

SECTION 213.10. AFFIRMATIVE DEFENSE OF EXPLICIT PRIOR PERMISSION

(1) Except as provided in subsection (3), it is an affirmative defense to a charge under this Article that the actor reasonably believed that, in connection with the charged act of sexual penetration, oral sex, or sexual contact, the other party personally gave the actor explicit prior permission to use or threaten to use physical force or restraint, or to inflict or threaten to inflict any harm otherwise proscribed by Sections 213.1, 213.2, 213.4, 213.7, or 213.9, or to ignore the absence of consent otherwise proscribed by Section 213.6.

(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 and 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).

(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(a) the act of sexual penetration, oral sex, or sexual contact occurs after the explicit permission was withdrawn, and the actor is aware of, yet recklessly disregards, the risk that the permission was withdrawn;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 at a time when the other party will be unconscious, asleep, or otherwise unable to withdraw that permission;

(c) the actor engages in conduct that causes or risks serious bodily injury and in so doing 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 that permission while subjected to physical force or restraint;

(iii) giving that permission because of the use of or threat to use physical force or restraint, or extortion as defined by Section 213.4, if that party does not give the permission;

(iv) lacking substantial capacity to appraise or control his or her conduct as a result of intoxication, whether voluntary or involuntary, and regardless of the identity of the person who administered the intoxicants;

(v) incapacitated, vulnerable, or legally restricted, as defined by Section 213.3;

(vi) subject to prohibited deception, as defined by Section 213.5; or

(vii) subject to trafficking, as defined by Section 213.9(1).

Comment:

1. General Considerations. Although the use of physical force to compel sexual submission is ordinarily and properly a serious felony, the parties to a sexual encounter sometimes agree to participate in sadomasochistic practices (colloquially referred to as BDSM¹) in which one of them, even in disregard of apparent protests, subjects the other to physical force, threats, or restraint, expecting that the encounter will prove sexually arousing for one or both of them. If an encounter does not involve sexual penetration, oral sex, or sexual contact as defined in Section 213.0(2), it is outside the scope of Article 213, even when the parties' motivation is sexual.² These encounters nonetheless may constitute an offense of simple or aggravated assault under the 1962 Code, which permits a defense of consent to an assault under specified circumstances.³

If the parties' encounter includes sexual penetration, oral sex, or sexual contact, the actor could face liability under one or more provisions of Article 213. For example, if the actor's

¹ The term is an acronym for practices involving "bondage, discipline (or domination), sadism (or submission), and masochism." See Oxford English Dictionary (Draft Additions, June 2013), available at <http://www.oed.com/view/Entry/14168#eid289098363>.

² The touching of non-intimate areas (except when involving ejaculate) does not constitute "sexual contact" under Article 213, even when done for purposes of sexual arousal or gratification. See Section 213.0(2)(c).

³ 1962 Code Section 211.1 (defining the offenses of simple and aggravated assault); 1962 Code Section 2.11(2)(a) (providing that consent can be a defense to a charge such as assault when "the bodily harm consented to or threatened by the conduct consented to is not serious.").

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1 knowing use of physical force, restraint, or extortionate threats was the but-for and proximate
2 cause of the other party's submission, liability could, absent special provisions, be based on
3 Sections 213.1, 213.2, or 213.4 (penetration and oral sex), or on Section 213.7(1)(b)(i) and
4 (2)(c)(iii) (sexual contact). If the actor, even without using physical force, restraint, or
5 extortionate threats, knowingly or with reckless disregard for the risk that the other person did
6 not consent, engaged in the sexual penetration or oral sex over the other person's express
7 protests, liability could, absent special provisions, be based on Section 213.6(1), because that
8 Section imposes liability for sexual acts in the absence of consent, and Section 213.0(2)(e)(v)
9 provides that the absence of consent is established—and that previously given consent may be
10 withdrawn at any time—by behavior indicating protest or unwillingness.

11 To avoid criminal liability for a sexual offense when competent adults desire and freely
12 agree to participate in this kind of encounter, Section 213.10 provides a defense of “explicit prior
13 permission.” This defense does not supplant the separate defenses that (1) the prosecution has
14 failed to prove the absence of effective consent by the other party, or (2) that the defendant
15 lacked the necessary mental state with respect to the absence of effective consent. And even
16 when a sexual-offense provision (such as Sections 213.1, 213.2, 213.3, 213.4, 213.5, or 213.7)
17 states that effective consent is absent as a matter of law when specified circumstances caused the
18 other person to submit to or perform the sexual act, the defendant may argue that the prosecution
19 has failed to prove (3) the required causation, or (4) the required mental state with respect to
20 causation. These consent-related defenses remain available even when the strict requirements for
21 the defense of “explicit prior permission” are not met.

22 “Consent” under Section 213.0(2)(e)(i) is defined as a person's subjective willingness,
23 which may be express or may be inferred from behavior in the context of all the circumstances; it
24 does not require explicit affirmative permission. Section 213.0(2)(e) therefore makes clear that
25 “consent” may exist in the absence of affirmative permission for sexual acts. But the “explicit
26 prior permission” defense is available in several situations where the prosecution can prove the
27 absence of effective consent as defined in Article 213. For example:

28 (a) An actor using or threatening physical force or restraint could not successfully
29 challenge the prosecution's proof of the absence of consent (or argue a mistaken belief in the
30 other person's consent), because under Section 213.0(2)(e)(iv) as well as Sections 213.1, 213.2,
31 and 213.7(1), consent is ineffective when given because of the use or threat of physical force or

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1 restraint.⁴ The defense of “explicit prior permission” might nonetheless be available. An actor
2 who satisfies the conditions in Section 213.10 is permitted to use physical force or restraint, even
3 though causally relevant physical force or restraint makes consent ineffective, so long as the
4 actor obtains explicit permission for that use of force or restraint from the other person in
5 advance, and adheres to the previously agreed-on limits for the encounter, including the agreed
6 limits on the kind and degree of physical force or restraint and the words or signals that require
7 the actor to stop.

