



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

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Executive Summary

Currently, Texas 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- 1) **The criminalization of common, consensual erotic behaviors.** Outdated U.S. case law has established, based on moral objections, that consent is not a defense to the use of force or restraint in an erotic context, including for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 Texas 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 Texas 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 Texas 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 Texas, sexual assault and assault with injury are public health issues. In 2022, there were 727 convictions for Aggravated Assault that caused serious bodily injury, 76 convictions of Aggravated Sexual Assault, 407 convictions for Sexual Assault.⁶ However, the Texas Department of Public Safety also states that 1 in 3 Texans will experience domestic violence in their lifetime.⁷

Therefore, it is essential for the Texas 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 Texas law.

Current Texas Law

Texas law does allow for a consent defense to assault if there is a “reasonable belief” that the victim consented to the conduct and the conduct did not threaten or inflict

serious bodily injury. However, the definition of “bodily injury” under the Texas Penal Code is physical pain, illness, or any impairment of physical condition from a visible or non-visible injury, **no matter how slight**:

Sec. 22.06. CONSENT AS DEFENSE TO ASSAULTIVE CONDUCT.

- (a) The victim's effective consent or the actor's reasonable belief that the victim consented to the actor's conduct is a defense to prosecution under Section 22.01 (Assault), 22.02 (Aggravated Assault), or 22.05 (Deadly Conduct) if:
 - (1) the conduct did not threaten or inflict serious bodily injury;

Further, the statute does not require explicit consent: a reasonable belief that someone consented is sufficient. However, there is no definition of how consent can be established in Court as to whether someone consented to erotic use of force or restraint.

In addition, Sec. 22.01. ASSAULT states that any “bodily injury” constitutes assault. If the physical contact caused pain, that could be considered bodily injury, which is a Class A misdemeanor punishable by up to one year in jail:

- (a) A person commits an offense if the person:
 - (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
 - (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
 - (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

Sec. 22.02. AGGRAVATED ASSAULT is a second degree felony punishable by 2-20 years in prison if you threaten someone with a “deadly weapon” which could include whips or even hands. No bodily injury is required, a threat suffices:

- (a) A person commits an offense if the person commits assault as defined in Sec. 22.01 and the person:
 - (1) causes serious bodily injury to another, including the person's spouse; or
 - (2) uses or exhibits a deadly weapon during the commission of the assault.

Texas Penal Code Sec. 22.011. SEXUAL ASSAULT defines what is lack of consent in the context of sexual assault, however there is no way to evaluate whether consent has been given for the use of physical force in conjunction with sexual activity:

- (b) A sexual assault under Subsection (a)(1) is without the consent of the other person if:
 - (1) the actor compels the other person to submit or participate by the use of physical force, violence, or coercion;

(2) the actor compels the other person to submit or participate by threatening to use force or violence against the other person or to cause harm to the other person, and the other person believes that the actor has the present ability to execute the threat;

Under Texas law, strangulation is restricted under Sec. 22.01. ASSAULT Subsection (a)(1) and is considered to be a felony in the second degree if:

(1) the offense is committed against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code;

(2) it is shown on the trial of the offense that the defendant has been previously convicted of an offense that was committed:

(A) against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code; and

(B) under:

(i) this chapter, Chapter 19, or Section 20.03, 20.04, 21.11, or 25.11;

(ii) Section 25.07, if the applicable violation was based on the commission of family violence as described by Subsection (a)(1) of that section; or

(iii) Section 25.072, if any of the applicable violations were based on the commission of family violence as described by Section 25.07(a)(1); and

(3) the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth.

Therefore, it is important to clarify in Texas 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 Texas 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 Texas Law

Texas allows for consent to activities that don't cause or threaten to cause bodily injury, however the definition of bodily injury includes nonvisible injuries, and there is no definition of how consent can be established and maintained throughout an erotic situation. 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 (defined as permanent disfiguring marks, impairment of a limb or organ, causing a risk of death) as well as disallowing 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 Texas can and should adopt the explicit prior permission standard for assault, as well. 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 Texas Section 22.01, the adoption of Explicit Prior Permission would clarify that strangulation/choking is not allowed during erotic activities, even if there is consent and no injury is caused.

Recommendations

The NCSF is advocating for Texas 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 "Crime Records Reports and Statistical Information," Texas Department of Public Safety (TDPS), 2022.

⁷ "Crime in Texas," Family Violence, Texas Department of Public Safety (TDPS), 2017.

⁸ 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>

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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).