



U.S. Department of Justice

Office of Justice Programs

Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking

Washington, D.C. 20531

May 14, 2021

Thank you for giving the Department of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART Office) the opportunity to review the latest draft of the ALI Model Penal Code on Sexual Assault and Related Offenses – Sentencing and Collateral Consequences. As indicated from our recommended edits and comments, attached, the SMART Office has wide-ranging and significant concerns with the draft. The draft, if adopted, would attempt to unravel sex offender registration and notification systems nationwide, severely limit law enforcement information-sharing capacity, weaken youth-serving organizations' ability to conduct background checks to protect children, and strip victims' and the public's right to know if convicted sex offenders live, work or go to school in their communities.

The purpose of the Sex Offender Registration and Notification Act (SORNA) is to increase public safety and enable law enforcement to better keep track of convicted sex offenders. The draft model code mischaracterizes registration and notification schemes in general, and SORNA in particular, by repeatedly stating inaccurate information about the history, structure, scope and purpose of sex offender registration and notification schemes. Unfortunately, the draft relies on questionable and discredited research regarding the effects of sex offender registration and repeatedly draws conclusions that are unsupported by scientific evidence. Specifically, the draft cites studies that were found to be problematic and misleading in an independent analysis by the Federal Research Division of the Library of Congress.¹ Additionally, the draft conflates sentencing conditions such as GPS monitoring with registration requirements – GPS monitoring is largely not a part of registry regimes but rather a condition of community supervision and is not unique to sex offenders. The draft also incorrectly asserts that residency and employment restrictions are a part of most registration and notification systems and point to these restrictions to justify broadly reducing registration requirements and non-website dissemination of registration information to the public. In fact, these registration requirements are not a feature of most state systems, or SORNA.

The proposed code narrows the field of registerable offenses to just five sexual assault offenses, two of which require a prior conviction before registration can occur. This reduction means that offenders who commit some of the worst offenses involving child victims — kidnapping, enticement, production and distribution of child sexual abuse images, and child sex trafficking — will not be required to register. In addition, nearly all federal, military, and foreign offenses, including most of the offenses that involve forcible sexual penetration, are left out of the scheme.

¹ The summary briefs are available at https://www.loc.gov/rr/frd/pdf-files/SexOffenderRegistration-NotificationPolicies_Brief-1.pdf and https://www.loc.gov/rr/frd/pdf-files/SexOffenderRegistration-NotificationPolicies_Brief-2.pdf.

Furthermore, the proposed code overly restricts law enforcement's access to sex offender registration information, and completely prohibits the public's access. By making even this narrow class of registrant information available only to law enforcement on request, and prohibiting law enforcement from disclosing registration information to any non-law enforcement entity, the proposed code hinders investigations, and undermines victims' and the public's ability to access public information to make informed decisions for themselves and their families.

Widespread implementation of the information-sharing provisions of this draft would result in shutting down the National Sex Offender Public Website (NSOPW), which averages nearly five million searches a month and serves as a critical tool in employment background checks for schools, daycares and volunteer and youth sport programs across the United States. Organizations that serve children depend on this free resource to screen for applicants convicted of sex crimes. Dismantling NSOPW will force organizations to curtail hiring, hire blindly, or to divert significant funds meant for services to background investigations.

The registration and notification scheme that this draft puts forth will subvert the public safety objectives of sex offender registration and notification. It will encourage "jurisdiction shopping" by sex offenders that SORNA was designed to eliminate, will allow for perpetrators of violent sexual misconduct to escape registration, and will remove the public's ability to use registration information to safeguard itself.

The SMART Office urges the Council to reconsider its support of this draft, and shape a new draft model code that considers the interests of victims of sexual assault and child sexual abuse, as well as the American public.

Submitted by the Council to the membership of
The American Law Institute
for consideration at the 2021 Annual Meeting on May 17-18 and June 7-8, 2021.



THE AMERICAN LAW INSTITUTE

MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES

Tentative Draft No. 5

(May 4, 2021)

SUBJECTS COVERED

ARTICLE 213	Part I – Grading Part II – Sections 213.0 to 213.11J
APPENDIX A	Pertinent 1962 Code Provisions
APPENDIX B	Black Letter of Tentative Draft No. 5

THE EXECUTIVE OFFICE
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Telephone: (215) 243-1626 • Fax: (215) 243-1636
E-mail: ali@ali.org • Website: <http://www.ali.org>

©2021 BY THE AMERICAN LAW INSTITUTE
ALL RIGHTS RESERVED

As of the date on its cover, this draft had not been considered by the membership of The American Law Institute and therefore may not represent the position of the Institute on any of the issues with which it deals. Any action taken by the membership with respect to this draft may be ascertained by consulting the ALI website or the Proceedings of the Annual Meeting.

The American Law Institute

DAVID F. LEVI, President
LEE H. ROSENTHAL, 1st Vice President
TERESA WILTON HARMON, 2nd Vice President
WALLACE B. JEFFERSON, Treasurer
PAUL L. FRIEDMAN, Secretary
RICHARD L. REVESZ, Director
STEPHANIE A. MIDDLETON, Deputy Director

COUNCIL

KIM J. ASKEW, DLA Piper US LLP, Dallas, TX
DONALD B. AYER, McLean, VA
SCOTT BALES, Arizona Supreme Court (retired), Phoenix, AZ
JOHN H. BEISNER, Skadden, Arps, Slate, Meagher & Flom, Washington, DC
JOHN B. BELLINGER III, Arnold & Porter, Washington, DC
EVAN R. CHESLER, Cravath, Swaine & Moore, New York, NY
MARIANO-FLORENTINO CUÉLLAR, California Supreme Court, San Francisco, CA
ALLISON H. EID, U.S. Court of Appeals, Tenth Circuit, Denver, CO
IVAN K. FONG, 3M Company, St. Paul, MN
KENNETH C. FRAZIER, Merck & Co., Inc., Kenilworth, NJ
PAUL L. FRIEDMAN, U.S. District Court, District of Columbia, Washington, DC
STEVEN S. GENSLER, University of Oklahoma College of Law, Norman, OK
DANIEL C. GIRARD, Girard Sharp LLP, San Francisco, CA
ABBE R. GLUCK, Yale Law School, New Haven, CT (on leave from Council until fall 2021)
YVONNE GONZALEZ ROGERS, U.S. District Court, Northern District of California, Oakland, CA
ANTON G. HAJAR, Chevy Chase, MD
THOMAS M. HARDIMAN, U.S. Court of Appeals, Third Circuit, Pittsburgh, PA
TERESA WILTON HARMON, Sidley Austin, Chicago, IL
NATHAN L. HECHT, Texas Supreme Court, Austin, TX
WILLIAM C. HUBBARD, University of South Carolina School of Law, Columbia, SC
SAMUEL ISSACHAROFF, New York University School of Law, New York, NY
KETANJI BROWN JACKSON, U.S. District Court, District of Columbia, Washington, DC
WALLACE B. JEFFERSON, Alexander Dubose & Jefferson LLP, Austin, TX
GREGORY P. JOSEPH, Joseph Hage Aaronson LLC, New York, NY
MICHELE C. KANE, The Walt Disney Company, Burbank, CA
PAMELA S. KARLAN, Stanford Law School, Stanford, CA
HAROLD HONGJU KOH, Yale Law School, New Haven, CT
CAROLYN B. KUHLMAN, Superior Court of California, County of Los Angeles, Los Angeles, CA
DEREK P. LANGHAUSER, Maine Maritime Academy and Community Colleges, Cumberland Foreside, ME
CAROL F. LEE, Taconic Capital Advisors, New York, NY
DAVID F. LEVI, Duke University School of Law, Durham, NC
LANCE LIEBMAN*, Columbia Law School, New York, NY
GOODWIN LIU, California Supreme Court, San Francisco, CA
RAYMOND J. LOHIER, Jr., U.S. Court of Appeals, Second Circuit, New York, NY
GERARD E. LYNCH, U.S. Court of Appeals, Second Circuit, New York, NY
LORI A. MARTIN, WilmerHale, New York, NY
TROY A. MCKENZIE, New York University School of Law, New York, NY
M. MARGARET MCKEOWN, U.S. Court of Appeals, Ninth Circuit, San Diego, CA
JUDITH A. MILLER, Chevy Chase, MD
PATRICIA ANN MILLETT, U.S. Court of Appeals, District of Columbia Circuit, Washington, DC
JANET NAPOLITANO, University of California Berkeley, Goldman School of Public Policy, Berkeley, CA
KATHRYN A. OBERLY, District of Columbia Court of Appeals (retired), Palm Beach, FL
KATHLEEN M. O'SULLIVAN, Perkins Coie, Seattle, WA

**Director Emeritus*

STEPHANIE E. PARKER, Jones Day, Atlanta, GA
 STUART RABNER, New Jersey Supreme Court, Trenton, NJ
 DAVID W. RIVKIN, Debevoise & Plimpton, New York, NY
 DANIEL B. RODRIGUEZ, Northwestern University Pritzker School of Law, Chicago, IL
 LEE H. ROSENTHAL, U.S. District Court, Southern District of Texas, Houston, TX
 GARY L. SASSO, Carlton Fields, Tampa, FL
 ANTHONY J. SCIRICA, U.S. Court of Appeals, Third Circuit, Philadelphia, PA
 MARSHA E. SIMMS, Weil, Gotshal & Manges (retired), New York, NY
 ROBERT H. SITKOFF, Harvard Law School, Cambridge, MA
 JANE STAPLETON, Christ's College, University of Cambridge, Cambridge, England
 LAURA STEIN, Mondelēz International, Chicago, IL
 LARRY S. STEWART, Stewart Tilghman Fox Bianchi & Cain (retired), Jupiter, FL
 ELIZABETH S. STONG, U.S. Bankruptcy Court, Eastern District of New York, Brooklyn, NY
 CATHERINE T. STRUVE, University of Pennsylvania Carey Law School, Philadelphia, PA
 JEFFREY S. SUTTON, U.S. Court of Appeals, Sixth Circuit, Columbus, OH
 SARAH S. VANCE, U.S. District Court, Eastern District of Louisiana, New Orleans, LA
 SETH P. WAXMAN, WilmerHale, Washington, DC
 STEVEN O. WEISE, Proskauer Rose LLP, Los Angeles, CA
 DIANE P. WOOD, U.S. Court of Appeals, Seventh Circuit, Chicago, IL

COUNCIL EMERITI

KENNETH S. ABRAHAM, University of Virginia School of Law, Charlottesville, VA
 PHILIP S. ANDERSON, Little Rock, AR
 SUSAN FRELICH APPLETON, Washington University School of Law, St. Louis, MO
 JOSÉ I. ASTIGARRAGA, Reed Smith, Miami, FL
 SHEILA L. BIRNBAUM, Dechert LLP, New York, NY
 ALLEN D. BLACK, Fine, Kaplan and Black, Philadelphia, PA
 AMELIA H. BOSS, Drexel University Thomas R. Kline School of Law, Philadelphia, PA
 MICHAEL BOUDIN, U.S. Court of Appeals, First Circuit, Boston, MA
 WILLIAM M. BURKE, Costa Mesa, CA
 ELIZABETH J. CABRASER, Lieff Cabraser Heimann & Bernstein, San Francisco, CA
 GERHARD CASPER, Stanford University, Stanford, CA
 EDWARD H. COOPER, University of Michigan Law School, Ann Arbor, MI
 N. LEE COOPER, Maynard, Cooper & Gale, Birmingham, AL
 GEORGE H. T. DUDLEY, Dudley Newman Feuerzeig, St. Thomas, U.S. VI
 CHRISTINE M. DURHAM, Utah Supreme Court (retired), Salt Lake City, UT
 CONRAD K. HARPER, New York, NY
 D. BROCK HORNBY, U.S. District Court, District of Maine, Portland, ME
 MARY KAY KANE, University of California, Hastings College of the Law, San Francisco, CA
 CAROLYN DINEEN KING, U.S. Court of Appeals, Fifth Circuit, Houston, TX
 CAROLYN B. LAMM, White & Case, Washington, DC
 DOUGLAS LAYCOCK, University of Virginia School of Law, Charlottesville, VA
 PIERRE N. LEVAL, U.S. Court of Appeals, Second Circuit, New York, NY
 BETSY LEVIN, Washington, DC
 MARTIN LIPTON, Wachtell, Lipton, Rosen & Katz, New York, NY
 MYLES V. LYNK, District of Columbia Office of Disciplinary Counsel, Washington, DC
 MARGARET H. MARSHALL, Choate Hall & Stewart, Cambridge, MA
 JOHN J. "MIKE" MCKETTA III, Graves, Dougherty, Hearon & Moody, Austin, TX
 ROBERT H. MUNDHEIM, Shearman & Sterling, New York, NY
 HARVEY S. PERLMAN, University of Nebraska College of Law, Lincoln, NE
 ELLEN ASH PETERS, Connecticut Supreme Court (retired), Hartford, CT
 ROBERTA COOPER RAMO*, Modrall Sperling, Albuquerque, NM
 MARY M. SCHROEDER, U.S. Court of Appeals, Ninth Circuit, Phoenix, AZ
 ROBERT A. STEIN, University of Minnesota Law School, Minneapolis, MN
 MICHAEL TRAYNOR*, Cobalt LLP, Berkeley, CA
 FREDERICK WILLIAM (BILL) WAGNER, Wagner McLaughlin, Tampa, FL
 WILLIAM H. WEBSTER, Milbank LLP (retired), Washington, DC
 HERBERT P. WILKINS, Concord, MA

**President Emeritus and Chair of the Council Emeritus*

**Model Penal Code:
Sexual Assault and Related Offenses**

Comments and Suggestions Invited

We welcome written comments on this draft. They may be submitted via the website [project page](#) or sent via email to MPCSAcomments@ali.org. Comments will be forwarded directly to the Reporters, the Director, and the Deputy Director. You may also send comments via standard mail; contact information appears below.

Unless expressed otherwise in the submission, individuals who submit comments authorize The American Law Institute to retain the submitted material in its files and archives, and to copy, distribute, publish, and otherwise make it available to others, with appropriate credit to the author. Comments will be accessible on the website's [project page](#) as soon as they are posted by ALI staff. You must be signed in to submit or view comments.

Reporter

Professor Stephen J. Schulhofer
New York University School of Law
40 Washington Square South # 322B
New York, NY 10012-1005
Email: stephen.schulhofer@nyu.edu

Associate Reporter

Professor Erin E. Murphy
New York University School of Law
40 Washington Square South # 419
New York, NY 10012-1005
Email: erin.murphy@nyu.edu

Director

Professor Richard L. Revesz
The Executive Office
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Email: director@ALI.org

Deputy Director

Ms. Stephanie A. Middleton
The Executive Office
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Email: smiddleton@ALI.org

Reporters' Conflicts of Interest

The project's Reporters may have been involved in other engagements on issues within the scope of the project; all Reporters are asked to disclose any conflicts of interest, or their appearance, in accord with the Policy Statement and Procedures on Conflicts of Interest with Respect to Institute Projects.

**Model Penal Code:
Sexual Assault and Related Offenses**

REPORTER

STEPHEN J. SCHULHOFER, New York University School of Law, New York, NY

ASSOCIATE REPORTER

ERIN E. MURPHY, New York University School of Law, New York, NY

ADVISERS

MICHELLE J. ANDERSON, Brooklyn College, Brooklyn, NY
SUSAN FRELICH APPLETON, Washington University School of Law, St. Louis, MO
JANIS M. BERRY, Attorney at Law (retired), Marblehead, MA
SAMUEL W. BUELL, Duke University School of Law, Durham, NC
I. BENNETT CAPERS, Fordham University School of Law, New York, NY
W. TUCKER CARRINGTON, University of Mississippi School of Law, University, MS
ROBERT M. CARY, Williams & Connolly, Washington, DC
SARAH DEER, University of Kansas School of Law, Lawrence, KS
DEBORAH W. DENNO, Fordham University School of Law, New York, NY
PAUL STEVEN DIAMOND, U.S. District Court, Eastern District of Pennsylvania, Philadelphia, PA
ARTHUR T. DONATO, Media, PA
RONALD EISENBERG, Pennsylvania Attorney General's Office, Philadelphia, PA
DONNA LEE ELM, Law Practice of Donna Elm, Cottonwood, AZ
MARY D. FAN, University of Washington School of Law, Seattle, WA
KIMBERLY KESSLER FERZAN, University of Pennsylvania Carey School of Law, Philadelphia, PA
TERRY L. FROMSON, Women's Law Project, Philadelphia, PA
FATIMA GOSS GRAVES, National Women's Law Center, Washington, DC
AYA GRUBER, University of Colorado Law School, Boulder, CO
ROSEMARY HART, Office of Legal Counsel, U.S. Department of Justice, Washington, DC
BARBARA PARKER HERVEY, Texas Court of Criminal Appeals, Austin, TX
WILLIAM M. JACKSON, District of Columbia Superior Court, Washington, DC
VIRGINIA M. KENDALL, U.S. District Court, Northern District of Illinois, Chicago, IL
NELLY N. KHOZAM, Florida Second District Court of Appeal, Tampa, FL
DEREK P. LANGHAUSER, Maine Maritime Academy and Community Colleges, Cumberland Foreside, ME
JENNIFER G. LONG, AEquitas, Washington, DC
GERARD E. LYNCH, U.S. Court of Appeals, Second Circuit, New York, NY
CATHARINE A. MACKINNON, University of Michigan Law School, Ann Arbor, MI
DANIEL J. MELTZER, Harvard Law School, Cambridge, MA [Deceased 2015]
NANCY E. O'MALLEY, Alameda County District Attorney's Office, Oakland, CA
WENDY L. PATRICK, County of San Diego District Attorney's Office, San Diego, CA
LEE H. ROSENTHAL, U.S. District Court, Southern District of Texas, Houston, TX
DAVID RUDOVSKY, Kairys, Rudovsky, Messing, Feinberg & Lin, Philadelphia, PA
JON M. SANDS, Federal Public Defender, District of Arizona, Phoenix, AZ
SUELLYN SCARNECCHIA, University of Michigan Law School (retired), Ann Arbor, MI
ABBE SMITH, Georgetown University Law Center, Washington, DC
DARRYL ANTONIO STALLWORTH, The Law Office of Darryl A. Stallworth, Oakland, CA
CAROL S. STEIKER, Harvard Law School, Cambridge, MA
JEANNIE SUK GERSEN, Harvard Law School, Cambridge, MA
RONALD S. SULLIVAN, JR., Harvard Law School, Criminal Justice Institute, Cambridge, MA
ANDREW E. TASLITZ, American University, Washington College of the Law, Washington, DC [Deceased 2014]
REGGIE B. WALTON, U.S. District Court, District of Columbia, Washington, DC

JOAN PATRICIA WEBER, San Diego Superior Court, San Diego, CA
COREY RAYBURN YUNG, University of Kansas School of Law, Lawrence, KS

LIAISONS

MARY KATHERINE BURKE, Rape, Abuse & Incest National Network, Washington, DC
LAURA DUNN, L.L. Dunn Law Firm, Washington, DC
CYNTHIA GARRETT, Families Advocating for Campus Equality, San Diego, CA
REBECCA HENRY, ABA Commission on Domestic & Sexual Violence, Washington, DC
MICHAEL J. IACOPINO, National Association of Criminal Defense Lawyers, Manchester, NH
NORMAN L. REIMER, National Association of Criminal Defense Lawyers, Washington, DC
RICHARD SCOTT SCHMECHSEL, D.C. Criminal Code Reform Commission, Washington, DC
EBONY TUCKER, National Alliance to End Sexual Violence, Washington, DC

MEMBERS CONSULTATIVE GROUP

Model Penal Code: Sexual Assault and Related Offenses

(as of May 03, 2021)

RAHEEMAH F. ABDULALEEM, Washington, DC	ILANA H. EISENSTEIN, Philadelphia, PA
ELIZABETH K. AINSLIE, Philadelphia, PA	IRA MARK ELLMAN, Berkeley, CA
JAMES J. ALFINI, Houston, TX	SHELDON H. ELSER, New York, NY
RONALD J. ALLEN, Chicago, IL	ROGER A. FAIRFAX JR., Washington, DC
JOSÉ F. ANDERSON, Baltimore, MD	IRA M. FEINBERG, New York, NY
RICHARD T. ANDRIAS, New York, NY	JAMES E. FELMAN, Tampa, FL
DAVID J. ARONOVSKY, Missoula, MT	HERBERT L. FENSTER, Longmont, CO
JOSEPH R. BANKOFF, Atlanta, GA	EUGENE R. FIDELL, New Haven, CT
JENNIFER S. BARD, Gainesville, FL	ARTHUR NORMAN FIELD, New York, NY
FLORA L. BECKER, Philadelphia, PA	EDWARD B. FOLEY, Columbus, OH
JOHN S. BECKERMAN, New Harbor, ME	C. ALLEN FOSTER, Washington, DC
WARREN BELMAR, Palm Beach, FL	MARY ANNE FRANKS, Miami, FL
DIANNE BENNETT, Buffalo, NY	CAROLINE ROSE FREDRICKSON, Washington, DC
BRIAN BIX, Minneapolis, MN	ERIC M. FREEDMAN, Hempstead, NY
CHRISTOPHER L. BLAKESLEY, Las Vegas, NV	ROBERT SHENTON FRENCH, Perth, Australia
STEVEN M. BRADFORD, Muscatine, IA	ANDREW L. FREY, New York, NY
RUSSELL J. BRUEMMER, Washington, DC	CHARLES FRIED, Cambridge, MA
ELLEN M. BUBLICK, Phoenix, AZ	PAUL L. FRIEDMAN, Washington, DC
JOSÉ A. CABRANES, New Haven, CT	HALEY J. FROMHOLZ, Pasadena, CA
TERRY CALVANI, Nashville, TN	KENNETH S. GALLANT, Sequim, WA
CATHERINE L. CARPENTER, Los Angeles, CA	ANNE GARDNER, Fort Worth, TX
ERIC R. CARPENTER, Miami, FL	BRYAN A. GARNER, Dallas, TX
JENNY E. CARROLL, Tuscaloosa, AL	STEPHEN P. GARVEY, Ithaca, NY
JOHN HILL CAYCE, Fort Worth, TX	HENRY L. GARZA, Belton, TX
MARTHA E. CHAMALLAS, Columbus, OH	JACOB E. GERSEN, Cambridge, MA
HENRY L. CHAMBERS JR., Richmond, VA	NANCY GERTNER, Cambridge, MA
STEVEN L. CHANENSON, Villanova, PA	CHRISTOPHER S. GONTARZ, Newport, RI
GABRIEL J. CHIN, Davis, CA	HERVÉ GOURAIGE, Newark, NJ
PENELOPE L. CHRISTOPHOROU, New York, NY	LINDA SHERYL GREENE, Madison, WI
DANE S. CIOLINO, Metairie, LA	MICHAEL GREENWALD, Philadelphia, PA
ROGER S. CLARK, Camden, NJ	BETSY J. GREY, Phoenix, AZ
CHRISTINE NERO COUGHLIN, Winston Salem, NC	CHARLES E. GRIFFIN, Ridgeland, MS
THOMAS L. CUBBAGE III, Plano, TX	JUST. WILLIAM M. C. GUMMOW, Canberra, Australia
RICHARD OLAF CUNNINGHAM, Washington, DC	JAMES B. HALPERN, Bethesda, MD
BEVERLY WINSLOW CUTLER, Palmer, AK	LESLIE JOAN HARRIS, Eugene, OR
GEORGE A. DAVIDSON, New York, NY	MICALYN SHAFER HARRIS, Ridgewood, NJ
ROSS E. DAVIES, Arlington, VA	ROBERT M. HART, Bronxville, NY
MICHELLE MADDEN DEMPSEY, Villanova, PA	VIRGINIA ELLEN HENCH, Honolulu, HI
JOHN L. DIAMOND, San Francisco, CA	RONALD K. HENRY, Washington, DC
DONALD L. DOERNBERG, Penn Valley, CA	ERNEST R. HIGGINBOTHAM, Dallas, TX
JOSHUA DRESSLER, Columbus, OH	W. WILLIAM HODES, Lady Lake, FL
JENNIFER ANN DROBAC, Indianapolis, IN	BRIAN M. HOFFSTADT, Los Angeles, CA
MEREDITH J. DUNCAN, Houston, TX	STEVEN F. HUEFNER, Columbus, OH
CHRISTINE M. DURHAM, Salt Lake City, UT	JOHN A. HUMBACH, White Plains, NY
CINDY DYER, Washington, DC	

RICHARD H. HUNTER, St. Croix, Virgin Islands
 CRAIG ISCOE, Washington, DC
 RALPH A. JACOBS, Philadelphia, PA
 RICHARD GIBBS JOHNSON, Cleveland, OH
 LIZA ILONA KARSAI, Chicago, IL
 HENRY R. KAUFMAN, New York, NY
 MICHAEL EDWARD KEASLER, Austin, TX
 ORIN S. KERR, Berkeley, CA
 EVELYN V. KEYES, Houston, TX
 MARK R. KILLENBECK, Fayetteville, AR
 NANCY S. KIM, San Diego, CA
 NANCY J. KING, Nashville, TN
 LAIRD C. KIRKPATRICK, Washington, DC
 DANIEL S. KLEINBERGER, Mendota Heights, MN
 CECELIA M. KLINGELE, Madison, WI
 NINA A. KOHN, Syracuse, NY
 GLENN S. KOPPEL, Irvine, CA
 MICHAEL J. KRAMER, Albion, IN
 BRUCE N. KUHLIK, Washington, DC
 SYBIL H. LANDAU, New York, NY
 HOWARD LANGER, Philadelphia, PA
 MÁXIMO LANGER, Los Angeles, CA
 WILLIAM J. LEAHY, Albany, NY
 BILL LANN LEE, Berkeley, CA
 CYNTHIA K. LEE, Washington, DC
 EVAN TSEN LEE, San Francisco, CA
 JUDITH LEONARD, Washington, DC
 GEORGE W. LIEBMANN, Baltimore, MD
 WAYNE A. LOGAN, Tallahassee, FL
 HENRY R. LORD, Baltimore, MD
 MARGARET COLGATE LOVE, Washington, DC
 LINDA A. MALONE, Williamsburg, VA
 C. SCOTT MARAVILLA, Washington, DC
 RICHARD D. MARKS, Charlottesville, VA
 AMIE C. MARTINEZ, LINCOLN, NE
 MARGARET PENNY MASON, New Haven, CT
 MARY MASSARON, Bloomfield Hills, MI
 ALFRED D. MATHEWSON, Albuquerque, NM
 DAVID MCCORD, Des Moines, IA
 ROY W. MCLEESE III, Washington, DC
 BENJAMIN C. MCMURRAY, Salt Lake City, UT
 M. ISABEL MEDINA, New Orleans, LA
 A. DOUGLAS MELAMED, Stanford, CA
 MARJORIE A. MEYERS, Houston, TX
 KATHERINE G. MINARIK, Chicago, IL
 NATASHA MINSKER, Sacramento, CA
 S. DAVID MITCHELL, Columbia, MO
 SAIRA MOHAMED, Berkeley, CA
 THOMAS D. MORGAN, Naples, FL
 THOMAS R. NEWMAN, New York, NY
 VIRGINIA E. NOLAN, del Mar, CA

MICHAEL M. O'HEAR, Milwaukee, WI
 JOHN EDWARD OSBORN, Chadds Ford, PA
 NANCY LEEDS PERKINS, Washington, DC
 ELLEN S. PODGOR, Gulfport, FL
 SUSAN POSER, Chicago, IL
 JOSEPHINE R. POTUTO, Lincoln, NE
 MARGARET JANE RADIN, Ann Arbor, MI
 GERALD S. REAMEY, San Antonio, TX
 HENRY R. REEVE, Denver, CO
 CHRISTINA C. REISS, Burlington, VT
 SARAH E. RICKS, Camden, NJ
 ALICE RISTROPH, Brooklyn, NY
 IRA P. ROBBINS, Bethesda, MD
 JAMES L. ROBERTSON, Jackson, MS
 PAUL H. ROBINSON, Philadelphia, PA
 MARGARET CASEY RODGERS, Pensacola, FL
 THEODORE O. ROGERS JR., New York, NY
 RONALD S. ROLFE, New York, NY
 HOWARD RUDA, New York, NY
 SABRINA R. SAFRIN, Newark, NJ
 STEPHEN A. SALTZBURG, Washington, DC
 LYNN HECHT SCHAFFRAN, New York, NY
 PAUL SCHLAUD, Austin, TX
 ELIZABETH M. SCHNEIDER, Brooklyn, NY
 MILTON R. SCHROEDER, Paradise Valley, AZ
 VICTOR E. SCHWARTZ, Washington, DC
 ELIZABETH J. SHAPIRO, Washington, DC
 ANNA WILLIAMS SHAVERS, Lincoln, NE
 RICHARD W. SHEPRO, Chicago, IL
 KAMI CHAVIS SIMMONS, Winston Salem, NC
 KENNETH W. SIMONS, Irvine, CA
 VIRGINIA E. SLOAN, Washington, DC
 ROBERT D. SLOANE, Boston, MA
 KATHLEEN SMALLEY, Los Angeles, CA
 BRADLEY Y. SMITH, New York, NY
 MARGARET POLES SPENCER, Richmond, VA
 ARTHUR B. SPITZER, Washington, DC
 JANE STAPLETON, Cambridge, England
 EDWIN H. STERN, Florham Park, NJ
 H. MARK STICHEL, Baltimore, MD
 KATE STITH, New Haven, CT
 MARK P. STRASSER, Columbus, OH
 GUY MILLER STRUVE, New York, NY
 DWIGHT H. SULLIVAN, Washington, DC
 MARY-CHRISTINE SUNGAILA, Irvine, CA
 STEPHEN LYLE TATUM, Fort Worth, TX
 CAROLYN ENGEL TEMIN, Philadelphia, PA
 BOWEN H. TUCKER, Chicago, IL
 DEBORAH TUERKHEIMER, Chicago, IL
 MICHAEL VITIELLO, Sacramento, CA
 EUGENE VOLOKH, Los Angeles, CA

JAY W. WAKS, Larchmont, NY
ARI EZRA WALDMAN, Boston, MA
JOHN L. WARDEN, New York, NY
THOMAS D. WATERMAN, Des Moines, IA
LOIS WEITHORN, San Francisco, CA
SARAH N. WELLING, Lexington, KY
MARIANNE WESSON, Lyons, CO
CHRISTINA B. WHITMAN, Ann Arbor, MI
KEN WISE, Houston, TX
NICHOLAS J. WITTNER, East Lansing, MI
ROBIN E. WOSJE, Arlington, VA
RONALD F. WRIGHT, Winston Salem, NC

The bylaws of The American Law Institute provide that “Publication of any work as representing the Institute’s position requires approval by both the membership and the Council.”

Each portion of an Institute project is submitted initially for review to the project’s Advisers and Members Consultative Group as a Preliminary Draft. As revised, it is then submitted to the Council as a Council Draft. After review by the Council, it is submitted as a Tentative Draft or Discussion Draft for consideration by the membership at an Annual Meeting.

Once it is approved by both the Council and membership, a Tentative Draft represents the most current statement of the Institute’s position on the subject and may be cited in opinions or briefs in accordance with Bluebook rule 12.9.4, e.g., Restatement (Second) of Torts § 847A (AM. L. INST., Tentative Draft No. 17, 1974), until the official text is published. The vote of approval allows for possible further revision of the drafts to reflect the discussion at the Annual Meeting and to make editorial improvements.

The drafting cycle continues in this manner until each segment of the project has been approved by both the Council and the membership. When extensive changes are required, the Reporter may be asked to prepare a Proposed Final Draft of the entire work, or appropriate portions thereof, for review by the Council and membership. Review of this draft is not de novo, and ordinarily is limited to consideration of whether changes previously decided upon have been accurately and adequately carried out.

The typical ALI Section is divided into three parts: black letter, Comment, and Reporter’s Notes. In some instances there may also be a separate Statutory Note. Although each of these components is subject to review by the project’s Advisers and Members Consultative Group and by the Council and the membership, only the black letter and Comment are regarded as the work of the Institute. The Reporter’s and Statutory Notes remain the work of the Reporter.

MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES

TENTATIVE DRAFT NO. 5

TABLE OF CONTENTS

<i>SECTION</i>	<i>PAGE</i>
PROJECT STATUS AT A GLANCE	xiii
FOREWORD	xv

PART I

GRADING: GENERAL CONSIDERATIONS	1

PART II

SECTION 213.0. GENERAL PRINCIPLES OF LIABILITY; DEFINITIONS.....	15
SECTION 213.1. SEXUAL ASSAULT BY AGGRAVATED PHYSICAL FORCE OR RESTRAINT	87
SECTION 213.2. SEXUAL ASSAULT BY PHYSICAL FORCE OR RESTRAINT	131
SECTION 213.3. SEXUAL ASSAULT OF AN INCAPACITATED, VULNERABLE, OR LEGALLY RESTRICTED PERSON	146
SECTION 213.4. SEXUAL ASSAULT BY EXTORTION	208
SECTION 213.5. SEXUAL ASSAULT BY PROHIBITED DECEPTION	237
SECTION 213.6. SEXUAL ASSAULT IN THE ABSENCE OF CONSENT	253
SECTION 213.7. OFFENSIVE SEXUAL CONTACT BY PHYSICAL FORCE OR RESTRAINT OR SURREPTITIOUS INCAPACITATION; OFFENSIVE SEXUAL CONTACT	284
SECTION 213.8. SEXUAL OFFENSES INVOLVING MINORS	317
SECTION 213.9. SEX TRAFFICKING.....	413
SECTION 213.10. AFFIRMATIVE DEFENSE OF EXPLICIT PRIOR PERMISSION	462
SECTION 213.11. SENTENCING AND COLLATERAL CONSEQUENCES OF CONVICTION – EXECUTIVE SUMMARY	481
SECTION 213.11. SENTENCING AND COLLATERAL CONSEQUENCES OF CONVICTION	493

SECTION 213.11A. REGISTRATION FOR LAW-ENFORCEMENT PURPOSES	539
SECTION 213.11B. NOTIFICATION OF THE OBLIGATION TO REGISTER AND ASSOCIATED DUTIES	556
SECTION 213.11C. TIME OF INITIAL REGISTRATION	558
SECTION 213.11D. INFORMATION REQUIRED IN REGISTRATION	560
SECTION 213.11E. DUTY TO KEEP REGISTRATION CURRENT	562
SECTION 213.11F. DURATION OF REGISTRATION REQUIREMENT	567
SECTION 213.11G. FAILURE TO REGISTER	571
SECTION 213.11H. ACCESS TO REGISTRY INFORMATION.....	573
SECTION 213.11I. ADDITIONAL COLLATERAL CONSEQUENCES OF CONVICTION	581
SECTION 213.11J. DISCRETIONARY RELIEF FROM REGISTRATION AND OTHER SENTENCING CONSEQUENCES AND COLLATERAL CONSEQUENCES	595
APPENDIX A - PERTINENT 1962 CODE PROVISIONS.....	601
APPENDIX B – PROPOSED BLACK LETTER OF ARTICLE 213	607

PROJECT STATUS AT A GLANCE

Section 213.0(2)(d) (formerly Section 213.0(3) in T.D. No. 2) – approved as amended at 2016 Annual Meeting; approved by Council Oct. 2016

Section 213.0(2)(a) and (b) (formerly Section 213.0(1) and (2) in T.D. No. 3) – approved at 2017 Annual Meeting

History of Material in This Draft

The Council approved the start of this project in 2012. The most recent earlier versions of Part I on Grading and Sections 213.0-213.7, 213.9, and 213.10 can be found in Tentative Draft No. 4 (2020). The most recent earlier versions of Sections 213.8 and 213.11-213.11J can be found in Council Draft No. 11 (2020).

Foreword

The Model Penal Code, which was approved in 1962 and has guided the field for over half a century, is one of the Institute's most important and significant accomplishments. It was the brainchild of Herbert Wechsler, who served as its Chief Reporter and became ALI Director shortly after the project's completion, serving with great distinction for 21 years from 1963 to 1984.

The MPC was a forward-looking document that withstood the test of time remarkably well. But, inevitably, revisions eventually became necessary. In 2001, the Institute launched a review of the Sentencing provisions; this project is now nearing completion. In 2009, following a report to the Council, the Institute withdrew the death-penalty provision. And, in 2012, it launched a review of the provisions on Sexual Assault and Related Offenses. This difficult project, which deals with some of the most controversial matters on the current public agenda, is under the very able hands of Reporter Stephen J. Schulhofer and Associate Reporter Erin E. Murphy, both of New York University School of Law.

This project was first discussed at the 2013 Annual Meeting and has subsequently been before the membership in 2014, 2015, 2016, and 2017, resulting in the approval of important definitional provisions, including the definition of "Consent." The Reporters now have completed a draft of the whole project, which has been approved by the Council, and are submitting it to the membership for approval.

I am enormously grateful to Professors Schulhofer and Murphy. They have tackled a very difficult set of issues with great insight and intelligence and have been open to the large number of suggestions they received, many of them mutually inconsistent. The Advisers, Members Consultative Group, Council, and membership have also devoted a great deal of time and energy and have significantly contributed to the quality of the project. They similarly deserve our collective thanks.

RICHARD L. REVESZ
Director
The American Law Institute

May 3, 2021

PART I

GRADING: GENERAL CONSIDERATIONS

1 In addition to setting out provisions of substantive liability, revised Article 213 also
2 prescribes suggested terms of punishment. In making those assessments, the Institute followed
3 the principles enumerated in the recently revised portions of the Model Penal Code pertaining to
4 sentencing, namely Section 1.02(2) and Articles 6 and 7. As a result, the punishments available
5 under Article 213 were assigned according to the revised sentencing provisions of the Code,
6 rather than in a manner that would harmonize them with the overall scheme of punishment
7 embodied in the 1962 Code. The revised sentencing provisions of the Model Penal Code depart
8 meaningfully from those expressed at the time of the adoption of the 1962 Code.¹ As the
9 Commentary to the revised Articles explains, the 1962 Code’s approach to sentencing was a
10 product of its time, and views about punishment have since shifted in important ways.

11 The penalties found in Article 213 also do not necessarily hew closely to the punishment
12 schemes found in existing criminal law, for two reasons. First, existing law defies ready
13 characterization. As a general matter, state laws exhibit a patchwork of penal philosophies. With
14 specific regard to sexual offenses, there is no clear consensus about the amount of punishment
15 that should apply to particular offenses, and a breadth of punishments is authorized for similar
16 conduct across the states. Take an offense such as engaging in sexual intercourse with an
17 unconscious adult. One jurisdiction punishes the offense with a maximum of five years’
18 incarceration;² another with a maximum of life without parole.³ Even an offense seemingly as
19 straightforward as using aggravated physical force to compel an adult to submit to sexual
20 penetration exhibits wide-ranging variations. On the low end, one jurisdiction authorizes a
21 maximum term of eight years;⁴ the highest maximum is life without parole.⁵ Looking to existing

¹ See, e.g., MODEL PENAL CODE: SENTENCING Section 1.02(2) Comment at 2 (AM. L. INST., Proposed Final Draft 2017) (“reorient[ing] the foundations of sentencing law throughout the Model Penal Code” by emphasizing proportionality and eschewing indeterminate sentences) [hereinafter MPC:S]. The 1962 Code classified felonies in three degrees and two misdemeanors. MODEL PENAL CODE Sections 6.06, 6.08 (AM. L. INST., Proposed Official Draft 1962). First-degree felonies carried a maximum of life, second-degree felonies carried a maximum of 10 years, and third-degree felonies carried a maximum of five years. *Id.* Section 6.06. Misdemeanors carried a year of maximum imprisonment and petty misdemeanors carried a maximum of 30 days. *Id.* Section 6.08.

² See, e.g., OHIO REV. CODE ANN. §§ 2907.03(A)(2)-(3), 2929.14(A)(3)(a) (LexisNexis 2020).

³ See, e.g., WASH. REV. CODE ANN. §§ 9A.44.050(1)(b), 9A.44.050(2), 9A.20.021(1)(a) (LexisNexis 2020).

⁴ See, e.g., CAL. PENAL CODE §§ 261(a)(2), 264(a) (Deering 2020).

1 law thus offers little guidance, if guidance is measured as consensus about either the absolute or
2 relative term appropriate for any particular offense.

3 Second, on the merits, current American punishment practices are simply too punitive,
4 from the standpoint of both morality and efficiency.⁶ Existing penal law broadly authorizes long
5 sentences of incarceration, including for nonviolent offenses. Collateral consequences impose a
6 range of debilitating and counterproductive restrictions that inhibit reintegration and aggravate
7 the risk of recidivism. Affixing an appropriate penalty for the conduct proscribed by Article 213
8 thus demands fresh consideration of the theoretical question of how best to achieve the legitimate
9 purposes of punishment in light of contemporary knowledge about the nature and impact of
10 terms of incarceration.

11 Such consideration does not point in a single, uncontroverted direction, whether toward
12 leniency or severity. Although there is bipartisan consensus that American penal law generally is
13 too harsh, not everyone agrees that this harshness is systematic with specific respect to the
14 punishment of sexual offenses. On the one hand, the punishment of those convicted of sexual
15 offenses unquestionably exhibits signs of penal excess. Long terms of incarceration are not
16 uncommon,⁷ even for low-level sexual encounters. Those convicted of sexual offenses often

⁵ See, e.g., GA. CODE ANN. § 16-6-1 (2020).

⁶ See, e.g., Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 260-261 (2018) (“A growing chorus of criminal law scholars, judges, policymakers, and activists increasingly agree that ‘too many Americans go to too many prisons for far too long.’”); id. at 261 n.2, 265-266, 266 n.26 (citing evidence). But see id. at 262-264 (teasing out strains of this belief that may be in tension with one another).

⁷ DANIELLE KAEBLE, U.S. BUREAU OF JUSTICE STATISTICS, NCJ 252205, TIME SERVED IN STATE PRISON, 2016, at 1-2 (2018). Data show that of persons released from prison, only those convicted of murder serve longer terms on average. Id. That study found that “[p]ersons released after serving time for rape or sexual assault . . . served the highest percentage of their sentence” and that one in five state prisoners released after a sentence for rape or sexual assault served at least 10 or more years. Id. at 3-4. In contrast, 72 percent of all persons convicted for violent offenses served less than five years, and nine in 10 served less than 10 years. Id. at 4; see also JOHN PFAFF, LOCKED IN 1, 187-188 (noting that, where violent crimes are defined as “murder/manslaughter, forcible sexual assault, aggravated assault, and robbery,” 25 percent of people imprisoned for a violent crime—and one-eighth of the total prison population—are incarcerated for murder or manslaughter, and 45 percent are incarcerated for robbery or aggravated assault; if all prisoners except those serving time for murder, manslaughter, and sexual assault were released, the incarceration *rate* in the United States would still be higher than in almost any European nation); URBAN INST., A MATTER OF TIME: THE CAUSES AND CONSEQUENCES OF RISING TIME SERVED IN AMERICA’S PRISONS 6, 13 (2017), https://apps.urban.org/features/long-prison-terms/a_matter_of_time_print_version.pdf (finding mass incarceration in part attributable to “increase in time served for violent crimes,” and that of the 94 percent of the prison population serving long sentences for violent crime, 10 percent are serving them for rape). See generally Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 447-453 (2010) (discussing the lengthy sentences and post-incarceration restrictions on sex offenders at local, state, and federal levels).

endure physical and sexual abuse during confinement.⁸ And onerous collateral consequences almost always apply upon release, including public shaming through registration provisions and draconian restrictions on housing and employment.⁹ These severe penalties also tend to be imposed in a racially disproportionate fashion, with black defendants convicted of assaulting white victims receiving the harshest sentences.¹⁰ The severity of the sanction and the stigma that attaches to sexual offenses also may undermine reporting, prosecution, and conviction rates.¹¹

On the other hand, critics have decried the ambivalence of the criminal process when it comes to effective responses to sexual violence. Although acknowledging the problem of mass incarceration, they point out that only a tiny fraction of perpetrators of sexual assault are ever charged or convicted. A majority of sexual attacks are never reported to police,¹² and victims

⁸ Ian O'Donnell & Kimmet Edgar, *Fear in Prison*, 79 PRISON J. 90, 98 (1999).

⁹ Yung, *supra* note 7, at 447-448.

¹⁰ Jessica Shaw & HaeNim Lee, *Race and the Criminal Justice System Response to Sexual Assault: A Systematic Review*, 64 AM. J. COMMUNITY PSYCHOL. 256, 274 (2019).

¹¹ See LYNN LANGTON ET AL., U.S. BUREAU OF JUSTICE STATISTICS, NCJ 238536, VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006-2010, at 4 tbl.1 (2012) (citing “[f]ear of reprisal or getting offender in trouble” as a disproportionately common reason that victims of rape or sexual assault did not report to the police); see also CALLIE MARIE RENNISON, U.S. BUREAU OF JUSTICE STATISTICS, NCJ 194530, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000, at 3 (2002) (“The closer the relationship between the female victim and the offender, the greater the likelihood that the police would not be told about the rape or sexual assault.”). Studies show that victims of sexual violence who do not report to police express reluctance in part due to uncertainty that a crime was committed, desire to protect the assailant, or reservations about the legal process. LYNN LANGTON ET AL., *supra*. As was articulated by one victim’s impact statement in a high-profile case, which involved an act of penetration while the victim was unconscious: “Had [the defendant] admitted guilt and remorse and offered to settle early on, I would have considered a lighter sentence, respecting his honesty, grateful to be able to move our lives forward. . . . I told the probation officer I do not want [defendant] to rot away in prison.” Katie J.M. Baker, *Here’s the Powerful Letter the Stanford Victim Read to Her Attacker*, BUZZFEED NEWS (June 3, 2016, 4:17 PM), <https://www.buzzfeednews.com/article/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra#.ymo4W4zw0>; see also ALL. FOR SAFETY & JUSTICE, CRIME SURVIVORS SPEAK: THE FIRST EVER NATIONAL SURVEY OF VICTIMS’ VIEWS ON SAFETY AND JUSTICE 20-21, 25 (2016), <https://allianceforsafetyandjustice.org/wp-content/uploads/2019/04/Crime-Survivors-Speak-Report.pdf> (surveying victims of violent crime (of whom 11 percent were sexual-assault survivors), and noting that by a margin of two to one, such victims think that prison is more likely to make people commit more crimes than rehabilitate them, that sentences should be shorter to facilitate rehabilitation, and that rehabilitation is preferable to punishment). One survey on victims’ views toward the criminal justice system quoted a survivor of sexual violence:

I don’t think knowing the perpetrators are in prison would have helped me heal and it might have added more trauma in my life because I would have had to testify against them, leaving me with the burden of breaking up my family unit. What I do want is for them to receive the help they need to see the impact of their actions and to value women and children, and to learn to love and be loved in healthy and appropriate ways.