8 (b) An actor who engaged in sexual acts over the other person’s express protests could
9 not successfully argue that the prosecution had failed to prove the absence of consent (or the
10 required mental state as to the absence of consent), even when the actor had the other person’s
11 express permission to ignore those protests. That is because under Section 213.0(2)(e)(v),
12 consent can be withdrawn at any time and is absent when a person participating in a sexual act
13 clearly tells the actor “no” or “stop.”⁵ However, the defense of “explicit prior permission” might
14 nonetheless be available: An actor who satisfies the conditions specified in Section 213.10 is
15 permitted to ignore words of protest that otherwise suffice to withhold or withdraw consent, so
16 long as the actor adheres to the previously agreed boundaries for the encounter, including the
17 obligation to honor the pre-established “safe word” (such as “red” or “off”).

18 Although the defense of “explicit prior permission” is potentially available in these
19 situations, it is tightly circumscribed. “Consent” under Section 213.0(2)(e)(i) does not require an
20 affirmative expression of willingness, but using physical force, restraint, or extortionate threats
21 against another person presents a different situation demanding exceptional precautions. The
22 same is true of ignoring that person’s explicit protests. An actor who believes the other party is
23 willing to submit to an uncoerced sexual act, and who is not aware of a substantial risk to the
24 contrary, ordinarily cannot be criminally liable under Section 213.6 or Section 213.7 on the basis
25 of the sexual act alone, because the actor’s belief in the other person’s consent to the uncoerced
26 sexual act is a defense.

⁴ See Section 213.0(2)(e)(iv) (“consent is ineffective when given ... under circumstances precluding the free exercise of consent, as provided in Sections 213.1, 213.2 [and] 213.7....”).

⁵ See Section 213.0(2)(e)(v) (“Consent may be revoked or withdrawn any time before or during the act of sexual penetration, oral sex, 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....”).

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1 In contrast, when an actor knowingly or recklessly ignores explicit protests, or knowingly
2 or recklessly uses physical force, restraint, or extortionate threats to cause another person to
3 submit to or perform sexual acts, the actor cannot avoid liability simply by claiming that the
4 actor thought the other party might find “rough sex” appealing. Indeed, defense efforts to present
5 a “rough-sex” defense, apparently an increasingly common tactic, can present an unjustified and
6 sometimes insurmountable obstacle to conviction even when inexcusable violence and sexual
7 overreaching is clear.⁶ And this is especially true when, as Article 213 properly requires,
8 conviction requires proof beyond a reasonable doubt that the defendant knew or was aware of,
9 yet recklessly disregarded, a substantial and unjustified risk that effective consent was absent.
10 Accordingly, Section 213.0(2)(e)(iv) and Sections 213.1, 213.2, 213.4, and 213.7 expressly
11 stipulate that effective consent is absent as a matter of law when physical force or restraint or
12 extortionate threats cause the other person to submit to or perform sexual acts.

13 Those who most strongly support the right to engage in “BDSM” practices emphatically
14 stress the need for explicit, fully informed permission for any acts that “significantly restrict[.] a
15 person’s ability to move freely,” or portend “physical harm, pain, or discomfort.”⁷ Consistent
16 with these principles, Section 213.10 requires that an actor who knowingly or recklessly ignores
17 explicit protests or deploys physical force, restraint, or extortionate threats must take special care
18 to ensure that the other party is in fact willing to be treated in that fashion.

19 2. *Permission Must be Explicit.* Under Section 213.10, permission to use physical force,
20 restraint, or extortionate threats in connection with sexual activity cannot be established by
21 inferences from body language or other nonverbal behavior that might suffice to indicate
22 “consent” in the absence of such coercive circumstances.⁸ Physical force and other coercive
23 measures cannot be authorized under Section 213.10 merely by a nod or a shrug, much less by a
24 person’s silence in the face of actual or threatened violence. Nor can permission be considered

⁶ See discussion in Comment 3 to Section 213.1 and Comment 7 to Section 213.2, *supra*.

⁷ See National Coalition for Sexual Freedom, “Consent Counts Statement” and “Consent Counts Statement Summary,” available at https://ncsfreedom.org/key-programs-2/consent-counts/#Consent_Counts_Statement (visited July 17, 2020). See also text at note 35, *infra* (discussing Memorandum from Susan Wright, Director of NCSF Incident Reporting & Response Program, to Dick Cunningham, NCSF legal counsel, Sept. 13, 2018).

⁸ See Section 213.0(2)(e).

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sufficient under Section 213.10, even when given verbally, if the words used are vague, such as “I’m OK with BDSM.” To raise the defense of Explicit Prior Permission under Section 213.10, the other person must specify how far that permission extends. Someone expressing interest in BDSM generally might be willing to be paddled or to have verbal protests ignored but might not want to be tied down, kicked, or subjected to other physical force. Just as consent to an act of oral sex does not imply consent to sexual penetration or to other sexual acts,⁹ explicit permission for some BDSM practices does not imply permission for others. Similarly, a person who gives explicit permission to be slapped or tied down does not give permission to have this treatment continue indefinitely. And under Section 213.10, a person must always have the right to withdraw permission given earlier. If the parties have agreed that ordinary words of protest such as “no” or “stop” need not be taken literally, that permission is considered sufficiently specific only when it establishes some other method of withdrawing it, such as a safe word. Otherwise, sexual overreaching would be too readily enabled, with an unacceptable risk of de facto impunity for unwanted violence.¹⁰

Illustration:

1. Before a date, Accused sends Complainant a text asking, “r u into BDSM?” Complainant responds, “Maybe tonight?” When Complainant arrives at Accused’s apartment, Accused greets Complainant with a hard slap across the face and carries Complainant to the bedroom. Accused ties Complainant’s hands and feet to the bedposts, attaches clamps to Complainant’s nipples, and warns Complainant not to scream. Accused then penetrates Complainant while Complainant remains silent throughout.

