



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

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## Executive Summary

Maryland law is missing a definition of affirmative consent for adults who engage in the use of force or restraint during erotic power exchange and roleplay. Under Maryland case law, consent is not a defense to assault, and even mild, non-injurious activities can meet the legal definition of assault. However, changing social mores and a rising tolerance associated with the mainstream success of *Fifty Shades of Grey* means that law enforcement and prosecutors typically ignore this case law and refuse to prosecute sexual violence and nonconsensual acts if the behavior is mischaracterized as BDSM, kink, or “rough sex.” Maryland statutes should do a better job distinguishing between assault that should be punished and desired consensual activities that should not.

Establishing a clear legal framework that differentiates consensual, non-injurious erotic activities from abuse and violence would assist law enforcement in addressing reports of sexual assault and assault in an intimate partner context. The American Law Institute grappled with these issues for six years and recently adopted Section 213.10 of the Model Penal Code, “Affirmative Defense of Explicit Prior Permission.” The Maryland General Assembly should take advantage of this development and adopt the provisions of Section 213.10 of the Model Penal Code into Maryland law.

## Introduction

There are a large number of citizens in Maryland who engage in alternative sexual expressions (“alt-sex”).<sup>1</sup> Alt-sex behaviors are often stigmatized, therefore these adults are an underserved population who face barriers to services. Establishing law that works to protect alt-sex practitioners is of the utmost importance. This policy brief identifies the gaps in Maryland’s current laws and shows how adopting Section 213.10 of the Model Penal Code would bridge those gaps, creating policies that benefit all Maryland citizens.

Many people in the U.S. engage in alt-sex practices: a cross-sectional survey found that 20-30% of adult Americans have engaged in roleplay, power exchange, and/or restraint in an erotic context.<sup>2</sup>

In Maryland, 21.3% of adult women have experienced a completed or attempted rape during their lifetime. In addition, 44% of Maryland women and 24.8% of Maryland men have experienced other forms of sexual violence according to the Maryland Coalition Against Sexual Assault (MCASA).<sup>3</sup> The National Network to End Domestic Violence “snapshot” in 2021 found that 762 victims were served in a single day in Maryland, and the Maryland Courts granted 19,848 Temporary Protective Orders and 8,746 Final Protective Orders in Fiscal Year 2021 according to the Maryland Network Against Domestic Violence (MNADV).<sup>4</sup>

The National Coalition for Sexual Freedom (NCSF) Consent Survey (2021) of alt-sex practitioners found that 25.5% of nearly 3,000 respondents reported their consent was violated in an alt-sex context.<sup>5</sup> 55% of those reported sexual assault, while the rest were nonconsensually assaulted (i.e., slapped, punched, choked) during erotic activities. 3.9% were injured, yet only 3.5% of those who experienced nonconsensual acts reported it to the police.

## Current Maryland Law

Maryland law defines assault as “the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings.” Md. Code, Crim. Law § 3-201(b). In the case of *Taylor v. State*, 133 A.2d 414, 415 (Md. 1957), the Maryland Court of Appeals held that “criminal assault [...] is treated as a crime against the public generally, and **therefore the consent of the victim is no defense.**” This holding defines Maryland law today. This stance is similar to the outdated case law in other states that criminalized all consensual use of force and restraint in an erotic context, including mild, non-injurious activities.

However, the Maryland Code does allow prosecutions for assault to be dismissed by the mutual agreement of the involved parties if the Court finds dismissal “proper,” but the statute does not indicate how the Court should evaluate what is proper:

- o Dismissal of Assault Cases by Mutual Agreement
  - o Md. Code, Crim. Law § 3-207

(a) “On a pretrial motion of the State, a court may dismiss a charge of assault if: (1) the victim and the defendant agree to the dismissal; and (2) **the court considers the dismissal proper**”.

· Definitions:

o “Assault”

§ "Assault" means the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings.”

Another provision of the Criminal Code, § 3-202, lists factors that make an assault a first degree assault, notably including strangulation by applying pressure to another person’s throat or neck:

§ 3-202. Assault in the first degree

Strangling defined

(a) In this section, “strangling” means impeding the normal breathing or blood circulation of another person by applying pressure to the other person’s throat or neck.

Regarding sexual assault specifically, on the one hand, Maryland statutes recognize that there may be legitimate “consent to force” in the context of individuals pursuing sexual activity. On the other hand, Maryland’s statutes only criminalize a lack of consent combined with the use of force. A mere lack of consent without the use of force or threat thereof is insufficient:

Md. Code, Crim. Law § 3-303

(a) A person may not:

- (1) · (i) engage in vaginal intercourse with another by force, or the threat of force, without the consent of the other; or  
· (ii) engage in a sexual act with another by force, or the threat of force, **without the consent of the other;**

Case Law on Consent - Sexual Offences

- o Maryland courts require negation (either express or implied) to evidence a lack of consent for sexual activity, or alternatively an explanation as to why fear of harm led to the lack of such negation (*Travis v. State* (2014) 218 Md. App. 410)

## 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 which was 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. In order 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. 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.

