



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

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

- 1) **The criminalization of common, consensual erotic behaviors.** Outdated U.S. case law has established, based on moral objections, that consent is not a defense to the use of force or restraint in an erotic context, including for mild non-injurious activities. Under Maryland case law, consent is not a defense to assault, and even mild, non-injurious activities can meet the legal definition of assault. This criminalization causes discrimination and stigmatization, which can lead to mental health issues and barriers to services for many Maryland 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 Maryland 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 Maryland 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 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).⁶ 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).⁷

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

Current Maryland Law

Regarding consent, Maryland HOUSE BILL 496, consent to sexual activity is not required to verbally explicit prior to the activity:

3-301.1.

(A) in this subtitle, “consent” means the clear and voluntary agreement by an individual to engage in vaginal intercourse, a sexual act, or sexual contact.

(1) the existence of consent, lack of consent, or withdrawal of consent shall be determined based on a totality of the circumstances, including the words and conduct of the victim and the defendant;

(2) consent may be withdrawn before or during vaginal intercourse, a sexual act, or sexual contact;

(3) the lack of consent may be communicated through words or conduct;

(4) a current or previous dating, social, or sexual relationship by itself does not constitute consent;

(5) submission as a result of fear, threat, or coercion does not constitute consent if the individual alleged to have performed the act in violation of this subtitle knows or reasonably should know that the victim would submit as a result of fear, threat, or coercion; and

(6) the manner of dress of an individual does not constitute consent.

(C) this section may not be construed to require documentation of consent.

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)

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.

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

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

The Model Penal Code is an influential model act for state criminal laws 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.”¹¹

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.”¹²

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.’”¹³

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 due to the risk of serious physical injury.

In regards to Maryland’s § 3–301.1 sexual assault law, the adoption of MPC Section 213.10 Explicit Prior Permission would require explicit prior permission, either verbally or in writing, for consent to use of specific acts of force or restraint while engaging in sexual acts.

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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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>

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⁷ Maryland Network Against Domestic Violence (MNADV), 2022.

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¹¹ 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>

¹² *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹³ 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.