Afterward, Complainant presses charges, and Accused is prosecuted for Sexual Assault by Physical Force or Restraint under Section 213.2. At trial, Complainant testifies that Complainant did not want to have sex with Accused but submitted without resisting because of fright and panic resulting from Accused’s unexpected behavior. Accused admits knowing that Complainant submitted because of that behavior but testifies to believing that Complainant found the physical force before and during

⁹ See Section 213.0(2)(e)(i) (“‘Consent’” for purposes of Article 213 means a person’s willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact.”).

¹⁰ See Comment 3 to Section 213.1 and Comment 7 to Section 213.2, *supra*.

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1 penetration sexually exciting, especially in light of Complainant's text message
2 expressing interest in BDSM. Accused requests an instruction that even if Accused knew
3 that Complainant submitted because of the physical force used, Accused is entitled to
4 acquittal unless the jury is persuaded beyond a reasonable doubt that Accused was aware
5 of, yet recklessly disregarded, the risk that Complainant was unwilling to submit to
6 sexual acts under these circumstances. Alternatively, Accused requests an instruction that
7 even if Accused knew that Complainant submitted because of the physical force used,
8 Accused is entitled to acquittal unless the jury is persuaded beyond a reasonable doubt
9 that Accused did not reasonably believe Complainant had given Accused permission to
10 use that force.

11 The judge may deny both the requested instructions. The first instruction seeks to
12 defeat the prosecution's evidence in support of the necessary element of awareness of the
13 lack of consent. But on these facts, Accused knew that Complainant had not given
14 effective consent because Section 213.2(3) provides that "consent is ineffective under
15 Section 213.0(2)(e)(iv) when other person submitted to ... sexual penetration ... [when]
16 the actor uses or explicitly or implicitly threatens to use physical force or restraint ...
17 [and] the actor's use of or threat to use physical force or restraint causes the other person to
18 submit to ...the act of sexual penetration" Section 213.2(3) then stipulates that an
19 attempted defense based on the alleged willingness of Complainant must satisfy the
20 requirements of Section 213.10.

21 The second instruction attempts to do just that by raising an affirmative defense of
22 "Explicit Prior Permission" under Section 213.10. Although Accused's testimony
23 supplies evidence that Accused reasonably believed that Complainant had given
24 permission for the force used, the defense is unavailable because that evidence does not
25 meet the additional requirements for explicit permission under Section 213.10(2).
26 Accused knew that Complainant's text message did not give Accused permission for the
27 specific acts of force and restraint used. Accused also knew that the parties had not
28 agreed on a specific word or gesture for Complainant to use to withdraw or end the
29 permission. Accused would be entitled to an instruction on the defense under Section
30 213.10 only if there was evidence to support all the required elements of Section 213.10,
31 including that Complainant had explicitly permitted the specific forms of physical force

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1 used and had explicitly identified the specific words or gestures that would withdraw or
2 terminate that permission.

3 *3. Permission Must be Given Personally.* Permission to use physical force or coercion in
4 connection with sexual activity cannot be established under Section 213.10 by reliance on third-
5 party assurances, which can too easily lend themselves to misunderstanding, misrepresentation,
6 or abuse. Section 213.10 requires the actor to obtain explicit permission in advance, directly
7 from the other individual. Only that individual's personal permission can provide confidence that
8 the supposed permission is genuine. An actor who intends to use force or ignore protests must
9 receive directly from the person concerned explicit permission to do so, as well as a clear
10 statement of the limits of that permission and the means of withdrawing it.

11 **Illustration:**

12 2.¹¹ M, a senior supervisor at a company, meets after work with three
13 subordinates, A, B, and C. M gives them the key to M's apartment and suggests that they
14 go there without M, surprise M's spouse CW, who will be at home, and have sex with
15 CW. M tells them that they should forcefully throw CW to the floor and that each of them
16 should penetrate CW while the others hold CW down. M assures the three that CW will
17 not mind this treatment because CW is "kinky" and can only get "turned on" in this way.
18 M does not tell the three co-workers that CW never expressed interest in such sexual
19 practices, or that CW is having an affair for which M wants to retaliate. A, B, and C go to
20 M's house, surprise CW, and throw CW to the floor. Each penetrates CW while the
21 others hold CW down. CW, who is shocked and frightened, squirms and struggles
22 physically while being held down but does not scream or tell them to stop. Afterward,
23 when A, B, and C are charged with rape, M confesses to having misled them.

24 At trial, CW testifies that although the sex was unwanted, CW submitted without
25 verbally protesting because of shock and fear. A, B, and C testify that they believed M's
26 story and thought that CW welcomed the sexual encounter despite CW's struggles. They
27 request an instruction that the prosecution must prove that they were aware of, yet
28 recklessly disregarded, a substantial and unjustified risk that CW was unwilling and that

¹¹ Based on the facts of *Regina v. Morgan*, [1976] A.C.182 (H.L.).

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the jury must acquit if it has a reasonable doubt in that regard. The judge may properly deny that instruction and instead tell the jury it can convict if it finds beyond a reasonable doubt that CW submitted to the acts of penetration because of the force and threats, and that A, B, and C were aware of, yet recklessly disregarded, a substantial and unjustified risk that CW had submitted for that reason. On these facts, A, B, and C violated Section 213.2 because they are aware of the facts that make CW's consent ineffective under Section 213.2(3), and they cannot invoke the Section 213.10 defense because there is no evidence that they believed (reasonably or otherwise) that CW had personally given them explicit permission for their use of force. The Section 213.10 defense therefore need not be submitted to the jury.