Id. at 12.

¹² RACHEL E. MORGAN & BARBARA A. OUDEKERK, U.S. BUREAU OF JUSTICE STATISTICS, NCJ 238536, CRIMINAL VICTIMIZATION, 2018, at 3, 8 (2019) (reporting an increase in victimization rate of rape or sexual assault

who do report are often sidelined or dismissed.¹³ The number of cases involving allegations of unchecked sexual harassment or assault committed by high-profile public figures points to impunity, more often than overzealousness.¹⁴ And even those who are convicted of sexual offenses do not always receive harsh treatment; recent public outrage has focused on judges perceived to have been too lenient in sentencing sexual offenses, leading in one case to voters recalling the judge from office.¹⁵

In addition, recent research suggests that complaints judged incredible or dismissed by law enforcement in fact often later prove to be well-founded. One set of data emerged from the

from 1.6 per 1,000 people in 2015 to 2.7 in 2018, but a decline in reporting rate from 40 percent in 2017 to 25 percent in 2018); see also LYNN LANGTON ET AL., *supra* note 11, at 1 (finding that from 2006 to 2010, only 34 percent of rapes were reported to police); RENNISON, *supra* note 11, at 2 tbl.3 (finding that from 1992 to 2000, only 26 to 36 percent of sexual assaults or rapes, depending on the nature of the assault, were reported to the police). A study of reporting of rape from 1973 to 2000 found that reports to police of non-stranger sexual assaults increased significantly during the 1970s and 1980s. ERIC P. BAUMER, NAT'L INST. OF JUSTICE, NCJ 207497, TEMPORAL VARIATION IN THE LIKELIHOOD OF POLICE NOTIFICATION BY VICTIMS OF RAPE, 1973-2000, at 5-7 (2004). The study used data from the National Crime Victimization Survey (1992-2000) and the National Crime Survey (1973-1991), and measured reports by both victims and third parties. *Id.* at 2, 14. But then in the 1990s, reporting rates declined. Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 148 & fig.1 (2012). Reporting rates apparently are again on the rise, arguably as a result of changes in the FBI's definition of rape as well as the salience of sexual crimes in contemporary media. See RACHEL E. MORGAN & JENNIFER L. TRUMAN, U.S. BUREAU OF JUSTICE STATISTICS, NCJ 252472, CRIMINAL VICTIMIZATION, 2017, at 1 (2018) (observing that reporting rates for rape rose from 23 percent in 2016 to 40 percent in 2017).

¹³ ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS 4 (2013). Corrigan's study of 167 rape-care advocates across six states concluded that "victims are still likely to face overwhelming resistance, reluctance, and even outright contempt from the legal and medical systems targeted by the feminist anti-rape movement of the 1970s." *Id.* See also MELISSA S. MORABITO, LINDA M. WILLIAMS & APRIL PATTAVINA, DECISION MAKING IN SEXUAL ASSAULT CASES: REPLICATION RESEARCH ON SEXUAL VIOLENCE CASE ATTRITION IN THE U.S. (DOJ Feb. 2019), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/252689.pdf> (reporting finding from multijurisdictional study that, of 2,887 cases of sexual assault reported by female victims to law enforcement in 2-year period, 544 led to arrest, 363 led to the filing of charges, and 189 led to conviction).

¹⁴ See generally RONAN FARROW, CATCH AND KILL (2019) (citing cases of Harvey Weinstein, Matt Lauer, Leslie Moonves, and Bill Cosby, among others).

¹⁵ Lili Loofbourow, *Why Society Goes Easy on Rapists*, SLATE (May 30, 2019, 5:45 AM), <https://slate.com/news-and-politics/2019/05/sexual-assault-rape-sympathy-no-prison.html> (citing a compiled "list of sexual assailants who got no prison time" and discussing the case of Judge Aaron Persky, who was recalled by California voters after handing down a lenient sentence in a high-profile sexual-assault case). See also *Montana judge sparks outrage with light sentence for man who raped 12-year-old daughter* (CHICAGO TRIBUNE Oct. 21, 2016) available at <https://www.chicagotribune.com/nation-world/ctmontana-judge-rape-sentence-20161021-story.html> (noting criticism of judge who gave 30-day suspended sentence); *The Montana Judge Who Blamed a 14-Year-Old for Her Own Rape Will Be Censured* (THE ATLANTIC, Jun. 4, 2014) (recounting censure of judge who sentenced teacher to 30 days in jail); *A bus driver rapes, a man keeps girl captive and neither are going to prison* (USA TODAY May 2019), available at <https://www.usatoday.com/story/news/nation/2019/05/03/bus-driver-shane-pinche-wont-goprison-rape-hes-not-alone/3653181002/> (reporting on convictions in which neither defendant was sent to prison).

study of tens of thousands of untested rape kits from unsolved cases.¹⁶ A selection of police files from those kits revealed that “most cases were closed after *minimal* investigational effort,” and that “law enforcement personnel expressed negative, victim-blaming beliefs about sexual assault victims.”¹⁷ Significantly, that same study evaluated the results of DNA testing from that backlog: from a sample of 1595 kits, half of those that produced a DNA profile generated a match in the national DNA databases, and a quarter of all matches were to serial offenders.¹⁸ That data also suggested that at least some perpetrators of sexual violence had committed a number of other sexual offenses;¹⁹ suggesting that investigative effort might have provided a basis for a successful prosecution.

These contradictory conclusions about the treatment of sexual violence in our society are further complicated by evidence of historic failures to identify and prosecute sexual offenses equitably. The history of the 20th-century enforcement of sexual crimes includes: racially discriminatory deployment of the death penalty; extra-legal lynching in cases of black men accused of sexual offenses against white women;²⁰ the legal permission once given to spousal

¹⁶ REBECCA CAMPBELL ET AL., NAT’L INST. OF JUSTICE, NCJ 248680, THE DETROIT SEXUAL ASSAULT KIT (SAK) ACTION RESEARCH PROJECT (ARP), FINAL REPORT 3 (2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/248680.pdf> (reporting an estimated 169,000 untested kits nationwide).

¹⁷ *Id.* at iv, 295.

¹⁸ *Id.* at 173-175. These figures are specific to the Detroit backlog, but the same study found comparable numbers in other jurisdictions. See *id.* at 303 & tbl.6.1 (reporting rates from Los Angeles and New Orleans).

¹⁹ *Id.* at 6 (citing a long list of academic research also indicating that “most rapists are serial rapists”). Empirical and other studies produce conflicting data on the rates of reoffending. The difficulty with recidivism data rests in large part on the use of re-arrest as a measure of recidivism. In a field with relatively low reporting and investigation rates, rearrest may be a poor proxy for actual victimization. This is particularly pronounced as regards child victims, who may be reluctant or delayed disclosers of sexual abuse. Victimization studies and offender self-identification of incidents often support higher rates of reoffending. Compare, e.g., Michele Elliott et al., *Child Sexual Abuse Prevention: What Offenders Tell Us*, 19 CHILD ABUSE & NEGLECT 579, 580-584 (1995) (reporting data from interviews with 91 convicted child sex offenders, of whom 70 percent had victimized one to nine minors, 23 percent had victimized 10 to 40 minors, and seven percent had victimized 41 to 450 children), Ron Langevin et al., *Lifetime Sex Offender Recidivism: A 25-Year Follow-Up Study*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 531, 548 (2004) (showing four in five reoffenders based on criminal justice data on convictions or charges, and nine in 10 based on sex offenses and “undetected sex crimes”), and David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 80 (2002) (finding that “[a]lmost two-thirds of [the self-identified rapists in the study] raped more than once, and a majority also committed other acts of interpersonal violence, such as battery, child physical abuse, and child sexual abuse”), with MARIEL ALPER & MATTHEW R. DUROSE, U.S. BUREAU OF JUSTICE STATISTICS, NCJ 251773, RECIDIVISM OF SEX OFFENDERS RELEASED FROM STATE PRISON: A 9-YEAR FOLLOW-UP (2005-14), at 4 (2019) (showing lower rates of rearrest for sex offenders than other types of offenders).

²⁰ See generally PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA (2002) (accounting the history of lynching in the United States, and acknowledging that a common excuse for lynching was a sexual assault alleged by a white woman); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF

rape;²¹ the use of the criminal law to punish extramarital sex and sex outside of heterosexual relationships;²² the moral panic that led to a number of convictions, later overturned, in a series of “day-care” cases;²³ and the exoneration of large numbers of persons wrongly convicted of rape, of which a significant fraction have been black men.²⁴

At the same time, that history also includes the fair complaint that penal law has too long ignored the prevalence and extent of sexual violence, to the detriment of victim welfare and public safety. In one careful survey, the Department of Justice estimated that among American women aged 18 or older, there were approximately 876,000 rapes and attempted rapes annually; 15 percent of American adult women had experienced one or more completed rapes in their lifetimes, and another three percent had been victims of attempted rape.²⁵ A more recent survey by the Centers for Disease Control estimates that nearly 20 percent of adult women have been raped at some time in their lives.²⁶ Rates of violence against Native American women are so

BLACKNESS 58-61 (2010) (discussing the observations of Black scholars of the 1890s that white press “applauded” lynching).

²¹ See generally Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1482-1505 (2000) (detailing the attitude toward and changes to the legality of spousal rape during the 20th century).

²² Compare *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding the constitutionality of a state statute criminalizing sodomy even when applied to private, consensual acts in a homosexual relationship), with *Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning *Bowers* by finding that application of laws prohibiting sodomy to private, consensual acts is unconstitutional).

²³ See DEBBIE NATHAN & MICHAEL SNEDEKER, SATAN’S SILENCE: RITUAL ABUSE AND THE MAKING OF A MODERN AMERICAN WITCH HUNT 2-4 (1995) (describing moral panic that led to the McMartin Preschool case, the conviction of Kelly Michaels, and other prosecutions).

²⁴ SAMUEL R. GROSS ET AL., NAT’L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 11-12 (2017). See *Know the Cases*, INNOCENCE PROJECT, <https://web.archive.org/web/20141229093723/http://www.innocenceproject.org/know> (as of December 2014, “[t]here have been 325 post-conviction DNA exonerations” in the United States, of which 70 percent were people of color). In a wider database that includes official exonerations resulting from evidence other than DNA, there were 305 exonerations of individuals convicted of sexual offenses (including crimes of child sexual abuse). Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989–2012*, at 20 tbl.2 (Univ. of Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 277, 2012), <http://ssrn.com/abstract=2092195>; see also id. at 49 (“Most women who are raped are victimized by men of their own race. Inter-racial rape is uncommon and rapes of white women by black men are a small minority of all rapes, about 5%.”).

²⁵ PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. OF JUSTICE, NCJ 183781, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 13 (2000).

²⁶ MICHELE C. BLACK ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1 (2011) [hereinafter CDC Study]. Rape was defined as “completed forced penetration, attempted penetration, and alcohol or drug-facilitated completed penetration.” Id. at 10. The 2009 crime victimization study by the Bureau of Justice Statistics found that 84.3 percent of sexual-assault victims were female. JENNIFER L. TRUMAN & MICHAEL R. RAND, U.S. BUREAU OF JUSTICE

disproportionately high that they garnered special congressional attention.²⁷ Surveys also indicate that between 1.4 percent and three percent of adult men have been victims of a completed or attempted rape in their lifetimes,²⁸ with dramatically higher rates for men who have been imprisoned.²⁹ Evidence of the recidivism rates of persons convicted of sex offenses is also a subject of dispute.³⁰

In short, neither the history nor contemporary research points in a single, uniform direction as regards the effective and just punishment of sexual offenses. Nevertheless, some basic guidelines shape the approach to grading taken in Article 213. The first basic precept is to follow the penal philosophy articulated in recently revised Sentencing Articles of the Model Penal Code, Articles 6 and 7. These revised Articles set forth a comprehensive scheme driven by four central purposes in assigning punishments to individual offenses.

First, punishment should be “within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders.”³¹ Specifically, Section 10.02 permits imposition of a sentence of incarceration only “when necessary to incapacitate dangerous offenders,” or “when other sanctions would depreciate the seriousness of

STATISTICS, NCJ 231327, CRIMINAL VICTIMIZATION, 2009, at 7 tbl.7 (2010) [hereinafter 2009 BJS Study]. In terms of demographics, the sexual-assault victimization rate for blacks was 1.2 in 1000, whereas for whites it was 0.4 in 1000. Hispanic and non-Hispanic rates remain roughly equal at 0.5 in 1000. Rates of victimization hover around 0.6-0.9 in 1000 for ages 12 through 34, and then drop off sharply after that. *Id.* at 5 tbl.5. A Pentagon survey released in 2013 found that in the previous year 6.1 percent of women and 1.2 percent of men on active duty in the military said they had experienced some form of sexual assault; these victimization rates are many times higher than those found in the general population. U.S. DEP’T OF DEF. ANN. REP. ON SEXUAL ASSAULT IN MIL., FISCAL YEAR 2012, vol. 1, at 2.

²⁷ See *United States v. Bryant*, 136 S. Ct. 1954, 1959 (2016) (noting that “American Indian and Alaska Native women are 2.5 times more likely to be raped or sexually assaulted than women in the United States in general”) (internal quotation marks and citation omitted).

²⁸ The Justice Department’s National Violence Against Women survey found that three percent of adult men had been victims of completed or attempted rape in their lifetimes. See PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. OF JUSTICE, NCJ 210346, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 7-8 (2006). On the other hand, according to the CDC’s 2010 survey, one in 71 men in the United States have been raped at some time in their lives. CDC Study, *supra* note 26, at 18. Rape was defined as “completed forced penetration, attempted penetration, and alcohol or drug-facilitated completed penetration.” *Id.* at 10. The 2009 crime victimization study by the Bureau of Justice Statistics found that 15.7 percent of sexual-assault victims were male. 2009 BJS Study, *supra* note 26, at 7 tbl.7.

²⁹ See Pat Kaufman, *Prison Rape: Research Explores Prevalence, Prevention*, NAT’L INST. JUST. J., Mar. 2008, at 24, 24 (estimating that 60,500 prisoners—or 4.5 percent of incarcerated persons in the United States—“report experiencing sexual violence ranging from unwanted touching to non-consensual sex”).

³⁰ See generally Comment to Section 213.11.

³¹ MPC:S Section 1.02(2)(a)(i).

the offense.”³² And the length of the sentence “shall be no longer than needed to serve the purposes for which it is imposed.”³³ Second, punishment should “when reasonably feasible, also serve utilitarian goals, such as offender rehabilitation, general deterrence, incapacitation of dangers offenders, restitution to crime victims, preservation of families, and reintegration of offenders into the law-abiding society.”³⁴ Third, a principle of parsimony should apply to punishment, such that any individual sentence “should be no more severe than necessary” to achieve the first two objectives.³⁵ Last, sentences should avoid criminogenic consequences.³⁶

Articles 6 and 7 disavow certain common approaches to sentencing. The Institute explicitly rejects the imposition of mandatory-minimum prison sentences for any offense.³⁷ Article 6 also rejects the general propriety of a sentence of life without parole.³⁸ Article 7 forbids a collateral consequence that permanently strips the right to vote,³⁹ and provides for relief from generally applicable collateral consequences shown to be unnecessary and unduly burdensome.⁴⁰ “In evaluating the total severity of punishment under this subsection, the court should consider the effects of collateral consequences likely to be applied to the offender under state and federal law, to the extent these can reasonably be determined.”⁴¹ Ultimately, Section 6.02 commands that courts “not impose any combination of sanctions if their total severity would result in disproportionate punishment under Section 1.02(2)(a)(i).”

The second basic precept is that, in setting the maximum terms of punishment under Article 213, existing law and practice provides guidance, but is not a constraint. The foundational values expressed in revised Section 1.02(2), in particular its commitment to

³² MPC:S Section 10.02(2).

³³ MPC:S Section 6.11(3); see also id. Section 10.02(4) (describing “Choices Among Sanctions”).

³⁴ MPC:S Section 1.02(2)(a)(ii).

³⁵ MPC:S Section 1.02(2)(a)(iii).

³⁶ MPC:S Section 1.02(2)(a)(iv).

³⁷ MPC:S Section 6.11(8) & Comment at 149.

³⁸ MPC:S Section 6.11, Comment at 161. The Institute also affirmed its decision in 2009 to exclude any provision for capital punishment. MPC:S Section 6.02, Comment at 45. But recognizing that some jurisdictions nonetheless maintain capital sanctions, and that in such jurisdictions the existence of life-without-parole sentences offers a viable alternative to death for many jurors, the Institute “with reluctance” endorsed determinate life sentences. MPC:S Section 6.11, Comment at 161.

³⁹ MPC:S Section 7.03.

⁴⁰ MPC:S Section 7.04(2)(c).

⁴¹ MPC:S Section 6.02(4).

1 proportionality and parsimony, often conflict with the penalties permitted by existing law.
2 Article 213 must not permit a sentence that replicates the excesses current American penal
3 practices. To do so would perpetuate the inequities, injustice, and inefficiency of the current
4 system. Article 213 therefore must choose the path of restraint, and authorize less extreme
5 maximums. But that approach must not be misunderstood. The recommended sentences are not
6 intended to minimize the trauma and seriousness of sexual crimes. To the contrary, the penalties
7 authorized for Article 213 are set at a level that fully accommodates the need for expressive
8 condemnation, deterrence, incapacitation, and other appropriate goals, while also applying
9 contemporary knowledge and experience, in order to ensure that penalty provisions are framed
10 with due regard for the oft-overlooked imperatives of parsimony and restraint.

11 One result of this approach, which is necessarily confined to Article 213, is that some of
12 the sentences authorized for the sexual offenses may be less severe than the sentences a
13 jurisdiction permits for equally serious non-sexual misconduct. The intention is not to depreciate
14 the seriousness of these sexual offenses. Rather, the maximums authorized under Article 213
15 reflect the desire to recalibrate society’s understanding of what constitutes a severe sanction. To
16 the extent that a jurisdiction punishes equally serious conduct more severely, the penalties
17 outlined in Article 213 should inspire reevaluation of the propriety of those severe sentences.

18 Finally, Articles 6 and 7 contemplate a wide menu of options for the disposition of
19 convicted persons, beyond only incarceration. For instance, Article 6 authorizes economic
20 sanctions including fines and victim restitution, suspended sentences and periods of supervision,
21 deferred prosecution or adjudication, restorative justice, specialized courts, and specialized
22 dispositions for juveniles. Article 6 also expressly embraces “experimentation” with noncarceral
23 sanctions,⁴² so long as such efforts adhere to the core principle of proportionality and justified
24 needs for social protection.

25 Recent research supports the use of alternatives to incarceration,⁴³ even for situations in
26 which such alternatives have typically been considered inappropriate, such as for relatively

⁴² MPC:S Section 1.02(2), Comment at 7.

⁴³ See generally MARY KOSS & MARY ACHILLES, RESTORATIVE JUSTICE RESPONSES TO SEXUAL ASSAULT, http://vawnet.org/sites/default/files/materials/files/2016-09/AR_RestorativeJustice.pdf (collecting research in promotion of restorative justice as “satisfying and empowering” options for victims); Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623 (2013) (describing a restorative justice program for misdemeanor and felony sexual assaults in Arizona and reviewing literature on restorative justice approaches to sex crimes).

serious offenses, including involving intimate partners.⁴⁴ From a broad range of perspectives, advocates increasingly argue that carceral responses often fail to serve the interests of victims,⁴⁵ and advocates for survivors of sexual assault have sought solutions that more directly address the root causes of sexual violence and the effects of such violence on the lives of victims and survivors.⁴⁶ In setting the maximum authorized period of incarceration for the Article 213 offenses, the Institute does not suggest that noncarceral approaches are necessarily inappropriate. As expressed by Article 6, experimentation with noncarceral responses that might succeed at reducing rates of offending and at meeting the needs of those impacted by sexual violence is welcome, so long as such alternatives adhere to the fundamental precept of proportionality.

In sum, just as the revision of Article 213 takes a fresh look at the proper scope of substantive liability for sexual offenses, so too does it consider anew the question of the amount of punishment that should attach to those crimes. Among the many considerations that factored into the determination of proper punishment were awareness of: the prevalence of unchecked sexual misconduct, particularly as committed against women and children; the history of

⁴⁴ See, e.g., Linda G. Mills et al., *A Randomized Controlled Trial of Restorative Justice-Informed Treatment for Domestic Violence Crimes*, 3 NATURE HUM. BEHAV. 1284, 1284-1285 (2019). One study shows that “the most often cited reason” for not reporting a sexual offense to law enforcement is that the complainant viewed it as a “personal matter.” RENNISON, *supra* note 11, at 3 (Aug. 2002) (citing data showing that “personal matter” was the reason cited by 23.3 percent of rape and 16.8 percent of attempted rape victims). The third most common reason that victims of attempted rape did not report was a desire to protect the offender. *Id.* (noting this is the case for 9.9 percent of attempted rape victims). Moreover, the closer the relationship between the offender and victim, the less likely the victim was to report the offense. *Id.*

⁴⁵ See Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 653-659 (2009) (arguing that the rape-reform movement has been misguided and that “addressing sexualized violence through increasing the prosecutorial power of the state is an endeavor in which, at this particular moment, feminists should no longer enlist”); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 750 (2007) (“Unfortunately, feminist criminal law reform, which began laudably with the goal of vindicating the autonomy and rights of women, has increasingly mirrored the victims’ rights movement and its criminalization goals. Many of the widespread domestic violence reforms are more about increasing the likelihood of defendants going to jail than about supporting the individual desires, welfare, and interests of victims.”); Dorothy E. Roberts, Foreword, Foreword, *The Meaning of Gender Equality in Criminal Law*, 85 J. CRIM. L. & CRIMINOLOGY 1, 5 (1994) (“Conservatives and feminists alike question the need for the criminal law’s special protection of women’s agreements to engage in sexual intercourse.”); KOSS & ACHILLES, *supra* note 43, at 5 (noting that “the justice needs of survivor/victims . . . in many cases are not sufficiently fulfilled through conventional justice”).

⁴⁶ See, e.g., ALL. FOR SAFETY & JUSTICE, *supra* note 11, at 21 (reporting that survivors of violent crime, from widely divergent demographic backgrounds, support rehabilitative measures); CORRIGAN, *supra* note 13, at 3 (citing advocates who now believe “the success of the anti-rape movement . . . has become a problem, as government and law enforcement adopt and stimulate public fears . . . to advance the neoliberal governing strategies and carceral priorities of the modern state”); *id.* at 17 (“[T]he focus on criminal law as the primary vehicle to express feminist arguments about rape has had serious negative consequences for anti-rape groups, including the contraction of movement vision, political and ideological alienation from potential left-progressive allies, and an inability to see or harness the power of law as a vehicle for further social change.”).

overwrought emotional reaction and racial prejudice often triggered by sexual offenses; the use of sexual assault laws to target sexual identities, orientations, and preferences defined as non-normative in a particular moment in time; the tendency to excessive severity in American sentencing practices; the growing support even among victim advocates for greater use of noncarceral and nonpenal sanctions; persistent racial inequities; and the increasingly evident inability of incarceration to solve difficult social problems.

With specific regard to setting absolute and relative penalties of incarceration, Article 6 outlines five grades of felony and two grades of misdemeanors.⁴⁷ That Article chooses a determinate system of judicial discretion in setting sentences,⁴⁸ with rough points of reference for the maximum terms of incarceration as follows:⁴⁹

1st-degree felony: life imprisonment

2nd-degree felony: [20] years

3rd-degree felony: [10] years

4th-degree felony: [five] years

5th-degree felony: [three] years

Misdemeanor: [one year]

Petty misdemeanor: [six months]

In following the Article 6 framework, Article 213 does not suggest a commitment to an exact term of years attached to a particular offense. The Article 6 Commentary explains that “maximum authorized terms are stated in brackets in part because judgments about the sanctions appropriate to [each offense grade] are fundamental policy questions that must be confronted by responsible officials within each state.”⁵⁰ Like the Sentencing revision, Article 213 “[r]ecogniz[es] the inevitability—and desirability—of jurisdictional variations in a federalist system” and thus does not expect a “single, lockstep approach to be followed in all states.”⁵¹

⁴⁷ MPC:S Section 6.11(6), (7).

⁴⁸ MPC:S Section 6.11(9), (10), Comment at 147-148. The Comment to Section 6.11 lists the reasons that the Institute preferred a determinate to an indeterminate approach.

⁴⁹ MPC:S Section 6.11(6), (7).

⁵⁰ MPC:S Section 6.11, Comment at 157.

⁵¹ MPC:S Section 1.02(2), Comment at 5.

Also like the Sentencing revision, Article 213 is ultimately “agnostic as to the number of felony grades that should exist in a criminal code,” and thus acknowledges that “[m]aximum penalties necessarily will be arranged in finer increments if a code creates 10 levels of felony offenses, for instance, rather than five.”⁵² Rather, in affixing penalties to the liability provisions of Article 213, the Institute assumed the framework of Section 6.11 to express the *relative severity rank* and *approximate* maximum term of incarceration appropriate for each offense.⁵³ In a jurisdiction with a more finely graded set of punishments, Article 213’s judgments about rank and number of years—rather than the nominal degree of penalty—should be taken as instructive.

Moreover, the maximum term authorized is a maximum, not a default or target. A penal code must of necessity limit the absolute number of categories created. The definition of any particular offense is likely to span less and more egregious versions of the prohibited conduct. A statutory range permits the factfinder to calibrate punishment accordingly, reserving punishments at the maximum end of the range for the most harmful or wrongful forms in which the provision may be violated while applying lighter sanctions to more typical violations. The suggested maximum sentences for each Section of Article 213 thus express the view that the most serious violations within that category could merit a sentence of the prescribed duration, but that most ordinary violations may be deserving of less.

Additional explanation for each particular assigned penalty can be found in the Comment to those subsections.

⁵² MPC:S Section 6.11, Comment at 157.

⁵³ Of course, as the Commentary observed in connection with affixing a particular sentence to a particular offense:

Even when a decisionmaker is acquainted with the circumstances of a particular crime and has a rich understanding of the offender, it is seldom possible, outside of extreme cases, for the decisionmaker to say that the deserved penalty is precisely x. In Morris’s phrase, the “moral calipers” possessed by human beings are not sufficiently fine-tuned to reach exact judgments of condign punishments. Instead, most people’s moral sensibilities, concerning most crimes, will orient them toward a range of permissible sanctions that are “not undeserved.” Outside the perimeters of the range, some punishments will appear clearly excessive on grounds of justice, and some will appear clearly too lenient—but there will nearly always be a substantial gray area between the two extremes.

MPC:S Section 1.02(2), Comment at 4.

Grading: General Considerations

213.1(2) – enhanced aggravated physical force or restraint (deadly weapon, gang rape, causing SBI)	2nd-degree felony
213.1(1) – aggravated physical force or restraint	3rd-degree felony + 5 years
213.2 – physical force	3rd-degree felony
213.3(1) – sleeping, unconscious, drugged	3rd-degree felony
213.3(2) – mental disability, passing out, substantial incapacity, disrobed for professional services	4th-degree felony
213.3(3) – custodial abuse	5th-degree felony
213.4 – extortion (coercive nonphysical threats)	4th-degree felony
213.5 – prohibited deception	5th-degree felony
213.6 – lack of consent	4th- or 5th-degree felony
213.7(1) aggravated offensive sexual contact (physical force, drugging)	5th-degree felony
213.7(2) offensive sexual contact	petty misdemeanor
213.8(1) Sexual Assault of a Minor	3rd-, 4th or 5th-degree felony
213.8(2) Incestuous Sexual Assault of a Minor	3rd-degree felony
213.8(3) Exploitative Sexual Assault of a Minor	5th-degree felony
213.8(4) Fondling a Minor	4th- or 5th-degree felony
213.8(5) Aggravated Offensive Sexual Contact with a Minor	4th-degree felony
213.8(6) Offensive Sexual Contact with a Minor	5th-degree felony or misdemeanor
213.9 Sex Trafficking	3rd-degree felony

PART II
MODEL PENAL CODE
ARTICLE 213

SECTION 213.0. GENERAL PRINCIPLES OF LIABILITY; DEFINITIONS

(1) This Article is governed by Part I of the 1962 Model Penal Code, including the definitions given in Section 210.0, except that:

(a) Section 2.11 (the definition of “consent”) does not apply to this article.

(b) Subsection (2) of Section 2.08 (Intoxication) does not apply to this article. Instead, the general provisions of the criminal law and rules of evidence of the jurisdiction govern the materiality of the actor’s intoxication in determining the actor’s culpability for an offense.

(2) *Definitions*

In this Article, unless a different definition is plainly required:

(a) “Sexual penetration” means an act involving penetration, however slight, of the anus or genitalia by an object or a body part, except when done for legitimate medical, hygienic, or law-enforcement purposes.*

(b) “Oral sex” means a touching of the anus or genitalia of one person by the mouth or tongue of another person.*

(c) “Sexual contact” means any of the following acts, when the actor’s purpose is the sexual arousal, sexual gratification, sexual humiliation, or sexual degradation of any person:

(i) touching the clothed or unclothed genitalia, anus, groin, breast, buttocks, or inner thigh of any person with any body part or object; or

* Approved by the membership, May 2017.

1 (ii) touching any body part of any person with the clothed or
2 unclothed genitalia, anus, groin, breast, buttocks, or inner thigh of any
3 person; or

4 (iii) touching any clothed or unclothed body part of any person with
5 the ejaculate of any person.

6 The touching described in paragraph (c) includes the actor touching
7 another person, another person touching the actor or a third party, or another
8 person touching that person's own body. It does not include the actor touching the
9 actor's own body.

10 (d) "Fondling" means prolonged contact with or manipulation of the
11 genitals, when the actor's purpose is the sexual arousal, sexual gratification, sexual
12 humiliation, or sexual degradation of any person. Fondling requires more than a
13 transient grope or grab. "To fondle" means to engage in fondling.

14 (e) "Consent"***

15 (i) "Consent" for purposes of Article 213 means a person's
16 willingness to engage in a specific act of sexual penetration, oral sex, or
17 sexual contact.

18 (ii) Consent may be express or it may be inferred from behavior—
19 both action and inaction—in the context of all the circumstances.

20 (iii) Neither verbal nor physical resistance is required to establish
21 that consent is lacking, but their absence may be considered, in the context
22 of all the circumstances, in determining the issue of consent.

23 (iv) Notwithstanding subsection (2)(e)(ii) of this Section, consent is
24 ineffective when given by a person incompetent to consent or under
25 circumstances precluding the free exercise of consent, as provided in
26 Sections 213.1, 213.2, 213.3, 213.4, 213.5, 213.7, 213.8, and 213.9.

27 (v) Consent may be revoked or withdrawn any time before or
28 during the act of sexual penetration, oral sex, or sexual contact. A clear
29 verbal refusal—such as "No," "Stop," or "Don't"—establishes the lack of

*** Approved by the membership, May 2016.

1 consent or the revocation or withdrawal of previous consent. Lack of
2 consent or revocation or withdrawal of consent may be overridden by
3 subsequent consent given prior to the act of sexual penetration, oral sex, or
4 sexual contact.

5 (f) Force.

6 (i) “Physical force or restraint” means a physical act or physical
7 restraint that inflicts more than negligible physical harm, pain, or
8 discomfort or that significantly restricts a person’s ability to move freely.
9 More than negligible physical harm includes but is not limited to a burn,
10 black eye, or bloody nose, and more than negligible pain or discomfort
11 includes but is not limited to the pain or discomfort resulting from a kick,
12 punch, or slap on the face.

13 (ii) “Aggravated physical force or restraint” means a physical act
14 or physical restraint that inflicts or is capable of inflicting death, serious
15 bodily injury, or extreme physical pain, or that confines another for a
16 substantial period in a place of isolation other than under color of law.

17 (g) “Actor” means a person more than 12 years old, except that “actor”
18 includes a person younger than 12 when the charge is Sexual Assault by
19 Aggravated Physical Force or Restraint (Section 213.1). “Actor” includes, where
20 relevant, a person guilty of an omission.

21 (h) “Registrable offense”

22 (i) “Registrable offense” means an offense that makes a convicted
23 person eligible for or subject to any of the collateral consequences specified
24 in Section 213.11.

25 (ii) No offense is a registrable offense under any provision of law
26 unless it is specifically so designated in this Article or is committed in another
27 jurisdiction, is a registrable offense in that jurisdiction, and would be a
28 registrable offense in this jurisdiction if it had been committed in this
29 jurisdiction.

Comment:

Section 213.0 prescribes the general principles of liability and definitions for this Article. However, Section 213.0 is not the exhaustive or exclusive source of authority in interpreting Article 213. That is because Article 213 is conceived as an integral part of the comprehensive Model Penal Code originally adopted by the Institute in 1962. The foundational concepts, and especially the mental-state definitions, first expressed in the 1962 Code find widespread support in existing criminal law. Nonetheless, their origins may be unfamiliar to many readers.

The parts of the 1962 Code that are essential interpretive principles in understanding and applying revised Article 213 are reproduced before the provisions of the revised Article. In restating those principles, the revised Code reprints verbatim the language adopted by the Institute in 1962, with one exception. The 1962 Code used gendered language and defaulted to the male pronoun as a shorthand for all persons. The version reprinted with revised Article 213 replaces this language with gender-neutral language.

In the process of revising Article 213, some members of the Institute advocated for re-examination of the existing provisions of general applicability. However, the Institute decided against reopening longstanding and serviceable definitions in favor of marginal improvements. Rather, revisions or adjustments pertaining to the general provisions of the 1962 Code were made only where important substantive reasons demanded.

This Comment first introduces the pertinent provisions of the 1962 Code that were chosen for reproduction. It then addresses each of the subsections of Section 213.0, starting with Section 213.0(1), which outlines two exceptions to the general applicability of the provisions of the 1962 Code.

1. Pertinent Provisions of the 1962 Code.

a. 1962 Code Section 1.12. The provisions of Section 1.12 simply state the constitutional prerequisite that guilt requires proof of all elements of the offense beyond a reasonable doubt, that innocence is presumed, and that an affirmative defense requires disproof only once evidence in support of that defense has been introduced.

The government's burden is to prove every element of the offense beyond a reasonable doubt. Failure to meet that burden for any element rightly results in acquittal. For instance, a prosecutor charging a violation of Section 213.6 must prove that: the defendant engaged in an act

1 of sexual penetration or oral sex with another person; the other person did not consent to that act;
2 the actor knew or was actually aware of a substantial and unjustifiable risk that the other person
3 did not consent; and the actor consciously disregarded that risk in a manner that grossly deviates
4 from a reasonable person’s standard of care. Absent proof beyond a reasonable doubt of each of
5 these elements, the conviction will not stand.

6 A defendant has no obligation to mount a defense, but of course the defendant has the
7 right to challenge the government’s evidence on any of the required elements of proof. The
8 defendant may contest the government’s entire factual presentation, or seek to sow even a single
9 thread of doubt. Either way, if the factfinder has a reasonable doubt with regard to the
10 government’s proof of any element of the offense, then acquittal is required.

11 Article 213 also affords the defendant the affirmative defense of explicit prior permission
12 to use otherwise unlawful force in Section 213.10. Under Section 1.12 of the 1962 Code and
13 longstanding practice, the operation of this affirmative defense is clear. The defense has the
14 burden of production for an affirmative defense: Section 1.12(2)(a) states that the Code “does not
15 . . . require the disproof of an affirmative defense unless and until there is evidence supporting
16 such a defense.”¹ If the defense produces such evidence, then the prosecution has not only the
17 burden of proving beyond a reasonable doubt every element of the charged offense, but it also
18 must prove beyond a reasonable doubt the absence of at least one of the elements of the
19 affirmative defense.²

20 *b. 1962 Code Section 1.13 – Actus Reus.* Section 1.13 provides general definitions for the
21 Code. Most pertinently, Section 1.13(9) identifies the three kinds of actus reus elements found in
22 criminal statutes: conduct, attendant circumstances, and results. Conduct is further defined in
23 Section 1.13(5) as “an action or omission and its accompanying state of mind, or, where relevant,
24 a series of acts and omissions”; the 1962 Code has no separate definitions of “attendant
25 circumstances” or “results.” Typically, an attendant-circumstance element refers to a surrounding
26 condition or facts that are essential to liability. A result element is an element that refers to proof
27 of a consequence or outcome caused by an actor’s conduct.

¹ MODEL PENAL CODE Section 1.12(2)(a) (AM. L. INST., Proposed Official Draft 1962) [hereinafter “1962 Code”].

² See Comment to Section 213.10.

1 Statutory provisions with result elements inherently also require proof of causation, or the
2 legal and factual link between the actor's conduct and the alleged result. As explained below,
3 Section 2.03 of the 1962 Code states the governing principles of causation.

4 *c. Section 2.02 – Mens Rea.* The next provision covers what many commenters view as
5 the signature achievement of the Model Penal Code: the codification of mens rea in Section 2.02
6 of the 1962 Code.³ The mens rea provisions of the 1962 Code have won nearly universal acclaim
7 and are perhaps the single most influential and enduring component of the 1962 Code. By
8 distilling a dizzying array of contradictory and confusing terms from the common law into four
9 clear categories of culpability—purpose, knowledge, recklessness, and negligence—the 1962
10 Code established a single common language for legal professionals and anyone else seeking to
11 understand and apply the criminal law. And empirical research finds that “with little to no training,
12 jury-eligible Americans can apply the MPC framework in a manner that is largely congruent with the
13 basic assumptions of the MPC’s mental state hierarchy.”⁴

14 *i. Section 2.02(1).*

15 Section 2.02(1) states that culpability requires proof of every material element along
16 with its accompanying mental state.⁵

³ See, e.g., Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 952-953 (1999) (“The Code’s mens rea proposals dissipated these clouds of confusion with an astute and perspicuous analysis that has been adopted in many states and has infused thinking about mens rea everywhere. . . . This is all old hat now, the standard stuff of the first-year criminal law class. But it was a breakthrough to articulate so lucidly and powerfully a conception of culpability requirements comprehending all crime definitions, and it has been transforming in its impact on the law and on legal education and scholarship.”); Michael Serota, *Proportional Mens Rea and the Future of Criminal Code Reform*, 52 WAKE FOREST L. REV. 1201, 1201 (2017) (“[T]he centerpiece of the most influential criminal code reform project in recent history, the American Law Institute’s Model Penal Code, is its general mens rea provisions, which define and more generally explicate the culpability requirement governing the individual offenses contained in the Code’s Special Part.”). Even critics of the Code acknowledge the universal acclaim for its mens rea provision. See V.F. Nourse, *Heart and Minds: Understanding the New Culpability*, 6 BUFF. CRIM. L. REV. 361, 361 (2002) (“One of the central tenets of late twentieth century criminal law scholarship is that the thin, descriptive ideas of culpability of the Model Penal Code are the essence of goodness and wisdom and clarity.”).

⁴ Matthew R. Ginther, et al., *Decoding Guilty Minds: How Jurors Attribute Knowledge and Guilt*, 71 VAND. L. REV. 241, 245 (2018). See also Francis X. Shen, *Minority Mens Rea: Racial Bias and Criminal Mental States*, 68 HASTINGS L.J. 1007, 1009 (2017) (testing whether racial bias affects mens rea determination and finding that subjects were not more likely to ascribe culpable mens rea to actors named “Lakisha or Jamal” as compared to “Emily or John”).

⁵ 1962 Code Section 2.02(1) (“Minimum Requirements of Culpability. Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.”).

1 *ii. Section 2.02(2).*

2 Section 2.02(2) reproduces unaltered the four signature mental states defined by the 1962
3 Code: purpose, knowledge, recklessness, and negligence. Significantly, the Model Penal Code
4 definition of recklessness⁶ has been adopted by statutory law in over half of American
5 jurisdictions, and by case law or pattern jury instruction in roughly another dozen.⁷ The 1962
6 Code formulation of recklessness, including its unambiguous requirement of proof of the actor's
7 subjective awareness and conscious disregard of the substantial risk, is commonly cited
8 approvingly by courts, including by the Supreme Court.⁸

9 However, concern arose during the revision of Article 213 that the Code's definition of
10 recklessness insufficiently emphasized the requirement that the actor be actually aware of the
11 risk that the actor disregarded, in part because tort law increasingly defines civil recklessness as

⁶ 1962 Code Section 2.02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.").

⁷ See, e.g., ALA. CODE § 13A-2-2 (3) (LexisNexis 2020) ("Recklessly.—A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.").

In at least two jurisdictions, the definition of recklessness approaches that of negligence. See KY. REV. STAT. ANN. § 501.020(4) (LexisNexis 2019) ("A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."); *Thigpen v. Lacombe*, 226 So. 3d 1138, 1148 (La. Ct. App. 2017) ("‘Reckless disregard’ connotes conduct more severe than negligent behavior. ‘Reckless disregard’ is, in effect, ‘gross negligence.’ Gross negligence has been defined as the want of even slight care and diligence. It is the want of that diligence which even careless persons are accustomed to exercise."). But those states are significant outliers, as there is overwhelming agreement that recklessness requires conscious awareness of the risk being disregarded.

⁸ See, e.g., *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) ("[S]uch a ‘reasonable person’ standard is a familiar feature of civil liability in tort law, but is inconsistent with ‘the conventional requirement for criminal conduct—awareness of some wrongdoing.’ (internal quotation and citations omitted)); *id.* at 2015 (Alito, J. concurring) ("Someone who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct. He is not merely careless. He is aware that others could regard his statements as a threat, but he delivers them anyway.").

1 including a species of substantial negligence (i.e., defining recklessness to include disregard of a
2 risk so obvious that it does not require proof of culpable awareness).⁹

3 The 1962 Code definition is reprinted here to underscore the clear language in Section
4 2.02 that, in the criminal law, recklessness requires that the actor be *aware* of a substantial,
5 unjustifiable risk and must nonetheless “*consciously* disregard[]” that risk.¹⁰ A factfinder
6 therefore cannot find an actor reckless simply because the risk was obviously great or because
7 the actor *should have been* aware of it. The actor must have had *actual awareness* of that risk.
8 Nor is it sufficient that the actor’s awareness merely involved suspecting or having a hunch that
9 this risk might exist. Instead, the factfinder must find that the actor had genuine subjective
10 awareness of three things: (1) that risk existed, (2) that it was substantial, and (3) that it was
11 unjustifiable.

12 Although as mentioned, the term recklessness in some civil-law contexts does not always
13 require subjective awareness, its interpretation and day-to-day application in criminal law, under
14 both the Model Penal Code and prevalent case law, reflect the clear understanding that *subjective*
15 *awareness* of a substantial, unjustifiable risk is a prerequisite to liability for criminal
16 recklessness.¹¹ Application of Article 213 in a manner that inquires only into objective

⁹ See, e.g., RESTATEMENT THIRD OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 2 (AM. L. INST. 2005) (defining recklessness as including not only an actor who “knows of the risk of harm created” but also one who “knows facts that make the risk obvious to another in the person’s situation.”).

¹⁰ 1962 Code Section 2.02(2)(c) (emphasis added).

¹¹ See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 842-843 (1994). In *Farmer*, liability required the “deliberate indifference” and the Supreme Court held this standard was akin to criminal-law recklessness. Moving then to define criminal-law recklessness, the Court noted, but rejected, the civil-law conception of “recklessness” as objective unreasonableness. Instead the Court chose the subjective recklessness approach of criminal law, which it defined as “knowledge of a substantial risk of serious harm.” *Id.* 837, 842-845. Elaborating, the Court observed:

While . . . deliberate indifference entails something more than mere *negligence*, the cases are also clear that it is satisfied by something less than acts or omissions for the very *purpose* of causing harm or with *knowledge* that harm will result.... With deliberate indifference lying somewhere between the poles of negligence at one end and purpose or knowledge at the other, the Courts of Appeals have routinely equated deliberate indifference with *recklessness*.

Id. at 835-836 (emphasis added). See also *Voisine v. United States*, 136 S. Ct. 2272 (2016) (“To commit an assault recklessly is to take that action with a certain state of mind (or *mens rea*)—in the dominant formulation, to ‘consciously disregard[]’ a substantial risk that the conduct will cause harm to another.”) (citing Model Penal Code Section 2.02(c)). Justice Breyer recently described “the best definition of recklessness” as a “consciously disregards a substantial and unjustifiable risk.” Oral Argument in *Borden v. United States*, No. 19-5410, 2020 WL 485110, at 11 (Nov. 3, 2020); in the same argument, Justice

1 reasonableness, and not subjective awareness, would impermissibly lower the mens rea to
2 negligence—a position roundly rejected by the 1962 Code.¹² The drafters of the 1962 Code
3 viewed recklessness as the threshold of criminal culpability, because it requires subjective
4 culpability—that the actor was aware of the risk rather than simply careless. That understanding
5 has carried forward in current law.¹³ Accordingly, the 1962 Code tends to specify mens rea
6 primarily when it departs from the presumption of recklessness,¹⁴ or to differentiate levels of
7 punishment on the basis of mens rea.¹⁵

8 *iii. Rules of Construction – Section 2.02(3), (4), and (5).*

9 A second major innovation of the 1962 Code was to announce clear rules for discerning
10 the applicable mental state for every element in an offense. These rules both aid an economical
11 drafting style—because a mental state need not be repeated endlessly—and also ensure that the
12 failure to expressly address mens rea for each specific element does not lead to application of
13 strict liability (or negligence).¹⁶ The Model Penal Code approach has become an influential tool

Gorsuch applauded counsel’s effort “to draw a firm and clear line between recklessness and negligence, as the model penal code does,” *id.* at 24.

¹² See 1962 Code Section 2.02(3) (setting a presumptive floor of recklessness when sufficient culpability for a material offense “is not prescribed by law”).

¹³ See, e.g., *Elonis*, 135 S. Ct. at 2015 (Alito, J., concurring) (“I agree with the Court that we should presume that criminal statutes require some sort of *mens rea* for conviction.... In the hierarchy of mental states that may be required as a condition for criminal liability, the *mens rea* just above negligence is recklessness. Negligence requires only that the defendant ‘should [have] be[en] aware of a substantial and unjustifiable risk,’ ALI, Model Penal Code § 2.02(2)(d), p. 226 (1985), while recklessness exists ‘when a person disregards a risk of harm of which he is aware,’ *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 128 L. Ed.2d 811 (1994); Model Penal Code § 2.02(2)(c). And when Congress does not specify a *mens rea* in a criminal statute, we have no justification for inferring that anything more than recklessness is needed.”).

¹⁴ For instance, most fraud offenses require a mens rea of knowledge or purpose. See generally 1962 Code Article 224 (defining forgery, fraudulent destruction, and other offenses as requiring purpose or knowledge to defraud or injure).