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, which is Chapter 8 of the book *The Ethics of Consent: Theory and Practice*. According to Bergelson, criminalization of the erotic use of force and restraint was based on “moral judgments about the iniquity of the conduct,” with courts tending “to inflate the risk and harmfulness of an activity they want to denounce.”<sup>6</sup>

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

The ALI’s reasoning is based on *Lawrence v. Texas*, 539 U.S. 558 (2003), which holds that competent adults have constitutionally protected privacy and autonomy rights to engage in mutually consensual sexual activity, as long as it doesn’t involve “persons who might be injured or coerced or who are situated in relationships where consent might not be easily refused.”<sup>7</sup>

The Reporters’ Notes also cite 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.’”<sup>8</sup>

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 safeword 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 safeword 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." 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 Maryland Law

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 apply to some charges of assault, not just sexual assault, and Maryland can and should adopt the explicit prior permission standard for assault, as well.

While Maryland courts can dismiss prosecutions for second-degree assault by the mutual agreement of the involved parties if the Court finds dismissal “proper,” consent to an act itself is not a defense under current law. If adopted, the Explicit Prior Permission criteria could be used to determine what is “proper” in the use of force or restraint in an erotic context, which may or may not include sexual contact.

In regards to Md. Code § 3-202, the adoption of Explicit Prior Permission would clarify that there is no erotic exception for strangulation/“choking” during sex. Debbie Herbinick’s recent study on college students found that 47% of the students who responded had been choked, with half of those being choked nonconsensually.<sup>9</sup>

In regards to Maryland’s § 3-303 sexual assault law, which recognizes that there may be legitimate “consent to force” in the context of individuals pursuing sexual intercourse, the adoption of MPC Section 213.10 Explicit Prior Permission would provide a definition for “consent” in the context of the use of force or restraint while engaging in a sexual act.

There is also no definition of “consent” in Md. Code, Criminal Law § 3-318, in which a perpetrator can be prosecuted for rape of a spouse if they use “force or threat of force **and the act is without the consent** of the spouse.” Adopting Explicit Prior Permission as the definition of “consent” would assist law enforcement in determining whether Explicit Prior Permission was given for a relationship dynamic that involves the erotic use of force or threat of force and restraint.

Explicit Prior Permission would not modify the portions of the definition of first degree rape under Maryland law which do not address consent.

## Recommendations

The NCSF is advocating for Maryland 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.

## Further Reading and Endnotes

### **Consent and BDSM: The State of the Law**

#### **Article 213.10. Affirmative Defense of Explicit Prior Permission**

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<sup>1</sup> Alternative sexual expression (alt-sex) includes a variety of behaviors between consenting adults, including power exchange, BDSM, fetishes, and consensual non-monogamy.

<sup>2</sup> Herbenick, D., Bowling, J., Fu, T. J., Dodge, B., Guerra-Reyes, L., & Sanders, S. (2017). Sexual diversity in the United States: Results from a nationally representative probability sample of adult women and men. *PloS one*, 12(7), e0181198. <https://pubmed.ncbi.nlm.nih.gov/28727762/> .

<sup>3</sup> Maryland Coalition Against Sexual Assault (MCASA), 2021.

<sup>4</sup> Maryland Network Against Domestic Violence (MNADV), 2022.

<sup>5</sup> Wright, S., Bowling, J., McCabe, S., Benson, J. K., Stambaugh, R., & Cramer, R. J. (2022). Sexual Violence and Nonconsensual Experiences Among Alt-Sex Communities' Members. *Journal of interpersonal violence*, 8862605211062999. Advance online publication. doi.org/10.1177/08862605211062999

<sup>6</sup> Bergelson, Vera, '7 Consent to Harm', in Franklin Miller, and Alan Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (New York, 2009; online edn, Oxford Academic, 1 Feb. 2010).

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

<sup>7</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>8</sup> American Law Institute. (2022). Model penal code on sexual assault: Tentative Draft No. 5. and explanatory notes: Section 213.10. Affirmative Defense of Explicit Prior Permission was adopted at the 2021 annual meeting of the American Law Institute at Washington, D.C., June, 2021. Philadelphia, Pa.: The Institute, 462-480.

<sup>9</sup> Herbenick, D., Patterson, C., Beckmeyer, J., Gonzalez, Y., Luetke, M., Guerra-Reyes, L., Eastman-Mueller, H., Valdivia, D. S., & Rosenberg, M. (2021). Diverse Sexual Behaviors in Undergraduate Students: Findings From a Campus Probability Survey. *The journal of sexual medicine*, 18(6), 1024–1041. <https://doi.org/10.1016/j.jsxm.2021.03.006>