4. *Ineffective Permission.* Section 213.10(3) specifies several limits on a person's capacity to permit the use of physical force, restraint, or extortionate threats. Under subsection (3)(c), permission is ineffective when the actor is aware of, yet recklessly disregards, a substantial and unjustified risk that the acts contemplated will inflict or create a danger of inflicting death or serious bodily injury.¹² But this proviso does not preclude permission to threaten serious bodily harm, so long as the parties understand that the threat will not be carried out.

Illustration:

3. Tyler gives Blair permission to draw a gun that is in fact unloaded and to threaten Tyler with death unless Tyler submits to sexual penetration. A person who made this threat without prior permission would face prosecution for Sexual Assault by Aggravated Physical Force or Restraint under Section 213.1. But if Tyler's permission meets all the requirements for explicit permission under Section 213.10(2), Blair can rely on it to raise the defense of Explicit Prior Permission, despite the limitations of Section 213.10(3)(c), because on these facts the gun was unloaded and using it to threaten Tyler with death would not pose a risk of actually inflicting death or serious bodily injury.

¹² Section 210.0(2) defines "bodily injury" as "physical pain, illness or any impairment of physical condition" and Section 210.0(3) defines "serious bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

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The person giving permission must be competent to do so. Section 213.10(3)(d) provides that the defense is available only when the person giving permission is 18 or older and is not—at the time when giving permission—coerced (paragraph (d)(ii) and (iii)), intoxicated to the point of incapacity (paragraph (d)(iv)), otherwise incapacitated or impaired (paragraph (d)(v)), vulnerable because of a state-imposed restriction on liberty (paragraph (d)(v)), subject to prohibited deception (paragraph (d)(vi)), or subject to trafficking (paragraph (d)(vii)).

Illustrations:

4. Accused, a police officer, knows that Complainant, a person in custody, has engaged in BDSM practices. Accused approaches Complainant and proposes that Complainant submit to being tied up in the jail cell and penetrated while pretending to struggle. Complainant agrees, but only after specifying a safe word and detailing limits on the encounter. The encounter then takes place as arranged.

Complainant's prior agreement meets the requirements for "explicit permission" under Section 213.10(2). But Accused cannot successfully raise a defense under Section 213.10, and Accused therefore can be convicted of Sexual Assault by Physical Force or Restraint under Section 213.2. This is because Section 213.10(3)(d)(v) provides that the defense is unavailable when, as is true on these facts: (1) permission is given by a person who, at the time, is in a condition of legally restricted liberty; and (2) the actor knows (or is aware of, yet recklessly disregards, a substantial and unjustifiable risk) that the other party is in that condition.

5. Accused, the local county sheriff, meets Complainant at a party and discovers that they share a mutual interest in BDSM sex. That evening, they go to Complainant's apartment. Complainant, after specifying a safe word, gives Accused permission to tie up Complainant and penetrate Complainant while Complainant struggles and screams "Stop!" The encounter then proceeds as planned. The facts satisfy the elements required for conviction of Sexual Assault by Physical Force or Restraint under Section 213.2. But Accused could successfully present an affirmative defense under Section 213.10, because Complainant gave explicit prior permission and, unlike the situation in Illustration 4, Complainant was not under any incapacity or disability, as detailed in Section 213.10(3)(d), when Complainant gave permission.

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1 The next night Complainant and Accused again meet at Complainant's apartment.
2 Complainant explains that Complainant would find it sexually exciting to be threatened
3 with arrest, placed in Accused's patrol car, and told that Complainant could leave only
4 after engaging in an act of oral sex with Accused. Accused agrees to participate in this
5 role-playing "scene," and Complainant, after specifying a safe word, gives Accused
6 explicit permission to do so. The encounter then proceeds as planned. The facts satisfy
7 the elements required for conviction of Sexual Assault by Extortion under Section
8 213.4(1)(b)(ii), because Complainant submitted only after Accused threatened to take
9 official action. But, as in the case of the encounter the previous evening, Accused could
10 successfully present an affirmative defense under Section 213.10, because Complainant
11 gave explicit prior permission, and Complainant was not under any incapacity or
12 disability, as detailed in Section 213.10(3)(d), when Complainant gave permission.

13 Just as Accused has a defense to a charge of engaging in a sex act by physically
14 restraining Complainant on the first evening, Accused has a similar defense to the charge
15 of engaging in a sex act by threatening to take official action on the second evening. In
16 both cases, Accused's use of coercive means is a necessary prelude to Complainant's
17 submission. But in both cases, Complainant's explicit prior permission is sufficient to
18 afford Accused a defense under Section 213.10, provided that, unlike the situation in
19 Illustration 4, Complainant was not under any incapacity or disability at the time when
20 Complainant gave permission.

21 5. *Mens Rea and the Burden of Proof.* Section 213.10 affords only an affirmative defense.
22 The 1962 Code "does not ... require the disproof of an affirmative defense unless and until there
23 is evidence supporting such defense."¹³ A defendant therefore cannot prevail merely by raising a
24 reasonable doubt about whether the complainant has an interest in BDSM or a willingness to
25 submit to physical force. Before the prosecution has the burden to negate a Section 213.10
26 defense, there must be evidence to support all its required elements, specifically that: (1) the
27 actor believed the complainant had given the actor explicit prior permission; (2) the complainant
28 personally gave this prior permission to the actor; (3) the permission identified the specific forms
29 of physical force or threats permitted; and (4) the permission identified the specific words or

¹³ 1962 Code Section 1.12(2)(a).

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gestures that would withdraw that permission. In addition, a defendant who is mistaken in regard to a complainant's grant of permission cannot succeed in a Section 213.10 defense merely by establishing that his or her belief was held in good faith, because (5) the belief must be objectively reasonable.