¹⁵ See, e.g., 1962 Code Section 220.2 (distinguishing second-degree felony for purposely or knowingly causing or risking catastrophe, and third-degree felony for doing so recklessly).

¹⁶ See, e.g., *Staples v. United States*, 511 U.S. 600, 605 (1994) (“[S]ome indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime.”).

1 for interpreting ambiguous statutes across a number of jurisdictions.¹⁷ It is embodied in Section
2 2.02(3), (4), and (5).

3 Section 2.02(3) states that when an offense does not expressly define the mens rea
4 required for a material element of an offense, that element is established only if the actor is at
5 least reckless with regard to that element.¹⁸ Section 2.02(4) states that when an offense
6 prescribes a level of culpability without distinguishing among its material elements, that level of
7 culpability applies to all the material elements of that offense, unless a contrary purpose plainly
8 appears.¹⁹ Section 2.02(5) clarifies that the mens rea requirement is satisfied by proof that a
9 defendant possessed a more culpable mental state than the one required by the law.²⁰

10 Combined, these provisions offer a three-step approach to ascertaining the mens rea of a
11 statute. First, and most obviously, the mental state for any element clearly prescribed by the
12 statutory text is the mental state that applies to that element. Second, applying Section 2.02(4), if
13 a single mental state appears in a statutory provision without distinguishing among the elements
14 of the provision, then that mental state is the minimum culpability required for all elements of
15 that offense, unless a contrary purpose plainly appears. Third, applying Section 2.02(3) in the
16 absence of any clearly applicable mental state presumes a floor requirement of recklessness for
17 each element.

¹⁷ See, e.g., *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019) (citing Model Penal Code Section 2.02(4) as guiding interpretive principle). See also Kadish, *supra* note 3, at 952-953 (“[W]e now inquire whether the crime requires that the defendant have acted purposely, knowingly, recklessly, or negligently in doing the action prohibited. Moreover, where necessary, we may also have to ask as to each component of a described action—the action itself, the circumstances of its commission, its result—which of these culpable states is required.”).

¹⁸ “When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.” 1962 Code Section 2.02(3).

¹⁹ “When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.” 1962 Code Section 2.02(4).

²⁰ “When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.” 1962 Code Section 2.02(5).

1 The following Illustrations demonstrate the application of these rules of construction,
2 which are a crucial step in the mens rea analysis for all the Article 213 offenses.

3 **Illustrations:**

4 1. Model Penal Code Section 222.1(1) states that “[a] person is guilty of robbery
5 if, in the course of committing a theft, he . . . inflicts serious bodily injury upon
6 another. . . .” On its face, the statutory language does not require that the actor have any
7 particular mens rea with respect to inflicting serious bodily injury. Absent a governing
8 rule of construction, a court might interpret the statute to require that the injury be
9 inflicted purposely or knowingly. Alternatively, a court might permit conviction on proof
10 of the defendant’s awareness—or a reasonable person’s awareness—of a substantial risk
11 that such injury might result. Finally, a court might interpret the statute to permit
12 conviction on the basis of strict liability. Despite the silence of this offense definition
13 with respect to the question of mens rea, however, the answer to that question is not
14 ambiguous because Section 2.02(3) stipulates a default rule requiring recklessness. Proof
15 of purpose or knowledge is sufficient but not necessary, and proof of negligence is
16 insufficient.²¹

17 2. Model Penal Code Section 211.2 states that a person commits a misdemeanor
18 “if he recklessly engages in conduct which places or may place another person in danger
19 of death or serious bodily injury.” The Code’s rules of construction make it unnecessary
20 to spell out that a person can also commit this offense when acting purposely or
21 knowingly, and a defendant could not avoid liability by arguing that he or she was not
22 reckless because he or she had *purposely* put the other person in danger. Under Section

²¹ Cf. *Staples v. United States*, 511 U.S. 600, 605-606 (1994). In construing a federal statute that was “silent concerning the mens rea required for a violation,” the Court, in an opinion by Justice Thomas, explained that “silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional mens rea element On the contrary, we must construe the statute in light of the background rules of the common law, in which the requirement of some mens rea for a crime is firmly embedded Relying on the strength of the traditional rule, we have stated that offenses that require no mens rea generally are disfavored, and have suggested that some indication of congressional intent . . . is required to dispense with mens rea as an element of a crime.” *Id.* at 605-606 (citations omitted). This language has been repeatedly quoted or cited with approval by the Supreme Court. See, e.g., *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019); *Torres v. Lynch*, 136 S. Ct. 1619, 1631 (2016); *Elonis v. United States*, 135 S. Ct. 2001, 2003 (2015).

1 2.02(5) “[w]hen recklessness suffices to establish an element, such element also is
2 established if a person acts purposely or knowingly.”

3 3. Model Penal Code Section 212.2 states that a person commits the offense of
4 felonious restraint “if he knowingly . . . restrains another unlawfully in circumstances
5 exposing him to risk of serious bodily injury.” The statutory language makes clear that
6 the actor must know that he or she is restraining another person but does not indicate to
7 what extent the actor must be aware that the restraint is unlawful, or that the
8 circumstances of the restraint create a risk of serious bodily injury. Absent Model Penal
9 Code rules of construction, some courts might treat these attendant circumstances as a
10 matter of recklessness, negligence, or even strict liability. But since Section 212.2
11 requires a higher level of mens rea (knowledge) with respect to the restraint, without
12 specifically distinguishing that element from the other material elements of the offense,
13 the default rule of Section 2.02(4) requires proof of knowledge for all material elements.
14 Recklessness is insufficient; the actor must *know* that the restraint is unlawful and that the
15 circumstances create a risk of serious bodily injury.

16 *d. Section 2.03 – Causation.* Causation serves a core role in determining the scope of
17 liability for a number of offenses defined in Article 213, including the most serious offenses of
18 Sexual Assault by Aggravated Physical Force or Restraint.²² Doctrines of causation have a
19 longstanding pedigree in American law, and the concepts of “but for” and “proximate” or “legal”
20 causation are familiar to every first-year law student.

21 Section 2.03 is the 1962 Code provision governing causation.²³ Section 2.03(1)(a)
22 embodies the familiar requirement that a result be the “but for” cause of the actor’s conduct, and

²² See, e.g., Section 213.1(1) (emphasis added) (citing one element as the fact that “the actor knows that the other person submitted to or performed the act of sexual penetration or oral sex *because of* the actor’s use of or threat to use aggravated physical force or restraint”).

²³ 1962 Code Section 2.03 provides:

(1) Conduct is the cause of a result when:

(a) it is an antecedent but for which the result in question would not have occurred; and

(b) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.

1 Section 2.03(2) and (3) states the Model Penal Code’s preferred formulation for foreseeability,
2 which includes that the result not be “too remote or accidental in its occurrence” to have a “just
3 bearing” on liability or the gravity of the offense. Section 2.03 further provides additional
4 guiding parameters. It states the basic principle that a result is not “too remote or accidental” if it
5 is substantially the same as that designed, contemplated, or within the range of risk apprehended.
6 Within established principles of causal culpability, an actor may be liable not only when the
7 result is precisely that contemplated but also when it is substantially similar in the ways
8 specified. Section 2.03 provides that the causal chain is not broken when: (i) only a different
9 person or property within the range of risk is harmed; and (ii) the harm that results is *less* serious
10 than that contemplated. The 1962 Code sets out separate sections for these principles depending
11 on whether the result was designed or contemplated (for situations in which an actor is
12 purposeful or knowing as to a result), or within the zone of risk apprehended (for situations in
13 which an actor is reckless as to a result).

14 Causation and mens rea often go hand in hand, although they serve different purposes
15 and invoke different inquiries. Causation focuses on the chain linking the actions of the actor

(2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:

(a) the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused; or

(b) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability or on the gravity of his offense.

(3) When recklessly or negligently causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:

(a) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or

(b) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability or on the gravity of his offense.

(4) When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor’s conduct.

1 with a result required to be proven for liability under a statute. It effectively asks two questions:
2 did the actor in fact cause the result (“but for” or “factual” causation); and is the connection
3 between the actor’s conduct and the result sufficiently close that it is just to hold the actor
4 responsible for that result (“proximate” or “legal” causation)? This latter question is particularly
5 important in cases in which the connection between the actor’s conduct and the result is
6 attenuated, or in which intervening actors or causes contributed to the result, or in which a result
7 is unexpected or unforeseeable. An enormous body of case law exists to guide these difficult but
8 familiar questions of legal cause in criminal cases.²⁴

9 Mens rea focuses on the defendant’s expectations or intentions.²⁵ For a result element,
10 the mens rea element requires asking what the defendant’s mental state was with respect to
11 producing the result that occurred. In theory, an actor may be purposeful about a result,
12 knowledgeable, reckless, negligent, or held responsible even for results the actor had no reason
13 to expect or took due care to avoid (strict liability). Causal inquiries intersect with mens rea
14 inquiries in that our understanding of a person’s intentions often hinges in part on the probability
15 that a result follows from conduct. For instance, it is generally hard to find that an actor brought
16 about a result knowingly or recklessly when the result was unexpected or unusual. Conversely,
17 even if the actor claims not to have subjectively anticipated a result, a factfinder may disbelieve
18 that claim if the conduct is well known to have a high probability of causing it—for instance, an
19 actor who claims not to have known that death could result from stabbing a person in the chest.
20 Finally, an actor may have a conscious object or intention to bring about even a remote result. In
21 such extreme cases, it might be that an actor has a purposeful mental state, but a jury finds
22 insufficient causation. The classic example is the actor who genuinely believes a magic spell will
23 cause death; even if the other person in fact dies (say, of a heart attack), causation principles
24 prevent the actor from being held liable for homicide, even if some jurisdictions might hold the
25 actor liable for *attempted* homicide. Nevertheless, the factfinder bears ultimate responsibility for

²⁴ Homicide liability, for instance, is premised on holding an actor responsible for conduct that causes a particular result—death. Thus, each homicide case necessarily entails inquiry into the causal connection between the actor’s conduct and the death caused. Such inquiry can be simple (actor fired a bullet at victim’s heart, killing victim), or complex (actor engaged police in car chase during which negligently flown police helicopter collided with another helicopter). See, e.g., *People v. Acosta*, 284 Cal. Rptr. 117, 120-128 (Cal. Ct. App. 1991) (discussing the causal connection at issue in the case of a police helicopter collision during a car chase).

²⁵ See Comment to Section 2.02(2)(c).

weighing the evidence and making its own independent assessment of both causation and the actor's mental state. Sections 213.1 and 213.2 provide Illustrations of the causation standard in operation in Article 213.

e. Section 2.12. De Minimis Infractions. Section 2.12 reproduces the provision of the 1962 Code that affords a basis for judicial dismissal of prosecutions deemed too trivial or inconsistent with the purpose of the law infringed to justify criminal sanctions. As the Reporters' Note explains, provisions of this kind have particular application to trivial violations of sex-offense laws. Although *de minimis* dismissals are uncommon in current law, a court's power to dismiss a prosecution for a technical but insignificant infringement of the law remains an important safeguard against prosecutorial overreach and thus merits inclusion in the revised Article 213.

f. Section 2.10 – Definitions. Lastly, revised Article 213 reprints a portion of the definitions found in Section 210.0 of the 1962 Code, and which applied to the 1962 provisions covering homicide, physical assault, and sexual assault. Three of those provisions are pertinent: Section 210.0(2) defining "bodily injury," Section 210.0(3) defining "serious bodily injury," and Section 210.0(4), defining "deadly weapon." These definitions find widespread support in a fully developed body of existing law.

2. Section 213.0(1). Section 213.0(1) of the revised Article makes explicit that Part I of the 1962 Code, including the definitions in Section 210.0, applies to the interpretation of revised Article 213, with two exceptions. First, the definition of consent in Section 2.11 of the 1962 Code does not apply in Article 213. Section 213.0(2)(e) provides a distinct definition of consent that governs the sexual offenses in this Article. The need for a definition of consent particular to Article 213 is discussed in the Comment to that Section.

Second, the materiality of the actor's intoxication in determining the actor's culpability for an offense is governed by the criminal law and rules of evidence of the jurisdiction, rather than by Section 2.08 of the 1962 Code. Section 2.08 of the 1962 Code provides that "[w]hen recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such awareness is immaterial."²⁶

²⁶ 1962 Code Section 2.08(1), (2).

The 1962 Model Penal Code approach is consistent with the common law, which provided that a defendant could argue that voluntary intoxication precluded the formation of a “specific intent” (i.e., purpose or knowledge), but that such evidence could not exculpate the actor in the case of a crime of general intent (i.e., recklessness or negligence).²⁷ There remains significant debate about whether and when the actor’s intoxication may be used as evidence that the actor lacked a required mental state.²⁸ As explained in the Reporters’ Note,²⁹ current law in many jurisdictions does not consider evidence of voluntary intoxication as relevant to mens rea of any kind. And even when such evidence is admissible on the issue of mens rea, its relevance is limited to elements that require proof of purpose or knowledge. As a result, such evidence rarely applies to sexual offenses, for which recklessness, negligence, or strict liability is frequently the standard. Nonetheless, some scholars argue that evidence of the defendant’s intoxication should negate even general intent. This question becomes particularly acute with regard to sexual offenses, because of the perception that many offenses occur while both parties are intoxicated.³⁰

²⁷ See generally Gideon Yaffe, *Intoxication, Recklessness and Negligence*, 9 OHIO ST. J. CRIM. L. 545, 546 (2012) (identifying “the old common law rule, still in effect in many jurisdictions, that intoxication is to be taken into consideration when identifying the defendant’s mental state when the crime is specific intent, but not when it is general intent”). But see *State v. Verhasselt*, 266 N.W.2d 342, 352 (Wis. 1978) (“Although intoxication will not negate the depraved mind element of a crime, . . . it may be that, in a proper case, a sufficiently high degree of intoxication could negate the existence of a general intent to do the acts. As this court has stated, intoxication is a defense if the accused is so completely intoxicated as to be “. . . incapable of forming intent to perform an act or commit a crime”) (citations omitted).

²⁸ See generally Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. CRIM. L. & CRIMINOLOGY 482 (1997) (detailing history of defense as reflective of developments in the debate).

²⁹ See Reporters’ Note, *infra*.

³⁰ Data provides inconsistent views of the role that intoxication plays in sexual offenses. According to one study, “[a]pproximately half of all sexual assault incidents among college and young adult populations involve the use of alcohol or other drugs by the perpetrator, the victim or both.” Maria Testa et al., *The Role of Victim and Perpetrator Intoxication on Sexual Assault Outcomes*, 65 J. STUD. ON ALCOHOL 320, 320 (2004). Another study, of 1,200 adults in Texas, found that only 14.6 percent of victims were under the influence of drugs or alcohol, and that 23.9 percent of victims said that the perpetrator was intoxicated. UNIV. OF TEX. AT AUSTIN INST. ON DOMESTIC VIOLENCE & SEXUAL ASSAULT, HEALTH AND WELL-BEING: TEXAS STATEWIDE SEXUAL ASSAULT PREVALENCE STUDY FINAL REPORT 27-28 (2015). That study concluded that “Alcohol was not a major contributing factor in the sexual assaults reported by this study for either the perpetrator or victim.” *Id.* at 28. Notably, in this study, only 34 percent of female and 23.3 percent of male respondents reported stranger rape; the remaining perpetrators were persons close to the victim, acquaintances or friends, or persons in positions of authority. *Id.* at 23.

As explained further in the Reporters' Note, there are legitimate arguments both for and against recognizing a defendant's intoxication as relevant to finding mens rea. On the one hand, allowing such evidence helps ensure the subjective culpability of the actor at the time the offense was committed. On the other hand, allowing such evidence cuts against the grain of both traditional and current law, which has typically refused to consider a defendant's intoxication on the issue of so-called general intent. The choice between these two alternatives is particularly vexing in the context of a revision that addresses only part of, rather than the entire, penal code.

In light of the lack of consensus with regard to the treatment of intoxicated defendants, and in recognition of the persuasiveness of the claim that sexual offenses should not be singled out for treatment distinct from other crimes, Section 213.0(1)(b) explicitly defers to the jurisdiction's existing legal rules on this evidentiary issue. The availability of intoxication-based evidence to negate mens rea for the sexual offenses specified in Article 213 is determined by state law.

3. "Sexual penetration" – Section 213.0(2)(a).

[Approved by the membership, May 2017].

4. "Oral sex" – Section 213.0(2)(b).

[Approved by the membership, May 2017].

5. "Sexual contact" – Section 213.0(2)(c).

a. Section 213.0(2)(c). As with the definitional Section describing sexual penetration and oral sex, Section 213.0(2)(c) does not by itself define any crime. It simply identifies the behaviors that constitute "sexual contact," an act that is a central element of certain defined

Another estimate places 35 percent to 55 percent of adult victims as under the influence of an intoxicant, most commonly alcohol, at the time of a sexual assault. Leanne R. Brecklin & Sarah E. Ullman, *The Roles of Victim and Offender Substance Use in Sexual Assault Outcomes*, 25 J. INTERPERSONAL VIOLENCE 1503, 1504 (2010). And studies of acquaintance rape in particular have found alcohol plays a significant role. Laurie Bechhofer & Andrea Parrot, *What Is Acquaintance Rape?*, in ACQUAINTANCE RAPE 9, 23 (Andrea Parrot & Laurie Bechhofer eds., 1991) (calling male intoxication the "single most important factor" in acquaintance rape); VERNON R. WIEHE & ANN L. RICHARDS, INTIMATE BETRAYAL: UNDERSTANDING AND RESPONDING TO THE TRAUMA OF ACQUAINTANCE RAPE 20 (1995), <http://knowledge.sagepub.com/view/intimate-betrayal/n3.xml> (finding that, in a study of 236 perpetrators, 60-66 percent were using drugs or alcohol at the time of the assault). One study places rates for male rape victims as distinctly lower. See, e.g., David Light & Elizabeth Monk-Turner, *Circumstances Surrounding Male Sexual Assault and Rape: Findings From the National Violence Against Women Study*, 24 J. INTERPERSONAL VIOLENCE 1849, 1854 (2009) (indicating low rates (about 16 percent) of intoxication in a study of nonpenal male rape victims). Few studies inquire as the degree of intoxication, beyond asking victims whether they were conscious.

substantive offenses. Whether such sexual contact is unlawful turns on whether it occurs in one of the specific circumstances identified in Sections 213.7 (defining Offensive Sexual Contact by Physical Force or Surreptitious Incapacitation and Offensive Sexual Contact) and 213.8(5) and (6) (defining Aggravated Offensive Sexual Contact with a Minor and Offensive Sexual Contact with a Minor).

Section 213.0(2)(c) limits “sexual contact” to acts done with the specific purpose of the “sexual arousal, sexual gratification, sexual humiliation, or sexual degradation of any person.”³¹ The arousal, gratification, humiliation, or degradation must be sexual in nature; acts committed for a nonsexual reward or degradation are not covered. With one exception, Section 213.0(2)(c) also confines the scope to acts that touch certain specified intimate body parts. Subparagraphs (i) and (ii) apply only to acts that satisfy both requirements: sexual purpose and contact with intimate areas. Subparagraph (iii) specifies that “sexual contact” also includes acts that cause bodily contact with the ejaculate of any person, regardless of whether the ejaculate touches an intimate area.

i. Sexual Purpose. Even when an actor touches an intimate area, the act constitutes “sexual contact” only if done with the proscribed purpose of “sexual arousal, sexual gratification, sexual humiliation, or sexual degradation of any person.”³² As stated, the sexual purpose may apply to any person, including the actor, the other person, or third parties.

The following Illustrations provide examples of acts performed *without* sexual purpose. These acts, even if unwanted or unwelcome, cannot constitute sexual contact as defined by Section 213.0(2)(c), absent proof beyond a reasonable doubt of the necessary sexual purpose.

Illustrations:

4. A coach, for the purpose of congratulating the players, pats players on the buttocks as they head toward the locker room after a game.

³¹ Section 213.0(2)(c). Although jurisdictions vary in the language that they use to capture the sexual-purpose requirement, in practice courts tend to interpret these differing standards in a manner that reaches the same result—namely, to encompass all contact that is clearly sexual in nature, whether for gratification or abusive purposes. See, e.g., *LaPin v. State*, 981 A.2d 34, 43 (Md. Ct. Spec. App. 2009) (interpreting abuse to include “harmful, injurious, or offensive” sexual touchings).

³² This phrase largely mirrors that of the 1962 Code, which required the “purpose of arousing or gratifying sexual desire,” see 1962 Code Section 213.4, Comment, while also including—as do many contemporary statutes—intentions related to sexually debasing the other person. See Reporters’ Note, *infra*.

1 5. A tailor, for the purpose of measuring the inseam of a pair of pants during a
2 fitting, knowingly touches the inner thigh area of a patron.

3 6. A passenger loses balance on a moving bus and reaches out to break his or her
4 fall, brushing the breast of the woman standing next to the passenger.

5 7. An aunt cups the breasts of her niece and affectionately observes, “You’re
6 growing up so fast!”

7 8. A caregiver changes the soiled diaper of a nursing-home patient and wipes
8 away bodily waste for the purpose of good hygiene, knowing that the patient’s anus will
9 be touched for that purpose.

10 Although each of these acts knowingly touched an intimate part, none is “a sexual
11 contact” because in each case, the actor’s purpose was not sexual.

12 *ii. Intimate Parts.* Not all sexually motivated acts of touching constitute sexual contact
13 within the meaning of subparagraphs (i) and (ii). Section 213.0(2)(c)(i) and (ii), like the 1962
14 Code, narrowly limits “sexual contact” to acts that (1) touch a specified intimate area and (2) do
15 so with a sexual purpose; the actor must have the purpose of sexual arousal, gratification,
16 humiliation, or degradation. The enumerated intimate parts are the genitalia, anus, groin, breast,
17 buttocks, or inner thigh.³³ Section 213.0(2)(c)(iii) covers touchings with ejaculate.

³³ Of the 33 jurisdictions that specify intimate parts, 30 include the breast. Of those, 20 are gender-neutral and 12 restrict coverage to the female breast. See *infra* notes 116-117. Compare, e.g., GA. CODE ANN. § 16-6-22.1(a) (2020) (specifying “breasts of a female” in the definition of “intimate parts” for the purposes of sexual battery), with, e.g., DEL. CODE ANN. tit. 11, § 761(g)(1) (2019) (applying to the “anus, breast, buttocks or genitalia of another person”), and D.C. CODE § 22-3001(9) (2019) (applying to “the genitalia, anus, groin, breast, inner thigh, or buttocks of any person”). Section 213.0(2)(c) follows the majority approach and does not impose a gender limitation. To be sure, given current social and cultural conventions, intentional touches of female breasts are far more likely to carry a sexual connotation than intentional touches of male breasts. However, the requirement that the prosecution prove beyond a reasonable doubt that the touch was done for a sexual purpose guards against potential overbreadth. What is more, limiting coverage to female breasts alone creates an unacceptable disparity in the consequences of equally culpable conduct on the basis of the gender of the victim. It also raises uncertainty as to the scope of coverage for a particularly vulnerable population: transgender persons. One study on sexual violence among undergraduate students found rates of sexual assault of transgender persons to be more than two to three times the rates in the gender-conforming community. See Robert W. S. Coulter, *Prevalence of Past-Year Sexual Assault Victimization Among Undergraduate Students: Exploring Differences by and Intersections of Gender Identity, Sexual Identity, and Race/Ethnicity*, 18 PREVENTION SCI. 726, 729-730 (2017).

Also following the 1962 Code and prevailing law, these subsections recognize acts done through clothing or skin-to-skin as “sexual contact.”³⁴ In addition, although “sexual contact” is conventionally associated with the actor touching another person, it also covers an actor who causes another person to touch the actor or a third party, or to touch that person’s own body. These latter scenarios are particularly common in cases involving minors or other vulnerable persons. Thus, Section 213.0(2)(c) expressly states that “sexual contact” includes “the actor touching another person, another person touching the actor or a third party, or another person touching that person’s own body. It does not include the actor touching the actor’s own body.”³⁵

The following Illustrations provide examples of acts that *do not* constitute sexual contact, even when sexually motivated, because a specified intimate part was not touched.

Illustrations:

9. While traveling on a crowded city bus, Complainant suddenly feels something cool and wet on the back of the neck. Shocked, Complainant turns around and finds the Accused’s face uncomfortably close. A fellow passenger exclaims, “That man just licked your neck while he was touching himself!” Accused’s action of licking Complainant’s neck does not constitute “sexual contact” under Section 213.0(2)(c). Even if the act was done for the actor’s sexual gratification, the neck is not an intimate part. In addition, the contact between the actor’s genitals and hand do not satisfy Section 213.0(2)(c) because the actor touching the actor’s own body is expressly excluded.

10. A parent and adult child decide to run a marathon together. The child dares the parent to kiss an attractive stranger along the route, and the parent accepts.³⁶ At mile 25, the parent runs to the side of the route and stops in front of a spectator, saying, “How

³⁴ “Such touching need not involve naked contact between the actor’s hand and another’s sexual or intimate parts, but may be accomplished through clothing.” 1962 Code, Comment to Section 213.4, at 401.

³⁵ The 1962 Code did not directly cover instances in which an actor forced another person to touch a third party, choosing instead to leave proscription of that behavior to aiding-and-abetting liability. See 1962 Code Section 213.4, Comment at 401. (“The section expressly applies to the actor who causes another to have sexual contact with him. . . .”). In contrast, Section 213.0(2)(c) does expressly cover such acts.

³⁶ Brendan Maloy, *Boston Marathon Runner Who Kissed Stranger Got a Letter from His Wife*, SPORTS ILLUSTRATED: EXTRA MUSTARD (May 4, 2015), <https://www.si.com/extra-mustard/2015/05/04/boston-marathon-runner-stranger-kiss-wife-letter>.

1 about a kiss?” and then bestows an open-mouth kiss on the spectator without waiting for
2 a response. This act does not constitute “sexual contact” under Section 213.0(2)(c), and
3 thus cannot by itself be the basis for any sexual-contact offense. Even if the kiss was
4 done for the purpose of the actor’s sexual gratification, the mouth is not a covered
5 intimate part.

6 11. A woman steps into an elevator in which another passenger is riding. When
7 the doors close, the passenger starts staring at the woman’s chest, saying, “Show me your
8 boobs!” The passenger then rips open the woman’s shirt but does not touch the woman’s
9 breasts. Because the passenger did not touch an intimate part, this conduct does not
10 involve “sexual contact” and thus cannot be the basis for a sexual-contact charge.

11 12. A person forces another person to simulate fellatio with a sex toy. Because
12 neither the mouth nor the object (the sex toy) constitutes an intimate part, this conduct
13 does not involve “sexual contact.” This act also would not constitute “sexual penetration”
14 as defined in Section 213.0(2)(a). Accordingly, the act would be punishable, if at all, only
15 under ordinary laws of assault and battery.³⁷

16 To be clear, an act that does not constitute “sexual contact” may nonetheless be an
17 offensive (nonsexual) touching under a jurisdiction’s assault or battery laws. However, under
18 assault laws—such as the Model Penal Code—that define assault and battery as causing or
19 attempting to cause bodily injury,³⁸ some conduct of this sort may escape liability altogether.³⁹

³⁷ Because the Model Penal Code’s simple-assault provision requires actual or attempted bodily injury, see *infra* note 38, and simulated fellatio does not typically cause such injury, this act would likely not constitute criminal conduct on its own. Threats, the use of a weapon, or other means of “force” might be independently punishable, however.

³⁸ 1962 Code Section 211.1:

(1) Simple Assault: A person is guilty of simple assault if he:

(a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or

(b) negligently causes bodily injury to another with a deadly weapon; or

(c) attempts by physical menace to put another in fear of imminent serious bodily harm.

Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

³⁹ The justification for this distinction is explained further in the Reporters’ Note, *infra*.

1 *iii. Section 213.0(2)(c)(i).* Subsection (2)(c)(i) mirrors the 1962 Code in defining “sexual
2 contact” as “touching the clothed or unclothed genitalia, anus, groin, breast, buttocks, or inner
3 thigh of any person with any body part or object.” In a common example of such contact, the
4 actor grabs, fondles, or rubs the intimate parts of another. This subsection also includes touching
5 an intimate part with an object.⁴⁰ An actor cannot evade liability for touching another person’s
6 intimate parts simply by using an object, when the nature and character of that touching are
7 clearly intimate and sexually motivated. For instance, pinching a woman’s breasts with fingers
8 clearly constitutes “sexual contact,” as does pinching her breasts with tweezers or tongs, an
9 affront that is equivalent, if not worse.

10 By stating that the intimate touch “includes the actor touching another person, another
11 person touching the actor or a third party, or another person touching that person’s own body,”
12 Section 213.0(2)(c) makes explicit that this subsection does not just cover touches by the actor to
13 another person’s intimate parts. “Sexual contact” also includes touches by another person to that
14 person’s own intimate parts or to the intimate parts of a third party.⁴¹ Of course, for any kind of
15 “sexual contact” to be illicit, it must meet all the elements of a substantive offense as defined in
16 Section 213.7 or 213.8. Just as the mere act of “sexual penetration” or “oral sex” is not criminal,
17 neither is “sexual contact.” For criminal liability to attach, the “sexual contact” must be done
18 knowingly, and under circumstances proscribed by Section 213.7 (addressing actor’s use of
19 physical force or restraint, or touches without consent or of vulnerable persons) or Section 213.8
20 (addressing touches of minors).

21 Listed below are Illustrations of behavior that constitutes “sexual contact” under Section
22 213.0(2)(c)(i), when done for a sexual purpose, and that accordingly could serve as the basis for
23 liability upon proof of additional elements found in Section 213.7 or 213.8.

24 **Illustrations:**

25 13. A person grabs the breasts of a woman walking by on the street.

⁴⁰ The 1962 Code did not expressly address sexual touching with an object, but it would appear to be covered by the language, which encompasses “any touching of the sexual or other intimate parts of the person of another.” 1962 Code Section 213.4.

⁴¹ See 1962 MPC Section 2.06(2) (holding an actor “legally accountable for the conduct of another person when: (a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct”).

1 14. A person massages the genitals of a neighbor's little boy, offering to "make
2 him a man."

3 15. A person rubs a sex toy against the genitals of another.

4 16. The actor causes another person to remove the actor's pants and masturbate
5 the actor.

6 17. The actor causes another person to undress and masturbate himself or herself,
7 using the person's own hands or a sex toy.

8 18. The actor causes another person to stroke the genitals of that person's own
9 child.

10 iv. *Section 213.0(2)(c)(ii)*. Subsection (2)(c)(ii) covers "touching any body part of any
11 person with the clothed or unclothed genitalia, anus, groin, breast, buttocks, or inner thigh of any
12 person," but does not include touching an object with intimate parts. The primary reason for
13 excluding object contact from subsection (2)(c)(ii) is to avoid penalizing an actor who touches
14 his or her genitals to an object⁴²—for instance, an actor who rubs his genitals against another
15 person's backpack, an act that does not rise to the same level of offensiveness as touching
16 another person's intimate parts with an object, or touching intimate parts to another person.

17 Listed below are Illustrations of behavior that constitutes "sexual contact" under Section
18 213.0(2)(c)(ii).

19 **Illustrations:**

20 19. A person on an elevator grabs the other person riding in the car and grinds his
21 or her genitals against the other person's side.

22 20. A person pushes another person onto the person's knees and pins that person
23 against a wall, while pressing the actor's groin into the person's face.

24 21. The actor causes another person to grind that person's breasts against a third
25 party's face.

26 v. *Section 213.0(2)(c)(iii)*. Subsection (2)(c)(iii) addresses sexual contact in the form of
27 touching another person with ejaculate, such as semen or seminal fluid, whether directly or

⁴² In contrast, if an actor causes another person to touch the actor's genitals with an object, that would be covered as an act of "sexual contact" under Section 213.0(2)(c)(i).

through clothing, when that touching is done with the purpose of sexual arousal, sexual gratification, sexual humiliation, or sexual degradation. A specific subsection of this kind is needed, even though the inclusion of “object” in subsection (2)(c)(i) includes bodily fluid, because that language would not cover touching sexual fluid to nonintimate areas (for instance, ejaculating on a person’s face). Yet “sexual contact” extends to the sexually invasive and egregious (when nonconsensual) actions involved in contact between this inherently sexualized object and *any* part of a complainant’s body.

Listed below are Illustrations of behavior that constitutes “sexual contact” under Section 213.0(2)(c)(iii) when done for a sexual purpose.

Illustrations:

22. A person ejaculates onto the neck of another person.

23. A person standing on a crowded bus ejaculates onto the pants leg of another person.

24. A person commands another to swallow the ejaculate of a third person.

Saliva, urine, and feces are excluded from the list of covered fluids. Although it is easy to imagine sexually motivated and offensive touching with these fluids, this type of touching too often involves either innocent motivation or malign but nonsexual motivation. These touchings cannot safely be treated as a sufficient basis for a sexual offense.

The following are Illustrations of behavior that cannot constitute “sexual contact” under Section 213.0(2)(c)(iii).

Illustrations:

25. Accused makes a sexual advance that Complainant rebuffs. Accused then spits in Complainant’s face and says, “You’re not attractive enough for me anyway.” Whether or not the spitting was done for the purpose of sexual abuse, this action does not constitute “sexual contact” under subsection (2)(c)(i), because the saliva did not touch an intimate part. Nor could it constitute “sexual contact” under subsection (2)(c)(ii), because saliva is not an intimate part, or subsection (2)(c)(iii), because for areas not specified as intimate parts, only touches with ejaculate are covered.

1 If the saliva had inadvertently landed on an intimate part, the contact could
2 qualify as “sexual contact” under Section 213.0(2)(c)(i). But liability is still unsupported,
3 because all of the offenses defined in Section 213.7 require that the actor “knowingly
4 engage[] in ... an act of sexual contact.” Accordingly, even if the actor, by spitting in
5 Complainant’s face, was aware of a substantial and unjustifiable risk that some saliva
6 would also hit Complainant’s breasts (an intimate part), the proof falls short of the
7 required evidence of knowledge. If, however, the actor deliberately spits on the
8 complainant’s breasts, then the contact between the saliva and the breasts qualifies as
9 “sexual contact,” and the proof supports finding that the contact was done knowingly and
10 with a sexual purpose. Assuming the added elements of an offense under Section 213.7
11 were proved (such as culpable awareness of the lack of consent), then the factfinder could
12 find the actor liable.

13 26. A correctional officer with a history of misconduct urinates on the breasts of a
14 prisoner who is asleep in the prisoner’s bunk. The act does not constitute “sexual contact”
15 under Section 213.0(2)(c)(iii), because only ejaculate is covered under that provision, not
16 urine. But the act may nonetheless constitute “sexual contact” under subsection (2)(c)(i),
17 because urine is an “object” and the actor touched the complainant’s breasts with that
18 object. To qualify as “sexual contact,” the prosecution would have to prove beyond a
19 reasonable doubt that the act was done for purpose of sexual arousal, sexual gratification,
20 sexual humiliation, or sexual degradation. If the evidence shows only that the officer
21 wanted to degrade the inmate, but not particularly in a sexual way, then the act may
22 constitute a simple assault, but it cannot serve as the basis for a sexual-contact offense
23 defined in Section 213.7. On the other hand, if the evidence shows that the officer’s act is
24 connected to the officer’s sexual degradation of the inmate—for instance, if the officer
25 made sexual remarks at the time of the act, or if there is evidence that the officer
26 regularly visits websites that sexualize urination—then the factfinder could find “sexual
27 contact” within the meaning of Section 213.0(2)(c).

28 **6. “Fondling” – Section 213.0(2)(d).**

29 Section 213.0(2)(d) defines “fondling,” an actus reus element that appears only in Section
30 213.8(4), a subsection of the child offenses. Fondling is defined as “prolonged contact with or
31 manipulation of the genitals, when the actor’s purpose is the sexual arousal, sexual gratification,

1 sexual humiliation, or sexual degradation of any person. Fondling requires more than a transient
2 grope or grab. ‘To fondle’ means to engage in fondling.” The need for a special provision
3 addressed to fondling of minors is explained in the commentary and Reporters’ Notes of Section
4 213.8(4). This definitional Section clarifies the scope of behavior that “fondling” is intended to
5 cover.

6 The generally applicable provisions of Sections 213.1 through 213.6 apply to acts of
7 sexual penetration or oral sex, as defined in Section 213.0(2)(a) and (b). These acts are broadly
8 considered the most serious forms of sexual intrusion. Section 213.7 applies to acts of sexual
9 contact, defined in Section 213.0(2)(c), that span an array of behavior of lesser to greater
10 intrusiveness. Such acts of contact are typically of a lesser severity than those involving
11 penetration or oral sex. The provisions of Sections 213.1 through 213.7 are accordingly graded in
12 a manner that distinguishes between these two general tiers of sexual conduct.

13 Those two general tiers adequately cover conduct that occurs among adults, but for
14 several reasons, a third tier is necessary for conduct with child complainants.

15 Experience teaches that not all acts of sexual contact are equivalent. As explained in the
16 Comment to Section 213.0(2)(c), it is too difficult to capture in statutory language the subtlety
17 and nuance of any single act as measured in degree of intrusion or intimacy. No statutes draw
18 fine-grained distinctions based on the precise location, duration, or extent of a sexual touch
19 precisely because such distinctions would quickly become unworkable and indefensibly
20 elaborate. Rather, the penalty range for acts of impermissible conduct is intended to allow for
21 less serious intrusions to be punished at one end of the spectrum, while more serious acts can be
22 punished at the higher end.

23 Acts of prolonged contact with the genitals generally fall on the more serious end of the
24 spectrum of sexual contact, whereas a single transient grope or grab typically falls on the less
25 serious end. In fact, acts of prolonged genital contact involving the vulva will likely technically
26 satisfy the definition of “sexual penetration.” For instance, an actor who grabs a woman from
27 behind and shoves a hand up the woman’s skirt and masturbates her may be factually proved to
28 have penetrated the vulva, thus satisfying the definition of sexual penetration in Section
29 213.0(2)(a). But an equivalent act performed by an actor on a person with a penis does not
30 constitute “sexual penetration,” and thus at most would be considered as “sexual contact.”

1 As the commentary to Section 213.0(2)(a) explains, such a result is the inevitable
2 consequence of the longstanding definition of “sexual penetration,” which has proved both
3 workable and wise for a century. It also is unlikely to work a grave injustice in practice. Many
4 cases of fondling—regardless of the victim’s gender—are likely to be handled under sexual
5 contact laws. Moreover, although not unheard of, cases of nonconsensual fondling of adult males
6 are uncommon.

7 But fondling of minors—again, of both genders—is an unfortunately familiar occurrence.
8 And although such acts could technically be punished as either sexual contact or sexual
9 penetration, neither category seems exactly right. The low punishment maximums appropriate
10 for acts of sexual contact may feel inappropriately low for the more intrusive behavior of
11 prolonged contact, and conversely the severe punishments appropriate for sexual penetration
12 may leave open a far greater sanction than warranted. Accordingly, Section 213.0(2)(d) defines a
13 third tier of sexual conduct that is operationalized only in the child offenses, as a means of
14 punishing actors whose behavior is more serious than a transient touch but less serious than an
15 act of sexual penetration. As with Section 213.0(2)(c), defining “sexual contact,” the act of
16 fondling must be done with a sexual purpose.

17 **Illustrations:**

18 27. A camp director calls a 10-year-old camper into the office, claiming the need
19 to discuss the camper’s “development.” During the conversation, the director reaches
20 down into the camper’s pants, grabs hold of the camper’s genitals, and says “and how is
21 everything going down here?” The camper mutters “fine,” and the director releases the
22 grip, and says “Glad to hear it. Come see me again in a week and we’ll check in again.”
23 The camper reports the incident to the camper’s parents, who notify the police.

24 If the factfinder concludes that the director acted with a sexual purpose, then the
25 director’s act may constitute “sexual contact” under Section 213.0(2)(c). But the act does
26 not qualify as “fondling” under Section 213.0(2)(d). That Section requires “prolonged
27 contact” and not just a “grope or grab” as the facts indicate.

28 28. Same facts as in Illustration 27, except that the director reaches down into the
29 camper’s pants and begins to stroke the camper’s penis. The director says, “I want to
30 show you how to make yourself feel really good,” and continues rubbing and stroking
31 until the camper is erect.

1 If the factfinder concludes that the director acted with a sexual purpose, then the
2 director’s act constitutes “fondling” under Section 213.0(2)(d). Stroking a penis to the
3 point of erection or engaging in masturbatory contact satisfies the definition of fondling.

4 **7. “Consent” – Section 213.0(2)(e).**

5 [Approved by the membership, May 2016].

6 **8. Physical Force – Section 213.0(2)(f).**

7 Like all Article 213 definitions, Section 213.0(2)(f) does not in itself identify a crime; it
8 simply gives substance to one element of potentially criminal behavior. Physical force becomes
9 culpable only when an actor uses or threatens such force with the required mens rea, in
10 circumstances specified in an Article 213 substantive offense. For example, a push is a form of
11 “physical force,” but not every push is a criminal act. The law of assault has long distinguished
12 between an unintentional bump on a crowded bus and a deliberate shove. Similarly, a weapon is
13 a form of “physical force,” but sexual activity does not automatically become criminal whenever
14 a weapon is present. An actor who keeps a gun at the bedside for protection does not commit a
15 sexual offense by engaging in sexual activity with a person who does not know about the gun.
16 An actor commits the offense of Sexual Assault by Aggravated Physical Force or Restraint under
17 Section 213.1 only if the actor brandishes the gun and knows that it causes another person to
18 engage in or submit to an act of sexual penetration.⁴³ Whether conduct constitutes a sexual crime
19 is governed by the required elements of that crime and is not resolved simply by determining
20 whether the conduct involves “physical force.”

21 Including any given circumstance within the term “physical force” does not in itself
22 aggravate an offense or make sexual activity in that circumstance a crime. The prosecution must
23 further prove all elements, including mental state and causation, beyond a reasonable doubt. The
24 actor must have culpable awareness that the force has a specified causal impact on another
25 person. Conversely, excluding a given factor from the concept of “physical force” does not make
26 this factor irrelevant; some nonphysical forms of coercion are covered elsewhere in the statute.
27 For instance, a threat to accuse a person of a crime is not a threat to use “physical force” within

⁴³ Even then, an actor who brandishes a weapon may be able to assert an affirmative defense of Explicit Prior Permission under Section 213.10, so long as the actor did not recklessly disregard the risk of serious bodily injury, Section 213.10(3)(c). That defense permits a defendant to use physical force to cause another person to submit to sexual activity—such as in a “BDSM” relationship in which the use of force is arousing—but only with the prior explicit permission of that other person. Section 213.10.

1 the meaning of Section 213.0(2)(f). But an actor is guilty of Sexual Assault by Extortion (Section
2 213.4) if the actor purposely, knowingly, or recklessly makes that nonphysical threat and thereby
3 causes the other person to submit to sexual penetration.

4 The concept of “physical force” plays two distinct roles in the Article 213 offenses. It is
5 both an aggravating element⁴⁴ and one of the facts that can make apparent consent ineffective.⁴⁵
6 Importantly, “physical force” is defined with reference to the behavior of the actor, not the
7 behavior of the other person. There is no requirement that the other person resist in order to
8 prove the actor’s use or threat of physical force: both physical violence and physical restraint are
9 illegitimate means to obtain sexual compliance, without regard to whether or how quickly they
10 physically overcome the other person.

11 In general terms, physical force spans a continuum of physical actions that range from
12 minimal contact at one end to the most extreme forms of violence (such as strangling or use of a
13 deadly weapon) at the other end. Ideally, a statute would draw categorical lines along that
14 continuum at varying degrees of severity. But with respect to sexual offenses, three problems
15 arise. First is the need to exclude from coverage forms of physical force that conventionally
16 accompany consensual sexual encounters, even if they may result in physical discomfort, such as
17 when one person’s body presses against the body of another. Second is the importance of
18 including at the appropriate level of severity physical acts that *threaten* serious harm, even
19 though the act itself, such as brandishing a deadly weapon or tying someone to a post, inflicts no
20 physical injury. And third is the difficulty of classifying degrees of force in categories that signal
21 meaningfully distinct levels of culpability.

22 On the first point, the definitions of force in Section 213.0(2)(f) do not include all
23 physical actions. Acts that involve muscular exertion or strength sufficient to move another
24 person’s limbs are often expected and unavoidable in ordinary sexual penetration, oral sex, and
25 sexual contact. Such acts cannot in themselves make consent ineffective or raise the grade of a
26 nonconsensual sex offense. In order to make expressed consent ineffective or aggravate the
27 seriousness of sexual acts committed without consent, the relevant force used or threatened must

⁴⁴ See, e.g., Sections 213.1, 213.2, and 213.7 (citing “physical force” as an element in the offenses of Sexual Assault by Aggravated Physical Force or Restraint, Sexual Assault by Physical Force or Restraint, and Offensive Sexual Contact).

⁴⁵ See, e.g., Sections 213.0(2)(e)(iv) (referencing Sections 213.1, 213.2, and 213.7).

1 go beyond “intrinsic” force (the physical movements inherent in sexual acts). The force must
2 also exceed the ordinary acts of “extrinsic” force that often accompany sexual interaction, such
3 as gently pushing a person back, guiding a person’s hips, or rolling on top of a person. Section
4 213.0(2)(f)(i) draws these essential distinctions by specifying as a threshold matter that a
5 physical act can qualify as “physical force or restraint” only if it “inflicts more than negligible
6 physical harm, pain, or discomfort” or “significantly restricts a person’s ability to move freely.”
7 A playful pinch is therefore excluded, but Section 213.0(2)(f)(i) makes clear that a “kick, punch,
8 or a slap on the face” is covered even if it leaves no mark.

9 Second, the substantive offenses that incorporate force as defined in subparagraphs (i)
10 and (ii) of Section 213.0(2)(f) expressly include threats to inflict the degree of harm covered by
11 each Section or threats to restrict another person’s ability to move freely. The most serious form
12 of physical threat and restraint is the threat to use a deadly weapon. Although the mere
13 brandishing of a deadly weapon inflicts neither pain nor injury, its lethal potential constitutes
14 both an immediate and severe threat to the other person and an unambiguous restraint on the
15 person’s ability to move freely. Section 213.0(2)(f)(ii), which defines “aggravated physical force
16 or restraint,” encompasses the brandishing of a deadly weapon by including acts “capable of
17 inflicting death, serious bodily injury, or extreme physical pain” even if they do not themselves
18 inflict injury. The same is true for other threats of force or restraint, such as an explicit threat to
19 kill or maim a person or to lock a person in isolation without a way to escape or summon help.
20 These common aggravators find universal support in existing law.

