



Creating Assault & Sexual Assault Policies that Protect All Virginia Citizens:

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

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Executive Summary

Currently, Virginia 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- 1) **The criminalization of common, consensual erotic behaviors.** Outdated U.S. case law has established, based on moral objections, that consent is not a defense to the use of force or restraint in an erotic context, including for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 Virginia 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 Virginia 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 Virginia 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 these respondents reported it to the police, even though 4% said they had been injured when they were assaulted. A recent study found that participants felt that police did not take reports of consent violations in a kink context seriously, and while some victims would contact police if a severe crime was committed, others would never seek police assistance or only as a last resort.⁶

In Virginia, sexual assault is a public health issue. According to the Virginia Department of State Police Crime Report, forcible sex offenses represent about 12.7% of all violent crimes in the state. According to the National Institutes of Health, research suggests the lifetime prevalence of sexual assault among adult women in Virginia is 27.6%.⁷

Therefore, it is essential for the Virginia General 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 Virginia law to assist in dealing with reports of sexual assault and the erotic use of force and restraint.

Current Virginia Law

Regarding consent, VA Code Ann. §§18.2-61; 18.2-67.4, consent to sexual activity is not required verbally or explicitly prior to the activity. Therefore, there is no requirement for "freely given consent" or "affirmative consent."

Consent Definition Code: § 18.2-67.4

Virginia does not provide a definition for consent, but defines rape as sexual intercourse:

- (i) against the complaining witness's will, by force, threat or intimidation of or against the complaining witness or another person; or
- (ii) through the use of the complaining witness's mental incapacity or physical helplessness; or
- (iii) with a child under age 13 as the victim, and sexual battery as sexual abuse against the will of the complaining witness, by force, threat, intimidation or ruse.

Assault and battery are combined into a single criminal charge under Virginia Code § 18.2-57. Battery is defined as any unlawful physical touching—no matter how slight—done in a rude, angry, or insulting manner. Simple Assault can involve acts such as slapping, kicking, pushing, punching, scratching, bumping, spitting, poking or throwing an object.

A 2016 federal district court ruling in Virginia (*Doe v. George Mason University*) determined that consensual BDSM does not enjoy the same constitutional privacy protections as traditional intimate conduct. The court noted that BDSM "involves inherent risks to personal safety", meaning the state could legally regulate or restrict such conduct.

As for strangulation and suffocation, under state law, a person is guilty of a Class 6 felony if they knowingly, intentionally, and unlawfully impede the blood circulation or respiration of another person by applying pressure to the neck or blocking the airway, which results in a wounding or bodily injury. This carries a penalty of one to five years in prison and up to \$2,500 in fines. Unlike many other states, Virginia law explicitly requires that the act be done "without consent". This means prosecutors must prove beyond a reasonable doubt that the victim did not agree to the act. However, the legal threshold is complex:

- Consent as a Defense: Evidence of mutual agreement or consent is recognized as a legal defense to strangulation charges.
- Bodily Injury and Safety: Even if both parties mutually consent to the act, consent cannot be used as a defense if the choking crosses into reckless conduct, causes serious physical injury, or results in death. In such cases, prosecutors can pursue other severe charges, such as aggravated malicious wounding or involuntary manslaughter.

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, and additional 30% were only sometimes asked if it was okay to be choked. 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 Virginia law should specifically address this issue.

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 2021.⁹

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.”¹⁰

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 the Due Process Clause of the Fourteenth Amendment of the Constitution, the right to privacy, which is a fundamental liberty right for all people. Competent adults have constitutionally protected 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."¹¹

The ALI's Reporters' Notes 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.'" With a legal definition of explicit consent, law enforcement would have a clear framework to investigate reports.

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 Virginia Law

Virginia does not have a consent definition. Instead, acts are unlawful if done against the complaining witness’s will, by force, threat or intimidation. This is inadequate when evaluating whether sexual acts that include force or restraint are consensual or not.

Adopting Explicit Prior Permission would require explicit prior consent **verbally or in writing** to specific acts of erotic force or restraint, which cannot be implied by body language or actions. This is appropriate due to the risks involved, including potentially coercing or forcing someone's consent through use of the erotic activities. The adoption of 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 in association with sexual contact. It would also define exceptions to this consent, such as not allowing the risk of serious physical harm, sexual choking, or engaging in the erotic use of force or restraint with someone under 18.

Because Section 213.10 was drafted as part of the section of the Model Penal Code on sexual assault, by its terms it only applies to incidences which involve "sexual penetration, oral sex, or sexual contact." However, the problems which gave rise to Section 213.10 also apply to some charges of assault, not just sexual assault, and Virginia can and should adopt the explicit prior permission standard for assault, as well, when allegations of BDSM activity are made that don't involve contact with the breasts or genitals. Allegations of assault during erotic force and restraint would be treated like allegations of simple assault or false imprisonment, where evidence of consent would be considered.

Explicit Prior Permission would also clarify in Virginia law that consent is not a defense to choking during sexual activities due to the risk of serious physical injury. The current strangulation law allows for a consent exception under § 18.2-51.6.

Recommendations

The NCSF is advocating for Virginia 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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- ¹ Meyer, I. H. (2003). Prejudice, social stress, and mental health in lesbian, gay, and bisexual populations: Conceptual issues and research evidence. *Psychological Bulletin*, 129(5), 674–697.
- ² American Law Institute. (2022). Model penal code on sexual assault: Tentative Draft No. 5. and explanatory notes: Section 213.10. Affirmative Defense of Explicit Prior Permission was adopted at the 2021 annual meeting of the American Law Institute at Washington, D.C., June, 2021. Philadelphia, Pa.: The Institute, p. 479.
- ³ American Law Institute. (2022). Model penal code on sexual assault: Tentative Draft No. 5. and explanatory notes: Section 213.10. Affirmative Defense of Explicit Prior Permission was adopted at the 2021 annual meeting of the American Law Institute at Washington, D.C., June, 2021. Philadelphia, Pa.: The Institute, 462-480.
- ⁴ Herbenick, D., Bowling, J., Fu, T. J., Dodge, B., Guerra-Reyes, L., & Sanders, S. (2017). Sexual diversity in the United States: Results from a nationally representative probability sample of adult women and men. *PloS one*, 12(7), e0181198. <https://pubmed.ncbi.nlm.nih.gov/28727762/>
- ⁵ Wright, S., Bowling, J., McCabe, S., Benson, J. K., Stambaugh, R., & Cramer, R. J. (2022). Sexual Violence and Nonconsensual Experiences Among Alt-Sex Communities' Members. *Journal of interpersonal violence*, 8862605211062999. <https://doi.org/10.1177/08862605211062999>
- ⁶ Ratcliff, S. E., Westlake, B., & O'Neill, A. (2025). Only as a last resort: perceptions of police among gender, sexual and relationally diverse (GSRD) BDSM/kink participants. *Policing and Society*, 1–18. <https://doi.org/10.1080/10439463.2024.2435405>
- ⁷ Masho, S. W., Odor, R. K., & Adera, T. (2005). Sexual assault in Virginia: A population-based study. *Women's health issues: official publication of the Jacobs Institute of Women's Health*, 15(4), 157–166. <https://doi.org/10.1016/j.whi.2005.04.001>.
- 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>
- ⁹ 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.
- ¹⁰ 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>
- ¹¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).