Once there is evidence to support each of the required elements of the Section 213.10 defense, the prosecution must carry its ordinary burden to prove beyond a reasonable doubt all elements of the offense charged, which include the absence of any applicable justification or excuse.¹⁴ Once the defense has effectively raised the permission defense under Section 213.10, meeting this burden requires the prosecution to prove beyond a reasonable doubt the absence of at least one of the required elements of the permission defense. The prosecution need not prove that all elements of the permission-to-use-force defense were lacking; as with any other justification or excuse, the defense under Section 213.10 fails when the prosecution proves beyond a reasonable doubt that any required element was missing.¹⁵

Illustration:

6. At Accused's apartment, Complainant notices a "BDSM" magazine and skims through it with apparent interest, lingering over several of the pictures. Accused says, "Interesting, huh?" When Complainant looks up with a smile, Accused leans on top of Complainant and starts tearing off Complainant's clothes. While Complainant struggles to pull the clothes back on and push Accused away, Accused shoves Complainant to the floor and warns Complainant not to scream. Accused then bites Complainant's nipples and penetrates Complainant while Complainant remains silent. Afterward, Complainant

¹⁴ See 1962 Code Section 1.13(9)(c).

¹⁵ For example, the Code requires, for the use of deadly force in self-defense, that the actor believe the use of deadly force is: (1) "immediately necessary" to protect against (2) an unlawful (3) threat of death or great bodily harm, with (4) no opportunity for safe retreat. See 1962 Code Section 3.04. The prosecution need not refute all these elements of the self-defense claim; the defense fails, for example, if the prosecution proves beyond a reasonable doubt that the defendant did not believe (1) that the threat involved death or great bodily harm, *or* (2) that the use of protective force was immediately necessary, *or* (3) that the defendant had no opportunity for safe retreat. Cf. *Ha v. State*, 892 P.2d 184, 191 (Alaska Ct. App. 1995), where court applying self-defense provision requiring (unlike the MPC) that the threatened force be imminent and that defendant's beliefs be reasonable, held that despite evidence that "a reasonable person in Ha's position would have feared death or serious physical injury" and that "there was no escape," a defense of self-defense was not available because defendant could not have held a reasonable belief that the threatened harm was imminent).

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1 files charges, alleging the Accused is guilty of Sexual Assault by Physical Force or
2 Restraint under Section 213.2. At trial, Complainant testifies that Complainant did not
3 want to have sex with Accused but submitted without resisting because of shock and fear.
4 Accused testifies to believing that Complainant was acting out a rape fantasy like one
5 Complainant had stared at in the magazine, and that Complainant's smile personally
6 conveyed Complainant's permission for Accused to use force to subdue and sexually
7 penetrate Complainant.

8 Accused requests an instruction that the prosecution must prove beyond a
9 reasonable doubt that Complainant was unwilling to participate in these acts and that
10 Accused was aware of, yet recklessly disregarded, the substantial, unjustifiable risk that
11 Complainant had not given permission for Accused to use force to subdue and sexually
12 penetrate Complainant. The judge may deny that instruction and instead tell the jury that
13 it may convict if it finds beyond a reasonable doubt that Complainant submitted to the act
14 of sexual penetration because of the force and threats, and that Accused was aware of, yet
15 recklessly disregarded, a substantial and unjustifiable risk that Complainant had
16 submitted for that reason. Accused cannot invoke the Section 213.10 defense, and it need
17 not be submitted to the jury, because in the absence of additional facts, there is no
18 evidence that Accused believed (reasonably or otherwise) that Complainant had given
19 explicit permission for the specific forms of force Accused used. Even if Complainant
20 had responded by saying "yes" instead of just smiling, the permission-to-use-force
21 defense would still be unavailable and would not need to be submitted to the jury,
22 because there is no evidence that Accused believed (reasonably or otherwise) that the
23 verbal "yes" gave explicit permission identifying, as Section 213.10 requires, the specific
24 forms of force or threat permitted and the specific words or gestures that would withdraw
25 that permission.

REPORTERS' NOTES

26 Sexual encounters involving BDSM are by no means unusual. Significant numbers of
27 individuals willingly agree to these practices as a means of sexual gratification.¹⁶ Social

¹⁶ Survey evidence is inconclusive for obvious reasons, but several relatively representative samples suggest that millions of Americans willingly engage in sexual practices of this sort. See JUNE MACHOVER REINISCH, RUTH BEASLEY & DEBRA KENT, THE KINSEY INSTITUTE NEW REPORT ON SEX: WHAT YOU MUST KNOW TO BE SEXUALLY LITERATE 162 (1990) (finding that between 5 and 10%

1 disapproval on moral grounds was once, and to some extent still is, widespread.¹⁷ Nonetheless,
 2 as long as the person giving permission for the use of force is a competent adult, and as long as
 3 the force used poses no risk of serious bodily injury, death, or harm to others, respect for
 4 individual autonomy requires deference to these choices, which the persons concerned may
 5 regard as a cherished vehicle for personal and sexual fulfillment.¹⁸ The 1962 Code explicitly
 6 endorsed this view.¹⁹ Current law largely does so as well, at least in principle. One recent
 7 survey²⁰ finds that in theory a majority of states recognize a consent defense to the use of force
 8 (short of force that risks serious bodily harm), either as a general statutory defense, a statutory
 9 defense to specific crimes, or a judicially created gloss.²¹ But the case law reveals significant
 10 ambiguity and reluctance in the application of this principle.

of the adult population engages in BDSM on at least an occasional basis); SAMUEL S. JANUS & CYNTHIA L. JANUS, *THE JANUS REPORT ON SEXUAL BEHAVIOR* (1993) (finding that up to 14% of American males and 11% of American females have engaged in some form of sadomasochism).