21 The final point involves distinguishing degrees of physical force for grading purposes.
22 Pinpointing the precise degrees of potential harm from different levels of force is impossible to
23 do with scientific accuracy, but it remains both possible and essential to identify workable
24 categories. An actor who uses life-endangering force to override another person’s sexual
25 autonomy deserves greater punishment than one who uses methods that, while inexcusable, pose
26 a lesser threat of physical and psychological harm. It is preferable to avoid a range of authorized
27 punishments so broad that it reaches both, without limiting the discretion to impose the more
28 severe sanctions on the latter.

29 The 1962 Code left precision on the degree of applicable force to the common law.
30 Section 213.1(1) reserved the most serious offense for situations in which an actor “compels [the
31 Complainant] to submit by force,” but it did not further define “force” and the commentary gave

1 scant illumination. That Section also applied to an actor who threatened “imminent death, serious
2 bodily injury, extreme pain, or kidnapping.”⁴⁶ Section 210.0(3) of the 1962 Code in turn defined
3 “serious bodily injury” as “bodily injury which creates a substantial risk of death or which
4 causes serious, permanent disfigurement, or protracted loss or impairment of the function of
5 any bodily member or organ.”⁴⁷ Although Section 213.1(2) of the 1962 Code prescribed a lesser
6 offense for “any threat that would prevent resistance by a woman of ordinary resolution” which
7 “compels her to submit,” the commentary described this lesser offense as aimed at “compulsion
8 by lesser threats”⁴⁸ rather than by lesser forms of physical force. Underscoring this point, the
9 commentary cited examples such as a “threat to cause her to lose her job or to deprive her of a
10 valued possession.”⁴⁹ Accordingly, the 1962 Code treated the most physically brutal acts used to
11 obtain sexual submission as the more culpable and subject to harsher punishment, but left
12 uncertain the culpability and punishment for lesser forms of physical violence.

13 Subparagraphs (i) and (ii) of Section 213.0(2)(f) fill that gap by more specifically
14 distinguishing between levels of prohibited force. Subparagraphs (i) and (ii) specify two tiers of
15 force, which, with Section 210.0(2) and (3) of the 1962 Code, define two comparable tiers of
16 injury.

17 At the more severe end of the spectrum, Section 213.0(2)(f)(ii) defines “aggravated
18 physical force or restraint” as “a physical act or physical restraint that inflicts or is capable of
19 inflicting death, serious bodily injury, or extreme physical pain or that confines another for a
20 substantial period in a place of isolation other than under color of law.” This definition of
21 “aggravated physical force or restraint” thus effectively mirrors the substantive terms of the
22 equivalent provision of the 1962 Code, which provided liability in situations involving actual or
23 threatened serious bodily injury, extreme pain, or kidnapping.⁵⁰ In place of the 1962 Code
24 reference to “kidnapping,” the revised Section 213.0(2)(f)(ii) applies when the actor “confines
25 another for a substantial period in a place of isolation, other than under color of law.” This

⁴⁶ 1962 Code Section 213.3(1).

⁴⁷ 1962 Code Section 213.0(3).

⁴⁸ 1962 Code Section 213.1(2), Comment at 271.

⁴⁹ 1962 Code Section 213.1, Comment at 312.

⁵⁰ 1962 Code Section 213.1(1)(a).

language borrows the core concept from the 1962 Code definition of kidnapping,⁵¹ without relying on the generic term “kidnapping,” which in contemporary application often sweeps quite broadly.⁵² Under these more extensive conceptions of kidnapping, an actor who picks up another person and carries him or her to a bed could be viewed as having committed kidnapping; although any ensuing nonconsensual sexual acts may constitute offenses, they should not receive aggravated punishment simply on the basis of an incidental restraint. In light of the gravity of the offenses that incorporate “aggravated physical force or restraint” as an element, the conduct that gives rise to such serious punishment ought to be sufficiently grave to merit distinct additional punishment.

“Serious bodily injury” is defined in the 1962 Code 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.”⁵³ The 1962 Code included “extreme pain” in its definition of forcible rape, setting it alongside “serious bodily injury” as a means by which an actor impermissibly compels submission.⁵⁴ Extreme physical pain is also a commonly recognized manifestation of serious bodily injury in existing law.⁵⁵ Similar language is found in

⁵¹ 1962 Code Section 212.1 provides:

A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes:

- (a) to hold for ransom or reward, or as a shield or hostage; or
- (b) to facilitate commission of any felony or flight thereafter; or
- (c) to inflict bodily injury on or to terrorize the victim or another; or
- (d) to interfere with the performance of any governmental or political function.

⁵² See, e.g., *State v. Salamon*, 949 A.2d 1092, 1115-1116 (Conn. 2008) (tracing the history of kidnapping in the common law, including the Model Penal Code’s efforts to narrow its scope, and ultimately narrowing the application of Connecticut’s kidnapping statute after a period of admitted overbreadth); cf. *Whitfield v. United States*, 135 S. Ct. 785, 786-787 (2015) (interpreting the word “accompany” in the federal kidnapping statute to include movement over a short distance).

⁵³ 1962 Code Section 213.1(1)(a).

⁵⁴ 1962 Code Section 213.0(3).

⁵⁵ See, e.g., 18 U.S.C. § 1365(g)(3) (defining serious bodily injury as including “extreme physical pain” in section that applies to consumer product tampering, but is also cross-referenced in other parts of 18 U.S.C. including certain assaults (§ 113) and carjacking (§ 2119). Accord 18 U.S.C. § 2246; id. § 1864 (defining serious bodily injury as including “extreme physical pain”); U.S. Sentencing Guidelines § 1B1.1, cmt. n.1(M) (U.S. SENTENCING COMM’N 2018); IND. CODE ANN. § 35-31.5-2-292(3) (LexisNexis 2019).

existing law, such as the Uniform Code of Military Justice,⁵⁶ which refers to “a fractured or dislocated bone,” as well as from the U.S. Sentencing Guidelines, which includes “[injury] requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.”⁵⁷ These objective, precise benchmarks of injury clarify the threshold at which an injury is “serious,” and provide notice that certain kinds of injury justify the most severe penalties.

The second tier of physical force or restraint is defined by subparagraph (i) as “a physical act or physical restraint that inflicts more than negligible physical harm, pain, or discomfort or that significantly restricts a person’s ability to move freely.” That section explicitly includes the pain and injury from “a burn, black eye, or bloody nose, and ... a kick, punch, or slap on the face.”

This lesser tier of force and injury is narrower than that which applies in ordinary assault-and-battery statutes, because the specific context of sexual assault requires more precise limitations. For instance, Section 211.1, the assault provision of the 1962 Code, applies to reckless attempts to cause bodily injury, negligent acts that cause bodily injury, and menacing in a manner that threatens serious bodily injury.⁵⁸ “Bodily injury” is in turn defined as “physical pain, illness or any impairment of physical condition,” without any limitation on the extent or degree of such pain or impairment.⁵⁹ Under such a definition, the discomfort of a pinch or exposure to a common cold could qualify as threatening or inflicting “bodily injury.” In the

⁵⁶ 10 U.S.C. § 920(g)(3) (2018) (defining “grievous bodily harm” as “fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries”).

⁵⁷ See U.S. Sentencing Guidelines § 1B1.1, cmt. n.1(M) (U.S. SENTENCING COMM’N 2018) (“‘Serious bodily injury’ means injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.”).

⁵⁸ Section 211.1 of the 1962 Code provides:

(1) Simple Assault. A person is guilty of assault if he:

(a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or

(b) negligently causes bodily injury to another with a deadly weapon; or

(c) attempts by physical menace to put another in fear of imminent serious bodily injury.

Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

⁵⁹ 1962 Code Section 210.0(2).

1 context of sexual assault, however, both provisions sweep too broadly, in that they would capture
2 the trivial physical interactions that commonly occur in the course of consensual sexual intimacy,
3 as well as actions that are insufficiently serious to render suspect the authenticity of a person's
4 consent.

5 At the same time, heightened punishment remains appropriate when an actor uses
6 unjustified force or threat of injury to obtain sexual submission, even if that force or injury does
7 not inflict serious bodily injury or death. An actor who consciously uses physical force as the
8 means of causing another person to engage in sexual activity, even if that physical force is not
9 life-threatening, merits punishment greater than an actor who pursues sexual gratification while
10 aware of the other person's lack of consent. In some cases, an act of physical force (such as a
11 punch) may be one part of a threat of more serious violence ("stop screaming or the next one will
12 be worse"), and thus fall under "aggravated physical force" in subparagraph (ii) as a threat of
13 serious bodily injury. But a factfinder convinced that an actor intended force no greater than a
14 bloody nose or black eye should not have to choose between the most and least serious tiers of
15 liability. Subparagraph (i) thus specifies a degree of force and injury less severe than aggravated
16 physical force or restraint yet greater than ordinary assault or battery, which typically require no
17 more than offensive touching and would include negligible or trivial physical pain.

18 Three illustrative forms of physical pain (kicks, punches, and slaps to the face) were
19 expressly included in Section 213.0(2)(f)(i) because such acts are common means of securing
20 sexual submission from a noncompliant person. These forms of force inflict more than negligible
21 pain, and yet they may fall short of serious bodily injury or even fail to leave a physical mark.
22 Nonetheless, these uses of force should not escape punishment at a heightened level simply
23 because they do not result in more severe pain or injuries. Under Section 213.0(2)(f)(i), a kick,
24 punch, or slap on the face is presumptively an impermissible means of obtaining sex. In contrast,
25 slaps to parts of the body other than the face may cause discomfort or affront—such as a slap on
26 the buttocks or the arm—but they are too common as forms of affection to be treated in the same
27 manner. To establish that such a slap constitutes physical force or restraint, the prosecution must
28 prove that it caused more than negligible pain or harm. Similarly, three types of cognizable
29 physical harm are included for illustrative purposes: "a burn, black eye, or bloody nose." Using
30 these means to cause sexual submission is more culpable than simply disregarding the absence of
31 consent.

Illustrations:

29. A housekeeper enters to clean an actor's motel room and finds the actor naked with only a loose-fitting robe. The actor says, "I always enjoy staying here; they have the most attractive staff," and approaches the housekeeper, who starts backing slowly toward the door, saying, "I'll come back later." The actor pushes the door shut behind the housekeeper and then caresses the housekeeper's hair, saying, "I'm glad you are here. I get really lonely on the road." The housekeeper demurs again and turns to leave, but the actor catches hold of the housekeeper's hand, leads the housekeeper away from the door, and gently pushes the housekeeper onto the bed, saying, "You aren't leaving already, are you?" The housekeeper freezes in fear as the actor begins to remove the housekeeper's clothing. The actor then lies on top of the housekeeper, pressing the housekeeper to the bed, and engages in an act of penetration as the housekeeper cries softly and repeatedly says, "Please stop."

These facts support conviction under Section 213.6, Sexual Assault in the Absence of Consent, but they are not sufficient to support a charge that requires proof of "physical force or restraint." Although the actor's inappropriate comments and nudity created an uncomfortable environment for the housekeeper, they inflicted no physical harm. Similarly, the acts of shutting the door, catching hold of the housekeeper's hand, and leading the housekeeper to the bed while making suggestive comments may have somewhat impeded the housekeeper's freedom to leave, but did not significantly do so. Finally, the force of the actor lying on top of the housekeeper during the sexual act was not greater than that which is intrinsic to the act itself, and does not fall under Section 213.0(2)(f)(i). Even if the actor knew that the housekeeper engaged in the act of sexual penetration because of the actor's behavior, the facts do not support liability under Section 213.1 or Section 213.2.

30. Same facts as Illustration 29, except that after the actor begins leading the housekeeper to the bed by the hand, the housekeeper pulls her hand back and starts to rush to the door to exit. The actor swiftly deadbolts the door, grabs both of the housekeeper's hands, and leads the housekeeper back toward the bed, saying, "I said you should stay." Even though the housekeeper could have screamed, jerked her hands back again, or rushed to unlock the door, a jury could find based on these facts that the actor

1 significantly impeded the housekeeper's ability to move freely, especially in light of the
2 command to remain. These actions establish "physical force or restraint." The actor's
3 ultimate liability requires proof of the other elements of the offense, including mens rea
4 and causation.

5 31. Same facts as Illustration 29, except that after the actor grabs the
6 housekeeper's hand, the actor slaps the housekeeper across the face and says, "I said you
7 should stay." A jury could find based on these facts that the actor engaged in "physical
8 force or restraint," because a slap to the face, even if it causes only transient pain,
9 constitutes "physical force or restraint." The actor's ultimate liability requires proof of
10 the other elements of the offense, including mens rea and causation.

11 32. Same facts as Illustration 29, except that after the actor grabs the
12 housekeeper's hand, the actor slaps the housekeeper across the face and says, "If you
13 scream, I'll kill you." Based on these facts, a jury could find that the actor engaged in
14 "aggravated physical force or restraint." Although the slap alone does not constitute
15 aggravated physical force, the explicit threat to kill the housekeeper constitutes a threat of
16 serious bodily injury or death, which satisfies the standard for "aggravated physical force
17 or restraint." The actor's ultimate liability requires proof of the other elements of the
18 offense, including mens rea and causation.

19 33. Same facts as Illustration 29, except that after the actor grabs the
20 housekeeper's hand, the actor begins punching the housekeeper all over the
21 housekeeper's body. The housekeeper falls to the ground, and the actor continues
22 punching and kicking the housekeeper until the housekeeper lies entirely still. Later, the
23 housekeeper is treated for a broken nose, two broken ribs, and severe bruising. Based on
24 these facts, a jury could find that the actor engaged in "aggravated physical force or
25 restraint." Although Section 213.0(2)(f)(i) explicitly lists a "punch" as "physical force or
26 restraint," subparagraph (ii) defines "aggravated physical force or restraint" as a degree
27 of force that uses or threatens to use a degree of force that "inflicts ... serious bodily
28 injury, or extreme physical pain." The repeated punches and kicks by the actor, causing
29 broken bones and severe bruising, could be found to meet that standard. The actor's
30 ultimate liability requires proof of the other elements of the offense, including mens rea
31 and causation.

1 34. Same facts as Illustration 29, except that after the actor grabs the
2 housekeeper's hand, the actor picks up a plastic feather duster from the housekeeper's
3 cart and slaps it against the actor's palm, saying, "I said you aren't leaving yet." A jury
4 could find based on these facts that the actor engaged in "physical force or restraint," if it
5 found that the display of the duster along with the actor's words threatened more than
6 negligible physical harm, pain, or discomfort, or significantly impeded the housekeeper's
7 ability to leave. But without more, this is insufficient evidence to find "aggravated
8 physical force or restraint," because the duster is not a deadly weapon and there does not
9 seem to be an express or implied threat of serious bodily harm or death.⁶⁰ The actor's
10 ultimate liability requires proof of the other elements of the offense, including mens rea
11 and causation.

12 35. Same facts as Illustration 29, except that after the actor grabs the
13 housekeeper's hand, the actor takes a knife from the pocket of the actor's bathrobe and
14 holds it up, saying, "I said you aren't leaving yet." A jury could find based on these facts
15 that the actor engaged in "aggravated physical force or restraint," because the display of
16 the deadly weapon is a threat to inflict death, serious bodily injury, or extreme physical
17 pain. The actor's ultimate liability requires proof of the other elements of the offense,
18 including mens rea and causation.

19 The precise contours of the lines drawn by the two subparagraphs of Section 213.0(2)(f)
20 hinge, as is the case throughout criminal law, on the evidence presented and its persuasiveness to
21 the factfinder. Recent research on the neurobiology of trauma, in particular in the context of
22 sexual violence, have opened questions about the roles of force, resistance, and nonconsent in
23 defining sex crimes.⁶¹ The grading of sexual offenses, however, should turn primarily on the
24 impermissibility of the actor's conduct, rather than the nature or extent of a victim's response.
25 Ultimately, the factfinder must judge the evidence presented and determine whether that

⁶⁰ See, e.g., *State v. McGouey*, 229 S.W.3d 668, 669 (Tenn. 2007) (an unloaded pellet gun is not a deadly weapon); *J.P. v. State*, 128 So. 3d 61, 62 (Fla. Dist. Ct. App. 2013) (quarter-sized rocks are not a deadly weapon). Pocket knives, baseball bats, and lighters are other objects that courts commonly find are not deadly weapons per se.

⁶¹ See Reporters' Note.

evidence supports a particular finding, recognizing that the law imposes outer boundaries on what credible conclusions may be drawn.

Consider, for instance, a complainant who testifies that an actor punched the complainant hard in the stomach, causing the complainant to collapse. The actor then sexually penetrated the complainant, who was lying passively on the floor or ground. The complainant might testify that the complainant submitted out of fear that the actor would kill the complainant. Or the complainant might testify to a belief that the actor would continue the beating, but not to a degree that would threaten serious bodily injury. Or the complainant might testify to feeling certain that the actor would do no more than strike the complainant again if the complainant refused to submit. The complainant's perceptions are critical in such an assessment, as is other evidence surrounding the encounter, such as the location, the prior relationship of the parties, and so forth. But the factfinder's task is not solely to determine the complainant's perceptions, but also to judge the actor's actions, along with the actor's mental state about those actions and their effects. Given other evidence, a single punch might support finding beyond a reasonable doubt that the actor knowingly punched the complainant as a means of implicitly threatening aggravated physical force—for example, if the actor is the complainant's spouse, and the evidence shows that the actor has previously followed a punch by aggravated physical force to obtain sexual submission. Or a single punch might only constitute "physical force or restraint," because the context suggests no greater implicit or explicit threat of harm.

Illustrations:

36. Complainant and Accused meet at a bar, and after they chat, Complainant agrees to give Accused a ride home. It's almost midnight when they get to Accused's apartment in a part of town far from Complainant's own apartment. Accused asks Complainant to come up for a drink, but Complainant declines, saying, "No, this has been fun, but I have to get home." Accused suddenly grabs the car keys from the ignition and snatches Complainant's mobile phone from the car's dashboard, telling Complainant, "You really should come up. I have a great apartment." Complainant answers, "Look—I'm serious. This has been great, but I need to get home. I'll call you another time." Accused gets out of the car, still holding Complainant's keys and phone, opens the building's outside door, calls out "Apartment 2C!" and turns to walk up the stairs. Complainant follows, calling out, "Please, please, let's not spoil a nice time. I really need

1 to get home.” Once in the apartment, Complainant finds Accused sitting on the bed in a
2 back bedroom. Complainant sits down next to Accused and says, “OK, I came up. Are
3 you happy? Give me back my phone and keys back so I can leave. I’m serious.” At that
4 point, Accused puts an arm around Complainant’s shoulder, pushes Complainant
5 backward onto the bed, pulls down Complainant’s pants, and sexually penetrates
6 Complainant.

7 On these facts, a jury could find that Accused engaged in an act of “physical force
8 or restraint.” The acts of putting an arm around Complainant’s shoulder and pushing
9 Complainant backward onto the bed do not in themselves constitute “physical force”
10 under Section 213.0(2)(f)(i), because they inflicted neither injury nor anything more than
11 negligible pain. But a jury could find that, under all the circumstances, Accused
12 “significantly restrict[ed] [Complainant’s] ability to move freely” by taking away and
13 refusing to return Complainant’s keys and phone. Accused’s actions prevented
14 Complainant from driving away and impeded Complainant’s ability to seek help.
15 Although Complainant could have screamed, tried to run away, knocked on a stranger’s
16 door, or attempted to hail a passing driver, Complainant’s failure to resort to means like
17 these does not negate the fact that Accused used an impermissible degree of restraint by
18 significantly impeding Complainant’s ability to leave. The actor’s ultimate liability
19 requires proof of the other elements of the offense, including mens rea and causation.

20 37. Accused meets Complainant at a bar where they talk over drinks. At one
21 point, Accused puts a temporary paralytic in Complainant’s drink. When the effects of the
22 drug begin to materialize, Accused picks up and carries Complainant to Accused’s car,
23 where Accused engages in an act of sexual penetration. On these facts, a jury could find
24 that Accused engaged in an act of “physical force or restraint.” The paralytic imposed a
25 significant restriction on Complainant’s “ability to move freely,” even if only on a
26 temporary basis. The actor’s ultimate liability requires proof of the other elements of the
27 offense, including Accused’s awareness of the risk that Accused’s actions caused
28 Complainant to submit to the act of sexual penetration.

29 38. Same as Illustration 37, except that the paralytic is long-lasting, and after it
30 takes effect, Accused takes Complainant to an abandoned barn on property owned by
31 Accused and engages in the act of sexual penetration. Based on these facts, a jury could

find that Accused used “aggravated physical force or restraint,” because the paralytic and subsequent acts “confine[d Complainant] for a substantial period in a place of isolation.” As in Illustration 35, the actor’s liability requires proof of the other elements of the offense, including Accused’s awareness of the risk that Accused’s actions caused Complainant to submit to the act of sexual penetration.

9. “Actor” – Section 213.0(2)(g).

Section 213.0(2)(g) defines an actor as a person more than 12 years old, “except that ‘actor’ includes a person younger than 12 years old when the charge is Sexual Assault by Aggravated Physical Force (Section 213.1).” In contemplating the liability of youthful actors, two distinct questions arise. The first is whether liability of any kind is appropriate, and the second is whether that liability should be adjudicated in adult criminal court or in juvenile court proceedings. The first question is resolved with reference to a minimum age of liability (generally driven by culpability and competency concerns); the second is resolved with reference to the type of forum that should resolve the liability issue (generally driven by the more holistic approach of juvenile courts, which also limit the permissible reach of a punitive sanction).

The 1962 Code did not set a minimum age threshold for liability. Section 4.10 stipulates that no person younger than 16 may be tried or convicted in criminal court for any offense, but it contemplates proceedings in juvenile court for all actors younger than 18.⁶² Article 213 presumes

⁶² **Section 4.10. Immaturity Excluding Criminal Conviction; Transfer of Proceedings to Juvenile Court.**

(1) A person shall not be tried for or convicted of an offense if:

(a) at the time of the conduct charged to constitute the offense he was less than sixteen years of age [, in which case the Juvenile Court shall have exclusive jurisdiction*]; or

(b) at the time of the conduct charged to constitute the offense he was sixteen or seventeen years of age, unless:

(i) the Juvenile Court has no jurisdiction over him, or

(ii) the Juvenile Court has entered an order waiving jurisdiction and consenting to the institution of criminal proceeding against him.

(2) No court shall have jurisdiction to try or convict a person of an offense if criminal proceedings against him are barred by Subsection (1) of this Section. When it appears that a person charged with the commission of an offense may be of such an age that criminal proceedings may be barred under Subsection (1) of this Section, the Court shall hold a hearing thereon, and the burden shall be on the prosecution to establish to the satisfaction of the Court

1 the continued applicability of this provision, even though in fact many jurisdictions permit
2 transfer of a juvenile actor to adult criminal court at ages significantly younger than 16.⁶³ Section
3 213.0(2)(g) further provides that, except with respect to conduct within the definition of Sexual
4 Assault by Aggravated Physical Force or Restraint under Section 213.1, an “actor” for purposes
5 of Article 213 must be a person more than 12 years old.

6 Together, these provisions reflect two principles. First, apart from the most egregious
7 forms of sexual violence, sexual offenses committed by actors 12 or younger generally are not
8 the proper subject of the penal law (whether processed through adult or juvenile courts), even
9 though they may properly be the subject of other state welfare systems.⁶⁴ Second, sexual
10 offenses committed by actors between 12 and 18 are preferably handled in the juvenile justice
11 system, rather than through adult criminal-court proceedings.

12 The need to impose a minimum threshold age for liability and to reinforce a preference
13 for adjudicating juveniles outside of adult criminal court arise from the special nature of the
14 conduct covered by Article 213. Sexual activity is commonly engaged in throughout childhood
15 and adolescence, and sexual maturation is a critical component of development throughout this
16 period. For young children, innocent sexual acts may occur in the context of play or exploration.

that the criminal proceeding is not barred upon such grounds. If the Court determines that the proceeding is barred, custody of the person charged shall be surrendered to the Juvenile Court, and the case, including all papers and processes relating thereto, shall be transferred.

⁶³ See Jeree Thomas et al., *Raising the Floor: Increasing the Minimum Age of Prosecution as an Adult*, Campaign for Youth Justice 1-2 (2019) http://www.cfyj.org/images/Raising_the_Floor_Final.pdf (identifying 45 states plus D.C. as using a judicial waiver system, 13 and D.C. as allowing prosecutorial waiver, and 26 states as statutorily excluding certain juveniles from juvenile court); id. at 3-4, 6, 10 (noting that 37% of jurisdictions permit judicial waiver without specifying a minimum age, 45.5% require mandatory waiver for at least one offense for juveniles at age 14 or higher, and 46.7% of jurisdictions permit prosecutors to “direct file” at the age of 14 for at least one offense). Generally speaking, states commonly set 14, rather than 16, as the age of likely prosecution in an adult court. See also Lisa S. Beresford, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 SAN DIEGO L. REV. 783, 801-802 (2000) (reviewing the state of the law on juvenile waiver, and finding that “[t]he vast majority of states with judicial waiver set 14 as the age to be eligible for transfer,” with some states having no minimum, three permitting transfer at age 10, three at age 12, and three at age 13). See also Commentary to Section 213.8.

⁶⁴ Depending on the nature of the allegations, such interventions might take the form of a child welfare inquiry, or a nonpunitive family court intervention such as a “persons in need of supervision” petition. Cf., e.g., Toolsi Gowin Meisner, *Shifting the Paradigm From Prosecution to Protection of Child Victims of Prostitution*, 43-JUN Prosecutor April/May/June 2009, at 22 (explaining desirability of using a welfare model over prosecution model as regards youth arrested for prostitution). See also Comment to Section 213.8.

1 A child under 12 is unlikely to engage in homicide, burglary, or motor-vehicle theft, much less
2 do so innocently. But children more frequently undertake acts such as those defined by Section
3 213.0(2)(a) (sexual penetration), (b) (oral sex), (c) (sexual contact), and (d) (fondling) and do so
4 without any culpable mindset. And even older youths who engage in deliberately wrongful
5 sexual acts often undertake those behaviors without careful reflection or understanding of the
6 harm or consequences. In both cases, the criminal law is an inappropriate tool of redress. A
7 precociously sexual child who engages in behavior harmful to others may be a proper subject for
8 state intervention, but that intervention should be in the form of health or welfare services, not
9 penal law. An adolescent acting upon sexual or other impulses insensitive to the harms to others
10 is a proper subject of state attention, but preferably through a holistic juvenile model rather than
11 one that treats the adolescent as sexually mature.⁶⁵ Indeed, although Article 213 permits liability
12 for actors ages 12 to 18, that does not mean that such liability is justified or desirable in every
13 case. In most instances, the criminal law will remain an inappropriate and ineffective means of
14 vindicating the state's interests.

15 The sole exceptions to this general principle apply to actors under 12 whose sexual
16 aggression includes the knowing use of aggravated physical force or restraint, a deadly weapon,
17 or the infliction of serious bodily injury to cause an act of sexual penetration or oral sex. In these
18 cases, the heightened mental state demanded for conviction, as well as the added culpability of
19 the actor using methods likely to cause grievous emotional or physical harm to the complainant,
20 justifies liability. These cases are also likely to involve additional charges related to the use or
21 threatened use of a weapon or the infliction of injuries. It would be anomalous to preclude the
22 addition of charges based on the resulting sexual intrusion.

23 Importantly, the inclusion of actors under 12 for purposes of Section 213.1 does not mean
24 that those children should be charged in adult court. Even in these most egregious cases, the state
25 should process the allegations against an actor under 12 through the juvenile, rather than
26 criminal, courts.

27 ***10. “Registrable offense” – Section 213.0(2)(h).***

28 Section 213.0(2)(h), in conjunction with Section 213.11 (Collateral Consequences of
29 Conviction), specifies which offenses are designated as “registrable.” Section 213.0(2)(h) limits

⁶⁵ See Comment & Reporters’ Note to Section 213.8 for more discussion about recent legal and scientific developments as regards the penal law and adolescent brains.

the scope of registration to those designated offenses. This limit has no substantive implications in itself, but it serves the important purpose of emphasizing that registration requirements ought to be imposed only after a deliberate legislative judgment that the underlying offense is sufficiently serious to warrant this exceptional measure.

REPORTERS' NOTES

1. Section 213.0(1) and the 1962 Code Provisions.

The revised Article 213 reprints the most pertinent established principles from the 1962 Code. Although Article 213 is presented as an independent provision, its proper interpretation and application requires understanding of the 1962 Code. Accordingly, Section 213.0(1) explicitly notes that the general provisions of the 1962 Code apply. Certain core tenets of statutory interpretation also bear restatement in the revised Article, and are thus selectively reprinted.

Section 213.0(1)(a) explains that the definition of consent in Section 2.11 of the 1962 Code does not apply to Article 213.⁶⁶ That Section does not provide a substantive definition of

⁶⁶ That provision reads:

Section 2.11. Consent.

(1) In General. The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

(2) Consent to Bodily Harm. When conduct is charged to constitute an offense because it causes or threatens bodily harm, consent to such conduct or to the infliction of such harm is a defense if:

(a) the bodily harm consented to or threatened by the conduct consented to is not serious; or

(b) the conduct and the harm are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport; or

(c) the consent establishes a justification for the conduct under Article 3 of the Code.

(3) Ineffective Consent. Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if:

(a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or

(b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or

(c) it is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or

1 consent, but rather addresses when consent may serve as a defense to liability, and the limits on
2 such use. Because consent in the area of sexual assault is a nuanced and highly contested
3 concept, it is necessary not just to reference the concept of consent, but to provide explicit
4 guidance as to what constitutes or fails to constitute consent. Section 213.0(2)(e) provides that
5 guidance, as is further explained in the Comment and Reporters' Note to that Section.

6 Revised Article 213 affirms the precepts in Section 2.11 of the 1962 Code. First, Section
7 2.11(2) recognizes that consent may be a defense to liability for conduct that is a threat of harm,
8 so long as that threat is limited to harms that are "not serious." An analogous principle is found
9 in Section 213.10 of the revised article, which recognizes an affirmative defense of explicit prior
10 permission for conduct that does not risk inflicting death or serious bodily injury. Second,
11 Section 2.11(3) lists four circumstances in which apparent consent does not constitute legal
12 consent, such as when given by a person who is legally incompetent, incapable of "reasonable
13 judgment" as a result of "youth, mental disease...or intoxication," or when "induced by force,
14 duress or deception." Those conditions generally reflect those in Sections 213.1 through 213.5 of
15 revised Article 213, which address sexual acts that occur as a result of the use of force or threat
16 of force, or that are exploitative, extortionate, or deceptive in specified ways, and in Section
17 213.8, which addresses sexual acts with minors. Each of those Sections contains a provision akin
18 to that found in Section 2.11(3), and that provision clearly states that proof of the specified
19 condition invalidates any apparent or perceived consent to the sexual acts.⁶⁷

20 Two provisions require further elaboration: Section 213.0(1)(b), which relates to the
21 effect of an actor's intoxication and the applicability of Section 2.08 of the 1962 Code; and the
22 provision pertaining to De Minimis Infractions found in Section 2.12 of the 1962 Code.

23 *a. Section 213.0(1)(b) and Section 2.08 of the 1962 Code.* Section 2.08 of the 1962 Code
24 provides that voluntary intoxication "is not a defense unless it negatives an element of the
25 offense" and that "[w]hen recklessness establishes an element of the offense, if the actor, due to
26 self-induced intoxication, is unaware of a risk of which he would have been aware had he been
27 sober, such awareness is immaterial."⁶⁸ This follows the historical custom of the common law,
28 which allowed evidence of voluntary intoxication to negate "specific intent"—roughly
29 equivalent to purpose or perhaps even knowledge in Model Penal Code terminology—but not
30 "general intent," i.e., recklessness or negligence.

31 However, in the context of sexual offenses, this approach to evidence of intoxication is
32 problematic. First, few jurisdictions follow the Model Penal Code's treatment of intoxication

(d) it is induced by force, duress or deception of a kind sought to be prevented
by the law defining the offense.

1962 Code Section 2.11.

⁶⁷ 1962 Code Section 2.11(3); see provisions addressing "Effective Consent" in Sections 213.1(3), 213.2(3), 213.3(4), 213.4(3), and 213.5(3), as well as in 213.7(3) (relating to sexual contact) and 213.8(7) (relating to age-based offenses).

⁶⁸ 1962 Code Section 2.08(1), (2).

evidence. A number of jurisdictions eliminate an intoxication defense altogether, reasoning, for example, that “the defense of voluntary intoxication is detrimental to the welfare and safety of the citizens of this State in that criminals are at times excused from the consequences of their criminal acts merely because of their voluntary intoxication.”⁶⁹ Others limit the relevance of intoxication evidence to mental states requiring purpose, precluding its admission when liability is based on knowledge.⁷⁰

Second, with respect to sexual offenses, the majority of jurisdictions with explicit mens rea standards for intoxicated actors apply a standard of negligence or “general intent,”⁷¹ and thus refuse to exculpate a voluntarily intoxicated actor who fails to conform to a standard of objective reasonableness.⁷² In practice, therefore, very few jurisdictions permit evidence of intoxication to mitigate or exculpate liability for a sexual offense.⁷³

⁶⁹ *White v. State*, 717 S.W.2d 784, 786 (Ark. 1986) (quoting An Act to Eliminate Self-Induced Intoxication as a Defense to Criminal Prosecution, 1977 Ark. Acts § 1 and affirming that state statute eliminated all defenses of voluntary intoxication in all prosecutions, rather than just in cases involving a mens rea less than purpose). Accord *Sanchez v. State*, 749 N.E.2d 511, 522 (Ind. 2001) (affirming in rape case the constitutionality of statute “prohibiting the use of evidence of voluntary intoxication to negate the mens rea requirement in criminal cases”); *Wyant v. State*, 519 A.2d 649, 651-652 (Del. 1986) (“Voluntary intoxication has never been accorded constitutional recognition as a defense to any criminal offense. With the Legislature’s elimination in 1973 of the common law distinction between crimes of specific and general intent, the Legislature was empowered to conclude that Delaware’s limited recognition of intoxication as a defense to crimes of specific intent should also end.”); *Payne v. State*, 540 S.E.2d 191, 193 (Ga. 2001) (quoting GA. CODE ANN. § 16-3-4 (2020) (“Voluntary intoxication shall not be an excuse for any criminal act or omission.”); *State v. Souza*, 813 P.2d 1384, 1386 (Haw. 1991) (holding that the “legislature was entitled to redefine the mens rea element of crimes and to exclude evidence of voluntary intoxication to negate state of mind”); *State v. Erwin*, 848 S.W.2d 476, 482 (Mo. 1993) (en banc) (affirming that “a jury may not consider intoxication on the issue of the defendant’s mental state”). See generally *Montana v. Egelhoff*, 518 U.S. 37 (1996) (upholding against constitutional due-process attack the state’s statutory ban on introduction of evidence of voluntary intoxication to negate mens rea).

⁷⁰ See, e.g., *State v. Ramos*, 648 P.2d 119, 121 (Ariz. 1982) (en banc) (finding that intoxication not a defense to knowing mental state, but rather only to “intentionality” or purpose); *People v. Brown*, 632 P.2d 1025, 1027-1028 (Colo. 1981) (noting that “evidence of intoxication is relevant to negative the mens rea element of specific intent crimes . . . [but f]irst-degree sexual assault, which contains the culpable mental state of ‘knowingly,’ is a general intent crime). Cf. Model Penal Code Section 2.08 (allowing voluntary intoxication to defeat knowledge or purpose). But see *State v. Smith*, 178 P.3d 672, 679, rev. denied 286 Kan. 1185 (2008) (“[T]he prohibited act is sexual intercourse with a victim incapable of giving consent, but the statute requires a *further* state of mind of the offender, *i.e.*, knowledge of that condition if not reasonably apparent. This is a state of mind that is beyond the general criminal intent required for rape. Accordingly, we conclude the knowledge requirement of [the statute] justified a voluntary intoxication defense, and Smith was entitled to have the jury so instructed.”).

⁷¹ See Comment to Section 213.3(2)(b)(ii).

⁷² *People v. Newton*, 867 N.E.2d 397, 398-399 (N.Y. 2007) (holding that “the proper inquiry for the factfinder is not whether a defendant actually perceives a lack of consent, but whether the victim, by words or actions, clearly expresses an unwillingness to engage in the sexual act in such a way that a

Some commentators maintain that intoxication evidence remains pertinent in assessing sexual offenses that occur when both the accused and the complainant are intoxicated, and that the intoxication of the complainant should be considered in judging the culpability of the accused. In this view, to hold otherwise would be to find that although two people, both heavily intoxicated, engaged in sexual activity, only one person is held responsible for those choices.⁷⁴ Empirical evidence suggests that, in fact, when both parties were intoxicated at the time of the sexual act, lay persons and jurors tend to discount the culpability of the actor and impute culpability to the complainant.⁷⁵

In addition, this argument is flawed. Under the incapacity standard articulated in Section 213.3, an actor, even if substantially intoxicated, is liable only if the other party is so heavily intoxicated as to be effectively incapacitated. A heavily intoxicated homeowner in a high-crime area who is too drunk to lock the front door probably has acted unwisely, but the homeowner's condition does not exonerate a burglar—even one heavily intoxicated from drug use—who enters through the unlocked door and steals. A bar patron may pass out from intoxication, but it remains theft if another patron, also intoxicated, takes the unconscious patron's wallet. The point has been well made that holding an actor responsible for harm inflicted on another while the actor was intoxicated is far more appropriate than holding the intoxicated individual accountable for what the actor did to him or her.⁷⁶ If strong arguments exist to excuse those heavily

neutral observer would have understood that the victim was not consenting,” and thus “a defendant's subjective mental state is not an element of the crime of third-degree sodomy, [so] evidence of intoxication at the time of the sexual act is irrelevant,” but contrasting that to statutes that require knowledge of incapacity); *Malone v. Commonwealth*, 636 S.W.2d 647, 647 (Ky. 1982) (forcible rape and sodomy—which include intercourse with a “physically helpless” person—are strict-liability crimes because the acts “do not say that a mental state is required for their commission,” and thus intoxication is no defense).

⁷³ Of course, to the extent that jurisdictions at present routinely allow liability for sexual offenses on the basis of negligence alone, thereby foreclosing an intoxication claim, then subsequent adoption of revised Article 213, which requires knowledge for many of its subsections, will have the effect of not only raising the standard of mens rea but also (in so doing) opening the possibility for an intoxication defense if the law of the jurisdiction permits evidence of intoxication to negate a specific intent.

⁷⁴ See, e.g., *State v. Haddock*, 664 S.E.2d 339, 346 (N.C. Ct. App. 2008) (reversing rape conviction based on incapacity of heavily intoxicated complainant, on the ground that the statute was not “intended for the protection of . . . alleged victims who have voluntarily ingested intoxicating substances through their own actions.”).

⁷⁵ See, e.g., Anne-Marie Wall & Regina A. Schuller, *Sexual Assault and Defendant/Victim Intoxication: Jurors' Perceptions of Guilt*, 30 J. APPLIED SOC. PSYCHOL. 253, 268-270 (2000); Regina A. Schuller & Anna Stewart, *Police Responses to Sexual Assault Complaints: The Role of Perpetrator/Complainant Intoxication*, 24 L. & HUMAN BEHAV. 535, 536-537 (2000); Regina A. Schuller & Anne-Marie Wall, *The Effects of Defendant and Complainant Intoxication on Mock Jurors' Judgments of Sexual Assault*, 22 PSYCHOL. OF WOMEN Q. 555, 555, 569 (1998). Interestingly, when only the actor was intoxicated, study participants viewed the actor as more culpable. Schuller & Stewart, *supra*, at 537.

⁷⁶ ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* 244 (2003).

1 intoxicated by drugs or alcohol from responsibility for their conduct, the criminal law should
2 adjust liability across the penal code rather than singling out sexual offenses for exceptional
3 treatment.

4 The challenge of evidence of the actor's voluntary intoxication has been met in different
5 ways by different jurisdictions, and no uniform solution presents itself. What seems most
6 important is that the treatment of mens rea evidence be equivalent for all serious offenses,
7 whether or not sexual in nature. Accordingly, revised Article 213 leaves to the determination of
8 local, generally applicable law the significance of evidence of the actor's intoxication for
9 purposes of assessing the actor's mens rea, and does not single out sexual offenses for special
10 treatment.

11 *b. De Minimis Infractions – Section 2.12 of the 1962 Code.* The 1962 Code contained a
12 provision that requires the court to dismiss a prosecution that seeks to penalize harmless or trivial
13 infractions of the technical terms of the law.⁷⁷ Similar provisions have been adopted in a number
14 of jurisdictions, currently including Pennsylvania,⁷⁸ Maine,⁷⁹ New Jersey,⁸⁰ and Hawaii.⁸¹

15 The Commentary to the Maine statute enunciates the common intent that underpins the
16 grant of this authority: “It gives the courts a visible degree of responsibility in the decision that
17 technical and minor violations of the law need not always be fully prosecuted.”⁸² The specific

⁷⁷ 1962 Code Section 2.12 reads:

The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:

(1) was within a customary license or tolerance, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or

(2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or

(3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.

The Court shall not dismiss a prosecution under Subsection (3) of this Section without filing a written statement of its reasons.

⁷⁸ 18 PA. C.S.A. § 312 (Purdon's 2018); Jt. St. Govt. Comm. Comment --1967 (“The purpose of this section is to remove petty infractions from the category of criminal conduct.”).

⁷⁹ 17-A MAINE REV. STAT. ANN. § 12.

⁸⁰ N.J.S.A. § 2C:2-11 (2018).

⁸¹ HAW. REV. STAT. ANN. (West 2018) § 702-236. See, e.g., *State v. Akina*, 828 P.2d 269 (Haw. 1992) (finding an abuse of discretion that lower court refused to dismiss as *de minimis* a prosecution against a man convicted for interference with foster parent custody as a result of helping a runaway).

⁸² 17-A M.R.S.A. § 12 comment (1983)

1 area of sex offenses has further been acknowledged as one in which this power may prove
2 especially pertinent.⁸³

3 Although exercises of the power are rare, a court in Maine exercised the authority in a
4 case in which the estranged former partner of a woman alleged that she twice sexually abused
5 their son by placing his penis in her mouth.⁸⁴ The court found the partner's testimony not
6 credible, and instead credited the mother's version of the episode—that she had merely kissed
7 the child's genitals, which she asserted reflected an accepted form of nonsexual intimacy in her
8 culture.⁸⁵ Even so, her conduct would have constituted sexual contact within the literal terms of
9 the statute (which prohibited touches between the genitals and mouth where one party is a minor
10 under 14); accordingly the court invoked the *de minimis* provision to dismiss the prosecution.

11 Scholars have debated the advantages and disadvantages of a *de minimis* provision,⁸⁶ but
12 there are good arguments in favor of a narrowly tailored provision giving courts the
13 responsibility to dismiss prosecutions in which the harm done, if any, is either minimal or
14 distinct from that which motivated the statutory prohibition and punishment. Under Section 2.12,
15 the exclusion of *de minimis* infractions from the possibility of criminal prosecution, including
16 for violations of Article 213, is a rule of law (“[t]he Court *shall* dismiss a prosecution ...”).
17 Accordingly a defendant can seek to invoke it as a matter of right rather than being dependent on
18 the vagaries of prosecutorial discretion.

19 **2. Definitions – “Sexual penetration” – Section 213.0(2)(a).**

20 [Approved by the membership, May 2016]

21 **3. Definitions – “Oral sex” – Section 213.0(2)(b).**

22 [Approved by the membership, May 2016]

23 **4. Definitions – “Sexual contact” – Section 213.0(2)(c).** The 1962 Code defined “sexual
24 contact” as “any touching of the sexual or other intimate parts of the person of another for the

⁸³ See Comment to HAW. REV. STAT. ANN. (West 2018) § 702-236 (noting that dismissal on *de minimis* grounds can be especially appropriate in “the field of minor sex offenses, where a rejected partner might seek revenge through the penal process”).

⁸⁴ *State v. Ramirez*, No. CR-04-213, 2005 WL 3678032 (Me. Super. Ct. Nov. 9, 2005) (acquitting a Dominican mother on a sexual-abuse charge filed by estranged partner about incidents involving infant child, finding that mother never placed child's penis in her mouth and that in mother's culture, “[t]ouching, kissing, and caressing a male or female child's genitals, including a male child's erect penis, are included in this common intimate interaction between a mother and her child.”).

⁸⁵ *Id.* at *1-*2.

⁸⁶ See, e.g., Guy Ben-David, *Legal Models for the Recognition of Cultural Arguments in Criminal Law: A Normative Viewpoint*, 2 U. MIAMI RACE & SOC. JUST. L. REV. 1, 26-27 (2012) (examining the advantages and disadvantages of the *de minimis* defense within the “integrated model” for the recognition of a defendant's culture in a criminal trial); Eliot M. Held & Reid Griffith Fontaine, *On the Boundaries of Culture as an Affirmative Defense*, 51 ARIZ. L. REV. 237, 237 (2009) (arguing that “[t]he closest thing to a cultural defense that a court could adopt without damaging the culpability regime is a narrow *de minimis* rule”).

purpose of arousing or gratifying sexual desire.”⁸⁷ The Commentary to that provision explained that “[t]he motives of the actor, the character of harm to the victim, and the nature of community norms at stake identify sexual assault as a distinct criminological problem,” and concluded that it should be treated as “a lesser sexual offense rather than a species of assault.”⁸⁸ The Commentary observed that while “the chief issue [in defining general assault] is to provide gradations of liability according to the gravity of physical injury caused or attempted by the actor,” for sexual-contact offenses, “the principal concern is to identify those circumstances under which a kind of conduct that often may be desirable to the other person becomes instead an invasion of individual dignity.”⁸⁹ Existing law is overwhelmingly in accord with this sentiment in proscribing unwanted sexual contact as an offense distinct from simple physical assault. Moreover, the Model Penal Code requires proof of or threat of bodily injury for the lowest level of battery or assault. Without a targeted provision, the most common forms of unwanted sexual contact (such as gropes, grabs, and the like) would go wholly unpunished in such a scheme.

1. Current Law. Every state extends criminal penalties to encompass unwanted sexual touching of both adults and children, but states vary in the way they define the types of touching that are covered.⁹⁰

The overwhelming majority of sexual-contact statutes contain two core elements: *touching certain body parts* and doing so with *sexual intent*.⁹¹ Outlier formulations prohibit only

⁸⁷ 1962 Code Section 213.4. The 1962 Code outlined eight circumstances under which sexual contact was prohibited. See Reporters’ Note to Section 213.7 (defining substantive contact offenses).

