2001)
- ¹¹ *State v. Peek*, A04-1535, 2005 WL 2495773 (Minn. App. Oct 11, 2005)
- ¹² *State v. Russell*, 138 N.W.2d 690 (Minn. 1965)
- ¹³ 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>
- ¹⁴ 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.
- ¹⁵ 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.
- ¹⁶ Nate Summers, *From Common Law to Affirmative Consent: Reforming Minnesota’s Criminal Sexual Conduct Laws*, 47 *Mitchell Hamline L. Rev.* 1 (2021)
- ¹⁷ *State v. Sollman*, 401 N.W.2d 634, 636 (1987)
- ¹⁸ *State v. Jarvis*, 665 N.W.2d 518, 522 (Minn. 2003)
- ¹⁹ 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.
- ²⁰ 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>
- ²¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).