¹⁷ Empirical evidence documents that when individuals' involvement in BDSM practices becomes known, they tend to suffer substantial stigma and adverse employment consequences. See, e.g., Carolyn Meeker, *"Learning the Ropes": An Exploration of BDSM Stigma, Identity Disclosure, and Workplace Socialization*, in M. S. Plakhotnik & S. M. Nielsen, eds., *PROCEEDINGS OF THE 12TH ANNUAL SOUTH FLORIDA EDUCATION RESEARCH CONFERENCE* (2013), 134, 137-139, available at <http://digitalcommons.fiu.edu/cgi/viewcontent.cgi?article=1319&context=sferc> (reporting that BDSM practitioners have experienced discrimination, harassment, and stigmatization by mental-health professionals, employers, and wider society); Tanya Bezreh, Thomas S. Weinberg & Timothy Edgar, *BDSM Disclosure and Stigma Management: Identifying Opportunities for Sex Education*, 7 AM. J. SEXUALITY EDUC. 37 (2012) (same). To be sure, evolving social mores suggest a greater degree of interest in, and perhaps acceptance of, such practices; a novel describing a sadomasochistic relationship sold over 100 million copies and was the basis of two major motion pictures. See Jocelyn McClurg, *'Fifty Shades' is Number 1 on USA Today's List*, USA TODAY, Feb. 18, 2015. Yet evidence of social curiosity and fascination is by no means inconsistent with tendencies to disapprove of or discriminate against individuals who reveal personal participation in such practices.

¹⁸ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that competent adults have constitutionally protected privacy and autonomy rights to engage in mutually consensual sexual activity but declining to extend such protection to allegedly consensual adult sexual relationships involving "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused").

¹⁹ See 1962 Code Section 2.11.

²⁰ See Vera Bergelson, *The Right to be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165, 174-175 n.55 (2007).

²¹ See, e.g., D.C. CODE ANN. § 22-3007 (West 2018); 38 ILL. COMP. STAT. ANN. 5/11-1.70 (West 2018); *State v. Gaspar*, 982 A.2d 140, 149 (R.I. 2009) (by implication); *Govan v. State*, 913 N.E.2d 237, 242-243 (Ind. Ct. App. 2009) (dictum). The law-in-action, however, may differ significantly. See text at notes 26-27, *infra*.

1 In *People v. Jovanovic*,²² the defendant was convicted of sexual assault and other crimes
 2 arising out of an incident in which he tied up the complainant, poured hot candle wax on
 3 sensitive parts of her body, and subjected her to other considerably painful actions, including
 4 forced sexual contact and sexual penetration. Applying New York’s rape-shield law, the trial
 5 court had excluded evidence of emails in which the complainant expressed general interest in
 6 BDSM activities. The appellate court reversed the convictions, holding that complainant’s
 7 statements were improperly excluded because they were relevant to “highlight both the
 8 complainant’s state of mind on the issue of consent, and [the actor’s] own state of mind
 9 regarding his own reasonable beliefs as to the complainant’s intentions.”²³

10 Because the *Jovanovic* court held the complainant’s statements of BDSM interest
 11 relevant to a consent defense, the decision implicitly but clearly endorsed the availability of the
 12 defense in the context of a sexual encounter, even for acts involving physical restraint, extensive
 13 physical force, and the infliction of significant pain.²⁴ But with its focus limited to that of
 14 evidentiary relevance, *Jovanovic* did not delineate the substantive parameters of the defense. And
 15 other decisions clearly upholding the defense in a BDSM context are rare or nonexistent.²⁵

16 The details of how the defense is applied on the ground are further limited by the
 17 infrequency of prosecutions arising out of BDSM encounters. Even when cases are prosecuted
 18 and result in convictions that reach the appellate courts, some decisions purport to accept the
 19 defense in principle but reject it on the facts through overly strict interpretation of the serious-
 20 bodily-injury limitation.²⁶ The more common problem appears to be the reverse—police and
 21 prosecutors who give overly generous interpretation to the concept of consent when the issue

²² 700 N.Y.S.2d 156 (N.Y. App. Div. 1999).

²³ *Id.*, at 159.

²⁴ See also *id.*, at 169 (stating that “the strength of the evidence as to the extent to which the complainant initially indicated to Jovanovic an interest in participating in sadomasochism with him is relevant to a determination of whether that consent was withdrawn”). To similar effect, though in a noncriminal context, see *Doe v. Rector and Visitors of George Mason Univ.*, 149 F.Supp.3d 602, 608 (E.D. Va. 2016), invalidating expulsion of a college student charged with sexual misconduct; court held that procedural errors committed by university during expulsion process could have affected result because accused student had potentially valid defense to BDSM acts committed after he admittedly heard the agreed-upon “safe word,” because he claimed to believe he was still within agreed boundaries and thus was acting without the requisite mens rea.

²⁵ A prominent advocacy group for the BDSM community reports: “To date, there is not a single appellate court decision anywhere in this country that has accepted consent as a defense in an assault or abuse prosecution arising from BDSM conduct.” See National Coalition for Sexual Freedom, Consent and BDSM: The State of the Law, <https://www.ncsfreedom.org/key-programs/consent-counts-64083/consent-counts-44979/item/580-consent-and-bdsm-the-state-of-the-law> (visited July 17, 2020).

²⁶ See text at notes 38-39, *infra*.

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1 arises in BDSM situations. As a result, law-enforcement officials may be too quick to refuse
2 prosecution when one party to a BDSM encounter suffers serious injury and complains about the
3 other party's failure to respect agreed-upon boundaries.²⁷ Neither doctrine nor practice displays a
4 clear understanding of the appropriate scope and limits of a BDSM defense.

5 Section 213.10 addresses this set of problems. It articulates in detail the elements of the
6 defense and the limits on its availability. To avoid confusion with the Article 213 concept of
7 "consent," which does not require an affirmative expression of willingness, the Section 213.10
8 defense, which requires explicit agreement, is not cast in terms of consent and instead is styled a
9 defense of "Explicit Prior Permission."