⁸⁸ 1962 Code Section 213.4, Comment at 399.

⁸⁹ *Id.*

⁹⁰ See Comment to Section 213.7.

⁹¹ See, e.g., 18 U.S.C. § 2246(3) (2014); ALA. CODE § 13A-6-60(3) (LexisNexis 2020); ARK. CODE ANN. § 5-14-101(11) (2019); CAL. PENAL CODE § 243.4(a)-(e) (Deering 2020); COLO. REV. STAT. § 18-3-401(2), (4) (2018); CONN. GEN. STAT. ANN. § 53a-65(3), (8) (LexisNexis 2019); DEL. CODE ANN. tit. 11, § 761(g)(3) (2019); D.C. CODE § 22-3001(9) (2019); 720 ILL. COMP. STAT. ANN. 5/11-0.1 (LexisNexis 2019); KY. REV. STAT. ANN. § 510.010(7) (LexisNexis 2019); ME. REV. STAT. ANN. tit. 17-A, § 251(1)(D), (G) (LexisNexis 2019); MD. CODE ANN., CRIM. LAW § 3-301(e)(1) (LexisNexis 2019); MICH. COMP. LAWS SERV. § 750.520a(f), (q) (LexisNexis 2019); MINN. STAT. § 609.341(5), (11) (2019); MO. ANN. STAT. § 566.010(3), (6) (LexisNexis 2019); MONT. CODE ANN. § 45-2-101(67) (2019); NEB. REV. STAT. ANN. § 28-318(2), (5) (LexisNexis 2019); N.H. REV. STAT. ANN. § 632-A:1(IV) (LexisNexis 2019); N.J. STAT. ANN. § 2C:14-1(d)-(e) (LexisNexis 2019); N.Y. PENAL LAW § 130.00(3) (Consol. 2019); N.C. GEN. STAT. §§ 14-27.20(5), -27.33(a) (2019); N.D. CENT. CODE § 12.1-20-02 (2019); OHIO REV. CODE ANN. § 2907.01(B) (LexisNexis 2020); OKLA. STAT. ANN. tit. 21, § 1123(A)-(B) (LexisNexis 2019) (considering “private parts” and “purpose of sexual gratification” in the definition of the offense of “lewd or indecent proposals or acts to child under 16”); 18 PA. CONS. STAT. § 3126 (2019); 11 R.I. GEN. LAWS § 11-37-1(3), (7) (2019); S.D. CODIFIED LAWS § 22-22-7.1 (2019); TENN. CODE ANN. § 39-13-501(2), (6) (2019); TEX. PENAL CODE ANN. § 21.01(2) (LexisNexis 2019); UTAH CODE ANN. § 76-5-404 (LexisNexis 2019); VA. CODE ANN. § 18.2-67.10(2), (6) (2019); WASH. REV. CODE ANN. § 9A.44.010(2) (LexisNexis 2020); W. VA. CODE ANN. § 61-8B-1(6) (LexisNexis 2019); WIS. STAT. ANN. § 939.22(19), (34) (LexisNexis 2019); WYO. STAT. ANN. § 6-2-301(a)(ii), (vi) (2019).

one or the other. Specifically, seven jurisdictions prohibit touching of intimate parts without reference to sexual intent,⁹² and several cast their prohibition in terms of intent alone rather than focus on specific body parts.⁹³ However, intent-only formulations are slightly more common in statutes limited to the touching of vulnerable persons or children.⁹⁴

With regard to the first element—the touching of certain body parts—roughly twice as many jurisdictions name those parts specifically⁹⁵ rather than use general language such as

⁹² See ALASKA STAT. ANN. §§ 11.41.410, .420, .425, .427 (2019); ARIZ. REV. STAT. ANN. § 13-1401(A)(3) (LexisNexis 2020); GA. CODE ANN. § 16-6-22.1 (2020); HAW. REV. STAT. § 707-700 (2019); LA. STAT. ANN. § 14:43.1(A) (2018); N.M. STAT. ANN. § 30-9-12 (LexisNexis 2019); S.C. CODE ANN. § 16-3-600(A)(3), -651 (2019). Strangely, section 16-6-5.1 of Georgia’s statute (improper sexual contact by employee or agent) has an intent clause, but general sexual battery (22.1) does not. GA. CODE ANN. § 16-6-5.1(a)(9), -22.1 (2020). In a jurisdiction that otherwise provides that intoxication can defeat proof of a specific intent, a statute that does not require proof of the defendant’s subjective purpose permits liability in the case of an intoxicated actor. See, e.g., *United States v. Kenyon*, 481 F.3d 1054, 1069-1071 (8th Cir. 2007) (reversing conviction for failure to instruct jury on the specific intent defense).

⁹³ E.g., KAN. STAT. ANN. §§ 21-5505, -5506 (2018); OR. REV. STAT. ANN. § 163.305(6) (LexisNexis 2019); 18 PA. CONS. STAT. § 3126 (2019). The “lewd and lascivious” jurisdictions also arguably fall under this designation, most of which prohibit behavior that is “lewd and lascivious” without specifying specific parts. See, e.g., VT. STAT. ANN. tit. 13, § 2601 (2019) (proscribing “open and gross lewdness and lascivious behavior”); *Commonwealth v. Castillo*, 772 N.E.2d 1093, 1096 (Mass. App. Ct. 2002) (holding that model jury instructions and prior precedent that list anatomical parts are not exhaustive, and all intentional and unjustified sexual touches that violate “our contemporary views of personal integrity and privacy” are covered).

⁹⁴ See, e.g., IDAHO CODE § 18-1505B(1), -1506(1) (2019) (defining “sexual abuse and exploitation of a vulnerable adult” and “sexual abuse of a child under the age of 16 years,” both of which have substantive provision with intent clause, then proscribe “sexual contact,” which is later defined as “any physical contact between a vulnerable adult and any person”); IND. CODE ANN. § 35-42-4-8(a)(1) (LexisNexis 2019) (The “intent” requirement applies when the victim is either compelled by force or “so mentally disabled or deficient that consent to the touching cannot be given.”); MISS. CODE ANN. § 97-5-23 (2019) (in proscribing the fondling of a “child, mentally defective or incapacitated person or physically helpless person,” including an intent clause with no limitation to specified body parts); NEV. REV. STAT. ANN. § 201.230 (LexisNexis 2019) (defining “lewdness with child under 16 years” so as to include an intent provision, but not to include specific body parts).

⁹⁵ 18 U.S.C. § 2246(3) (2014) (listing “the genitalia, anus, groin, breast, inner thigh, or buttocks of any person” in the definition of “sexual contact”); ALASKA STAT. § 11.81.900(61) (2019) (referring to “the victim’s genitals, anus, or female breast”); ARIZ. REV. STAT. ANN. § 13-1401(A)(3)(a) (LexisNexis 2020) (referring to “any part of the [victim’s] genitals, anus or female breast”); ARK. CODE ANN. 5-14-101(11) (2019) (listing “sex organs, buttocks, or anus of a person or the breast of a female” in the definition of “sexual contact”); CAL. PENAL CODE § 243.4(g)(1) (Deering 2020) (listing “the sexual organ, anus, groin, or buttocks of any person, and the breast of a female”); DEL. CODE ANN. tit. 11, § 761(g)(1) (2019) (specifying “the anus, breast, buttocks or genitalia of another person”); D.C. CODE § 22-3001(9) (2019) (referring to “genitalia, anus, groin, breast, inner thigh, or buttocks”); 720 ILL. COMP. STAT. ANN. 5/11-0.1 (LexisNexis 2019) (listing “sex organs, anus, or breast of the victim or the accused” in the definition of “sexual contact”); LA. STAT. ANN. §§ 14:43.1(A), 43.1.1(A) (2018) (listing “the anus or genitals” in the definition of “sexual battery,” and “the breasts or buttocks” in the definition of “misdemeanor sexual battery”); ME. REV. STAT. ANN. tit. 17-A, § 251(D), (G) (LexisNexis 2019) (listing “genitals or anus” in the definition of “sexual contact,” and “the breasts, buttocks, groin or inner thigh” in

- 1 “intimate parts.”⁹⁶ Of the jurisdictions that name body parts with regard to adult offenses, almost
- 2 none include the mouth or tongue;⁹⁷ in contrast, in jurisdictions that use general language like

the definition of “sexual touching”); MICH. COMP. LAWS SERV. § 750.520a(f), (q) (LexisNexis 2019) (defining “intimate parts” as including “the primary genital area, groin, inner thigh, buttock, or breast of a human being”); MO. ANN. STAT. § 566.010(3), (6) (LexisNexis 2019) (defining “deviate sexual intercourse” as “any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the penis, female genitalia, or the anus,” and “sexual contact” as “any touching of the genitals or anus of another person, or the breast of a female person”); N.J. STAT. ANN. § 2C:14-1(d)-(e) (LexisNexis 2019) (defining “intimate parts” as “sexual organs, genital area, anal area, inner thigh, groin, buttock or breast of a person”); N.C. GEN. STAT. § 14-27.20(5)(a) (2019) (referring to “sexual organ, anus, breast, groin, or buttocks of any person”); S.C. CODE ANN. §§ 16-3-600(A)(3), -651(d) (2019) (defining “private parts” in the context of assault and battery as “the genital area or buttocks of a male or female or the breasts of a female,” and “intimate parts” in the context of criminal sexual conduct as “the primary genital area, anus, groin, inner thighs, or buttocks of a male or female human being and the breasts of a female human being”); S.D. CODIFIED LAWS § 22-22-7.1 (2019) (defining “sexual contact” as “any touching . . . of the breasts of a female or the genitalia or anus of any person”); UTAH CODE ANN. § 76-5-404(1) (LexisNexis 2019) (defining “forcible sexual abuse” as touching of “the anus, buttocks, pubic area, or any part of the genitals of another, or touches the breast of a female”); VA. CODE ANN. § 18.2-67.10(2), (6) (2019) (“‘Intimate parts’ means the genitalia, anus, groin, breast, or buttocks of any person.”); W. VA. CODE ANN. § 61-8B-1(6) (LexisNexis 2019) (including “breasts, buttocks, anus or any part of the sex organs of another person” in the definition of “sexual contact”); WYO. STAT. ANN. § 6-2-301(a)(ii), (vi) (2019) (“‘Intimate parts’ means the external genitalia, perineum, anus or pubes of any person or the breast of a female person . . .”).

Some jurisdictions say “intimate parts,” but then go on to define them. See, e.g., COLO. REV. STAT. § 18-3-401(2), (4) (2018) (“‘Intimate parts’ means the external genitalia or the perineum or the anus or the buttocks or the pubes or the breast of any person.”); CONN. GEN. STAT. ANN. § 53a-65(3), (8) (LexisNexis 2019) (“‘Intimate parts’ means the genital area or any substance emitted therefrom, groin, anus or any substance emitted therefrom, inner thighs, buttocks or breasts.”); GA. CODE ANN. §§ 16-6-5.1(a)(5), 16-6-22.1(a) (2020) (listing “genital area,” “groin,” “inner thighs,” or “buttocks,” or “breasts,” but specifying that for the offense of sexual battery, only female breasts are included); MINN. STAT. § 609.341(5) (2019) (“‘Intimate parts’ includes the primary genital area, groin, inner thigh, buttocks, or breast of a human being.”); NEB. REV. STAT. ANN. § 28-318(2), (5) (LexisNexis 2019) (defining “intimate parts” as “the genital area, groin, inner thighs, buttocks, or breasts”); N.M. STAT. ANN. § 30-9-12(E) (LexisNexis 2019) (“‘[I]ntimate parts’ means the primary genital area, groin, buttocks, anus or breast.”); 11 R.I. GEN. LAWS § 11-37-1(3), (7) (2019) (“‘Intimate parts’ means the genital or anal areas, groin, inner thigh, or buttock of any person or the breast of a female.”); TENN. CODE ANN. § 39-13-501(2), (6) (2019) (“‘Intimate parts’ includes semen, vaginal fluid, the primary genital area, groin, inner thigh, buttock or breast of a human being . . .”); TEX. PENAL CODE ANN. § 21.01(2) (LexisNexis 2019) (referring to “the anus, breast, or any part of the genitals of another person”); WIS. STAT. ANN. §§ 939.22(19) (LexisNexis 2019) (“‘Intimate parts’ means the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being.”). Ohio provides a nonexhaustive list of body parts. OHIO REV. CODE ANN. § 2907.01(B) (LexisNexis 2020) (covering “without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast”). Maryland and New Hampshire name select parts and add “other intimate area” as a catch-all. MD. CODE ANN., CRIM. LAW § 3-301(e)(1) (LexisNexis 2019); see N.H. REV. STAT. ANN. § 632-A:1(IV) (LexisNexis 2019) (referring to “intimate parts, including emissions, tongue, anus, breasts, and buttocks”).

⁹⁶ ALA. CODE § 13A-6-60(3) (LexisNexis 2020); HAW. REV. STAT. § 707-700 (2019); KY. REV. STAT. ANN. § 510.010(7) (LexisNexis 2019); MONT. CODE ANN. § 45-2-101(67) (2019); N.Y. PENAL

“intimate parts” or that have only an intent requirement, courts appear more ready to recognize the mouth and tongue as intimate parts.⁹⁸ In contrast, of 33 jurisdictions that define at least some specific body parts by statute, 32 include the breast or female breast,⁹⁹ 25 include the buttocks, and 13 include the thigh or inner thigh.¹⁰⁰

Ten states include touching with ejaculate in the statutory scope of “sexual contact.”¹⁰¹ But courts in jurisdictions without explicit statutory provisions have commonly interpreted

LAW § 130.00(3) (Consol. 2019); N.D. CENT. CODE § 12.1-20-02(5) (2019); OKLA. STAT. ANN. tit. 21, § 1123(B) (LexisNexis 2019); OR. REV. STAT. ANN. § 163.305(6) (LexisNexis 2019); WASH. REV. CODE ANN. § 9A.44.010(2) (LexisNexis 2020).

⁹⁷ Only one jurisdiction explicitly includes the tongue as an intimate part. N.H. REV. STAT. ANN. § 632-A:1(IV) (LexisNexis 2019).

⁹⁸ See, e.g., *State v. Newman*, 163 P.3d 1272 (Kan. Ct. App. 2007) (upholding a conviction where the defendant tried to kiss the complainant and pull up her top, finding that there need not be a touch of specific sexual organs); *State v. Stout*, 114 P.3d 989, 993 (Kan. Ct. App. 2005) (finding that “kissing can be intimate sexual contact”).

⁹⁹ See Reporters’ Note, *infra*.

¹⁰⁰ See Reporters’ Note *infra*. Jurisdictions that don’t explicitly include these parts may nonetheless do so in some cases, such as through case law interpreting catch-all phrases like “erogenous zone” or “other intimate area.” See, e.g., *Bible v. State*, 982 A.2d 348, 351 (Md. 2009). In addition, some jurisdictions interpret “groin” to include the inner thigh or buttocks. See, e.g., *Commonwealth v. Lavigne*, 676 N.E.2d 1170, 1173 (Mass. App. Ct. 1997) (discussing the determination that a touch to the “inner thigh” constituted a touch to the “‘groin’ area”).

¹⁰¹ 720 ILL. COMP. STAT. ANN. 5/11-0.1 (LexisNexis 2019) (considering “any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim” in defining “sexual conduct”); MINN. STAT. § 609.341 (2019) (defining “sexual contact” as “the intentional touching with seminal fluid or sperm by the actor of the complainant’s body or the clothing covering the complainant’s body”); N.H. REV. STAT. ANN. § 632-A:1(IV) (LexisNexis 2019) (including “intimate parts, including emissions” in the definition of “sexual contact”); N.Y. PENAL LAW § 130.00(3) (Consol. 2019) (including in the definition of “sexual contact” the “emission of ejaculate by the actor upon any part of the victim, clothed or unclothed”); N.C. GEN. STAT. § 14-27.20(5)(c) (2019) (including in the definition of “sexual contact,” “[a] person ejaculating, emitting, or placing semen, urine, or feces upon any part of another person”); N.D. CENT. CODE § 12.1-20-02(5) (2019) (including “the penile ejaculation or ejaculate or emission of urine or feces upon any part of the person”); OR. REV. STAT. ANN. § 163.415(1)(b), (3) (LexisNexis 2019) (Behavior that rises to sexual abuse in the third degree includes “propel[ling] any dangerous substance at a victim without . . . consent,” where “‘dangerous substance’ means blood, urine, semen or feces.”); 18 PA. CONS. STAT. § 3126(a) (2019) (stating that causing contact with “seminal fluid, urine or feces” rises to the level of “indecent assault”); TENN. CODE ANN. § 39-13-501(2) (2019) (“‘Intimate parts’ includes semen[and] vaginal fluid”); WIS. STAT. ANN. § 939.22(34)(c) (LexisNexis 2019) (in defining “sexual contact,” including the “intentional penile ejaculation of ejaculate or the intentional emission of urine or feces by the defendant or, upon the defendant’s instruction, by a third person upon any part of the body, clothed or unclothed, of another person”). A 2019 article catalogued cases involving touches with ejaculate and legislative efforts to recognize such acts as sexual offenses. See David Mack, *The Loophole*, BUZZFEED (June 15, 2019, 9:18 AM), <https://www.buzzfeednews.com/article/davidmack/alaska-sexual-assault-loophole-masturbate-ejaculate-semen> (citing assault cases of an Alaska woman who was choked; Connecticut and Colorado women who were asleep; a Minnesota man who repeatedly ejaculated into a female colleague’s coffee; a

1 general sexual-contact provisions to include semen.¹⁰² Of course, the law of ordinary assault and
 2 battery, under the MPC and prevalent state law, commonly includes offensive touches with
 3 bodily fluids, such as saliva or urine.¹⁰³

4 As to the element of sexual purpose, these intent clauses are common, but their
 5 articulation varies by jurisdiction. Common formulations include acts done for the “purpose of
 6 gratifying the sexual desire of either party,” to “humiliate, harass, or degrade another; or arouse
 7 or gratify the sexual response or desire of either party,” or that are “reasonably construed as
 8 being for the purpose of sexual arousal or gratification.”¹⁰⁴ Of the 43 jurisdictions with a sexual-

foster parent who ejaculated into the hands of his foster daughters, aged four and six, and ordered them to drink the semen; and other cases).

¹⁰² See, e.g., *People v. Vinson*, 42 P.3d 86, 87 (Colo. App. 2002) (rejecting the defendant’s argument that “ejaculating semen onto the victim’s buttocks does not constitute ‘touching’” an “intimate part” under the statute at issue, and upholding the sexual contact conviction). Some statutes explicitly include waste in their general battery provisions. See, e.g., IND. CODE ANN. § 35-42-2-1(c)(2) (LexisNexis 2019) (punishing those who knowingly, “in a rude, insolent, or angry manner place[] any bodily fluid or waste on another person” as a misdemeanor).

¹⁰³ A body of law in the context of physical assault and battery has held that offensive touches with fluids—such as spitting or urinating on a person or placing semen in food or drink (without regard to nonsexual purpose)—satisfies the actus reus of the offense. See, e.g., *United States v. Whitefeather*, 275 F.3d 741, 741 (8th Cir. 2002) (affirming an assault conviction based the defendant’s urination on a sleeping victim’s face); *State v. Jackson*, 187 P.3d 321, 323-324 (Wash. Ct. App. 2008) (citing assault and battery cases while interpreting Washington law to include ejaculating on a person as “sexual contact”).

¹⁰⁴ 18 U.S.C. § 2246(3) (2014) (“intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person”); ALA. CODE § 13A-6-60(3) (LexisNexis 2020) (“for the purpose of gratifying the sexual desire of either party”); ARK. CODE ANN. § 5-14-101(11) (2019) (“any act of sexual gratification”); CAL. PENAL CODE §§ 243.4(a)-I (Deering 2020) (“for the purpose of sexual arousal, sexual gratification, or sexual abuse”); COLO. REV. STAT. § 18-3-401(4) (2018) (“for the purposes of sexual arousal, gratification, or abuse”); CONN. GEN. STAT. ANN. § 53a-65(3) (LexisNexis 2019) (“for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person”); D.C. CODE § 22-3001(9) (2019) (“intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person”); DEL. CODE ANN. tit. 11, § 761(g)(3) (2019) (“touching [that], under the circumstances as viewed by a reasonable person, is intended to be sexual in nature”); GA. CODE ANN. § 16-6-5.1(a)(9) (2020) (“for the purpose of sexual gratification of either person”); IDAHO CODE § 18-1505B(1) (2019) (“with the intent of arousing, appealing to or gratifying the lust, passion, or sexual desires of [the offender]”); 720 ILL. COMP. STAT. ANN. 5/11-0.1 (LexisNexis 2019) (“for the purpose of sexual gratification or arousal of the victim or the accused”); IND. CODE ANN. § 35-42-4-8(a) (LexisNexis 2019) (“with intent to arouse or satisfy the person’s own sexual desires or the sexual desires of another person”); IOWA CODE ANN. §§ 709.8(1), .12(1) (LexisNexis 2019) (in defining “lascivious acts with a child” and “indecent contact with a child,” requiring that the offender have “the purpose of arousing or satisfying the sexual desires of either of them”); KAN. STAT. ANN. §§ 21-5505, -5506 (2018) (defining “sexual battery” and “indecent liberties with a child” such that both require “the intent to arouse or satisfy the sexual desires of the offender or another”); KY. REV. STAT. ANN. § 510.010(7) (LexisNexis 2019) (“for the purpose of gratifying the sexual desire of either party”); ME. REV. STAT. ANN. tit. 17-A, § 251(D), (G) (LexisNexis 2019) (The definitions for “sexual contact” and “sexual touching” both include “for the purpose of arousing or gratifying sexual desire,” but the sexual-contact definition continues: “or

- 1 purpose clause of some form, roughly 23 specify gratification or arousal, and 22 include abuse,
- 2 degradation, humiliation, or other such language.¹⁰⁵ However, some of the jurisdictions that limit

for the purpose of causing bodily injury or offensive physical contact.”); MD. CODE ANN., CRIM. LAW § 3-301(e)(1) (LexisNexis 2019) (“for sexual arousal or gratification, or for the abuse of either party”); MICH. COMP. LAWS SERV. § 750.520a(q) (LexisNexis 2019) (“reasonably . . . construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for: (i) Revenge[,] (ii) To inflict humiliation[, or] (iii) Out of anger”); MINN. STAT. §§ 609.341(11)(a) (2019) (“with sexual or aggressive intent); MISS. CODE ANN. § 97-5-23 (2019) (“for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires”); MO. ANN. STAT. § 566.010(3), (6) (LexisNexis 2019) (“for the purpose of arousing or gratifying sexual desire of any person”); MONT. CODE ANN. § 45-2-101(67) (2019) (“‘Sexual contact’ means touching . . . in order to knowingly or purposely: (a) cause bodily injury to or humiliate, harass, or degrade another; or (b) arouse or gratify the sexual response or desire of either party.”); NEB. REV. STAT. ANN. § 28-318(5) (LexisNexis 2019) (“reasonably construed as being for the purpose of sexual arousal or gratification of either party”); NEV. REV. STAT. ANN. § 201.230 (LexisNexis 2019) (“with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child”); N.H. REV. STAT. ANN. § 632-A:1(IV) (LexisNexis 2019) (“conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification”); N.J. STAT. ANN. § 2C:14-1(d) (LexisNexis 2019) (“for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor”); N.Y. PENAL LAW § 130.00(3) (Consol. 2019) (“for the purpose of gratifying sexual desire of either party”); N.C. GEN. STAT. § 14-27.33(a) (2019) (“for the purpose of sexual arousal, sexual gratification, or sexual abuse”); N.D. CENT. CODE § 12.1-20-02(5) (2019) (“for the purpose of arousing or satisfying sexual or aggressive desires”); OHIO REV. CODE ANN. § 2907.01(B) (LexisNexis 2020) (“for the purpose of sexually arousing or gratifying either person”); OR. REV. STAT. ANN. § 163.305 (LexisNexis 2019) (“for the purpose of arousing or gratifying the sexual desire of either party”); 18 PA. CONS. STAT. § 3126(a) (2019) (“for the purpose of arousing sexual desire in the person or the complainant”); 11 R.I. GEN. LAWS § 11-37-1(7) (2019) (conduct that “can be reasonably construed as intended by the accused to be for the purpose of sexual arousal, gratification, or assault”); S.D. CODIFIED LAWS § 22-22-7.1 (2019) (“with the intent to arouse or gratify the sexual desire of either party”); TENN. CODE ANN. § 39-13-501(6) (2019) (“touching [that] can be reasonably construed as being for the purpose of sexual arousal or gratification”); TEX. PENAL CODE ANN. § 21.01(2) (LexisNexis 2019) (“with intent to arouse or gratify the sexual desire of any person”); UTAH CODE ANN. § 76-5-404(1) (LexisNexis 2019) (“with intent to cause substantial emotional or bodily pain to any individual or with the intent to arouse or gratify the sexual desire of any individual”); VT. STAT. ANN. tit. 13, § 2602(a)(1) (2019) (in the context of “lewd or lascivious conduct with a child,” including the requirement that the act be done “with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of such person or of such child”); VA. CODE ANN. § 18.2-67.10(6) (2019) (“with the intent to sexually molest, arouse, or gratify any person”); WASH. REV. CODE ANN. § 9A.44.010(2) (LexisNexis 2020) (“for the purpose of gratifying sexual desire of either party or a third party”); W. VA. CODE ANN. § 61-8B-1(6) (LexisNexis 2019) (where “the touching is done for the purpose of gratifying the sexual desire of either party”); WIS. STAT. ANN. § 939.22(34) (LexisNexis 2019) (“for the purpose of sexual humiliation, degradation, arousal, or gratification”); WYO. STAT. ANN. § 6-2-301(a)(vi) (2019) (“touching[] with the intention of sexual arousal, gratification or abuse”).

¹⁰⁵ Alternative phrases include purposes such as to “molest,” “assault,” or cause “emotional pain,” or to be “offensive” or act with “aggressive” or “depraved” intent or desire. See generally statutes cited in *supra* note 104. Another jurisdiction not included in these counts requires only that the purpose is “sexual in nature.” DEL. CODE ANN. tit. 11, § 761(g)(3) (2019).

1 the purpose to arousal or gratification interpret that language to include degrading purposes.¹⁰⁶ A
2 handful of states rely on the common-law formulation proscribing “lewd and lascivious”
3 behavior.¹⁰⁷

4 The law surrounding the mens rea for other aspects of sexual contact is less unified.
5 Although a culpable mental state could be specifically required for the act of touching, the
6 attendant circumstance of the body part touched (e.g., the breast or groin), and the purpose of the
7 touch,¹⁰⁸ no existing statute is drafted at this level of detail. A handful of statutes expressly
8 provide, either in the terms of the substantive offense or in the definition of “sexual contact,” that
9 the touch must be knowing or intentional.¹⁰⁹ However, many statutes simply prohibit touches of
10 intimate areas, when done with a sexual purpose in specific circumstances (e.g., without consent
11 or when offensive).¹¹⁰

¹⁰⁶ See, e.g., *State v. Charron*, 415 N.W.2d 474, 475-476 (Neb. 1987) (interpreting a statute requiring “sexual arousal or gratification” to include an incident in which defendant grabbed a woman’s vaginal area and “walk[ed] away, laughing and bobbing his head,” based on the fact that proof of actual arousal or gratification is not required, “but only circumstances and conduct which could reasonably be construed as being for such purpose”).

¹⁰⁷ NEV. REV. STAT. ANN. § 201.210 (LexisNexis 2019) (defining the offense of “open or gross lewdness”); VT. STAT. ANN. tit. 13, §§ 2601, 2602 (2019) (proscribing “lewd and lascivious” acts and behavior). Oklahoma also uses “lewd and lascivious manner,” although its statute otherwise resembles an ordinary sexual battery. OKLA. STAT. ANN. tit. 21, § 1123(B) (LexisNexis 2019).

¹⁰⁸ The question whether the element of consent is required, and if so what mental state should attach to it, is addressed in the Comment to Section 213.7.

¹⁰⁹ ALASKA STAT. § 11.81.900(61) (2019) (requiring a knowing touch, but not sexual purpose); COLO. REV. STAT. § 18-3-401(4) (2018) (requiring a “knowing touching” with sexual purpose in the definition of “sexual contact”); 720 ILL. COMP. STAT. ANN. 5/11-0.1 (LexisNexis 2019) (defining “sexual conduct” as a “knowing” touch with sexual purpose); IND. CODE ANN. § 35-42-2-1(c) (LexisNexis 2019) (including “knowingly or intentionally” in the definition of “touches” that constitute battery); MICH. COMP. LAWS SERV. § 750.520a(q) (LexisNexis 2019) (defining “sexual contact” as “intentional touching [that] can reasonably be construed as being for . . . sexual arousal or gratification”); N.D. CENT. CODE § 12.1-20-07(1) (2019) (defining “sexual assault” as “knowingly ha[ving] sexual contact with another person”); TENN. CODE ANN. § 39-13-501(6) (2019) (defining “sexual contact” as “intentional touching”).

¹¹⁰ In such cases, courts often provide an interpretive gloss. For instance, Oregon courts require a knowing touch, sexual purpose, and criminal negligence as to lack of consent. See *State v. Wier*, 317 P.3d 330, 331, 337 (Or. Ct. App. 2013) (referring to instructions that require knowing contact, but holding that criminal negligence suffices with respect to the absence of consent). For the statute provision at issue in *Wier*, see OR. REV. STAT. ANN. § 163.415(1) (LexisNexis 2019) (“A person commits the crime of sexual abuse in the third degree if: (a) The person subjects another person to sexual contact and: (A) The victim does not consent to the sexual contact; or (B) The victim is incapable of consent by reason of being under 18 years of age; or (b) For the purpose of arousing or gratifying the sexual desire of the person or another person, the person intentionally propels any dangerous substance at a victim without the consent of the victim.”).

1 Finally, most statutes appear to allow sexual penetration to qualify as a sexual touching,
2 as penetration obviously involves contact. However, a handful of states expressly exclude
3 penetrative acts from their statutory definition of “contact.”¹¹¹

4 2. *Section 213.0(2)(c) – General Considerations.* Section 213.0(2)(c), like the 1962 Code
5 and the great majority of American jurisdictions, limits sexual contact to touchings that involve
6 both a sexual purpose *and* an especially intimate body part (or ejaculate, an inherently sexual
7 bodily fluid).¹¹²

8 It can be argued that proof of a sexual purpose should suffice by itself, regardless of the
9 area of the body touched. That approach, however, involves unacceptable overbreadth: an
10 unconsented kiss on the cheek would be a criminal offense, subject only to the need to prove
11 sexual purpose, a requirement easily satisfied in many such cases. And if marked as a sexual
12 crime, this type of offense would carry grave consequences, regardless of how it might be
13 graded. These scenarios make clear the need to limit the areas of the body that are covered by
14 sexual-offense laws.

15 Posing a harder choice, however, the limitation to particularly intimate areas excludes
16 situations in which liability for a sexual offense could be reasonably defended. Consider the
17 following cases:

18 *A passenger on a crowded bus repeatedly strokes the small of the back of a rider*
19 *standing nearby. Another passenger notices that the passenger seems to be sexually*
20 *aroused and alerts the rider, who then files a criminal complaint. The prosecution can*
21 *plausibly allege that the passenger did so knowingly, without consent, and for purposes*
22 *of sexual arousal.*

23 *A salesperson is fitting a customer for a new pair of shoes when the customer notices that*
24 *the salesperson is caressing the customer’s foot in a strange manner and appears to be*
25 *sexually aroused. The customer reports the salesperson to a manager, and later learns*
26 *that the salesperson has a foot fetish. The customer files a criminal complaint. The*
27 *prosecution can plausibly allege that the salesperson knowingly touched the customer in*
28 *a sexual manner and without consent.*¹¹³

29 In both of these cases, a sexual-contact charge is arguably appropriate and would be
30 permissible under a statute not limited to particularly intimate areas. But in the context of

¹¹¹ CAL. PENAL CODE § 243.4(g)(2) (Deering 2020); HAW. REV. STAT. § 707-700 (2019); S.D. CODIFIED LAWS § 22-22-7.1 (2019) (excluding “rape” from the definition of “sexual contact”); UTAH CODE ANN. § 76-5-404(1) (LexisNexis 2019) (excluding “rape” and “forcible sodomy” from the definition of “forcible sexual abuse”). Wisconsin’s misdemeanor nonconsensual contact provision (fourth-degree sexual assault) excludes application of its felony nonconsensual penetration provision (third-degree sexual assault). WIS. STAT. ANN. § 940.225(3), (3m) (LexisNexis 2019).

¹¹² See *supra* note 91.

¹¹³ Cf. *Fey v. State*, 125 So. 3d 828 (Fla. Dist. Ct. App. 2013) (upholding conviction of defendant who masturbated while touching complainants’ feet).

1 interaction not marked by intrusion into a uniquely sexual area of the body, liability would turn
2 on the particular character of the actor's motivation. In those circumstances, the dangers are
3 apparent that factfinding may go awry and that the distinctive stigma and consequences of a sex-
4 offense conviction may be misdirected. The underlying policy concerns point in conflicting
5 directions, both supporting and resisting liability.

6 Other difficulties arise, however, under statutes that set aside the requirement of sexual
7 intent and limit potential criminal liability *solely* by limiting "sexual contact" to the touching of
8 especially intimate areas of the body. Consider the following cases:

9 *A tailor, measuring the inseam of a pair of pants during a fitting, touches the inner thigh*
10 *of a patron. The patron believes the contact inappropriate and gratuitous, but the tailor*
11 *insists it was necessary in the course of an ordinary fitting. The factfinder believes the*
12 *tailor's assertion that the touch was not sexually motivated, but also finds that the tailor*
13 *knew the patron did not consent to such a touch.*

14 *A rider moves to exit a crowded train, which requires squeezing by several women*
15 *standing at the doorway. In passing, the rider's back knowingly brushes against one of*
16 *the women's breasts. The rider claims the touch was necessitated by the crowded*
17 *conditions, but the woman alleges that the brush was deliberate. The factfinder believes*
18 *the rider's claim that the touching was not sexually motivated but concludes that the*
19 *woman had not consented to it.*

20 In cases like these, finding liability for a sexual offense again involves unacceptable
21 overbreadth. Although it would be relatively straightforward to prove liability under a statute
22 that, like those of several states, defines "sexual contact" without requiring proof of a sexual
23 purpose, that approach risks significant overbreadth. Given these difficulties, the best escape
24 from overbreadth is to limit "sexual contact" to acts that involve both sexual intent and a
25 distinctively sexual area of the body.

26 The concern remains that this resistance to overbreadth will preclude liability in cases
27 like the shoe-sales associate and the passenger who stroked another rider's back on a bus. The
28 choice between an approach that leaves gaps and one that risks overbreadth is by no means easy,
29 but two considerations guide the judgment to prefer the more limited conception of sexual
30 contact, even at the cost of leaving gaps. First, a sexual offense, no matter how graded, carries a
31 distinctive stigma that should be reserved for the clearest instances, rather than being applied in
32 cases where the sexual dimension of the conduct is potentially ambiguous. Second, the objection
33 that narrow limits will leave conduct of legitimate concern outside the scope of the sexual-
34 contact offense carries less weight than it otherwise might because the law of ordinary assault
35 remains available as a gap-filler. Although it is an imperfect gap filler in jurisdictions that require
36 proof of bodily injury, it provides some assurance that some appropriately prosecuted cases
37 remain within the reach of the criminal law.

38 3. *Which Parts of the Body are Sufficiently Intimate?* Section 213.0(2)(c) limits the
39 covered intimate parts to specified areas of the body: the genitalia, anus, groin, breasts, buttocks,

1 or inner thigh. The genitalia, anus, groin, and female breast are unambiguously associated with
2 sexuality, and protecting them from unwanted sexual contact is not controversial.

3 Difficulty arises, however, in deciding which other parts of the body, if any, should also
4 be covered, on the ground that they too can be sexually sensitive. Section 213.0(2)(c) includes
5 the buttocks, inner thigh, and the breast of any person, when knowingly touched for a sexual
6 purpose. It excludes other arguably intimate areas, such as the tongue, mouth, and lips. In each
7 case, reasonable arguments can be made that the area can elicit sexual attention and that
8 unwanted contact can be sexually intrusive. At the same time, contact with these areas is likely to
9 be experienced as significantly less invasive than contact with the genitalia, anus, or groin. This
10 generalization, however, is by no means clear-cut, making the choice whether to include or
11 exclude areas such as the tongue, mouth, and lips a difficult one.

12 *The buttocks.* Unwanted groping of the buttocks, especially by strangers on the sidewalk
13 or on public transportation, is a particularly common and concerning phenomenon that sexual-
14 offense laws justifiably seek to prevent. And its sexual dimension is often not hard to discern.
15 The difficulty is that in situations involving dating or activities like dancing that often involve
16 consensual bodily contact, the contact is not widely considered socially aberrational or deserving
17 of criminal punishment. In contrast, when “butt-groping” is perpetrated by a complete stranger,
18 different considerations obviously apply. Although this divide can seem unclear in theory, it
19 proves workable in existing law. The elements that must be proved beyond a reasonable doubt—
20 at minimum, a touching, without consent, and the defendant’s culpable mens rea as to those
21 facts—ensure that neither accidental touches nor the deliberate touches of a hopeful but mistaken
22 (even if negligently mistaken) suitor will be punished as a crime. In current American law,
23 among the 33 jurisdictions that limit liability for sexual contact with adults to contact with
24 statutorily identified areas of the body, roughly 25 include the buttocks.¹¹⁴

25 *The inner thigh.* Like unwanted contact with the buttocks, sexually motivated unwanted
26 touching of the inner thigh can be intensely resented in some contexts and less aberrational or
27 culpable in others. For example, an airline passenger may reach out and suggestively squeeze the
28 inner thigh of a stranger in the next seat, or a business executive seated at a conference table
29 during a professional meeting may unexpectedly squeeze the thigh of a colleague sitting in the
30 next chair. This conduct is widely understood to be offensive and unacceptable. It remains a
31 serious social problem that sexual-offense law could justifiably seek to prevent. Compare these
32 actions to those of someone who takes a date to a movie and reaches out to squeeze the date’s
33 inner thigh while they are seated side by side in the dark theater. As with touches of the breast or
34 buttocks, the context and prior relationship between the parties are important factors in

¹¹⁴ Those jurisdictions are Arkansas, California, Colorado, Connecticut, Delaware, D.C., Georgia, Louisiana, Maine, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Utah, Virginia, West Virginia, Wisconsin, and the federal government. See *supra* notes 91 and 92. Again, those statutes that specify “intimate parts” alone often include the buttocks through case law. See, e.g., *State v. Silver*, 249 P.3d 1141, 1146-1147 (Haw. 2011); *Bible v. State*, 982 A.2d 348, 357-358 (Md. 2009).

1 identifying which touchings of the inner thigh can plausibly be regarded as involving culpable
2 awareness of the absence of consent. Liability largely turns on the proof of the additional
3 elements of the statute, in particular the defendant's mens rea. In current American law, among
4 the 33 jurisdictions that limit liability for sexual contact with adults to contact with statutorily
5 identified areas of the body, roughly 13 include the thigh or inner thigh.¹¹⁵ This definition has
6 proved workable in these jurisdictions, in part because it minimizes disputes about whether an
7 asserted touch of the genital area in fact made precise contact with the genitals.

8 *The breast.* In current American law, 32 of the 33 jurisdictions that limit liability for
9 sexual contact with adults to statutorily identified areas of the body include the breast. Of those,
10 20 include the male breast, and 12 are limited to female breasts.¹¹⁶ Judicial decisions interpreting
11 statutes that require only "intimate parts" often include breasts within that term.¹¹⁷

12 The female breast is widely recognized as a body part with strong sexual connotations. In
13 contrast, the male breast has fewer inherently sexual associations and is less obviously or
14 frequently classified as an erogenous zone. The male breast, for example, is routinely exposed in
15 public, on beaches, or during exercise, for example, while exposure of the female breast is
16 uncommon and in many jurisdictions even illegal.¹¹⁸ Contact with the male breast is not marked
17 by the same strong link to sexual interest and sexual intrusiveness and does not, even when not
18 consented to, carry a similarly strong social taboo. Treating this area as a site of potentially
19 illegal sexual contact, for purposes of the criminal sexual-contact offenses, raises a question
20 about potential overbreadth.

21 At the same time, the requirement that the prosecution prove beyond a reasonable doubt
22 that a touch was for a sexual purpose greatly limits this risk. Most touches of the male breast—
23 even unwanted touches—will have no sexual dimension and thus pose little risk of liability under
24 this Section. In contrast, a victim of touches with proven sexual intent—for instance, a man
25 forced to endure nipple clamps against his will—merits the same protection extended to female
26 victims. A fuller acknowledgement that sexual assault is a crime that affects men and boys as
27 well as women and girls is an important advance since the 1962 Code, and the revision should

¹¹⁵ Those jurisdictions are Connecticut, D.C., Georgia, Maine, Michigan, Minnesota, Nebraska, New Jersey, Ohio, Rhode Island, South Carolina, Tennessee, and the federal government.

¹¹⁶ Those gender-neutral jurisdictions are: Colorado, Connecticut, Delaware, D.C., Illinois, Louisiana, Maine, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Tennessee, Texas, Virginia, West Virginia, Wisconsin, and the federal government. The female-only jurisdictions are Alaska, Arizona, Arkansas, California, Georgia, Missouri, Ohio, Rhode Island, South Carolina, South Dakota, Utah, and Wyoming. The one jurisdiction that does not include the breast in its statute, Maryland, instead relies on a catch-all for "other intimate areas." Case law indicates that the breast is covered under that term. *Travis v. State*, 98 A.3d 281, 313 (Md. Ct. Spec. App. 2014) (clarifying MD. CODE ANN. CRIM. LAW § 3-301(e)(1) (LexisNexis 2019)).

¹¹⁷ See, e.g., *State v. Woodley*, 760 P.2d 884, 885-886 (Or. 1988) (en banc).

¹¹⁸ See, e.g., N.Y. PENAL LAW § 245.01 (Consol. 2019) (defining the "intimate parts" at issue in the offense of public exposure to include a "portion" of the female breast).

1 prefer gender-neutral language and coverage when possible. Moreover, limiting the covered area
2 to female breasts alone would potentially create uncertainty or gaps in the protection accorded to
3 an especially vulnerable population: transgender persons. For example, would “female breast”
4 cover the unwanted sexual touch of the breasts of a transgender man? Would it cover unwanted
5 contact with the breasts of a transgender woman? Hinging liability on sex at birth, status of
6 transition, or some other irrelevant criterion would miss the point, which is to focus on
7 unconsented sexual touching of an intimate area. For this reason, Section 213.0(2)(c) follows the
8 majority position of current law, which does not distinguish between breasts on the basis of
9 gender.

10 *The mouth.* Contact between the mouth of the actor and (for example) the cheek or hand
11 of another person is a frequent, socially acceptable, and nonsexual expression of greeting or
12 respect, even between relative strangers, and is seldom regarded as criminal even in the absence
13 of prior consent. Contact between the mouth of the actor and the lips, mouth, or tongue of
14 another person is different. Apart from the relatively infrequent context of mouth-to-mouth
15 resuscitation, this kind of contact in American society typically expresses personal intimacy and
16 affection, or a degree (especially when the touch is to the tongue) of sexual interest. On the other
17 hand, such contact, even in the absence of consent, is sufficiently common in the context of
18 dating and personal interaction between acquaintances that it would be extravagant to treat it as
19 socially aberrational to an extent warranting criminal punishment.

20 The strongest context for treating unconsented contact with the mouth of another as a
21 sexual offense is that in which such contact is imposed on a complete stranger, as when a person
22 accosts an unknown person and suddenly kisses that person on the lips, or when contact with the
23 mouth is intended to simulate more invasive actions, for example if an actor forces another
24 person to mimic acts of fellatio on a sex toy. However, to reach such conduct as a sexual-contact
25 offense, without risking substantial overbreadth, requires that either the definition of “contact” or
26 the substantive offense distinguish between acquaintance and stranger interaction. This kind of
27 approach would entail significant substantive and drafting challenges and still be insufficient to
28 permit sexual-contact liability when forced object-mouth contact involves an acquaintance. In
29 current American law, few jurisdictions cover nongenital touching of the mouth, lips, or tongue
30 in adult sexual-contact offenses.¹¹⁹

31 Given the dilemmas and unavoidable costs presented in each instance by the decision
32 whether to include these less-intimate areas within the domain of sexual contact, any choice—
33 whether to leave gaps or to risk overbreadth—is difficult and easy to criticize. Section

¹¹⁹ Only one jurisdiction covers the tongue by statute. N.H. REV. STAT. ANN. § 632-A:1(IV) (LexisNexis 2019). Touches of the mouth, tongue, and lips are more commonly covered in jurisdictions that do not define specific parts at all, but require only sexual intent, as well as those that cover any contact with an “intimate part.” See, e.g., *State v. Stout*, 114 P.3d 989, 993 (Kan. Ct. App. 2005) (holding that a “french kiss” could constitute “lewd touching”); *Commonwealth v. Castillo*, 772 N.E.2d 1093 (Mass. App. Ct. 2002) (permitting a jury instruction in a case of indecent assault and battery that would allow a kiss to be read into the statutory list of “intimate parts”).

213.0(2)(c) relies for a guiding principle on the same preference for lenity that governs the decision to require the combined presence of specified intimate areas *and* a sexual purpose. A sexual offense, no matter how graded, carries a distinctively afflictive stigma that is appropriate only when the sexual character of the conduct is clear, and concern for gaps in the law’s reach carries less weight than usual because the law of ordinary assault remains available as a gap-filler. Because existing law and policy considerations counsel a different conclusion with regard to mouth and tongue contact with children, the child offenses defined in Section 213.8 expressly include in Section 213.8(6)(a)(ii) not only sexual contact as defined here, but also acts involving a touching of the tongue, as explained in the Commentary and Reporters’ Notes of that Section.

4. *Which Sexual Purposes Suffice?* Section 213.0(2)(c) defines the touching of intimate parts as sexual contact only when such acts are committed for a sexual purpose. Like the 1962 Code, statutes almost uniformly identify sexual arousal and sexual gratification as qualifying sexual purposes. Many statutes go further by including a purpose to inflict sexual humiliation, sexual degradation, or sexual abuse, and some go further still by eliminating the sexual qualification and extending the concept of “sexual contact” to any intimate-area contact motivated by a purpose to abuse, humiliate, or degrade, whether or not such motivation has a sexual dimension.