10 As provided in Section 213.10(3)(c), the defense is not available when the actor causes or
11 risks serious bodily injury and in doing so is aware of, yet recklessly disregards, a substantial,
12 unjustifiable risk of such injury. Section 213.10(3)(d) denies the defense to an actor charged with
13 an offense against a person who lacks sufficient capacity to freely give permission—a person
14 who is underage (paragraph (d)(i)); coerced or subject to prohibited deception (paragraph (d)(ii),
15 (iii), and (vi)); unable to appraise or control his or her conduct because of intoxication (paragraph
16 (d)(iv)); incapacitated, vulnerable, or legally restricted within the meaning of Section 213.3
17 (paragraph (d)(v)); or trafficked within the meaning of Section 213.9 (paragraph (d)(vii)).

18 The Section 213.10 defense is an affirmative defense. Accordingly, there must be
19 evidence supporting the existence of all its requisite elements, including the reasonableness of
20 the accused's belief that the other person personally gave the actor explicit prior permission to
21 ignore protests or to use the specific forms of physical force or restraint or the specific threats in
22 question. In this respect, a defense of permission to use force or threats, or to disregard explicit
23 protests, plays a fundamentally different role—and requires much more support—than a defense
24 of consent to sexual interaction as such. In the absence of physical force or restraint, nonviolent
25 threats, explicit protests, or other indications of nonconsent, sexual penetration involving
26 competent adults is not morally or legally suspect; to the contrary, it is a valued dimension of
27 human experience. In contrast, in any context, sexual or otherwise, using physical restraint,
28 inflicting pain, making extortionate threats, disregarding an express verbal protest, and similar
29 actions are, by contemporary standards, unacceptable and illegal in the absence of specific
30 justification, such as self-defense or necessity. These justifications are affirmative defenses.²⁸

²⁷ See text at notes 33-34, *infra*.

²⁸ See 1962 Code Section 3.02(1), stating that "[i]n any prosecution based on conduct which is justifiable under this Article, justification is an affirmative defense." Article 3 (General Principles of Justification) includes the defenses of necessity (Section 3.02) and self-defense (Section 3.04). See also 1962 Code Section 2.08(4) (intoxication when pathological or not self-induced is an affirmative defense); Sections 2.09, 2.10 (duress and military orders are affirmative defenses); Section 4.03(1) (mental disease or defect is an affirmative defense); Sections 5.01(4), 5.02(3), 5.03(6) (renunciation defense to charges of attempt, solicitation, and conspiracy is an affirmative defense); Section 221.1(1) (affirmative defense to burglary charge that structure entered was abandoned); Section 221.2(3) (three affirmative defenses to charge of criminal trespass); Section 223.1(3) (claim of right as affirmative defense to theft charge);

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1 For the same reason, permission to use physical force or restraint, or to make otherwise-
2 prohibited threats, to cause sexual cooperation or submission—unlike consent to sexual
3 penetration, oral sex, or sexual contact itself—is intrinsically a matter of affirmative defense.²⁹

4 With respect to the mens rea required for an affirmative defense, jurisdictions resolve the
5 issue differently from one defense to another, depending on the context. On the issue of self-
6 defense, many jurisdictions require that a defendant's belief in the need to use force be
7 objectively reasonable.³⁰ The 1962 Code does not take that approach to self-defense,³¹ but on
8 several other issues, including mistake of age in sexual offenses and mistake of penal law, the
9 1962 Code requires that a defendant's belief in the relevant facts be reasonable.³² In the context
10 of the sexual offenses, when there is a claim of permission to ignore explicit verbal protests or to
11 use physical force, restraint, or extortionate threats to cause another person to submit to or
12 perform a sexual act, the mere belief that the other person would be receptive to "rough sex," or
13 that "no" does not mean no, even if held in good faith, cannot by itself justify an actor's decision
14 to ignore words of protest or to deliberately deploy these coercive measures to obtain the other
15 person's submission. As Illustrations 1, 2, and 3 demonstrate, someone who treats an individual
16 in that fashion can fairly be expected to ensure in advance that this individual has personally
17 given the actor explicit permission to behave in that way, and that impressions of that
18 individual's permission have a sufficiently concrete basis to ensure that the belief is reasonable.

19 Permission to use force or ignore protests must be explicit and specific in order to
20 minimize potential misunderstanding and ensure that when force is used, all parties agree to the

Section 223.4 (honest claim of restitution or indemnification as affirmative defense to extortion charge);
Section 224.7 (lack of mens rea as affirmative defense to charge of deceptive business practices).

²⁹ See Bergelson, *supra* note 20, at 210, 212 (2007) ("[H]urting another is bad per se . . . [A] coherent legal system that accounts for important moral distinctions must conceptualize consent to bodily harm as an affirmative defense.").

³⁰ See, e.g., *People v. Goetz*, 497 N.E.2d 41, 50 (N.Y. 1986) (noting that "New York did not follow the Model Penal Code's equation of a mistake as to the need to use deadly force with a mistake negating an element of a crime, choosing instead to [require that such a mistake be objectively reasonable]").

³¹ See 1962 Code Section 3.04 (1962) (requiring for defense of self-defense only that "the actor believes" the necessary factual predicates are present). Nonetheless, in the case of a prosecution for homicide under the Code, an unreasonable (criminally negligent) belief in the need to use deadly force does not necessarily escape punishment because such a belief can support conviction for Negligent Homicide, a felony of the third degree. See *id.* Section 3.09(2); Section 210.4.

³² See 1962 Code Section 213.6(1) (mistake as to age in sexual offenses; mistake must be reasonable if age is greater than 10 years old); Section 2.04(3)(b) (mistake of penal law in reasonable reliance on official statement). See also *id.* Section 221.2(3)(c) (in trespass prosecution, belief in owner's permission must be reasonable); Section 223.9 (same, in prosecution for unauthorized use of automobile).

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1 particular types of force that are allowed. Otherwise, the potential for abuse is obvious; an
2 acceptable defense to the use or threat of physical force, physical restraint, or extortionate
3 demands cannot be based on a rumor spread by third parties or a person's statement of general
4 receptivity to a BDSM experience. The failure to appreciate this distinction is a source of
5 increasing concern within the community of BDSM practitioners. They cite disturbing evidence
6 that police and prosecutors nationwide are especially reluctant to investigate and file charges for
7 sexual assault when the complainant has engaged in BDSM activity "because they assume that a
8 person injured or sexually violated in such a case 'must have asked for it.'"³³ A report for the
9 National Coalition for Sexual Freedom, a coalition of groups supporting legal protection for
10 BDSM practices,³⁴ states that growing numbers of people have been seeking its help because
11 they were subjected to serious injury and unwelcome sexual assault while participating in BDSM
12 encounters. In supporting the affirmative defense proposed in Section 213.10, the report
13 concludes that "[t]he problem is worsening as predators realize that if they claim they are doing
14 BDSM, then they will likely not be prosecuted. ... [P]rosecutors need a way to separate
15 consensual BDSM from nonconsensual acts, and the [proposed MPC] definition of informed
16 consent for BDSM would be the foundation for this change."³⁵

17 Requiring explicit prior permission does not impose an undue burden in this context. In
18 the absence of such permission, an actor who is about to ignore clear verbal protests or subject
19 the other person to ordinarily prohibited forms of coercion—for example, physical force,
20 restraint, or extortionate threats—cannot expect the right to use these coercive means when such
21 means cause the person to submit to or perform sexual acts. The parties will, by the very nature
22 of the acts involved, need to discuss the manner in which authentic permission will be
23 communicated and withdrawn. When the record provides some evidence that the actor could
24 reasonably believe that the prerequisites of the Section 213.10 defense were present, the burden
25 then shifts back to the prosecution to prove beyond a reasonable doubt that at least one of those
26 prerequisites was absent and that a reasonable person would have realized as much.

27 Section 213.10 stipulates the obvious proviso, also specified in the 1962 Code, that a
28 person cannot grant effective permission for acts that cause or risk serious bodily injury or
29 death.³⁶ This proviso reflects the well-settled law of physical assault,³⁷ but it can become a

³³ Memorandum from Dick Cunningham, Legal Counsel, National Coalition for Sexual Freedom [NCSF], to Stephen Schulhofer, Oct. 9, 2018.

³⁴ See <https://www.ncsfreedom.org/who-we-are/about-ncsf>.

³⁵ Memorandum from Susan Wright, Director of NCSF Incident Reporting & Response Program, to Dick Cunningham, NCSF legal counsel, Sept. 13, 2018.

³⁶ See 1962 Code Section 2.11(2)(a). As a procedural matter, of course, the defense does not fail simply because one of its necessary attendant circumstances (such as the absence of a risk of serious bodily harm) was absent; the prosecution in addition must prove beyond a reasonable doubt that the accused lacked a reasonable belief that the circumstance existed.

1 pretext for hedging the defense with moralistic limitations. In nonsexual contexts—football,
2 boxing, and other competitive sports are examples—the law permits consent to forceful assaults
3 with clear potential to cause serious physical injury. But, in cases with sexual overtones, courts
4 sometimes invoke the “serious bodily injury” exception to punish mutually accepted BDSM
5 practices that can be far less likely to injure than a full-impact football tackle, not to mention a
6 knock-out punch in a boxing match. In an Iowa case, the court held that serious injury defeating
7 consent in a sexual-assault case was established by “a swollen lip, large welts on [the victim’s]
8 ankles, wrists, hips, buttocks, and severe bruises on her thighs.”³⁸ In *State v. Guinn*, a
9 Washington court reached the same conclusion, even though the victim “[n]ever required
10 medical attention or suffered wounds of any sort,” on the ground that the defendant had inflicted
11 pain by using candle wax that was “hot and it stung,” and nipple clamps that were “tight and
12 cutting.”³⁹

13 Some of these decisions, though not overruled, show signs of aging and might no longer
14 be followed. The Iowa court, for example, writing when the doctrine underlying *Bowers v.*
15 *Hardwick*⁴⁰ was still good law, argued that sadomasochistic activity is “in conflict with the
16 general moral principles of our society.”⁴¹ This reasoning is inconsistent with contemporary law
17 requiring respect for autonomy and sexual privacy⁴²—subject of course to the crucial proviso
18 that the injured party must be a competent adult who has given explicit prior permission for
19 specific acts that do not cause or risk serious bodily harm. Indeed, a decision like *Guinn*, which
20 appears to equate any pain with the always-excluded “serious bodily injury,” would make a wide
21 range of mutually accepted BDSM practices impermissible. It is therefore important not to
22 stretch “serious bodily injury” under Section 213.10(3)(c) to include freely accepted physical
23 discomfort, bruising, and even sharper pain potentially associated with paddling, slapping,
24 handcuffing, and the like. Rather, “serious bodily injury” under the Model Penal Code requires
25 “bodily injury which creates a substantial risk of death or which causes serious, permanent
26 disfigurement, or protracted loss or impairment of the function of any bodily member or
27 organ.”⁴³

³⁷ See, e.g., *Commonwealth v. Appleby*, 402 N.E.2d 1051, 1060 (Mass. 1980) (rejecting consent defense to use of a dangerous weapon); *People v. Samuels*, 58 Cal. Rptr. 439 (Cal. Ct. App. 1967) (holding consent not a defense to charge of *aggravated* assault); *Bergelson*, *supra* note 20, at 175-176.

³⁸ *State v. Collier*, 372 N.W.2d 303, 304 (Iowa Ct. App. 1985).

³⁹ *State v. Guinn*, 105 Wash. App. 1030 (Wash. Ct. App. 2001).

⁴⁰ 478 U.S. 186 (1986).

⁴¹ *Collier*, *supra* note 38, 372 N.W.2d at 307.

⁴² E.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), overruling *Bowers*, *supra* note 40.

⁴³ 1962 Code Section 210.0(3):