Consistent with existing law in many states,¹²⁰ and in contrast to the 1962 Code,¹²¹ Section 213.0(2)(c) includes sexually *degrading* purposes. The murky, multifaceted nature of sexual interests and desires suggest that an effort to draw a line between a purpose of sexual arousal and one of sexual humiliation is futile. The scholarly literature is replete with examples of the struggle to characterize sexual violence as either an act of sexual gratification or one of domination and abuse.¹²² Consider an actor who grabs the breasts of a co-worker and says “A photo of your boobs should be mounted on our office wall.”¹²³ In context, the statement could support finding that the grab was intended to humiliate the woman or to sexually arouse the actor. And suppose the actor added, “because they’re so small they belong in a museum.” That additional language might indicate a purpose to degrade or humiliate; but that added purpose does not undermine the possibility that the actor is also sexually aroused. In fact, many persons find sexual degradation or humiliation to be sexually arousing.¹²⁴

But even if it were possible to distinguish actors who engage in unwanted sexual contact for sexual gratification from those who do so for sexual humiliation, that distinction bears little

¹²⁰ See *supra* nn.104-106 and accompanying text.

¹²¹ The 1962 Code did not include humiliation, degradation, or abuse (sexual or otherwise) among the sexual purposes that can suffice to trigger liability for sexual contact.

¹²² See, e.g., Dorothy E. Roberts, *Rape, Violence, and Women’s Autonomy*, 69 CHI.-KENT L. REV. 359, 359 n.3 (1993) (collecting sources arguing rape is a crime of violence, not passion).

¹²³ See *LaPin v. State*, 981 A.2d 34 (Md. Ct. Spec. App. 2009) (upholding the conviction of a man who grabbed the victim’s breast and said expressed desire “to mount [her breasts] on the wall”).

¹²⁴ See Comment to Section 213.10 (discussing defense of explicit prior permission).

1 relevance to the actor's criminal culpability. Returning to the example above, the complainant
2 whose breasts are grabbed suffers an identical insult regardless of whether the actor's purpose is
3 sexual gratification or sexual humiliation. The distinguishing feature of the purpose is its *sexual*
4 nature, not the precise variation on the sexual theme. The salient characteristic of an unwanted
5 *sexual* touch is that it intrudes upon the other person's bodily autonomy in a distinctly menacing
6 and invasive manner. An actor who touches another while aware that the touch may be unwanted
7 subordinates the other person's wishes to the actor's own desires. An unwanted touch of intimate
8 areas constitutes an added affront, because decisionmaking about sexual intimacy is one of the
9 most personal ways by which individuals express their own autonomy.

10 Although Section 213.0(2)(c) defines "sexual purpose" to include humiliation and
11 degradation as well as arousal and gratification, it retains the requirement that those objectives be
12 sexual in nature. Intimate-area contact is not a sexual offense when the motivation does not have
13 a sexual dimension. Of course, in cases involving contact with intimate parts, it is often difficult
14 to distinguish sexual humiliation or degradation from humiliation or degradation that lacks a
15 sexual dimension. Consider, for example, a person who, as part of a fraternity hazing ritual,
16 spans the buttocks of a pledge. Or consider a case in which a correctional officer intending to
17 retaliate against a belligerent inmate deliberately spills a bucket of urine on the inmate, soaking
18 the inmate's groin. Does the actor's motivation involve sexual humiliation or just humiliation,
19 plain and simple? Although such cases raise difficult questions, they may be resolved with
20 reference to added facts that indicate whether the actor's purpose was at least partly sexual in
21 nature, such as whether the actor made sexually suggestive comments or insults during the act,
22 whether the context of a relationship suggests a sexual motivation, and whether the contact with
23 the intimate area was fundamental to the actor's intention in engaging in the contact.¹²⁵ A coach
24 who affectionately slaps the buttocks of players as they leave the field is unlikely to have a
25 sexually motivated purpose at all. A coach who slaps the buttocks of only one player, given
26 additional evidence that the coach also makes sexual comments while doing so and refers to that
27 player by name or gesture while using a derogatory anti-gay slur, may be found to be acting with
28 a sexual purpose. As is often the case with regard to mens rea requirements, the particular
29 context and circumstances of the act will determine the sufficiency of the evidence.

30 **5. Fondling—Section 213.0(2)(d).**

31 Section 213.0(2)(d) defines "fondling," the actus reus element of Section 213.8(4).
32 Sexual acts involving prolonged manipulation of the genitals are unfortunately common among
33 sexual offenses committed by adults against children, and forcible fondling offenses are common
34 charges.¹²⁶

¹²⁵ See, e.g., Illustrations in Comment to Section 213.0(2)(c).

¹²⁶ One study found that the majority of all victims of reported sexual assaults involving sexual penetration or forcible fondling were minors; specifically, 14 percent of victims were aged 0 to 5, 20.1 percent were 6 to 11, and 32.8 percent were 12 to 17. HOWARD N. SNYDER, U.S. BUREAU OF JUSTICE STATISTICS, NCJ 182990, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 2 & tbl.1 (2000). The most

States take one of three approaches in dealing with fondling offenses. The first approach, followed in only one jurisdiction, is to expressly include some forms of fondling in the definition of sexual penetration.¹²⁷ The second approach is to explicitly fold fondling into the definition of sexual contact (or an equivalent provision).¹²⁸ This approach is commonly found as regards child-specific offenses. The final approach is simply to allow fondling to be covered by general sexual-contact laws, thereby covering both a transient touch and more sustained contact under a single provision.¹²⁹

Failing to carve out a specialized provision for prolonged contact with the genitals thus generally constrains the punishment to the contact offense level, or broadens it to the severe thresholds associated with acts of penetration. Folding fondling into contact can be a functional option, because many jurisdictions punish sexual contact, and especially sexual contact with children, fairly severely. It is also attractive because the line between a touch and sustained contact can be hard to draw, both legislatively and as a matter of practice, and because some acts of fondling (specifically, those involving the vulva) are apt to also qualify as sexual penetration.

common charge across penetration and fondling categories was forcible fondling—it was the most serious charge in 45 percent of all sexual-assault cases reported to law enforcement between 1991 and 1996. *Id.* at 2.

¹²⁷ ARIZ. REV. STAT. ANN. § 13-1401(3)(a), (4) (LexisNexis 2020) (defining “sexual contact” to include “fondling or manipulating of any part of the genitals, anus or female breast,” and “sexual intercourse” to include “masturbatory contact with the penis or vulva”); cf. OHIO REV. CODE ANN. § 2907.05(B) (LexisNexis 2020) (specifically proscribing touches of a child’s genitalia).

¹²⁸ See, e.g., GA. CODE ANN. § 16-6-4(a)(1) (2020) (defining child molestation as “any immoral or indecent act to or in the presence of or with any child under the age of 16 years” when done with sexual intent); IND. CODE ANN. § 35-42-4-3(b) (LexisNexis 2019) (“A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching . . . with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Level 4 felony.”); IOWA CODE ANN. § 709.8(1)(a)-(b), (2)(a) (LexisNexis 2019) (defining “lascivious acts with a child” as a class C felony where actors 16 or older who perform certain acts with a child, including “fondl[ing] or touch[ing] the pubes or genitals of a child” or having the child fondle the actor’s genitals); KAN. STAT. ANN. § 21-5506(b)(3), (c)(2)-(3) (2018) (defining “aggravated indecent liberties with a child” under 14 as “[a]ny lewd fondling or touching of the person of either the child or the offender” done with sexual purpose, and is a level 3 felony, or an “off-grid person felony” where the actor is 18 or older); MISS. CODE ANN. § 97-5-23(1) (2019) (providing that “handl[ing], touch[ing] or rub[b]ing with hands or any part of his or her body or any member thereof, or with any object” any child under 16 with sexual purpose is punishable by two to 15 years’ imprisonment).

¹²⁹ See, e.g., VERNON’S TEX. PENAL CODE § 21.11. Texas previously defined an offense of “Handling or fondling a child’s sexual parts,” with an actus reus element defined as to “in any way or manner fondle or attempt to fondle a sexual part of a male or female under the age of fourteen (14) years, . . . or to in any way or manner fondle or attempt to fondle the breast of a female under the age of fourteen (14) years.” VERNON’S TEX. STAT. ANN. Art. 535d (1975). A revision of the code later replaced this provision with Section 21.11, titled “Indecency with a Child.” That offense mirrors a traditional contact offense, but punishes touches and masturbatory contact at an equivalent and high level—a felony of the second degree. VERNON’S TEX. PENAL CODE § 21.11.

For the adult offenses, the availability of two tiers of sexual intrusion—contact or penetration—suffices. Acts of fondling without more are uncommon among adults, and the associated penalty ranges provide adequate punishment. But for acts involving children, a third tier is needed. Section 213.0(2)(d) thus defines this third tier in a manner that clarifies that the touch must go beyond mere contact, even while it may fall short of an act of penetration.

6. Consent – Section 213.0(2)(e).

[Approved by the membership, May 2016].

7. Physical Force and Injury – Section 213.0(2)(f).

Current law. In nearly all American jurisdictions, the concept of force plays an important role in the definition or grading of at least some sexual offenses. Under many older statutes, proof of force is a prerequisite to conviction of any sexual offense involving a competent adult complainant. In statutes of this type, the force may be expressly identified as an offense element¹³⁰ or it may come into play indirectly, as a requirement for establishing the absence of consent.¹³¹ When a sexual offense can rest on nonconsent even in the absence of force, the presence of force is consistently taken into account in determining the seriousness of the offense, either as an element that formally enhances the grading of the offense or as an aggravating factor in sentencing.

Despite its crucial importance, many states have no formal statutory definition of force. This lack of specificity is especially concerning because nearly all sexual conduct involves physical actions of some sort. As a result, force in both its everyday and scientific sense (any effort sufficient to cause motion) is not objectionable *per se* and cannot serve to mark the line between criminal and noncriminal conduct. The *kind* of force sufficient to establish a sexual offense or to aggravate its severity therefore must differ markedly in character from the physical movements intrinsic to sexual interaction and from such “extrinsic” but unremarkable acts as tenderly leading another person to the bedroom, gently removing another person’s clothing or lightly moving another person’s hand to an intimate place. Force can be considered aggravating and inconsistent with valid consent only when it exceeds the scope of otherwise valid consent, if

¹³⁰ E.g., MD. CODE ANN., CRIM. LAW § 3-303(a)(1)(i) (LexisNexis 2019) (providing that a person is guilty of rape when “[a] person . . . engage[s] in vaginal intercourse with another by force, or the threat of force, without the consent of the other”); accord id. § 3-303(a)(1).

¹³¹ For example, DEL. CODE ANN. tit. 11, § 770 (a)(3)(a) (2019) provides that “[a] person is guilty of rape in the fourth degree when . . . [t]he sexual penetration occurs without the victim’s consent,” but DEL. CODE ANN. tit. 11, § 761(k)(1) (2019) defines “without consent” as requiring that the defendant “compelled the victim to submit . . . by force.” Similarly, TEX. PENAL CODE ANN. § 22.011(a) (LexisNexis 2019) provides that a person commits sexual assault if “the person intentionally or knowingly . . . causes the penetration of the anus or sexual organ of another person . . . without that person’s consent.” However, in the case of a competent adult complainant, subsection (b) of this section provides that an assault is “without the consent” only when “the actor compels the other person to submit or participate by the use [or threat] of physical force, violence, or coercion . . .” Id. § 22.011(b).

any, and induces the sexual act. And the characteristics of *impermissible* force must be translated into an operationally clear statutory standard.

In jurisdictions where force *is* defined, the imprecision and inconsistency of commonly encountered statutory language and judicial decisions preclude any strictly accurate picture of how American jurisdictions respond to this challenge. Further complicating this overview is that (at least in theory) the *significance* of any given definition turns on the context in which it operates. One jurisdiction might define “force” broadly but attach relatively low levels of punishment to “forcible” conduct, perhaps because the force covered is not necessarily violent or egregious. Another jurisdiction might limit its definition of force to brutal violence, in part because its substantive offenses treat conduct “by force” as an extremely serious felony. In practice, however, definitions of force typically do not differ in ways that their operational significance might predict. Many jurisdictions define force restrictively even when “force” is the minimum prerequisite for any sexual offense;¹³² others define force expansively even when actors found to have used force face harsh punishment.¹³³ Statutory context and functional effect seem to have little impact on cross-jurisdictional disagreements over what “force” is. Rather, jurisdictions appear to treat force, like consent, as a conceptually independent fact, one on which widely varying offense schemas can be built.

Six roughly distinguishable paths seem to be available for defining this pervasively relevant but pervasively contested offense element. Any attempt to count and classify these approaches must necessarily be approximate, but the following summary gives a general sense of the range of disagreement on this issue in current law.

At one end of the spectrum, several jurisdictions expressly define “force” to include any act of penetration without consent.¹³⁴ Similarly, but arguably one step removed from this approach, three jurisdictions define force as including any physical act; to avoid overlap with the statutory element of penetration, that definition can be interpreted to exclude intrinsic force, but

¹³² See note 137, *infra*.

¹³³ See, e.g., *In re M.T.S.*, 129 N.J. 422, 609 A.2d 1266 (1992) (interpreting statute authorizing 10-year punishment, with element of “physical force or coercion,” as satisfied by proof of penetration).

¹³⁴ E.g., FLA. STAT. ANN. § 794.005 (LexisNexis 2019) (stating that “[t]he Legislature . . . never intended that the sexual battery offense described in s. 794.011(5) require any force or violence beyond the force and violence that is inherent in the accomplishment of ‘penetration’”); OKLA. STAT. ANN. tit. 21, § 111(A) (LexisNexis 2019) (“[T]he term ‘force’ shall mean any force, no matter how slight, necessary to accomplish the act without the consent of the victim.”); see also *State v. Sedia*, 614 So. 2d 533, 535 (Fla. Dist. Ct. App. 1993) (holding that the “state need not prove that the defendant used more physical force than merely the physical force necessary to accomplish sexual penetration in order to convict a defendant under [the statute criminalizing sexual battery with use of physical force]”). In New Jersey, the statute requiring “physical force” does not define that term explicitly, but in a prominent case, the state supreme court interpreted “physical force” to include “any amount of force against another person [including the force intrinsic to sexual penetration] in the absence of what a reasonable person would believe to be affirmative and freely-given permission to the act.” *In re M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992). In all three of these states, penetration by “force” (i.e., any penetration without consent) carries stiff penalties.

even with this fix, the approach if taken literally includes within “force” many extrinsic acts that are not inherently objectionable (such as gently removing a person’s clothing).¹³⁵ At the other end of the spectrum, nine statutes use the term “forcible compulsion” rather than “force,”¹³⁶ and another six arrive at a similar result by defining “force” in terms equivalent to compulsion or conduct sufficient to overcome resistance.¹³⁷ An intermediate solution, found in the federal courts and several other jurisdictions, defines force to involve more than simple physical action but does not require overwhelming, irresistible force; instead, these jurisdictions also include within “force” the use of a weapon or infliction of injury, whether or not these actions are sufficiently compelling to preclude resistance.¹³⁸ A more popular intermediate approach, if not a

¹³⁵ ALASKA STAT. § 11.81.900(28) (2019) (“[F]orce’ means any bodily impact, restraint, or confinement or the threat of imminent bodily impact, restraint, or confinement”); N.M. STAT. ANN. § 30-9-10(A) (LexisNexis 2019) (“[F]orce or coercion” includes “the use of physical force or physical violence”); N.D. CENT. CODE ANN. § 12.1-01-04(10) (2019) (“Force’ means physical action”).

¹³⁶ ALA. CODE § 13A-6-60(1) (LexisNexis 2020); ARK. CODE ANN. § 5-14-101(2) (2019); KY. REV. STAT. ANN. § 510.010(2) (LexisNexis 2019); MO. ANN. STAT. § 566.030(1) (LexisNexis 2019); N.Y. PENAL LAW § 130.00(8) (Consol. 2019); OR. REV. STAT. ANN. § 163.305(1) (LexisNexis 2019); 18 PA. CONS. STAT. § 3101 (2019); WASH. REV. CODE ANN. § 9A.44.010(6) (LexisNexis 2020); W. VA. CODE ANN. § 61-8b-1(1) (LexisNexis 2019).

¹³⁷ CONN. GEN. STAT. ANN. § 53a-65(7) (LexisNexis 2019) defines “force” broadly to include any “use of actual physical force or violence or superior physical strength against the victim,” but such force is ordinarily sufficient to establish a sexual offense only when it “compels” the other person to engage in sexual acts. See CONN. GEN. STAT. ANN. § 53a-70(a) (LexisNexis 2019); see also 720 ILL. COMP. STAT. ANN. 5/11-0.1 (LexisNexis 2019) (“Force or threat of force’ . . . includ[es] . . . when the accused overcomes the victim by use of superior strength or size, physical restraint, or physical confinement”); ME. REV. STAT. ANN. tit. 17-A, § 251(E) (LexisNexis 2019) (“Compulsion’ means the use of physical force, a threat to use physical force or a combination thereof that makes a person unable to physically repel the actor”); NEB. REV. STAT. ANN. § 28-318(9) (LexisNexis 2019) (“Force or threat of force means (a) the use of physical force which overcomes the victim’s resistance”); OHIO REV. CODE ANN. § 2901.01(A)(1) (LexisNexis 2020) (“Force’ means any violence, compulsion, or constraint physically exerted by any means upon or against a person”); 11 R.I. GEN. LAWS § 11-37-1(2) (2019) (“Force or coercion’ means when the accused does any of the following: (i) Uses or threatens to use a weapon, . . . [or] (ii) Overcomes the victim through the application of physical force or physical violence.”).

¹³⁸ Although the sexual-offense provisions of the U.S. Code do not explicitly define “force,” the legislative history states that “[t]he requirement of force may be satisfied by a showing of the use, or threatened use, of a weapon; [or] the use of such physical force as is sufficient to overcome, restrain, or injure a person” H.R. REP. NO. 99-594, at 14 n.54a (1986), as reprinted in 1986 U.S.C.C.A.N. 6186, 6194 n.54a. Every federal court of appeals considering the issue has accepted this statement as the controlling definition of “force” for purposes of federal sexual offenses. See, e.g., *United States v. Pena*, 216 F.3d 1204, 1211 (10th Cir. 2000) (defining force, for purposes of sexual offense guideline enhancement, as “such physical force as is sufficient to overcome, restrain or injure a person”); *United States v. Fulton*, 987 F.2d 631, 633 (9th Cir. 1993) (adopting the “such physical force as is sufficient to overcome, restrain, or injure a person” definition in interpreting 18 U.S.C. § 2241(a)(1), which defines the offense of “aggravated sexual abuse”); *United States v. Fire Thunder*, 908 F.2d 272, 274 (8th Cir. 1990) (relying on the legislative history in adopting this definition for purposes of 18 U.S.C. § 2241(a)(1);

1 solution, appears to be the most prevalent. While roughly two dozen jurisdictions codify a
2 statutory standard of some sort, roughly 30 states avoid the conundrum by declining to adopt *any*
3 statutory definition of force. In many of these states, courts provide only skimpy or conflicting
4 guidance¹³⁹; in others, case law leaves the decision to the “common sense” understanding of
5 jurors or simply instructs the trier of fact to determine whether the degree of force was
6 unacceptable under all the circumstances.¹⁴⁰

7 *Assessment.* The most common way to specify what force means—leaving the term
8 undefined or entrusting it to jurors’ everyday understanding—is not an acceptable solution for a
9 Model Code. Because physical force broadly defined is inherent in most consensual sexual
10 interaction, that widespread approach skirts the borders of unconstitutional vagueness. This
11 approach is plainly not optimal as a dividing line between constitutionally protected conduct on
12 the one hand and a serious felony on the other.

13 It is similarly easy to rule out approaches that equate “force” with any unconsented
14 sexual act. Because physical force is used to mark conduct as more serious than an offense based
15 solely on lack of consent, its function as a grading factor is obviously defeated by a definition
16 that collapses the difference between the two. Much the same flaw infects any definition that
17 excludes “intrinsic” force but includes all physical acts not intrinsic to unconsented sex. Because
18 unconsented sex almost always includes extrinsic physical acts, some of which are not
19 necessarily dangerous or frightening, treating such acts as physical force for grading purposes
20 again defeats those purposes by collapsing the distinction between lesser and more serious

United States v. Knight, 116 F. Supp. 3d 439, 444 (M.D. Pa. 2015) (relying on the decisions of other courts to adopt the same definition).

For statutes adopting a comparable standard, see, e.g., D.C. CODE § 22-3001(5) (2019) (defining “force” as “the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person”); MINN. STAT. § 609.341(3) (2019) (“‘Force’ means the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime . . . which . . . causes the complainant to submit.”); MONT. CODE ANN. § 45-5-501(2) (2019) (“[F]orce’ means: (a) the infliction, attempted infliction, or threatened infliction of bodily injury or the commission of a forcible felony . . .”).

¹³⁹ See Reporters’ Note to Section 213.1.

¹⁴⁰ See, e.g., *People v. Griffin*, 94 P.3d 1089, 1093, 1097 (Cal. 2004) (holding that when a charge of rape is based on use of “force,” the term does not have “any specialized legal definition” and therefore does not require an explanatory jury instruction; the jury must determine whether the defendant used force “as that term is commonly used and understood”); *People v. Komar*, 411 P.3d 978, 983 n.1, 987 (Colo. App. 2015) (upholding a trial judge’s response to a jury request for clarification that stated: “There is no legal definition. You are to use your collective wisdom and judgment”); *People v. Le*, 803 N.E.2d 552, 559 (Ill. App. Ct. 2004) (holding that there is “no definite standard setting the amount of force needed to show that the parties engaged in nonconsensual intercourse, and each case must be considered on its own facts”); *State v. Edwards*, 727 S.E.2d 26 (N.C. Ct. App. 2012) (requiring a “totality of the circumstances analysis”); *Davis v. Commonwealth*, 45 S.E.2d 167, 172 (Va. 1947) (holding that “[w]hether there be sufficient force in any case depends upon the surrounding circumstances and the conditions existing at the time”).

offenses—for example between nonviolent disregard of another person’s unwillingness and the use of a weapon or physical strength to compel submission.

Beyond its role as a grading factor, moreover, the concept of force serves an additional purpose that precludes equating it with intrinsic force or even with just any form of extrinsic force. Specifically, force is one of the principal factors that determine when expressed willingness is inauthentic. Assent cannot constitute valid consent when given in response to the pain of a twisted arm or the threat of a deadly weapon; in short, the use of or threat to use physical force renders apparent consent ineffective.¹⁴¹ It is circular and unhelpful to define force as penetration in the absence of consent while simultaneously defining consent as willingness in the absence of force.

The important choice to be made is whether to prefer the intermediate solution of limiting “physical force” to the kinds of physical dissuasion readily recognized as presumptively unacceptable in a sexual context (such as a weapon or intentionally inflicted physical pain), or whether to limit the concept even further by stipulating—as roughly 15 states still do—that acts meet the requirements of “physical force” only when they are sufficient to “overcome” a victim or “compel” submission.

Although a standard of forcible compulsion does not technically require the prosecution to produce evidence of resistance, a standard that requires that a victim be “compelled” or “overcome” has virtually the same effect. Force typically can be seen as “compelling” only when it *actually* precludes or overcomes resistance. Conversely, force that *can be* resisted (for example, slapping, kicking, or taking a person’s mobile phone) need not be considered “compelling” *per se*, at least in the case of a competent adult complainant, precisely because the complainant can usually take steps to resist it.¹⁴² As a result, a detailed review of the cases finds

¹⁴¹ Section 213.0(2)(e)(iv).

¹⁴² See, e.g., 720 ILL. COMP. STAT. ANN. 5/11-0.1 (LexisNexis 2019) (equating force with acts “when the accused *overcomes* the victim by use of superior strength or size, physical restraint, or physical confinement” (emphasis added)); *People v. Warren*, 446 N.E.2d 592, 594 (Ill. App. Ct. 1983) (The defendant approached a much smaller person on an isolated bike path, “then lifted her off the ground and carried her into a wooded area,” where he performed several sex acts while she remained silent, without attempting to flee or fight back; the court reversed the rape conviction because “[i]f complainant had the use of her faculties and physical powers, the evidence must show such resistance as will demonstrate that the act was against her will. . . . Complainant’s failure to resist when it was within her power to do so conveys the impression of consent . . . and removes from the act performed an essential element of the crime.”); see also ME. REV. STAT. ANN. tit. 17-A, § 251(E) (LexisNexis 2019) (“‘Compulsion’ means the use of physical force, a threat to use physical force or a combination thereof that makes a person *unable to physically repel* the actor” (emphasis added)); NEB. REV. STAT. ANN. § 28-318(9) (LexisNexis 2019) (“Force or threat of force means (a) the use of physical force which *overcomes the victim’s resistance*” (emphasis added)); 11 R.I. GEN. LAWS § 11-37-1(2) (2019) (“‘Force or coercion’ means when the accused does any of the following: (i) Uses or threatens to use a weapon, . . . [or] (ii) *Overcomes the victim* through the application of physical force or physical violence.” (emphasis added)); *Gibbins v. State*, 495 S.E.2d 46, 48 (Ga. Ct. App. 1997) (finding that the required force is “force used to *overcome the resistance* of the female” (emphasis added) (quoting *Drake v. State*, 236 S.E.2d 748, 750-751 (Ga. 1977))).

1 that even when resistance is not formally required, many courts applying a compulsion test
2 consider resistance (or its absence) highly probative on the question whether the defendant used
3 sufficient force.¹⁴³

4 Section 213.0(2)(f), like the federal courts¹⁴⁴ and a number of other jurisdictions,¹⁴⁵
5 rejects this position and instead follows the model of those jurisdictions that define two tiers of

¹⁴³ See Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953 (1998) (criticizing the tendency of courts to consider resistance in determining consent and force even where resistance is no longer a requirement under the statute). In contrast, courts applying a “restrain or injure” test frequently find sufficient force even absent proof that defendant’s actions were irresistibly compelling. E.g., *United States v. Willis*, 826 F.3d 1265, 1269, 1272 (10th Cir. 2016) (upholding conviction where the defendant took the victim into the bathroom, pulled down her pants, lifted her onto sink, and penetrated her; the victim stopped resisting because “she was scared and ‘didn’t know what to do’”); *United States v. Cloud*, 780 F.3d 877, 879 (8th Cir. 2015) (The defendant entered the victim’s shower and grabbed her breasts and vaginal area; the victim subsequently broke free, and court stated that “simply because a victim was able to escape does not mean that the defendant did not use force.”); *United States v. Lauck*, 905 F.2d 15, 16, 18 (2d Cir. 1990) (affirming conviction for abusive sexual conduct where the defendant backed the victim into a corner, held her there, and groped her); *Jones v. Commonwealth*, 252 S.E.2d 370, 372 (Va. 1979) (Where the assailants drove the victim to remote location and ordered her to submit, the court found that, even though the victim “was not struck, . . . did not scream, and . . . did not fight her assailants,” “the evidence amply supports the conclusion of fact that these crimes were committed against the victim’s will, without her consent and thus by force.”); *State v. Speese*, 528 N.W.2d 63, 66-67 (Wis. Ct. App. 1995) (finding that the force requirement was met where the victim acknowledged that the incidents in question did not involve force or threats of violence, but where the defendant had beaten her in the past), *rev’d on other grounds*, 545 N.W.2d 510 (Wis. 1996).

¹⁴⁴ For the federal case law defining force in the context of the sex offenses, see *supra* note 138. Outside the context of sexual crime, the federal courts sometimes use the much broader common-law definition, which equates physical force with “even the slightest offensive touching.” *United States v. Castleman*, 572 U.S. 157, 163 (2014) (quoting *Johnson v. United States*, 559 U.S. 133, 139 (2010)) (using that definition in defining force as an element in a misdemeanor crime of domestic violence). That broader definition cannot describe “physical force” when used as an aggravating factor in a sex offense, though, because it is satisfied whenever the sexual acts are without consent. Likewise, the federal courts reject the broad Blackstonian definition of “physical force” and, where context requires, use definitions akin to that which governs sex offenses in other particular settings. E.g., *Johnson*, 559 U.S. at 139-140 (noting that the term “physical force” bears a specialized meaning when it triggers a penalty enhancement under 18 U.S.C. § 924(e)(2)(B)(i), and so rejecting the common-law definition to hold that, in this context, “the phrase ‘physical force’ means *violent* force—that is, force capable of causing physical pain or injury to another person”); see also, e.g., *Stokeling v. United States*, 139 S. Ct. 544, 553-554 (2019) (affirming such a narrower definition of force, citing *Castleman*, 572 U.S. at 165-182, *Johnson*, 559 U.S. at 140, and *Sessions v. Dimaya*, 138 S. Ct. 1204, 1220 (2018)).

¹⁴⁵ See statutes cited at *supra* note 138. In several additional states, case law leans in this direction, even in the absence of clear statutory language to this effect. E.g., *People v. Keene*, 226 P.3d 1140, 1142-1143 (Colo. App. 2009) (The defendant assaulted victims who were initially asleep and subsequently woke up; once they were awake, the defendant did not use his hands to hold the victims down or voice threats, but his body weight held them down; the court, citing the federal definition of force, held that “evidence that a defendant’s body weight caused the victim to submit against his or her will is sufficient to establish . . . the physical force required . . . [because] the statutory language did not require force that prevents the victim’s escape[, merely] force sufficient to restrain the victim”); *Mohajer*

1 “physical force.” One tier is a lesser form of force defined by infliction of more than negligible
2 physical pain or restraint, and the other tier is a greater form of force defined by acts or restraint
3 that inflict or threaten serious bodily injury or death.¹⁴⁶ The Section excludes from the definition
4 of “physical force” negligible acts of physical aggression that cause a person to submit
5 unwillingly to sexual activity, but includes acts that have no place in a consensual encounter
6 (absent the person’s express prior permission) whether or not they prompt resistance.

7 The terms of Section 213.0(2)(f) rest on the judgment that the relevant touchstone for a
8 defendant’s liability is the defendant’s own actions, not the response of the complainant. Recent
9 research into the neurobiology of trauma, including in the context of sexual assault, underscores
10 the flaws of a model that relies on a complainant’s response rather than the actor’s actions.¹⁴⁷ As
11 the House Judiciary Committee, in defining force in objective terms, declared:¹⁴⁸

12 [In prior law, the] resistance doctrine was applied to determine whether the requisite
13 force, and therefore lack of consent, was present. The resistance doctrine reflected a
14 policy in direct conflict with the safety and welfare of sexual abuse victims. Resistance
15 under certain conditions is dangerous. Requiring a victim to become a martyr by testing

v. Commonwealth, 579 S.E.2d 359, 362, 364 (Va. Ct. App. 2003) (en banc) (finding that a reasonable jury could find force where the defendant masseur grabbed a client’s head and inserted his penis, and the client testified that she “tried to turn [her] head” but “could not bring herself to do so,” saying “there was something in me that I couldn’t do it,” but not suggesting that turning away would have been impossible); State v. Slade, No. 91-0936-CR, 1992 Wisc. App. LEXIS 134, at *3-4 (Wis. Ct. App. Feb. 20, 1992) (finding the force requirement met where the defendant gave the victim “a look” that the victim recognized, based on past behavior, as a threat); State v. Riley, No. 88-2065-CR, 1989 Wisc. App. LEXIS 670, at *2 (Wis. Ct. App. July 13, 1989) (finding the force requirement met where the defendant trapped the victim in her truck by taking her keys).

¹⁴⁶ Several states accomplish the same two-tier structure by defining a lower level of force that applies to a base offense level, and then aggravating that offense via the substantive elements of a greater crime (rather than through the definition itself). See, e.g., 720 ILL. COMP. STAT. ANN. 5/11-1.20(a), -1.30(a) (LexisNexis 2019) (requiring force for the offense of criminal sexual assault, and force in addition to the display of a weapon, bodily harm, or endangering the victim’s life for the offense of aggravated criminal sexual assault); IOWA CODE ANN. §§ 709.2(1), .3(1), .4(1) (LexisNexis 2019) (requiring force alone for the offense of sexual abuse in the third degree; force plus the display of a weapon for sexual abuse in the second degree; and force plus “serious injury” for sexual abuse in the first degree); MD. CODE ANN., CRIM. LAW § 3-303(a), -304(a) (LexisNexis 2019) (indicating that rape in the first degree requires force plus display of a weapon or injury, while rape in the second degree requires force alone).

¹⁴⁷ See generally David V. Baldwin, *Primitive Mechanisms of Trauma Response: An Evolutionary Perspective on Trauma-Related Disorders*, 37 NEUROSCIENCE AND BIOBEHAV. REV. 1549 (2013) (describing five defense states of “freeze-alert, flight, fight, freeze-fright, and collapse” evident in trauma-related diagnosis); Juliana Kalaf et al., *Sexual Trauma Is More Strongly Associated with Tonic Immobility Than Other Types of Trauma – A Population Based Study*, 215 J. AFFECTIVE DISORDERS 71, 72 (2017) (citing research on “tonic immobility” response in female victims of sexual assault and mixed-gender samples exposed to differing traumas).

¹⁴⁸ H.R. REP. NO. 99-594, at 11 (1986), as reprinted in 1986 U.S.C.C.A.N. 6186, 6191 (citations omitted).

1 the sincerity of an offender’s threat is unfair and should not be imposed upon victims of
2 sexual abuse offenses. The law does not impose a similar requirement upon victims of
3 other crimes of violence. . . . The offenses set forth in [the sex-offense provisions of the
4 U.S. Code] do not incorporate a resistance doctrine, which the Committee believes is
5 neither fair nor necessary.

6 **8. “Actor” – Section 213.0(2)(g).**

7 Section 213.0(2)(g) addresses a discrete problem that sometimes arises when the “actor”
8 in question is a minor who has not reached the age of puberty. The broad reach of the terms
9 “sexual penetration,” “oral sex,” and “sexual contact” as defined in Section 213.0(2) would
10 present a potential problem if applied literally to the actions of a young child. Section 213.8, like
11 all comparable state legislation, sets out tiers of liability for various ages, where sexual activity is
12 forbidden regardless of the ostensible consent of the victim. When defined in traditional terms
13 (vaginal penetration), there is little risk that the innocent antics and semi-sexual experimentation
14 of very young children will be seen as constituting the crime of rape. Sexual penetration is
15 justifiably extended, however, to a much broader range of behaviors, including for example,
16 digital penetration and any contact between the mouth of one person and the anus, penis, or
17 vagina of another. Nonetheless, when this appropriate step is taken, a young child who is
18 “playing doctor” could easily fall within the literal terms of the offense of statutory rape.

19 No reasonable prosecutor would seek to charge the child with rape (or pursue
20 delinquency proceedings premised on rape) in this situation,¹⁴⁹ but prosecutorial discretion
21 sometimes defies even the strongest expectations, and some prosecutors have initiated
22 proceedings in cases of this kind. Where this has happened, state courts have at times refused to
23 read their statutes literally; instead they have held either that the applicable statute did not apply
24 when the accused actor was a young child or that, if not, the statute was unconstitutionally vague
25 in this context.¹⁵⁰ Recently, however, the U.S. Court of Appeals for the Ninth Circuit held
26 otherwise. Choosing a strictly literal approach to interpreting the federal rape statute,¹⁵¹ the

¹⁴⁹ See, e.g., MODEL RULES OF PROF’L CONDUCT r. 3.1 (AM. BAR ASS’N. 1983) (“A lawyer shall not bring . . . a proceeding . . . unless there is a basis for doing so that is not frivolous”); AM. BAR ASS’N., ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION, at r. 3-1.2(c) (3rd ed. 1993) (“The duty of the prosecutor is to seek justice, not merely to convict.”); id. r. 3-3.9(b) (“The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction.”).

¹⁵⁰ E.g., *In re D.B.*, 950 N.E.2d 528, 529 (Ohio 2011); *In re Z.C.*, 165 P.3d 1206, 1213-1214 (Utah 2007). See also Comment and Reporters’ Note to Section 213.8 (discussing prosecutions of actors who are also legally incapable of consent or otherwise within a protected statutory class). But see *In re J.L.*, 800 N.W.2d 720, 723-724 (S.D. 2011) (refusing to find absurdity in applying the statutory rape statute to a child whose age was within the protected age class, as long as only the defendant could be “adjudicated a delinquent”).

¹⁵¹ 18 U.S.C. § 2241(c) (2012).

1 Ninth Circuit ruled that a 10-year-old boy was properly adjudicated a delinquent, based on rape,
2 for having placed his penis in the mouth of another child.¹⁵²

3 The revised Code disapproves that outcome. Moreover, in light of the Ninth Circuit
4 decision, the revised Code considers it inadvisable to rely on judicial interpretation to reach the
5 appropriate result without statutory guidance. Section 213.0(2)(g) provides that, with one
6 exception, an “actor” for purposes of Article 213 must be a person more than 12 years old. That
7 sole exception permits the government to charge a child under 12, if the charge alleges a
8 violation of Section 213.1 (Sexual Assault by Aggravated Physical Force or Restraint). Even in
9 such cases, however, any such charge should be processed through the juvenile courts, which are
10 better equipped to identify and rectify the underlying conditions that gave rise to such extreme
11 conduct.

12 **9. “Registrable offense” – Section 213.0(2)(h).**

13 The Reporters’ Notes on this definition are found in Section 213.11.

¹⁵² United States v. J.D.T., 762 F.3d 984, 988-989, 999 (9th Cir. 2014).

1 **SECTION 213.1. SEXUAL ASSAULT BY AGGRAVATED PHYSICAL FORCE OR RESTRAINT**

2 **(1) *Sexual Assault by Aggravated Physical Force or Restraint.* An actor is guilty of**
3 **Sexual Assault by Aggravated Physical Force or Restraint when:**

4 **(a) the actor causes another person to submit to or perform an act of**
5 **sexual penetration or oral sex; and**

6 **(b) the act is without effective consent because:**

7 **(i) the actor uses or explicitly or implicitly threatens to use**
8 **aggravated physical force or restraint against anyone; and**

9 **(ii) the actor's use of or threat to use aggravated physical force or**
10 **restraint causes the other person to submit to or perform the act of sexual**
11 **penetration or oral sex; and**

12 **(c) the actor knows that the circumstances described in paragraphs (a)**
13 **and (b) are present.**

14 **(2) *Grading.* Sexual Assault by Aggravated Physical Force or Restraint is a**
15 **registrable offense. It is a felony of the third degree [10-year maximum], except that (1) the**
16 **maximum term of imprisonment is five years greater than that otherwise applicable to a**
17 **felony of the third degree; and (2) it is a felony of the second degree [20-year maximum] if**
18 **the actor violates subsection (1) of this Section and in so doing:**

19 **(a) knowingly uses or explicitly or implicitly threatens to use a deadly**
20 **weapon and knows that this act causes the other person to submit to or perform the**
21 **act of sexual penetration or oral sex; or**

22 **(b) knowingly acts with one or more persons who:**

23 **(i) also engage in an act or acts of sexual penetration or oral sex with**
24 **the same victim at the same place at a time contemporaneous with the actor's**
25 **violation of this Section; or**

26 **(ii) assist in the use of or threat to use aggravated physical force or**
27 **restraint when the actor's act of sexual penetration or oral sex occurs; or**

28 **(c) causes serious bodily injury to any person, and is aware of, yet recklessly**
29 **disregards, the risk of causing such injury.**

30 **(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the**
31 **other person submitted to or performed the act of sexual penetration or oral sex under the**

1 **circumstances described in subsection(1)(b). Submission, acquiescence, or words or**
2 **conduct that would otherwise indicate consent do not constitute effective consent when**
3 **occurring in a circumstance described in that subsection. If applicable, the actor may raise**
4 **an affirmative defense of Explicit Prior Permission according to the terms of Section**
5 **213.10.**

6 **Comment:**

7 Section 213.1 defines the gravest of the sexual offenses. It is graded as a third-degree
8 felony, but with two qualifications. The authorized maximum sentence of imprisonment is five
9 years higher than the generally applicable maximum sentence for a third-degree felony, and it is
10 graded as a second-degree felony in the circumstances described in paragraphs (2)(a), (2)(b), and
11 (2)(c). All these offenses are based on the use of or threat to use aggravated physical force or
12 restraint, which Section 213.0(2)(e)(ii) defines as “a physical act or physical restraint that inflicts
13 or is capable of inflicting death, serious bodily injury, or extreme physical pain or that confines
14 another for a substantial period in a place of isolation, other than under color of law.” Because of
15 its seriousness, a violation of Section 213.1 is a “registrable offense,” which means that
16 conviction makes the offender eligible for the collateral consequences of conviction specified in
17 Section 213.11.

18 This Comment to Section 213.1 addresses: (1) the scope of the core offense of using or
19 threatening to use aggravated physical force or restraint; (2) the aggravating circumstances that
20 permit additional punishment—the knowing threat to use or use of a deadly weapon, the active
21 involvement of multiple offenders, or the actual infliction of serious physical injury; and (3) the
22 relevance of consent.

23 ***1. Sexual Assault by Aggravated Physical Force or Restraint – Subsection 213.1(1).***

24 Subsection 213.1(1) punishes the actor who causes another person to submit to or
25 perform an act of sexual penetration or oral sex and knows that the other person submitted to or
26 performed that sexual act because of the actor’s use or threatened use of aggravated physical
27 force or restraint.

28 *a. The required force.* Physical force or restraint must be *aggravated* to trigger liability
29 under Section 213.1. “Physical force or restraint” is defined in Section 213.0(2)(f)(i) as “a
30 physical act or physical restraint that inflicts more than negligible physical harm, pain, or
31 discomfort or that significantly restricts a person’s ability to move freely”; the definition adds

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

1 that more than negligible physical harm includes “a burn, black eye, or bloody nose,” and more
2 than negligible pain or discomfort includes the pain or discomfort resulting from “a kick, punch,
3 or slap on the face.”

4 When physical force or restraint, so defined, causes another person to submit to or
5 perform an act of sexual penetration or oral sex, that force or restraint, whether or not
6 “aggravated,” can support conviction for the lesser offense of Sexual Assault by Physical Force
7 or Restraint, a felony of the third degree under Section 213.2. But this level of force or restraint
8 is not in itself sufficient to support conviction for the more serious felony of Sexual Assault by
9 Aggravated Physical Force or Restraint under Subsection 213.1(1). This offense requires proof
10 of “aggravated physical force or restraint,” which is defined in Section 213.0(2)(f)(ii) as physical
11 force or restraint that “inflicts or is capable of inflicting death, serious bodily injury, or extreme
12 physical pain, or that confines another for a substantial period in a place of isolation other than
13 under color of law.”

14 Certain weapons (for example a sling shot or paddle) can be coercive without necessarily
15 arousing fear of serious bodily injury.¹ Liability for Sexual Assault by Aggravated Physical
16 Force or Restraint therefore requires proof that the accused knowingly used or threatened to use
17 physical force or restraint sufficient to inflict serious bodily injury or death. Serious bodily injury
18 is “bodily injury which creates a substantial risk of death or which causes serious, permanent
19 disfigurement, or protracted loss or impairment of the function of any bodily member or organ.”²

20 These criteria largely carry forward the 1962 Code’s definition of Rape, which was
21 graded as a felony of the second degree when a person “compels [another person] to submit by
22 force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be
23 inflicted on anyone.”³ Unlike the 1962 Code, revised Section 213.1 uses gender-neutral language

¹ Because almost any offensive or defensive device has the potential to inflict severe injury when aggressively used, the intimidating impact of a weapon is best defined not by its conceivable effect but by the manner in which it is typically used. For example, the 1962 Code defines “deadly weapon” as “any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.” Section 210.0(4) (1962).

² 1962 Code Section 210.0(3).

³ 1962 Code Section 213.1(1)(a).

1 and requires a higher degree of mental culpability—knowledge rather than the mens rea of
2 recklessness that sufficed for conviction under the 1962 Code.⁴ In other respects, revised Section
3 213.1 is substantially equivalent to the corresponding provision of the 1962 Code: The level of
4 force that establishes the second-degree felony offense is comparably severe.

5 The requirement that the other person’s submission be *caused by* the use or threatened
6 use of aggravated physical force or restraint—a level of force that threatens serious bodily injury
7 or death—is on a par with the 1962 Code requirement that the other person’s submission be
8 “*compel[led]*.” Although many older decisions interpret a “compulsion” standard to imply a
9 requirement of resistance,⁵ the 1962 Code sought to avoid that result, and under current law,
10 states overwhelmingly reject physical-resistance requirements.⁶ The language of revised Section
11 213.1 stipulating that submission be *caused* (rather than *compelled*) by aggravated physical force
12 or restraint reduces the risk that courts might impose that outdated and overly demanding
13 standard. Resistance is not required so long as (1) the force or restraint used entails the elevated
14 degree of physical force or restraint sufficient to threaten or inflict serious bodily injury or a
15 substantial period of confinement, and (2) that force or restraint is the reason for (“causes”) the
16 other person’s submission to or performance of the sexual act.

17 **Illustration:**

18 1. Accused, who is much bigger and stronger than Complainant, pushes
19 Complainant down to the ground, lies on top of Complainant, and holds Complainant’s
20 wrists tightly over Complainant’s head, immobilizing Complainant. Accused then urges
21 Complainant not to struggle, assuring Complainant that after Accused performs sexual
22 acts, Complainant will be set free without suffering additional injury. Accused penetrates
23 Complainant and promptly releases Complainant thereafter, without inflicting further
24 bodily harm. On proof of these circumstances, and particularly if the trier of fact believes

⁴ Section 213.1(1) explicitly requires a mens rea of knowledge. The corresponding provision of the 1962 Code does not state the required mental state explicitly, so the Code’s default rule makes recklessness the applicable mens rea. See 1962 Code Section 2.02(3).

⁵ See Reporters’ Note 1, *infra*.

⁶ See Reporters’ Note 1, at notes 61-66, *infra*.

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

1 that Accused's reassurances were sincere, the trier of fact might not find beyond a
2 reasonable doubt that Accused used aggravated physical force, which requires proof that
3 Accused had inflicted or threatened to inflict "serious bodily injury," defined as "bodily
4 injury which creates a substantial risk of death or which causes serious, permanent
5 disfigurement, or protracted loss or impairment of the function of any bodily member or
6 organ."⁷ Similarly, the trier of fact might not find beyond a reasonable doubt that
7 Accused used aggravated physical restraint, which requires proof that Accused had
8 "confined [Complainant] for a substantial period in a place of isolation other than under
9 color of law." Absent one of those findings, the trier of fact could not find Accused
10 guilty of Sexual Assault by Aggravated Physical Force or Restraint under Section 213.1.
11 Nonetheless, if the trier of fact found that that by physically overpowering Complainant,
12 Accused had used force or restraint sufficient to "significantly restrict[] [Complainant]'s
13 ability to move freely,"⁸ and had done so while recklessly disregarding the risk that those
14 actions would cause Complainant to submit, the facts would meet the requirements for
15 conviction of the lesser offense of Sexual Assault by Physical Force or Restraint under
16 Section 213.2.⁹

17 *b. Threats.* The threats of aggravated physical force or restraint sufficient to trigger
18 Section 213.1 include not only explicitly threatening words or gestures, but also implicit threats
19 to inflict serious bodily injury.

20 In *Johnson v. State*,¹⁰ the victim was kidnapped at gunpoint and raped by a group of men.
21 The defendant also sexually penetrated the victim but was not part of that group, and there was
22 no evidence that he knew that the other men had used a deadly weapon to bring her to the house.

⁷ See 1962 Code Section 210.0(3).

⁸ See Section 213.0(2)(f)(i), defining "physical force or restraint."

⁹ When an accused does not physically restrain a complainant but instead allegedly orders the complainant not to struggle if the complainant wants to avoid physical harm, the accused might still be convicted under Section 213.2 if the factfinder concludes beyond a reasonable doubt that the accused, by commanding the complainant to submit in order to avoid injury, had in effect knowingly or recklessly *threatened* to use physical force. See Comment 1(b), *infra*.

¹⁰ *Johnson v. State*, 94 S.W.3d 344 (Ark. Ct. App. 2002).

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

1 However, other circumstances implicated the defendant in the use of force. The victim testified
2 that she was walking naked to the bathroom “hysterical and panicking” when she encountered
3 the defendant, whom she did not know. He followed her into the bathroom and penetrated her
4 while she repeatedly pleaded, “Please don’t.” The jury convicted under a statute requiring
5 “physical force or a threat, express or implied, of death or physical injury to or kidnapping of any
6 person.” Affirming the conviction, the court found sufficient evidence of physical force on the
7 basis that the defendant’s actions—cornering the hysterical, frightened, and naked victim in the
8 bathroom— amounted to an actual physical restraint. Under Sections 213.1 and 213.2, a court
9 would not have to stretch the facts to find that the victim had been restrained or threatened with
10 physical force. Given the circumstances of the encounter, the trier of fact could find beyond a
11 reasonable doubt that the defendant had *implicitly threatened* “a physical act or physical restraint
12 that inflicts more than negligible physical harm, pain, or discomfort or that significantly restricts
13 a person’s ability to move freely,” and thus had threatened “physical force or restraint” sufficient
14 to support liability for Sexual Assault by Physical Force or Restraint under Section 213.2. But
15 the defendant could not be convicted of the more serious offense of Sexual Assault by
16 Aggravated Physical Force or Restraint under Section 213.1, absent a finding that under the
17 circumstances he had, by his conduct, knowingly threatened the victim with death, serious bodily
18 injury, or extreme physical pain.

19 **Illustration:**

20 2. Complainant, a college student, periodically babysits for Accused, the parent of
21 a small child. One evening, Accused returns home late at night. Complainant reports that
22 the child is asleep and prepares to leave. Accused asks Complainant to stay a little longer,
23 stating that Accused is lonely because Accused’s spouse is traveling out of town.
24 Complainant expresses the need to return to campus immediately because of an important
25 exam the next day. Accused removes a shotgun from a nearby closet. Holding but not
26 pointing the weapon, Accused says, “Are you sure you have to leave? I think that’s a bad
27 idea. My friend Winchester here thinks so too.” Complainant does not verbally respond,
28 but stares at the weapon as Accused approaches and kisses Complainant. Accused then
29 removes Complainant’s clothing and sexually penetrates Complainant. At trial, Accused
30 testifies that there was no explicit threat and no intent to threaten or harm Complainant.
31 Accused also testifies that Accused believed Complainant’s participation was consensual.

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

1 On this evidence, a trier of fact could conclude beyond a reasonable doubt that
2 Accused's words and actions amounted to an *implied* threat to use the deadly weapon or
3 otherwise subject Complainant to serious bodily injury. In order to find Accused guilty of
4 Sexual Assault by Aggravated Physical Force or Restraint under Section 213.1(1), the
5 trier of fact also must find beyond a reasonable doubt that the applicable causation and
6 mens rea requirements were met—namely that Accused *knew* (1) that those words and
7 actions would be understood as threatening in that way; and (2) that this implied threat
8 *caused* Complainant to submit to the act of penetration.

9 *c. Third Parties and Other Harms.* Section 213.1(1) reaches express or implied threats to
10 use aggravated physical force or restraint against third parties—threats that are equivalent in
11 seriousness to threats to use such force against the victim directly. Threats to commit other kinds
12 of crime, including property damage (such as arson), are less serious than threats of serious
13 bodily injury, but they can still have considerable coercive force. Section 213.4 addresses
14 liability for sexual penetration and oral sex resulting from such lesser but still coercive threats.

15 *d. Causal Effect.* Commonplace differences in height, weight, and bodily position
16 between sexual partners almost inevitably inhibit to some degree one party's freedom of
17 movement. Liability for the offense of Sexual Assault by Aggravated Physical Force or Restraint
18 under Section 213.1(1) requires the use of or threat to use aggravated physical force or restraint
19 sufficient to inflict death, serious bodily injury, extreme physical pain, or prolonged
20 confinement. Liability for other sexual offenses can rest on lesser degrees of physical force or
21 restraint as well as certain nonphysical coercion.¹¹ But even when an actor has used a prohibited
22 degree of physical force or coercion, criminal liability does not invariably attach. The force or
23 coercion must *cause* the other person to submit to or perform sexual acts when that person would
24 not otherwise have done so. As in other areas of the criminal law, and indeed throughout the law
25 generally, liability for wrongful action generally requires a nexus—a *causal* connection—
26 between that wrongful action and the occurrence of a prohibited result.¹²

¹¹ See, e.g., Section 213.2 (Sexual Assault by Physical Force or Restraint); Section 213.4 (Sexual Assault by Extortion).

¹² The law of attempt and other inchoate crimes is an exception, of course.

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

1 The Code’s causation requirement means (1) the aggravated physical force or restraint
2 employed by the accused must be an antecedent act, but for which the complainant would not
3 have engaged in the sexual acts, and (2) the subsequent sexual conduct must not be “too remote
4 or accidental in its occurrence to have a [just] bearing on the actor’s liability.”¹³ Thus, the Code,
5 like the law generally, defines causation as a two-pronged requirement, involving both the but-
6 for connection and a sufficiently proximate link between proscribed conduct and its but-for
7 consequence. The following examples illustrate the contours of this two-pronged causation
8 requirement in the context of Section 213.1 and the other Article 213 offenses.

9 **Illustrations:**

10 3. Accused and Complainant are friends traveling together. After dinner one
11 night, Accused expresses romantic feelings for Complainant, and the two begin to kiss in
12 the elevator on the way up to their respective hotel rooms. Complainant says, “My room
13 is a mess. But I want you!! Where can we be alone?” When the elevator arrives at their
14 common floor, Accused, who is much taller and heavier than Complainant, picks up
15 Complainant and says, “I’m taking you to my bed!” After carrying Complainant to
16 Accused’s room, Accused opens the door, puts on the “Do Not Disturb” sign and closes
17 the door while setting its lock. Accused then forcefully throws Complainant onto the bed,
18 removes Complainant’s clothes, climbs on top of Complainant, and engages in an act of
19 sexual penetration.

20 In order to hold Accused liable for Sexual Assault by Aggravated Physical Force
21 or Restraint under Section 213.1(1), the trier of fact would have to find that Accused’s
22 actions, including the acts of lifting and carrying Complainant to the room and forcefully
23 throwing Complainant onto the bed constituted or threatened physical force “capable of
24 inflicting death, serious bodily injury, or extreme physical pain.” But even if Accused’s
25 actions were found to satisfy that requirement, the trier of fact could convict under
26 Section 213.1(1) only by finding that (1) those actions *caused* Complainant to submit,

¹³ See 1962 Code Section 2.03(1), (2)(b), 3(b) (“Conduct is the cause of a result when . . . it is an antecedent but for which the result in question would not have occurred; and . . . the actual result . . . is not too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability . . .”).

1 and (2) Accused *knew* this to be the case. If accepted by the trier of fact, and in the
2 absence of other pertinent evidence, the testimony concerning Complainant's statements
3 in the elevator could raise a reasonable doubt on either or both points. That testimony
4 could suggest that Complainant would have engaged in the sexual acts even if Accused
5 had not lifted and carried Complainant to the room and thrown Complainant onto the bed
6 (i.e., absence of but-for causation). That testimony could also support a finding that, even
7 if Accused's physical acts caused Complainant to engage in the sexual activity, Accused
8 did not know that Accused's actions had that effect (i.e., absence of mens rea as to the
9 requisite causal nexus).

10 4. Accused and Complainant meet for the first time on a blind date. On the couch
11 at Complainant's apartment, Accused, who is much taller and heavier, rolls on top of
12 Complainant in a way that prevents Complainant from moving and pins Complainant's
13 hands behind Complainant's head. Complainant says, "No, get off," and Accused
14 promptly does so. The two then part company. When Complainant and Accused meet for
15 a second date the next day, Complainant leads Accused into the bedroom, saying, "I love
16 how strong you are. I want you! NOW!!" The two then engage in acts of oral sex.

17 In order to hold Accused liable for Sexual Assault by Aggravated Physical Force
18 or Restraint under Section 213.1(1) for the acts of oral sex on the second date, the trier of
19 fact would have to conclude that Accused's initial actions on the first date, by pinning
20 Complainant's hands and preventing Complainant from moving, constituted aggravated
21 physical force because they were "capable of inflicting ... serious bodily injury." But
22 even if Accused's actions satisfy that requirement, the trier of fact also would have to
23 find causation and the requisite mens rea beyond a reasonable doubt. If the jury found
24 that Accused's show of strength on the first date was a but-for cause of Complainant's
25 willingness to engage in sexual activity on the second date, that but-for relationship can
26 establish legally sufficient causation only if that show of strength on the first date is "not
27 too remote [from the subsequent sexual conduct] . . . to have a [just] bearing on
28 liability."¹⁴ On these facts, any coercive impact of Accused's actions on the first date was

¹⁴ See note 13, *supra*.

1 substantially dissipated at the time of the second date by several factors: (1) in their initial
2 encounter, Accused did not lead Complainant to believe that verbal resistance would be
3 futile and instead immediately honored Complainant's request to "get off"; (2) the
4 parties, who had no ongoing relationship, had disengaged, parted, and allowed a day to
5 elapse before voluntarily meeting again; (3) Complainant expressed a desire to have sex
6 with Accused at a time when Accused was not exercising any intimidating influence; and
7 (4) there are no facts suggesting that Accused directly or implicitly used or threatened
8 physical force or restraint on the subsequent occasion. Taken together, these facts suggest
9 that Accused's earlier use of force, even if it had the necessary but-for relationship, was
10 too attenuated in its impact to satisfy the requisite *proximate* causation; Accused's initial
11 use of force was "too remote. . . to have a [just] bearing on liability."

12 5. Complainant and Accused live together for six months, but Accused becomes
13 increasingly abusive, subjecting Complainant to severe beatings when Complainant
14 hesitates to do as Accused demands. One night, Accused, who is much taller and heavier,
15 throws Complainant to the floor and pins Complainant's hands behind Complainant's
16 head, so that Complainant cannot move. Complainant says, "No, get off." Accused then
17 repeatedly slaps and punches Complainant, but when Complainant screams for help from
18 neighbors, Accused stops and leaves, taking a suitcase and clothes to live elsewhere. A
19 week later, Accused returns to Complainant's apartment, accuses Complainant of
20 betraying Accused, and then tears off Complainant's clothes and penetrates Complainant.
21 At Accused's trial for Sexual Assault, Complainant testifies to having submitted out of
22 fear of another violent, possibly fatal beating, because of Accused's conduct at the time
23 in the context of Accused's violent behavior throughout the relationship.

24 Viewed in isolation, Accused's actions at the time of the sexual act might not *by*
25 *themselves* qualify under Section 213.1 as aggravated physical force. Nevertheless, a trier
26 of fact could readily find that Accused's use of physical force throughout the relationship
27 (pinning Complainant to the floor, repeatedly slapping and punching Complainant) met
28 Section 213.1's heightened force requirement by implicitly threatening serious bodily
29 injury at the time of the alleged sexual assault. In order to convict Accused of Sexual
30 Assault by Aggravated Physical Force or Restraint on that basis, the trier of fact would

1 also have to find that the climate of violence created by the earlier uses of aggravated
2 physical force, many days previously, caused Complainant to submit.

3 Complainant's testimony, if accepted by the trier of fact, would support the
4 necessary findings of both but-for and proximate causation. Accused's earlier actions are
5 a but-for cause of Complainant's submission, and on these facts, unlike those of the
6 previous Illustration, the coercive impact of Accused's earlier actions was *not*
7 significantly dissipated. Although the parties separated and substantial time elapsed,
8 Complainant expressed no desire during that interim period to have sex with Accused,
9 and there are no facts suggesting that Accused took any steps to avoid intimidating
10 behavior on the subsequent occasion. To the contrary, Accused once again used physical
11 violence, and Complainant submitted to the sexual act because of the continuing threat of
12 Accused's violently intimidating behavior. Nothing that had transpired, therefore, was
13 sufficient to attenuate the impact of Accused's earlier use of aggravated physical force or
14 to break its causal connection to Complainant's later submission. The trier of fact
15 therefore could find beyond a reasonable doubt that this earlier use of force was "not too
16 remote . . . to have a [just] bearing on liability."

17 *e. The Required Mental State.* A person who uses direct physical force or expressly
18 threatens to do so often acts purposely. Yet people assertively engaging in sexual acts are not
19 always aware of the coercive impact and potential injury their physical strength may cause.
20 Likewise, people are not always aware of the implicitly threatening character of many other
21 things they might do or say; they might not purposefully engage in coercive conduct or know
22 that others perceive it as menacing.

23 Criminal law typically does not assume that a specific intent or *purpose* to threaten is
24 inherent in the concept of threat. Offenses based on making a threat typically require only proof
25 that the accused *knew* his or her actions would be perceived as threatening or *recklessly*
26 disregarded that risk.¹⁵ For situations involving the use of or threat to use physical force or
27 restraint, Article 213 resolves this issue of the necessary mental state (*mens rea*) by requiring

¹⁵ See Reporters' Note 3 at notes 83-89, *infra* (discussing *United States v. Elonis*, 575 U.S. 723 (2015)).

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

1 purpose or knowledge for the offense of Sexual Assault by Aggravated Physical Force or
2 Restraint (Section 213.1(1)), while requiring purpose, knowledge, or recklessness for the less
3 serious offense of Sexual Assault by Physical Force or Restraint (Section 213.2).

4 The 1962 Code treated recklessness as the presumptively sufficient mens rea for every
5 element of a criminal offense, displacing the notion reflected in many prior common law cases
6 that silence in a statute might imply negligence or even strict liability with respect to the
7 attendant-circumstance elements of an offense. This principle was followed in Article 213 of the
8 1962 Code, which often omitted any mention of mens rea and thus, by operation of the Code's
9 default rule,¹⁶ established recklessness as the sufficient mens rea. That understanding is affirmed
10 by the Commentary, which repeatedly describes the applicable mens rea as recklessness when
11 discussing Article 213 provisions—including the first-degree felony of Rape under 1962 Code
12 Section 213.1(1)—in which the 1962 black letter omitted mens rea language entirely.¹⁷

13 Departing from the 1962 Code's preference for recklessness, even for its most serious
14 sexual offense, revised Section 213.1 sets *knowledge* as the minimally sufficient mens rea for the
15 offense of Sexual Assault by Aggravated Physical Force or Restraint. The decision to require a
16 mens rea of knowledge reflects the facts that Section 213.1 defines the most serious Article 213
17 offense, that authorized American punishment levels tend to be quite high, that sentences
18 imposed have become much more harsh than they were at the time of the 1962 Code, and that
19 revised Article 213 makes a lesser included offense available at a lower felony level when an
20 actor engages in the same conduct recklessly but without *knowing* (defined as realizing to a

¹⁶ “When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.” 1962 Code Section 2.02(3).

¹⁷ The Commentary explains, for example, that Section 213.1(1)(b) requires that the actor “be at least reckless with respect to her lack of awareness” (p. 316), and that “by operation of the general culpability provisions, the actor must be at least reckless with respect to the female’s unconsciousness” (p. 319). Similarly, Commentary expressly rejects a requirement “that the defendant know of the victim’s state” (p. 319), explains that the serious bodily injury enhancement is for “reckless infliction” (p. 336), and states that the actor must be at least reckless as to the female not being his wife (p. 342 n.185). In all these instances, the Commentary references black letter that makes no mention of mens rea at all.

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

practical certainty)¹⁸ that penetration or oral sex will be caused by aggravated physical force or restraint.

The knowledge requirement under Section 213.1 applies to all the material elements of the basic offense under Section 213.1(1). In other words, the actor must purposely or knowingly cause the other person to submit to or engage in the sexual act and must do so by purposely or knowingly using or threatening physical force or restraint sufficient to inflict serious bodily injury or prolonged confinement. Absent proof that the actor has at least knowingly engaged in that conduct, liability cannot be imposed for Sexual Assault by Aggravated Physical Force or Restraint. However, the actor may be guilty of a lesser sexual offense, for example under Section 213.2 (Sexual Assault by Physical Force or Restraint) or Section 213.6 (Sexual Assault in the Absence of Consent).

2. Grading. The less serious offense under this Section, the offense of Sexual Assault by Aggravated Physical Force or Restraint under subsection (1), is graded as a third-degree felony, with the proviso that the maximum available sentence of imprisonment may be up to five years longer than the term otherwise available for a felony of the third degree.¹⁹ The more serious offense under subsection (2) is graded as a second-degree felony.²⁰ Because of the exceptional

¹⁸ “A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.” 1962 Code Section 2.02(2)(b).

¹⁹ Under the provisions of the Model Penal Code: Sentencing, a person convicted of a felony of the third degree is subject to “a term of incarceration ... [that] shall not exceed [10] years.” MODEL PENAL CODE: SENTENCING (Proposed Final Draft, April 10, 2017), approved May 2017, Section 6.06(6)(c). A Comment to this provision explains: “The revised Code does not offer exact guidance on the maximum prison terms that should be attached to different grades of felony offenses. Instead, maximum authorized terms are stated in brackets in part because judgments about the sanctions appropriate to a felony of the second degree are fundamental policy questions that must be confronted by responsible officials within each state.” *Id.*, Comment *k*, p. 157.

²⁰ Under the provisions of the Model Penal Code: Sentencing, a person convicted of a felony of the second degree is subject to “a term of incarceration ... [that] shall not exceed [20] years.” *Id.* Section 6.06(6)(b).

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

dangerousness and culpability associated with both the less serious and the more serious offenses under this Section, both are registrable offenses.

Section 213.1(2) lists three factors that increase the grading of the offense to that of a second-degree felony. The factors are: (a) using or threatening to use a deadly weapon;²¹ (b) multiple offenders; and (c) serious bodily injury.²²

Of crucial importance, these aggravating circumstances are never sufficient by themselves to establish the more serious offense. Rather, the prosecution must first prove beyond a reasonable doubt all the elements of the Section 213.1(1) predicate offense of Sexual Assault by Aggravated Physical Force or Restraint. That offense requires proof that the defendant knowingly used or threatened aggravated physical force or restraint and knew that those actions were causing another person to submit to or perform the sexual acts. Once facts sufficient to establish the predicate offense are proved, Section 213.1(2) classifies the offense as a felony of the second degree upon proof of one of the three aggravating factors specified in Section 213.1(2)(a), (b), and (c).

The first aggravating factor, the use of or threat to use a deadly weapon (subsection (2)(a)), is straightforward. A “deadly weapon” is “any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.”²³ The accused must not only know (Section 213.1(1)) that the victim submitted because of the use of aggravated physical force or restraint, but must also know (Section 213.1(2)(a)) that the force causing that submission involved a deadly weapon.

Illustration:

6. Accused, a truck driver, picks up Complainant, a hitchhiker. Complainant notices a pistol handle sticking out from beneath Accused’s seat but is not concerned at

²¹ Defined in 1962 Code Section 210.0(4).

²² As defined in 1962 Code Section 210.0(3), serious bodily injury means “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.”

²³ 1962 Code Section 210.0(4).

1 the time because Complainant knows that many drivers carry firearms for self-protection.
2 Complainant rides with Accused most of the day, chatting as they go. That night,
3 preparing to sleep, Accused parks the truck by the side of the road. Accused then touches
4 Complainant sexually, and when Complainant rebuffs these advances, Accused says,
5 “Look where we are, on an isolated stretch of road. No one can see or hear us.” Accused
6 then touches Complainant again in a sexual way and inserts a finger into Complainant’s
7 anus. Accused testifies to believing that Complainant participated willingly and that the
8 “isolated road” comment merely sought to help Complainant relax without worries about
9 the intrusion of strangers. Complainant testifies that Complainant was not willing but
10 submitted after recalling the pistol and interpreting Accused’s “isolated road” comment
11 as a veiled threat.

12 If the factfinder concludes that Accused did not know that Complainant felt
13 threatened by the “isolated road” comment, but Accused was aware of a risk in that
14 regard, Accused cannot be convicted of Sexual Assault by Aggravated Physical Force or
15 Restraint under Section 213.1(1). That Section requires proof that Accused *knew*
16 Complainant submitted because of a perceived threat of serious bodily injury. If the
17 factfinder concludes that Accused *knew* that Complainant understood the “isolated road”
18 comment as an implied threat to inflict serious bodily injury and submitted for that
19 reason, Accused can now be convicted of Sexual Assault by Aggravated Physical Force
20 or Restraint under Section 213.1, which is graded as a felony of the third degree under
21 Section 213.1(2). But the higher grade of the offense under Section 213.1(2)(a), a felony
22 of the second degree, remains unavailable if Accused was unaware that Complainant had
23 seen the deadly weapon; the second-degree offense is likewise unavailable—even if
24 Accused knew Complainant had seen the weapon—if Accused did not know but was
25 merely aware of and recklessly disregarded the risk that the sight of the weapon caused
26 Complainant to submit to the sexual act. Accused can be convicted of the second-degree
27 offense under Section 213.1(2)(a) only if the factfinder concludes beyond a reasonable
28 doubt that Accused knew *both* that Complainant submitted because of a perceived threat
29 of serious bodily injury and that the threat causing submission involved the deadly
30 weapon.

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

Section 213.1(2)(b) raises the grade of the offense to a second-degree felony when the actor violates Section 213.1(1) and “knowingly acts with one or more persons who (i) also engage in an act or acts of sexual penetration or oral sex with the same victim at the same place at a time contemporaneous with the actor’s violation of this Section, or (ii) assist in the use of or threat to use aggravated physical force or restraint when the actor’s act of sexual penetration or oral sex occurs.” The fact that another person aided the actor in committing the offense does not in itself raise the grade of the offense. The higher penalty level authorized by subsection (2)(b) is restricted to situations in which the other person or persons themselves engage in acts of sexual penetration or oral sex with the same victim at the same time and place, or otherwise assist the actor by using or threatening to use aggravated physical force or restraint against the victim at the time when the sexual act or acts occur. The involvement of an accomplice²⁴ who purposely provides access to the place where another person commits a sexual attack, but plays no role in the offense when it occurs, would not make the principal perpetrator liable for the higher penalty level authorized under this provision. Absent other aggravating circumstances, the principal would be liable only for the third-degree felony offense under Section 213.1(1), and the person who aided would be liable only as an accomplice in that offense. But when a victim is subdued or violated by several people acting together, as in a classic “gang rape” situation, the greater brutality, danger to the victim, and attendant fear bring the crime within the domain of the more serious offense.

Illustrations:

7. A and B meet Complainant at a bar and socialize with one another. When Complainant takes a break to use a single-stall restroom at the back of the bar, A and B follow. As Complainant enters the restroom, A, who is much bigger and stronger, pushes Complainant inside and slams Complainant against the wall. Complainant struggles to break free and manages to open the door slightly, but as previously arranged, B holds the door shut from the outside. A grabs Complainant by the hair, knocks Complainant’s head against the wall, and then engages in an act of oral sex with Complainant.

²⁴ See 1962 Code Section 2.06(3).

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

1 These facts are sufficient to find A guilty under Section 213.1(1): The trier of fact
2 could conclude beyond a reasonable doubt that A knowingly caused Complainant to
3 submit to an act of oral sex by using aggravated physical force in the form of strength
4 sufficient to threaten or cause serious bodily injury. In addition, because A knew that
5 another person—B—assisted A in deploying that force, the multiple-actor enhancement
6 applies to A, who could be found guilty of the second-degree felony offense under
7 Section 213.1(2)(b). And because the trier of fact could conclude beyond a reasonable
8 doubt that B purposely aided A in committing that offense, there is sufficient evidence to
9 support B’s conviction as an accomplice in the same second-degree felony offense.²⁵

10 8. As in Illustration 7, A and B socialize with Complainant at a bar. When
11 Complainant takes a bathroom break, A follows, after first telling B of his plan to assault
12 Complainant. A asks B to get their car ready to leave so that A can make a quick escape.
13 In the bathroom A uses aggravated physical force to subdue Complainant and cause
14 Complainant to submit to oral sex, then runs outside where B is waiting with the getaway
15 car. On these facts, A could be found guilty of violating Section 213.1(1) if the trier of
16 fact concluded beyond a reasonable doubt that A knowingly caused Complainant to
17 submit to the act of oral sex by committing or threatening physical acts capable of
18 inflicting serious bodily injury. B could be found guilty of aiding and abetting A’s
19 violation of Section 213.1(1), because B purposely aided A in committing that offense.
20 But neither A nor B could be found guilty of the second-degree felony offense under
21 Section 213.1(2)(b), because B did not assist in using physical force against Complainant
22 at the time and place that the oral sex occurred.

23 9. At their shared home, A and B host a party that Complainant attends. During
24 the evening, Complainant drinks heavily and becomes disoriented. A and B lead
25 Complainant upstairs to a private room, and wait until Complainant becomes

²⁵ Under the Model Penal Code, as at common law, an actor is liable as “an accomplice of another person in the commission of an offense if: with the purpose of promoting or facilitating the commission of the offense, he . . . aids or agrees or attempts to aid such other person in planning or committing it.” 1962 Code Section 2.06(3)(a)(ii).

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

1 unconscious. While Complainant is unconscious, A and B take turns penetrating
2 Complainant.

3 On this evidence, both A and B could be convicted as principal offenders for an
4 offense under one or more Sections of Article 213, for example under Section
5 213.3(1)(b)(i), which prohibits acts of penetration with an unconscious person. In
6 addition, each may be found guilty as an accomplice in the Section 213.3(1)(b)(i) offense
7 committed by the other. But neither A nor B is liable under Section 213.1(1), which
8 requires proof that the actor caused Complainant to submit by using or threatening to use
9 physical force sufficient to inflict serious bodily injury. And the heightened penalty
10 provision of Section 213.1(2)(b) does not come into play, even though multiple actors are
11 involved, because the acts of sexual penetration in this case did not involve aggravated
12 physical force or restraint sufficient to establish the necessary predicate offense under
13 Section 213.1(1).

14 The multiple-offender provision does not cover all forcible sexual assaults involving
15 accomplices. An accomplice who does not actively participate in using physical force or physical
16 restraint against the victim does not receive the aggravated penalty, as shown in Illustration 8
17 above and in the Illustrations below.

18 **Illustrations:**

19 10. A and B frequently discuss their sexual fantasies about their co-worker V.
20 One day, A asks B, who works in the company's human-resources office, to get V's
21 home address, explaining that A plans to subdue and penetrate V. B gives A the
22 information. Several nights later, A waits outside V's home for V to take out the garbage.
23 When V does so, A, who is much bigger and stronger, grabs V, forcefully throws V to the
24 ground, and sexually penetrates V. On these facts, A could be found guilty of Sexual
25 Assault by Aggravated Physical Force or Restraint under Section 213.1(1), because the
26 trier of fact could find that A knowingly caused V to submit to an act of sexual
27 penetration by using aggravated physical force against V, that is, physical force capable
28 of inflicting serious bodily injury. B could be liable as an accomplice in that offense if it
29 is shown that B purposely facilitated A's crime. But A did not commit the second-degree
30 felony offense under Section 213.1(2)(b), because no one else joined A in using

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

1 aggravated physical force against V. B's liability as an accomplice is limited to the
2 Section 213.1(1) offense that A, the principal, committed.

3 11. Same facts as Illustration 10, except that bystander C sees A tackle V and
4 goes over to investigate. Rather than help V, C spontaneously joins in A's assault by
5 holding V down during A's act of penetration. C then penetrates V as well, with A
6 helping by holding V down. On these facts, both A and C committed the second-degree
7 felony offense under Section 213.1(2)(b). Each also could be found guilty as an
8 accomplice in the second-degree felony offense committed by the other, because the trier
9 of fact could conclude that each of them purposely assisted the other in using aggravated
10 physical force against V. But B (who gave A the home address) is guilty only of aiding
11 and abetting the violation of Section 213.1(1), because B did not purposely aid A in
12 violating Section 213.1(2)(b), and was not aware of C's participation.²⁶

13 12. Same facts as Illustration 11, except that A and C jointly decide to attack V,
14 and B intends to help both of them to do so. As in Illustration 11, both A and C are guilty
15 of the second-degree felony of Sexual Assault by Aggravated Physical Force or Restraint
16 as principals, because each knowingly used aggravated physical force causing V to
17 submit to an act of sexual penetration while the other directly participated. And because
18 B purposely aided A and C in committing these second-degree felony offenses, B is
19 liable as an accomplice in two second-degree felony offenses, the violations of Section
20 213.1(2)(b) committed by A and C.

21 Section 213.1(2)(c) raises the grade of Sexual Assault by Aggravated Physical Force or
22 Restraint to a second-degree felony when the actor, in committing the Section 213.1 offense,
23 recklessly causes "serious bodily injury." Serious bodily injury is defined in Section 210.0(3) as
24 "bodily injury which creates a substantial risk of death or which causes serious, permanent
25 disfigurement, or protracted loss or impairment of the function of any bodily member or

²⁶ Under the Model Penal Code, an accomplice may be charged with an offense less serious than that of the principal. See 1962 Code Section 2.06(7): "An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted."

organ.”²⁷ In order to face this increase in the grade of the offense, (1) the defendant must knowingly cause the other person to submit by using or threatening physical force or restraint sufficient to inflict or threaten serious bodily injury, (2) serious bodily injury must in fact result, either to that person or to someone else, and (3) the actor must have recklessly disregarded the risk that such injury would occur.

Although the Section 213.1 predicate offense typically will involve some risk of serious bodily injury, the Section 213.1(2)(c) enhancement does not apply unless that risk actually materializes. A defendant who causes another person to submit by using superior physical strength to overpower and tie down that person, with an implicit threat of inflicting serious bodily injury if the other person fails to submit, could be found liable for the predicate offense of Sexual Assault by Aggravated Physical Force or Restraint under Section 213.1(1). But such conduct does not inevitably lead to serious bodily injury, and therefore the defendant cannot be convicted of the second-degree felony offense under Section 213.1(2)(c) unless serious bodily injury actually results.

So long as the prosecution establishes the predicate offense under Section 213.1(1), by proving that a defendant knowingly caused submission by using or threatening to use aggravated physical force or restraint, conviction of the second-degree felony offense under Section 213.2(c) does not require proof that the defendant knew with certainty that serious bodily injury would occur. The prosecution must, however, prove that the defendant was at least reckless in that regard. That is, the prosecution must prove beyond a reasonable doubt that the defendant was aware of, and consciously disregarded, a substantial and unjustifiable risk that serious bodily injury would result.

3. Consent – Section 213.1(3). Under most circumstances, the freely given consent of a competent adult transforms a potentially harmful sexual interaction into one that is not a proper subject of legal concern.²⁸ Yet persons who appear to assent to sexual acts obviously do not do so freely when they submit only because they face a threat of serious bodily harm. Apparent

²⁷ Cf. 1962 Code Section 210.0(3). Most states do not consider pregnancy “serious bodily injury.” See *infra* note 104 and accompanying text.

²⁸ See Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121 (1996).

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

1 consent under these circumstances is universally regarded as legally ineffective.²⁹ Thus, when
2 the circumstances described in Section 213.1(1) are proved beyond a reasonable doubt—that the
3 actor knowingly used or threatened aggravated physical force or restraint against another person
4 and knew that the other person submitted to or performed the sexual act because of that force or
5 restraint—it is superfluous to inquire into the other person’s willingness. Those circumstances,
6 once proved, preclude the possibility of legally effective consent. Section 213.1(3) makes this
7 principle explicit, as did the 1962 Code with respect to uses of force generally.³⁰

8 For purposes of Section 213.1, this principle applies even when a threat to inflict serious
9 bodily injury (for example, the threat of a severe beating) is communicated in a manner that the
10 complainant allegedly finds sexually stimulating and desirable. To be sure, sexual encounters
11 should not give rise to criminal liability when consenting adults agree to participate on a fully
12 voluntary basis in sexual practices of this kind, colloquially referred to as “BDSM,”³¹ provided
13 that serious bodily harm does not actually result.³² Section 213.10 accordingly provides an

²⁹ See, e.g., *Madison v. State*, 766 S.E.2d 206, 212 (Ga. Ct. App. 2014) (holding that “a trial court may properly charge the jury that ‘consent induced by force, fear, or intimidation does not amount to consent in law....’”). Similarly, in *Dunton v. People*, 898 P.2d 571 (Colo. 1995) (en banc), defendant allegedly grabbed the victim, pulled her into an apartment, and sexually penetrated her while physically restraining her. Defendant argued that the victim’s body language indicated she was willing and that the trial court should have instructed the jury that to convict, it must find he was aware of the victim’s lack of consent. The statute defined sexual assault to include conduct where “[t]he actor [knowingly] causes submission of the victim through the actual application of physical force or physical violence.” Upholding the conviction, the court held it was not necessary to prove defendant’s awareness of victim’s lack of consent because the statute equated lack of consent with proof that a defendant caused the victim’s submission by force. The court stated: “[T]he first degree sexual assault statute prohibits conduct which by its very nature negates the existence of the victim’s consent. The statute equates the victim’s nonconsent with proof that the defendant has caused the victim’s submission by force, by threat either of great harm or of retaliation.... These acts of the defendant cause the victim to be unable to consent.”

³⁰ See 1962 Code Section 2.11(3) (“*Ineffective Consent*. . . [A]ssent does not constitute consent if . . . it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.”).

³¹ 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>.

³² Cf. 1962 Code Section 2.11(2)(a) (providing that consent ordinarily is not a defense to the infliction of serious bodily harm). Although Section 2.11, defining consent for purposes of the 1962 Code, does not apply to Article 213, Section 213.10 imports the same limitation into Article 213.

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

1 affirmative defense, narrowly framed, to preclude liability in such situations. But when an actor
2 has knowingly used or threatened aggravated physical force or restraint that causes sexual
3 submission and the safeguards of Section 213.10 are not met, the actor does not escape liability
4 merely by suggesting that he or she believed the other person might be attracted to a
5 sadomasochistic experience or might “like it rough.”

6 This is not an abstract or theoretical problem. Among the most serious rape prosecutions
7 are those involving allegations that the defendant ignored the complainant’s emphatic protests
8 and used brutal violence to force the complainant to submit to or perform the sexual act. In such
9 cases, a frequent defense strategy is to concede the use of physical force but argue that the
10 complainant “likes it rough” or, if not, that the defendant thought this was the case.³³ But it is

³³ See George E. Buzach, *The Rough Sex Defense*, 80 J. CRIM. L. & CRIMINOLOGY 557 (1989). The often-unappreciated importance of this problem makes it worthwhile to document its prevalence in detail. See Corey Rayburn Yung, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437, 459 (2006) (noting that “the defense strategy in most rape cases is to argue that the rape was simulated. Defense attorneys do not use the term ‘simulated,’ but when they say ‘it was just rough sex’ or ‘bruises are normal,’ they are saying the rape was only an illusion, a facsimile, a copy, a *simulation*.”); *Hill v. Almager*, No. C 07-3229 JSW PR, 2010 WL 2721538, at *6 (N.D. Cal. July 7, 2010) (holding that defense counsel’s use of the “rough sex” defense in trial for spousal rape and other sexual-assault charges was reasonable under *Strickland v. Washington*, 466 U.S. 668 (1984)).

For a few of the voluminous press reports on use of the rough-sex defense in sexual-assault prosecutions, see, e.g., Simon McCormack, *Mohammad Hossain Cleared in ‘50 Shades of Grey’ Rape Case*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffpost.com/entry/not-enough-evidence-50-shades-of-grey-rape_n_6912158 (county judge ruling that there was not enough evidence presented to establish probable cause to pursue aggravated criminal sexual-assault charges against defendant who argued that he and the victim were “acting out scenes from ‘50 Shades [of Grey]’”); Niraj Chokshi, *Eric Schneiderman, Consent and Domestic Violence*, N.Y. TIMES (May 8, 2018), (reporting that former New York attorney general Eric T. Schneiderman, in response to allegations of sexual assault, asserted that he was merely engaging in “role-playing and other consensual sexual activity,” and noting that “[t]hose accused of committing violence against their partners often seek to dismiss those claims, sometimes by arguing that the partners were willing participants in sexual role playing or ‘rough sex[.]’”); *Ex-NFL Player Hugh Douglas Faces Civil Suit in Assault Case*, CBS NEWS (Apr. 29, 2014), <https://www.cbsnews.com/news/ex-nfl-player-hugh-douglas-faces-civil-suit-in-assault-case/> (reporting that the defendant, who was initially charged with assault and strangulation, argued that the victim’s “neck injury was the result of rough sex” and ultimately pleaded no contest to misdemeanor breach of peace); Olivia Messer, *Mistrial Declared in Trinity University Cheerleader’s Murder Case*, THE DAILY BEAST (Dec. 13, 2019), <https://www.thedailybeast.com/mark-howerton-trial-mistrial-declared-in-murder-case-of-trinity-university-cheerleader-cayley-mandadi> (mistrial due to deadlocked jury in trial for murder and aggravated sexual assault where defense counsel argued that the victim could have died as a result of “rough” but “consensual” sex with the defendant).

1 unacceptable for a sexual aggressor to act on possibly wishful thinking about another party's
 2 willingness to be physically forced into sexual submission and then demand impunity simply
 3 because the actor claims not to know for certain that the other party did not welcome that
 4 treatment.³⁴ Once the prosecution proves that a complainant submitted *because of* the specified
 5 degree of physical force or restraint and that the defendant knew this, criminal culpability
 6 properly attaches, unless the actor has taken the special care required by Section 213.10 to assure
 7 that the other party had indeed given genuine permission for that use of force or restraint.³⁵

8 Section 213.1(3), read in conjunction with Section 213.10, does not override the
 9 definition of consent in Section 213.0(2)(e). It does not require the actor to obtain an express
 10 statement of “affirmative consent” before sexual interaction generally. Rather, its requirement of
 11 explicit prior permission applies only when sexual interaction is accompanied by the actor’s use
 12 of or threat to use aggravated physical force or restraint. Nor does Section 213.1(3) nullify the
 13 stipulation in Section 213.0(2)(e)(ii) that consent can be inferred from behavior, including
 14 “inaction—in the context of all the circumstances.” Rather, Section 213.1(3) simply articulates

Nearly a dozen additional press reports and numerous additional reported cases involving the defense are collected in Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL’Y REV. 431, 459-461 & nn.108-109 (2016).

Underscoring the importance of safeguards to prevent the unjustified use of physical violence in sexual encounters, the “rough sex” defense also is raised, apparently with increasing frequency and increasing success, in domestic violence and even homicide cases. See Cheryl Hanna, *Sex is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239, 244 (2001) (“Often, [domestic violence] defendants [that the author prosecuted] would claim that the injuries inflicted upon their intimate partners were a result of “rough sex” and thus raised consent as a defense to charges of assault and battery.”); Alexander Robertson, *Violent Men Are “Getting Away with Murder” by Using 50 Shades of Grey Defence and Blaming “Rough Sex” for Their Partners’ Deaths, Campaigners Warn*, DAILY MAIL (U.K.), Oct. 28, 2019, <https://www.dailymail.co.uk/news/article-7621111/Violent-men-getting-away-murder-using-50-Shades-Grey-defence-campaigners-say.html> (reporting advocates’ claim that in homicide cases “[t]he number of men to use the [50 Shades of Grey] defence [sic] has increased tenfold since 2000.”).

³⁴ In the UK, concern about unjustified obstacles to conviction in such cases has recently prompted the government to consider legislation to curb the use and abuse of the “rough sex” defense. See Jamie Grierson, *Government Considers Law to Curb Use Of “Rough Sex” Defence*, THE GUARDIAN, Mar. 2, 2020, <https://www.theguardian.com/society/2020/mar/03/government-considers-law-curb-use-rough-sex-defence>.

³⁵ Cf. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (declining to extend constitutional 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”).

the uncontroversial principle, made explicit in Section 213.0(2)(e)(iv) itself, that “consent is ineffective when given ... under circumstances precluding the free exercise of consent.” In a prosecution under Section 213.1, the requirement of clearly expressed prior permission described in Section 213.10 comes into play only as a prerequisite to an actor’s use of or threat to use aggravated physical force or restraint.

Illustration:

13. At Accused’s apartment after a date, Complainant notices a popular “BDSM” magazine, leafs through it and laughingly remarks, “Some folks really seem to be into this—they even made it into a movie!” Accused replies, “A lot of people say it’s fun.” Accused then slaps Complainant hard across the face, throws Complainant to the floor, and carries Complainant to the bedroom, where Accused ties Complainant’s hands and feet to the bedposts. Accused holds a sharp kitchen knife against Complainant’s throat and tells Complainant, “If you scream, you’ll be very sorry.” Accused then touches Complainant in increasingly intimate ways and eventually penetrates Complainant, who stares in stony silence throughout. Afterward, Complainant reports the incident to the police, and officers observe prominent bruises on Complainant’s cheek and wrists.

At trial, Complainant testifies that Complainant did not want to have sex with Accused but submitted without resisting because of shock and fear resulting from Accused’s use of such unexpected force and Accused’s threat to inflict serious bodily injury. Accused admits knowing that Complainant submitted because of Accused’s use of physical force and threat to inflict injury, but testifies that Accused believed Complainant was attracted to that sort of sexual experience and welcomed it. In support, Accused refers to Complainant’s evident interest in the BDSM magazine.

Accused requests an instruction that even if Complainant submitted because of substantial physical force and threats of serious bodily injury, the prosecution must prove beyond a reasonable doubt (1) that Complainant did not consent, meaning Complainant was not willing to engage in the act of sexual penetration. Accused requests a further instruction (2) that the prosecution also must prove beyond a reasonable doubt that Accused was aware of Complainant’s unwillingness, and therefore (3) that the jury must acquit if it has a reasonable doubt about whether Complainant was truly unwilling or whether Accused was aware of Complainant’s unwillingness.

1 The judge may properly deny those instructions. Instead, the judge may tell the
2 jury it can convict if it finds beyond a reasonable doubt that (1) Accused used aggravated
3 physical force by carrying Complainant into the bedroom, tying down Complainant's
4 arms and legs, wielding a weapon, and making an explicit threat of serious bodily injury;
5 (2) Complainant engaged in the act of sexual penetration because of those actions; and
6 (3) Accused knew that Complainant submitted for that reason. To defend on the basis of
7 Complainant's alleged receptivity to being slapped, restrained, and threatened, Accused
8 would have to meet the criteria set out for such a defense in Section 213.10.

REPORTERS' NOTES

9 ***1. The Element of Physical Force or Restraint.***

10 *Current law.* Most jurisdictions take force of some sort into account in defining or
11 grading their adult felony sex offenses.³⁶ However, the definition of the force required and the
12 operational significance of such force vary widely. Some statutes do not *seem* to require proof of
13 force at all, but they define nonconsent by referring to force and resistance.³⁷ In other states,
14 statutory language nominally imposes a strong force requirement, but courts interpret or apply
15 that language in ways that diminish or minimize the degree of force actually required.³⁸

³⁶ See John F. Decker & Peter G. Baroni, “No” Still Means “Yes”: The Failure of the “Non-Consent” Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1102 (2011).

³⁷ See, e.g., DEL. CODE ANN. Tit. 11, § 770(a)(3)(a) (2018) (“(a) A person is guilty of rape in the fourth degree when the person: (3) Intentionally engages in sexual penetration with another person under any of the following circumstances: . . . a. The sexual penetration occurs without the victim’s consent. . . .”); DEL. CODE ANN. Tit. 11 § 761(j) (2018) (defining “without consent” as “compelled the victim to submit . . . by force” and requiring reasonable resistance that “makes the victim’s refusal to consent known to the defendant”).

³⁸ See, e.g., ALA. CODE § 13A-6-60(8) (2018) (defining forcible compulsion as “[p]hysical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person”); *Ex parte Williford*, 931 So. 2d 10, 13-15 (Ala. 2005) (upholding conviction in case involving isolation and age differentials and noting that “[t]he force necessary to sustain a conviction for first-degree rape or first-degree sodomy is relative”).

Arizona law illustrates a similar dynamic. The state’s statute criminalizes sexual intercourse accomplished “without consent.” ARIZ. REV. STAT. § 13-1404(A) (2018). But the Arizona statute then defines “without consent” as limited to four circumstances, one of which is that “[t]he victim is coerced by the immediate use or threatened use of force against a person or property.” ARIZ. REV. STAT. ANN. § 13-1401(7) (2018). Case law clarifies that the statutory definition of “nonconsent” is not exhaustive, and that the word has its “ordinary meaning.” *State v. Stoeckel*, 2012 WL 1248615 (Ariz. Ct. App. Apr. 11, 2012) (citing *State v. Witwer*, 856 P.2d 1183, 1185-1186 (Ariz. Ct. App. 1993)) (rejecting argument that “voluntary submission to economic or financial pressures” does not meet statutory nonconsent).

1 Elsewhere, statutes have not generated authoritative reported case law. Any summary of current
2 law is necessarily approximate. Subject to that caveat, a review of statutes and cases reveals the
3 following landscape, starting with requirements applicable to the least serious of the adult felony
4 sex offenses and then turning to requirements applicable to the most serious.³⁹

5 a. For *the least serious* of the adult felony sex offenses, only a handful of states still
6 require proof of a significant degree of physical force.⁴⁰ The majority of states either eliminate
7 force as a requirement (except to the extent necessary to effect penetration),⁴¹ define it broadly to
8 include not just physical force but circumstantial coercion or intimidation,⁴² or require only a
9 slight showing of force or restraint (such as pressure applied against a victim’s hands or body

definition, noting that the word has its “ordinary meaning” and that the victim’s repeated statements that she did not want the defendant to touch her met the statutory requirements even without financial pressure). Thus, on its face, the statute first appears to penalize sex without consent, on second glance it appears to impose a force requirement, and on final inspection it is revealed that force is not invariably required and that a broad range of factors can invalidate consent.

³⁹ In addition to conducting their own independent research, the Reporters also consulted several particularly helpful recent compilations of statutory materials on this topic: an article by Professor John F. Decker and Peter G. Baroni, *supra* note 36; statutory provisions compiled by AEquitas: The Prosecutors’ Resource on Violence Against Women (2013); and a compilation of statutes created by a joint project between the National Women’s Law Center and the National Crime Victim Law Institute.

⁴⁰ For examples of statutes that preserve some force requirement even for the least serious adult sex offense, see, e.g., IOWA CODE ANN. § 709.1 (2018); N.C. GEN. STAT. ANN. § 14-27.2 et seq. (2018); S.C. CODE ANN. § 16-3-651(2018). Notably, even among these states, many have felony provisions that punish sexual assaults in the absence of force in discrete situations, such as sexual penetration in the context of unconscious victims, deception, or persons in custody.

⁴¹ E.g., OR. REV. STAT. §§ 163.415, .425 (2018); OKLA. STAT. ANN. tit. 21, § 111(A) (2018) (“the term ‘force’ shall mean any force, no matter how slight, necessary to accomplish the act without the consent of the victim”). 18 PA. CONS. STAT. ANN. § 3124.1 (WEST 2018); WIS. STAT. ANN. § 940.225(3) (WEST 2018). Several additional states have eliminated force requirements through judicial interpretation. See, e.g., *Gonzalez v. Com.*, 611 S.E.2d 616, 620 (Va. Ct. App. 2005) (stating, “If the victim did not consent . . . the use of force is shown by the act of non-consensual intercourse itself.”); *In re M.T.S.*, 609 A.2d 1266 (N.J. 1992); *State v. Sedia*, 614 So. 2d 533, 535 (Fla. Dist. Ct. App. 1993) (stating “The state need not prove that the defendant used more physical force than merely the physical force necessary to accomplish sexual penetration in order to convict a defendant under section 749.011(5),” and relying on FLA. STAT. § 794.005 (legislative finding that “it was never intended that the sexual battery offense . . . require any force or violence beyond the force and violence that is inherent in the accomplishment of ‘penetration’ or ‘union.’”) and *In re M.T.S.*, *supra*. See also Reporters’ Note to Section 213.0(2)(f), *supra*.

⁴² See Reporters’ Note to Section 213.0(2)(f).

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

parts).⁴³ Most jurisdictions include *implied* threats to use physical force or restraint, although they vary on the standard applied.⁴⁴

The states that treat implied threats to use force or restraint as sufficient to support a felony sex offense follow a broad range of approaches. Some states focus on physical aggression, most commonly by including threats to kidnap⁴⁵ or to damage property.⁴⁶ Some states go further

⁴³ See, e.g., *People v. Griffin*, 94 P.3d 1089, 1097 (Cal. 2004) (“[T]he prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the victim.”); *State v. Borthwick*, 880 P.2d 1261 (Kan. 1994) (victim’s testimony that accused pushed her legs apart was sufficient evidence of force); *People v. Le*, 346 Ill. App. 3d 41, 50 (2004) (there is “no definite standard setting the amount of force needed to show that the parties engaged in nonconsensual intercourse, and each case must be considered on its own facts”).

⁴⁴ See, e.g., *Way v. United States*, 982 A.2d 1135 (D.C. 2009) (upholding conviction under “reasonable fear” provision of a police officer who insisted that a prostitute provide free sexual services); *Yarnell v. Commonwealth*, 833 S.W.2d 834, 836 (Ky. 1992) (recognizing prior physical, emotional, or verbal abuse as relevant to an implied threat). A handful of jurisdictions follow this broader view as a matter of case law, see, e.g., *State v. Meyers*, 799 N.W.2d 132, 147 (Iowa 2011); *Dasher v. State*, 636 S.E.2d 83, 86 (Ga. Ct. App. 2006); *Lewis v. State*, 137 P.3d 909, 912 (Wyo. 2006); *United States v. Holly*, 488 F.3d 1298, 1303 (10th Cir. 2007), or statutory law, see MINN. STAT. ANN. § 609.341 (West 2018) (defining “coercion” as “the use by the actor of words or circumstances that cause the complainant reasonably to fear that the actor will inflict bodily harm upon the complainant or another, or the use by the actor of confinement, or superior size or strength, against the complainant that causes the complainant to submit to sexual penetration or contact against the complainant’s will. Proof of coercion does not require proof of a specific act or threat”).

Alaska’s criminal code provides that sexual assault in the first and second degrees (the two penetrative offenses) occurs when “the offender engages in sexual penetration with another person without consent of that person.” ALASKA STAT. ANN. § 11.41.410 (WEST 2018). “Without consent,” in turn, is defined as when a person “with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone.” ALASKA STAT. ANN. § 11.41.470 (WEST 2018). On its face, then, Alaska seems to be an overt-force jurisdiction (that also recognizes both express and implied threats of force). See also *Ritter v. State*, 97 P.3d 73 (Alaska Ct. App. 2004) (affirming the conviction of a massage therapist who digitally penetrated his adult clients, finding implied threat of force).

Finally, some states appear more willing to acknowledge implied threat of force in the context of certain relationships with inherent power imbalances, such as sexual assaults by guardians or police officers. See, e.g., *State v. DiPetrillo*, 922 A.2d 124 (R.I. 2007) (acknowledging that precedent recognized implied threat of force in the context of a police officer’s sexually coercive actions, but rejecting that theory in context of ordinary employment relationship).

⁴⁵ See, e.g., ARK. CODE ANN. § 6-14-101(2) (2018); KY. REV. STAT. ANN. § 510.010(2) (2018).

⁴⁶ See, e.g., IDAHO CODE ANN. § 18-6101(10) (WEST 2018).

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

1 and recognize proxies for force such as size differentials between the accused and complainant,
2 isolation, or other indicators of physical domination.⁴⁷

3 A handful of states go beyond physical acts to define force as also including
4 *psychological* coercion.⁴⁸ These forms of coercion are not sufficient to support liability under
5 Section 213.1, but they are covered by Section 213.4 (Sexual Assault by Extortion) under some
6 circumstances. Formulations along these lines include statutes that penalize submission obtained
7 by:

- 8 • “extortion,” “intimidation,” or “coercion”⁴⁹;
- 9 • “threats of public humiliation or intimidation”⁵⁰;
- 10 • threats to accuse the victim or any other person of a crime⁵¹;
- 11 • threats to “expose a secret or publicize an asserted fact, whether true or false,
12 tending to subject any person to hatred, contempt or ridicule”⁵²;

⁴⁷ State v. Gilger, 158 Wash. App. 1034 (2010), review denied, 171 Wash. 2d 1009, 249 P.3d 1028 (2011) (“[F]orcible compulsion may be found in the presence of other forms of non-physical resistance that are ‘reasonable under the circumstances,’ given the physical size differences between the victim and perpetrator, the victim’s perception of the futility of a physical struggle, and the victim’s sense of intimidation and fear.”); MINN. STAT. ANN. § 609.341 (WEST 2018) (“[U]se by the actor of confinement, or superior size or strength, against the complainant that causes the complainant to submit to sexual penetration or contact against the complainant’s will. Proof of coercion does not require proof of a specific act or threat.”).

⁴⁸ E.g., PA. CONS. STAT. ANN. 18 § 3101 (2018) (“Compulsion by use of physical, intellectual, moral, emotional, or psychological force, either express or implied.”); State v. Dehner, 2013 WL 4470810 (Ohio Ct. App. 2013) (defendant’s threats to take away phone, car, and spending money of his step-granddaughter, who lived with him, were sufficient to support rape conviction under statute applicable to a person who “compels the other person [whether minor or adult] to submit by force or threat of force”; court held that “the force requirement need not be overt and physically brutal but can be subtle and psychological”) (internal quotation marks omitted); State v. Meyers, 799 N.W.2d 132, 147 (Iowa 2011) (“psychological force or inability to consent based on the relationship and circumstance of the participants may give rise to a conviction under the ‘against the will’ element [of the statute]”).

⁴⁹ Decker & Baroni, *supra* note 36, at 1121 & n.265 (collecting statutes of roughly seven states) (“none of these . . . states . . . further define what constitutes ‘extortion’”). North Dakota defines coercion as imposing “fear or anxiety through intimidation, compulsion, domination, or control with the intent to compel conduct or compliance.” *Id.* at 1121 & n.268. Texas defines “coercion,” sufficient for sexual assault, a felony of the second degree (20-year maximum) (see TEX. PENAL CODE § 22.011(b)(1)) (2017)) to include any threat “to expose a person to hatred, contempt, or ridicule [or] to harm the credit or business repute of any person. . . .” *Id.* § 1.07(a)(9)(D), (E).

⁵⁰ Decker & Baroni *supra* note 36, at 1121 (citing this language as followed by three states).

⁵¹ See, e.g., DEL. CODE ANN. Tit. 11, § 774 (2018).

⁵² IDAHO CODE ANN. § 18-6101(10) (WEST 2018); TEX. PENAL CODE § 1.07(a)(9)(D) (2017) (any threat “to expose a person to hatred, contempt, or ridicule”).

1 • “a threat, express or implied, that places a person in fear of public humiliation,
2 property damage, or financial loss”⁵³; or

3 • “use of physical, intellectual, moral, emotional, or psychological force, either
4 express or implied.”⁵⁴

5 In contrast to the treatment of force and coercion, the treatment of resistance appears far
6 more uniform across contemporary American law. Historically, under the common law, a
7 defendant could not be convicted of sexual assault unless the victim had resisted—often “to the
8 utmost”—or unless the physical force used was so overwhelming that resistance would be
9 futile.⁵⁵ *Physical* resistance was required; verbal refusals were insufficient. Some victims’
10 advocates have pointed to legitimate reasons for encouraging victims to resist physically when
11 they feel physically and psychologically able to do so. Data suggest that resistance (when
12 reasonably feasible) may “deter rape completion without increasing the serious bodily injury
13 women suffer”;⁵⁶ may decrease the extent of psychological harm to the victim;⁵⁷ and may
14 increase the chances of apprehending and convicting the assailant.⁵⁸ But to recognize these
15 possible benefits does not justify *requiring* resistance whenever possible. The law’s traditional
16 requirement of physical resistance undervalued a woman’s “no,” at times treating physical or
17 even verbal resistance as if it were an expected part of mutually desired sexual foreplay.⁵⁹

⁵³ HAWAII REV. STAT. ANN. § 707-700 (2018); TEX. PENAL CODE § 1.07(a)(9)(E) (2017) (any threat “to harm the credit or business repute of any person....”)

⁵⁴ PA. CONS. STAT. ANN. 18 § 3101 (2018); *State v. Meyers*, 799 N.W.2d 132, 146 (Iowa 2011) (“[C]onsidering the legislative history of Iowa’s sexual abuse statute, the language and purpose of the statute, our prior cases interpreting the statute, and the persuasive authority from other jurisdictions and scholars on the topic, we conclude psychological force or inability to consent based on the relationship and circumstance of the participants may give rise to a conviction under the ‘against the will’ element. . . .”).

⁵⁵ Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 962. Decker and Baroni observe that the statutory-resistance states may employ their requirements to different effects. Decker & Baroni, *supra* note 36, at 1103-1104. For instance, some states use resistance to gauge the existence of nonconsent (e.g., Alabama, Virginia, and Nebraska); some states use it to gauge force (e.g., Missouri and Washington); and some states use resistance to assess the defendant’s mental state about the victim’s nonconsent (e.g., Delaware and Nebraska). *Id.*

⁵⁶ *Id.* at 980-987 (collecting studies).

⁵⁷ *Id.* at 987-990.

⁵⁸ *Id.* at 990-991.

⁵⁹ *Id.* at 992-994.

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

1 Imposing strict resistance requirements—whether by statute or case law—reinforces unrealistic
2 “masculine” ideas of “fighting back”⁶⁰ and presents unjustified barriers to effective prosecution
3 of sexual assault.

4 In the wake of these criticisms, states gradually relaxed traditional resistance
5 requirements. In adult felony sex prosecutions, only eight states still formally require resistance
6 unless it would be futile or likely to result in injury.⁶¹ Among these states, only West Virginia
7 provides a statutory definition of resistance: “physical resistance or any clear communication of
8 the victim’s lack of consent.”⁶² Under the case law, every jurisdiction that requires resistance
9 currently appears to recognize verbal resistance as sufficient to meet this requirement.⁶³

10 In contrast, 16 states and the District of Columbia have statutes stating that resistance is
11 not required.⁶⁴ One state court has judicially eliminated what might have been an implicit

⁶⁰ Id. at 1009-1011.

⁶¹ Only one state retains the historical standard of resistance “to the utmost,” but it does so only for a class of aggravated rape that had been subject to the death penalty. LA. REV. STAT. ANN. § 14:42(A)(1) (2018); see also *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (invalidating death penalty for rape of a child under this statute). In two states the felony sex offense incorporates a requirement of “earnest resistance.” ALA. CODE § 13A-6-60(8) (LEXISNEXIS 2018); W. VA. CODE ANN. § 61-8B-1(1)(A) (LEXISNEXIS 2018). For its offenses requiring proof of forcible compulsion, one state requires “reasonable” resistance, MO. ANN. STAT. § 556.061(27)(A) (WEST 2018), while two more require only that the victim make refusal reasonably known, DEL. CODE ANN. Tit. 11, § 761(J)(1) (2018); NEB. REV. STAT. § 28-318(8)(B)-(C), (9)(A) (2018). But see *State v. Van*, 268 Neb. 814, 836 (Neb. 2004) (“[T]he mere fact that J.G.C. did not verbally or physically resist is not determinative of whether he consented to the acts. The record includes evidence that J.G.C. was subject to beatings for disobeying Van and that he revoked his consent to the BDSM relationship prior to the acts of sexual penetration.”). Finally, in two states the felony sex offense simply requires “resistance.” IDAHO CODE ANN. § 18-6101(4) (2018); WASH. REV. CODE ANN. § 9A.44.010(6) (WEST 2018), although Idaho recently amended its statute to define rape to include liability “[w]here the victim is prevented from resistance due to an objectively reasonable belief that resistance would be futile. . . .” IDAHO CODE ANN. § 18-6101(5) (2018). Massachusetts is not included in this count, as it eliminated a statutory resistance requirement. However, its narrowly worded jury instruction appears to reintroduce some idea of resistance as a requirement, not just a factual consideration. Instructions for Specific Crimes, CRMJII, MA-CLE 2-1 (“The complainant is not required to use physical force to resist. However, you may consider evidence of any attempt to restrain or confine the complainant, of violence by the defendant, or of struggle or outcry by the complainant on the issues of force and consent. However, lack of such evidence does not necessarily imply consent or the absence of force, because in certain circumstances physical resistance may not be possible. You may consider all of the circumstances and the entire sequence of events in determining whether the intercourse was without the complainant’s consent and (his/her) ability to resist.”).

⁶² W. VA. CODE ANN. § 61-8B-1(1) (LexisNexis 2018).

⁶³ *State v. Jones*, 299 P.3d 219, 227 (Idaho 2013) (“[V]erbal resistance is sufficient resistance to substantiate a charge of forcible rape”); *Decker & Baroni*, *supra* note 36, at 1112.

⁶⁴ ALASKA STAT. § 11.41.470(8) (2018); D.C. CODE § 22-3001 (2018); FLA. STAT. ANN. § 794.011 (WEST 2018); 720 ILL. COMP. STAT. ANN. 5/11-1.70 (WEST 2018); IOWA CODE ANN. § 709.5

1 statutory resistance requirement.⁶⁵ But many states without resistance requirements acknowledge
2 that resistance may shed light on whether the complainant did not consent and whether the
3 defendant had the culpable mental state necessary for conviction.⁶⁶

4 *b. For the most serious adult felony sex offenses, state statutes take a variety of forms. A*
5 *few draw no distinction between the most dangerous forms of physical force and the lower levels*
6 *of indirect or implicit physical force sufficient to support the basic felony offense: Any degree of*
7 *physical force or physical restraint along this continuum places the offense in the same felony*
8 *category for grading purposes, with perhaps one or two narrow enhancements for offenses*
9 *involving, for example, a deadly weapon or serious bodily harm.⁶⁷ More commonly, modern*
10 *statutes differentiate between degrees of the sexual offenses, reserving the most severe sanctions*
11 *for especially violent or dangerous forms of sexual assault.*

12 *Assessment.* Obtaining a person’s submission by inflicting or threatening physical injury,
13 or by restraining a person’s ability to move freely, ought to be punished more severely than
14 nonconsensual sexual assault that lacks these aggravating elements. Doing so is not
15 controversial, and many states acknowledge that this is best accomplished by establishing a
16 separate grading category, so that nonconsensual sex without aggravating elements carries a
17 lower statutory maximum sentence than more violent sexual conduct that carries a more severe
18 statutory maximum sentence.⁶⁸

(2018); KY. REV. STAT. ANN. § 510.010(2) (2018); ME. REV. STAT. ANN. Tit. 17-A § 251 (2018); MICH. COMP. LAWS ANN. § 750.520i (WEST 2018); MINN. STAT. ANN. § 609.341 (WEST 2018); MONT. CODE ANN. § 45-5-511(5) (2018); N.J. STAT. ANN. § 2C:14-5(A) (WEST 2018); N.M. STAT. ANN. § 30-9-10 (WEST 2018); N.D. CENT. CODE § 12.1-20-04 (2018); OHIO REV. CODE ANN. § 2907.02 (WEST 2018); OR. REV. STAT. ANN. § 163.315(2) (WEST 2018); PA. CONS. STAT. ANN. 18 § 3107 (WEST 2018); VA. CODE ANN. § 18.2-67.6 (WEST 2018). Of these, seven (Florida, Illinois, Iowa, Kentucky, New Mexico, Ohio, and Virginia) specify expressly that physical resistance is not required, but do not reference verbal resistance.

⁶⁵ State v. Borthwick, 880 P.2d 1261 (Kan. 1994); KAN. STAT. ANN. § 21-5503 (WEST 2018) (requiring that the victim be “overcome by force or fear,” but not explicitly requiring proof of resistance).

⁶⁶ See, e.g., Commonwealth v. Berkowitz, 641 A.2d 1161, 1163-1164 (Pa. 1994).

⁶⁷ E.g., MD. CODE §§ 3-303, 3-304 (2018) (rape in the second degree, 20-year maximum, for vaginal intercourse by force without consent; rape in the first degree, maximum of life, when involving a deadly weapon or serious physical injury); N.J. Stat. Ann. § 2C: 14-2c(1) (2018), as interpreted in In re M.T.S., 609 A.2d 1266 (1992) (sexual assault for sexual penetration by physical force, coercion, or without consent, 10-year maximum; aggravated sexual assault when committed with a weapon or “severe personal injury,” 20-year maximum).

⁶⁸ Compare N.Y. PENAL LAW § 130.35 (2018) (Rape in the First Degree, 25-year maximum) (sexual intercourse by “forcible compulsion”) with N.Y. PENAL LAW § 130.25(3) (2018) (Rape in the Third Degree, four-year maximum) (sexual intercourse without consent); PA. STAT. § 3101 (2018) (Rape involving “forcible compulsion” . . .); WIS. STAT. § 940.225(2)(a) (2018) (Second-degree sexual assault, 40-year maximum) (sexual intercourse by “force or violence”) with WIS. STAT. § 940.225(3)

Section 213.1 endorses this approach. The use or threat of aggravated physical force adds physical violence and serious bodily injury—actual or threatened—to the harm of nonconsensual sexual penetration or oral sex. Such behavior is especially culpable and is especially important to deter through the prospect of a more significant term of imprisonment. Conversely, when sexual misconduct lacks these aggravating elements, there is good reason to impose a lower cap on the available punishment, in order to restrain and economize in society’s use of the most afflictive sanctions. Moreover, the wide range of punishments potentially available for sexual offenses, from probation to decades of imprisonment, counsels in favor of a series of discrete offenses, with discrete statutory maximums, in order to limit sentencing discretion.

The revised Code fulfills these objectives by reserving the most severe penalties for conduct involving aggravated physical force or restraint. Sexual submission that results from less dangerous forms of physical force or restraint and conduct involving other grave but less abusive means are graded as less serious felonies, with correspondingly lower statutory maximum sentences.

2. Causation – The Required Connection Between Force and Submission.

Current law. American jurisdictions display little uniformity in their judgments about whether and when the use of force or violence should trigger enhanced penalties. As discussed in connection with the definition of “physical force,” there are at least six roughly distinguishable approaches.⁶⁹ At one end of the spectrum, a number of states place *any* nonconsensual penetration among the most serious felonies; penetration without consent establishes by itself a sufficient showing of physical force.⁷⁰ States at the opposite end of the spectrum do not permit aggravated penalties (and in some cases do not permit criminal sanctions at all) unless a substantial degree of physical force is deployed or threatened.⁷¹

In either case, a further issue is whether to describe the required link between the relevant degree of force and the resulting sexual act in terms of compulsion or causation. The latter approach makes force, once suitably defined, sufficient whenever it *causes* the other party to submit to or perform the sexual act; the former approach, a more demanding standard, requires that the force be sufficient to *overcome* the victim or *compel submission*. In some jurisdictions, substantive offense elements are cast in terms suggestive of a causation test, but force itself is

(2018) (Third-degree sexual assault, 10-year maximum, involving sexual intercourse without consent). See generally Decker & Baroni, *supra* note 36, at 1102.

⁶⁹ See Reporters’ Note 7 to Section 213.0(2)(f), *supra*.

⁷⁰ E.g., *Gonzalez v. Com.*, 611 S.E.2d 616, 620 (Va. Ct. App. 2005) (stating, “If the victim did not consent . . . the use of force is shown by the act of non-consensual intercourse itself.”). See also Reporters’ Note 7 to Section 213.0, at note 134, *supra*.

⁷¹ See Reporters’ Note 7 to Section 213.0(2)(f), *supra*.

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

1 defined in terms that limit that concept to compelling threats and actions.⁷² In other jurisdictions,
2 the definition of force largely rejects an added requirement of compulsion. Roughly 30 states
3 leave the concept of force essentially undefined, in a context where older notions tending to
4 permit some physical force short of compulsion are increasingly disfavored.⁷³ A number of
5 jurisdictions structure their offense elements to make explicit that prohibited force need not
6 *compel* submission.⁷⁴

7 Federal law illustrates this last approach. “Force” is defined, without regard to
8 compulsion, as “the use, or threatened use, of a weapon; the use of such physical force as is
9 sufficient to overcome, restrain, or injure a person”⁷⁵ The U.S. Code then specifies that the
10 substantive offense of Aggravated Sexual Abuse (punishable by a maximum of life
11 imprisonment) is committed whenever a person “knowingly *causes* another person to engage in a

⁷² Altogether more than a dozen jurisdictions arrive at a requirement of compulsion either through definitions of force tied to that concept or through substantive offenses that make physical force sufficient only when it has a compelling effect. See Reporters’ Note 7 to Section 213.0(2)(f), *supra*.

⁷³ See Reporters’ Note 7 to Section 213.0(2)(f), *supra*.

⁷⁴ See, e.g., CAL. PENAL CODE § 261 (2018) (defining rape as penetration “accomplished against a person's will by means of force”); D.C. CODE § 22-3002 (2018) (providing that “A person shall be imprisoned for any term of years or for life . . . if that person engages in or causes another person to engage in or submit to a sexual act By using force against that other person; “Force” means the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person;); MINN. STAT. ANN. § 609.342 (2018) (rape defined as “us[ing] force or coercion to accomplish sexual penetration”; where § 609.341 defines “force” as “the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the complainant or another, which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the complainant to submit”; VA. CODE ANN. § 18.2-61 (West 2018) (rape established when “any person has sexual intercourse with a complaining witness . . . or causes a complaining witness . . . to engage in sexual intercourse with any other person and such act is accomplished (i) against the complaining witness’s will, by force, threat or intimidation . . .”); WIS. STAT. ANN. § 940.225 (2018) (defining second-degree sexual assault, a Class C felony, as “[having] sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence”); 18 U.S.C.A. § 2241 (West 2018) (aggravated sexual abuse, punishable by life imprisonment, committed whenever a person “knowingly causes another person to engage in a sexual act . . . by using force against that other person;”); cf. *People v. Martinez*, 36 P.3d 154, 163 (Colo. App. 2001) (stating, “It is the actor’s knowing persistence in the conduct, notwithstanding the lack of communicated consent, that is necessary for the *mens rea*. Although the actor need not know that the victim in fact submits [without consent], the actor must be aware that his conduct is sufficient in character and degree to be likely to cause nonconsensual submission.”).

⁷⁵ H. REP. NO. 594, 99th Cong., at 16 n.54a, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 6186, 6194 n.54a. See cases cited in Reporters’ Note to Section 213.0(2)(f), *supra*.

sexual act . . . by using force against that other person; . . .”⁷⁶ The D.C. Code has the identical structure,⁷⁷ and a number of other jurisdictions take a similar approach.⁷⁸

Assessment. In evaluating the relative merits of the causation and compulsion approaches, their differences should not be overstated. Prosecuted cases often involve extreme violence, and when a defendant tackles a stranger from behind, puts a knife at the stranger’s throat, and warns the stranger not to scream, the force deployed is both causal and compelling, thus clearly meeting both tests. Moreover, appellate courts operating under a compulsion test increasingly accept subtle forms of force as sufficient and decline to insist that the victim resist whenever possible.⁷⁹

Nonetheless, the two tests emphasize significantly different issues at trial and can produce dramatically different results. The difference turns on the fact that when lesser degrees of physical coercion are involved (for example, a push or slap, a subtly displayed weapon, or an indirect restraint), or when the allegations involve implicit rather than explicit threats, a compulsion test permits a defendant to argue that those actions did not necessarily *compel* submission and that a truly unwilling person would have struggled, cried out for help, or run away. Thus, a compulsion test need not technically require the prosecution to produce evidence of resistance and may not dictate sharply different results *on appeal* if the prosecution succeeds in obtaining a conviction. But the practical effect of a compulsion test *at trial* can be similar to that of a physical-resistance requirement because statutes and case law adhering to this approach (and jurors applying it) may consider force “compelling” only when it effectively precludes or overcomes resistance.⁸⁰

⁷⁶ 18 U.S.C. § 2241 (emphasis added).

⁷⁷ See D.C. CODE § 22-3002 ((2018), note 74, *supra*. The District’s Criminal Code Reform Commission (CCRC) recently submitted to the D.C. Mayor and Council comprehensive recommendations to modernize the D.C. Code. With respect to the sexual offenses, the CCRC recommendations carry forward the same focus on causation rather than coercion or compulsion as the linchpin of liability. For example, the offense of first-degree sexual assault, as revised, would read as follows: “An actor commits first degree sexual assault when the actor: . . . [knowingly] causes the complainant to engage in or submit to a sexual act . . . By causing bodily injury to the complainant, or by using physical force that moves or immobilizes the complainant.” D.C. Revised Criminal Code § 22E-1301(a), available at <https://ccrc.dc.gov/page/recommendations>.

⁷⁸ See note 74 *supra* (citing, in addition to the U.S. and D.C. codes, statutes and case law from California, Colorado, Minnesota, Virginia, and Wisconsin).

⁷⁹ See Reporters’ Note 1.a., *supra*.

⁸⁰ See, e.g., 720 ILL. COMP. STAT. ANN. 5/11-0.1 (West 2018) (equating force with acts “when the accused *overcomes* the victim by use of superior strength or size, physical restraint, or physical confinement”) (emphasis added); *People v. Warren*, 446 N.E.2d 591 (Ill. App. Ct.1983) (Defendant approached a much smaller person on an isolated bike path, lifted her off the ground and carried her into the woods, where he performed several sex acts while she remained silent, without attempting to flee or

With its implication that force is insufficient if a complainant could have escaped it, the compulsion test imposes on victims of sexual assault a widely criticized burden. If conviction requires *compulsion* and if juries take that requirement seriously, unjust acquittals can all too easily result. As the House Judiciary Committee explained in rejecting the compulsion and resistance requirements: “Requiring a victim to become a martyr by testing the sincerity of an offender’s threat is unfair and should not be imposed upon victims of sexual abuse offenses.”⁸¹ Sections 213.1 and 213.2 express the judgment that readiness to deploy physical force or physical restraint deserves categorically greater punishment than other instances of sexual penetration or oral sex without consent, and that sensible grading distinctions properly turn on whether submission resulted from the actor’s use of more serious or less serious degrees of physical force or physical restraint.

3. The Required Mental State (*Mens Rea*).

In many rape cases, the defendant’s use of physical force and threats of violence leaves no doubt about the culpability of the defendant’s mental state. A knife at the victim’s throat, a rope that immobilizes the victim, or a warning that the victim must submit or die all signal the actor’s undeniable awareness of the victim’s unwillingness. An actor who puts a knife to the victim’s throat and says “Tell me you want me” cannot then argue that a victim who did so had given verbal consent. Even lesser forms of violence—a slap, a punch, or a kick—normally provide assurance that the defendant knows the other person is not freely engaging in the sexual act. A person who submits under these circumstances—whether with stunned silence, repeated protests, or affirmative indicia of compliance—clearly was forced to do so, and the defendant can scarcely claim that this result was unintended.

In other situations, however, the defendant’s mental state is far from obvious. Ambiguous displays of physical strength and perceived threats to use force can cause a victim to submit even

fight back; court reversed rape conviction because “if complainant had the use of her faculties and physical powers, the evidence must show such resistance as will demonstrate that the act was against her will. . . . Complainant’s failure to resist when it was within her power to do so conveys the impression of consent . . . and removes from the act performed an essential element of the crime.”). See also ME. REV. STAT. ANN. Tit. 17-A, § 251(E) (2018) (“‘Compulsion’ means the use of physical force, a threat to use physical force or a combination thereof that makes a person *unable to physically repel* the actor”) (emphasis added); NEB. REV. STAT. ANN. § 28-318(9) (West 2018) (“Force or threat of force means (a) the use of physical force which *overcomes the victim’s resistance*”) (emphasis added); 11 R.I. GEN. LAWS § 11-37-1(2) (2018) (“‘Force or coercion’ means when the accused does any of the following: (i) Uses or threatens to use a weapon, . . . [or] (ii) *Overcomes the victim* through the application of physical force or physical violence”) (emphasis added); *Gibbons v. State*, 495 S.E.2d 46, 48 (Ga. Ct. App. 1997) (quoting *Drake v. State*, 239 Ga. 232, 234-235 (1977) (holding that the required force is “force used to *overcome the resistance* of the female”) (emphasis added)).

⁸¹ H. REP. NO. 594, *supra* n.75, at 4.

1 when the defendant was not aware of the victim’s apprehensions. In Illustration 6 above, for
 2 example, the Complainant plausibly claims to fear that the Accused would use physical force or
 3 a firearm to secure compliance; yet the Accused plausibly claims not to realize that the
 4 Complainant had seen the weapon or was afraid for any other reason.⁸² This type of situation is
 5 not uncommon. A complainant may see the accused’s words or the surrounding circumstances as
 6 implicitly threatening even though the accused did not intend to intimidate and did not realize
 7 that the complainant was in fear. A conviction can seem inappropriate in this kind of case, but
 8 there is also a danger that the actor might seek to capitalize on the ambiguity: Although aware of
 9 a risk that his or her actions or words would be seen as menacing, the actor may choose to
 10 proceed anyway, deciding to desist only if met with express resistance. It is therefore essential to
 11 determine the level of culpability that should be required for conviction. As the Supreme Court
 12 has noted, dictionary definitions of the word *threat* “speak to what the statement conveys—not to
 13 the mental state of the author.”⁸³

14 Outside the area of the sexual offenses, the Supreme Court has struggled with this mens
 15 rea complexity in comparable situations—those involving defendants who claim no purpose to
 16 intimidate and no awareness that their words or conduct are perceived as threatening, even
 17 though an outside observer might think otherwise. *Elonis v. United States*⁸⁴ involved a statute
 18 making it a crime to transmit in interstate commerce “any communication containing any threat
 19 . . . to injure the person of another.”⁸⁵ The defendant had repeatedly posted graphically violent
 20 images and material on his Facebook page, in language clearly targeting his estranged wife.⁸⁶ At
 21 trial, he was convicted of violating the threat-transmission statute under an instruction that
 22 required the jury to find that he had intentionally made the relevant statements and that “a
 23 reasonable person would foresee that the statement would be interpreted . . . as a serious
 24 expression of an intention to inflict bodily injury”⁸⁷ The instruction therefore permitted the
 25 jury to convict on proof of culpability no greater than negligence. The Court held this instruction
 26 erroneous and reversed the conviction, but no Justice suggested that the statute required a

⁸² See text following note 23, *supra*.

⁸³ *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2008 (2015).

⁸⁴ *Id.*

⁸⁵ 18 U.S.C. § 875(c).

⁸⁶ For example, one post stated, “I really, really think someone out there should kill my wife. . . . [T]he best place to fire a mortar launcher at her house would be from the cornfield behind it” *Elonis*, 135 S. Ct. at 2005.

⁸⁷ *Id.* at 2007.

purposeful threat. The Court’s majority interpreted the threat-transmission statute to require, contrary to the trial court’s instruction, that the prosecution prove more than negligence. But the Court left open the question whether conviction should require *knowledge* that the statements would be understood as a threat or should require instead a minimum of *recklessness*.⁸⁸ Two Justices would have reached that issue: Justice Alito would have required recklessness, and Justice Thomas would have required “general intent,” which he defined in terms roughly equivalent to either negligence or strict liability.⁸⁹

With respect to the sexual offenses, analogous situations often arise. An accused’s actions may have caused another person to submit to a sexual act, but the defense alleges that the accused did not intend that result, did not know the complainant was in fear, and perhaps was not even reckless or negligent in failing to realize that this was so. In cases like these, the liability of the accused turns on the degree of culpability required—whether the implicit threat must have been deployed purposely or whether it should suffice that the accused knew—or realized the risk, or should have realized the risk—that the other person felt threatened.

Governing law on this issue is clear in a number of jurisdictions but ambiguous, indeterminate, or nonexistent in many more. To complicate matters further, several jurisdictions require one kind of mental culpability for some types of force or threats and a different kind of mental culpability for others. As on other issues central to the law of sexual assault, generalizations about the current state of the law must inevitably be simplified and highly approximate.

Subject to that qualification, a roughly accurate picture of current law can be drawn. A few states (roughly seven) specify that the defendant must *purposely* or *knowingly* use force or threats.⁹⁰ A similar number either specify that *recklessness* can suffice⁹¹ or that the offense is a

⁸⁸ Accord *Carrell v. United States*, 165 A.3d 314 (D.C. 2017) (holding it sufficient to prove a purpose to threaten or defendant’s “knowledge that his words would be perceived as a threat,” but “declin[ing] to decide whether a lesser threshold *mens rea* for the second element of the crime of threats—recklessness—would suffice.”)

⁸⁹ See *id.* at 2014-2015 (Alito, J., concurring and dissenting):

(“[W]e should presume that criminal statutes require some sort of *mens rea* for conviction. . . . [W]e require “some indication of congressional intent, express or implied, . . . to dispense with *mens rea* as an element of a crime.” . . . [W]hen Congress does not specify a *mens rea* in a criminal statute, we have no justification for inferring that anything more than recklessness is needed”) (quoting *Staples v. United States*, 511, U.S. 600, 605-606 (1994)).

See also *id.* at 2017-2018 (Thomas, J., dissenting) (supporting a “general-intent standard,” that would require “no more than that a defendant knew he transmitted a communication, knew the words used in that communication, and understood the ordinary meaning of those words in the relevant context.”)

⁹⁰ COLO. STAT. §18-3-401 et seq. (2018) (“actual application of physical force or physical violence”) (knowingly), but see *People v. Garcia*, 452 P.3d 55, 58-60, note 85 *infra* (apparently accepting strict liability standard for some elements of the offense); HAW. STAT. § 702-233 et seq. (2018) (first-degree sexual assault when actor “knowingly subjects another person to an act of sexual penetration by

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

- 1 “*general intent*” crime, a rubric usually understood to require no more than recklessness or
2 possibly mere negligence.⁹² Several jurisdictions stipulate that *negligence* can suffice on the

strong compulsion”); IND. STAT. 35-42-4-1 et seq. (2018) (rape when actor “knowingly or intentionally has sexual intercourse” and victim is “compelled by force or imminent threat of force”); MONT. STAT. § 45-5-501 (2018) (knowingly compelled to submit by force); State v. Ayer, 612 A.2d 923, 925 (N.H. 1992) (“engaging in sexual penetration in any of the statutorily prohibited circumstances is criminal when the actor is aware that his conduct is of such a nature or that such circumstances exist, that is, when he acts knowingly”); OHIO STAT. § 2907.01 et seq. (2018) (rape by forcible compulsion), see State v. Martens, 629 N.E.2d 462 (Ohio Ct. App. 1993) (approving definition of “purposeful” and noting proof of specific intent of purposeful compulsion required for conviction); TEX. PENAL CODE 22.011 (a)(1) (2017) (sexual assault, 20-year maximum, when a person “intentionally or knowingly . . . compels the other person to submit . . . by the use of physical force or violence”).

⁹¹ ARK. STAT. § 11.41.410 et seq. (2018) (first-degree sexual assault, sexual penetration without consent); see Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983) (interpreting statute to require recklessness); MICH. COMP. L. § 750.520b(1)(e),(f) (2018) (first-degree criminal sexual conduct, maximum of life imprisonment, when actor engages in sexual penetration by force or coercion or is “armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon”; no mens rea specified, statutory default rule requires at least recklessness, see MICH. COMP. L. § 8.9(3) (2018); MO. STAT. § 566.010 et seq. (2018) (sexual intercourse by forcible compulsion), see State v. Bryant, 756 S.W.2d 594 (Mo. Ct. App. 1988) (holding prosecution must prove at least recklessness); 18 PA. CONS. STAT. ANN. § 3121(a) (2018) (rape, a felony of the first degree (20-year maximum), when a person engages in sexual intercourse by “forcible compulsion or . . . by threat of forcible compulsion . . .”) (because mens rea is not specified, default mens rea of recklessness applies, see 18 PA. CONS. STAT. ANN. § 302(c) (2018), but see Com. v. Fischer, 721 A.2d 1111 (Pa. Super. Ct. 1998) (strict liability standard); UTAH STAT. § 76-5-402 et seq. (2018) (rape by sexual intercourse without consent), see State v. Calamity, 735 P.2d 39 (Utah 1987) (holding prosecution must prove at least recklessness); cf. State v. Bowles, 52 S.W.3d 69, 78 (Tenn. 2001) (statute silent with regard to mens rea but statutory default rule requires at least recklessness, citing Crittenden v. State, 978 S.W.2d 929, 930 (Tenn. 1998) as holding that ‘intent, knowledge or recklessness’ is required for aggravated rape under TENN. CODE ANN. § 39-11-502, but not for lesser offense of rape under § 39-11- 503).

⁹² ALA. STAT. § 13A-6-60 et seq. (2018) (first-degree rape, sexual intercourse by “forcible compulsion”), see Stokes v. State, 648 So.2d 1179 (Ala. Crim. App. 1994) (interpreting statute to require only “general intent”); FLA. STAT. § 775.082 et seq. (2018) (first-degree sexual battery by force or threats of force “likely to cause serious personal injury”), see Wright v. State, 675 So.2d 1009 (Fla. Dist. Ct. App. 1996) (specific intent not required); ID. STAT. § 18-6101 et seq. (rape when resistance is overcome by force or violence”), see State v. Lopez, 892 P.2d 898 (Idaho Ct. App. 1995) (stating that rape is not a specific-intent crime); ILL. STAT. ch.720 5/12-12 et seq. (2018) (criminal sexual assault, penetration by “use of force or threat of force”), see People v. Simms, 736 N.E.2d 1092 (Ill. 2000) (approving general-intent requirement); LA. REV. STAT. 14:41 et seq. (2018) (aggravated rape when victim is prevented from resisting by threats of harm or weapon), see State v. Crawford, 672 So.2d 197 (La. Ct. App. 1996) (stating that specific intent not necessary); MICH. COMP. L. § 750.520a et seq. (2018) (first-degree criminal sexual conduct), see People v. Brown, 495 N.E.2d 812, 813 (Mich. 1992) (first-degree criminal sexual conduct is general-intent crime; therefore no need to prove defendant’s knowledge that victim was subject to force or coercion).

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

1 issue of force or threat,⁹³ and a few appear to permit conviction on a *strict liability* basis.⁹⁴ Most
2 state statutes leave the required mental state unspecified and lack a general mens rea default
3 rule.⁹⁵ In these states, judicial interpretation of the statutes often is either absent or based on
4 vague references to “intent” or “general intent,” terms that, again, tend in operation to imply a
5 requirement satisfied by recklessness or possibly mere negligence.⁹⁶

⁹³ CONN. STAT. § 53a-70 (2018) (first-degree sexual assault when a person “compels another person to engage in sexual intercourse by the use of force [or] threat”), see *State v. Smith*, 554 A.2d 713, 716-717 (Conn. 1989) (“[N]o specific intent, but only a general intent to perform the physical acts constituting the crime, is necessary for the crime of first degree sexual assault. We reject the position of the British courts, as well as that adopted in Alaska, that the state must prove either an actual awareness on the part of the defendant that the complainant had not consented or a reckless disregard of her nonconsenting status. We agree, however, with the California courts that a defendant . . . may not be convicted of this crime if the words or conduct of the complainant under all the circumstances would justify a reasonable belief that she had consented.”); *Com. v. Sherry*, 437 N.E. 2d 224 (Mass. 1982) (strict liability or negligence); N.J. STAT. ANN. § 2C: 14-2c(1) (2018) (sexual assault, 10-year maximum), see *In re M.T.S.*, 609 A.2d 1266 (1992) (liability if defendant lacks reasonable belief that complainant’s consent was “freely given”).

⁹⁴ E.g., *People v. Garcia*, 452 P.3d 55, 58-60 (Colo. App. 2017) (“Garcia contends that the trial court erred in not applying ‘knowingly’ to every element of the offense of sexual assault, including the ‘caused submission’ element of this offense. We perceive no reversible error . . . [T]he jury was not instructed and thus did not find that Garcia knowingly used force to cause submission . . . [But] the intent of the General Assembly was to punish more severely those offenders who use physical force or violence in a sexual assault; therefore, ‘[t]he circumstances specified in § 18-3-402(4) do not require proof of a *mens rea* to convict the defendant of a class three felony.’ Accordingly, . . . the interrogatory on the issue of ‘physical force or violence’ without *mens rea* was not error.”), *aff’d*, 445 P.3d 1065 (Colo. 2019); *Com. v. Minor*, 591 S.E.2d 61, 66 (Va. 2004) (stating, “Whether the defendant intended to commit the offenses without the victim’s consent is not relevant, the critical question being whether the victim did, in fact, consent. This involves her mental state, not the defendant’s.”); *State v. Branch*, No. C8-01-374, 2001 WL 1646508 at *3 (Minn. Ct. App. 2001) (holding that because criminal sexual conduct is a general-intent crime, “it is not necessary that the perpetrator have actual knowledge of the victim’s fear”; state must prove that victim was in fear, but “whether appellant knew of this fear is irrelevant”); *State v. Neumann*, 508 N.W.2d 54, 62 (Wis. Ct. App. 1993) (holding that second-degree sexual assault requires no proof of intent); *State v. Lederer*, 299 N.W.2d 457, 461 (Wis. Ct. App. 1980) (holding that third-degree sexual assault is strict-liability offense); *Malone v. Com.*, 636 S.W.2d 647 (Ky. 1982) (forcible rape is strict liability, as the “act itself constituted the offense”); *Com. v. Fischer*, 721 A.2d 1111 (Pa. Super. Ct. 1998) (same). Compare *State v. Wenthe*, 865 N.W.2d 293, 302 (Minn. 2015) (stating that court would be “hesitant to dispense with *mens rea* when doing so would result in a strict liability offense”).

⁹⁵ E.g., MASS. STAT. ANN. ch. 265 § 22(b) (2018) (rape, 20-year maximum, when a person “compels such person to submit by force [or] by threat”).

⁹⁶ See, e.g., *People v. Williams*, 81 N.Y. 2d 303, 316 (N.Y. 1993) (noting that first-degree rape (25-year maximum) requires “forcible compulsion; intent is an implicit element, namely an “intent to forcibly compel another); cf. note 82, *supra* (interpreting statutory silence or “intent” in analogous state statutes to mean only general intent); *United States v. Thornton*, 498 F.2d 749, 752 (D.C. Cir. 1974) (“general *mens rea* may be sufficient and may generally be inferred from the proscribed acts themselves.”)

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

1 The 1962 Code proposed to clarify this mens rea jurisprudence, which was in similar
2 disarray at the time, by treating *recklessness* as sufficient for liability for most of the Code's
3 major criminal offenses, including aggravated assault, manslaughter, and robbery, all three
4 felonies of the second degree,⁹⁷ and terroristic threats and causing a catastrophe, both felonies of
5 the third degree.⁹⁸

6 The 1962 Code imposed liability on the same basis of *recklessness* for most of the
7 sexual-penetration offenses, including those at the highest end of the grading spectrum.
8 Recklessness was sufficient for the actor who compels a person to submit by perceived threats of
9 serious bodily injury—a first-degree felony (with a maximum of life) when the victim was not a
10 “voluntary social companion,” and a second-degree felony otherwise.⁹⁹ The 1962 Code also
11 made recklessness a sufficient basis for liability in the case of an actor who compels a person to
12 submit by “any threat that would prevent resistance by a [person] of ordinary resolution”—a
13 third-degree felony.¹⁰⁰

14 From two distinct directions, revised Section 213.1 limits liability more narrowly than did
15 the 1962 Code. First, as explained in Reporters' Note 5 below, revised Section 213.1
16 contemplates for the most serious sexual offenses a *less severe* statutory maximum sentence than
17 that found in the 1962 Code and much of contemporary state law. Second, with respect to mens
18 rea, revised Section 213.1 requires proof of a greater degree of mental culpability; the
19 prosecution must prove knowledge rather than recklessness with respect to the material elements
20 of the basic Section 213.1 offense. This level of mental culpability is also greater than that
21 required under much of the currently prevalent state law.¹⁰¹ As a result, the actor who is aware of
22 a *risk* that his or her gestures or words create a perceived threat of physical violence could be

⁹⁷ 1962 Code Sections 210.3, 211.1(2), 222.1. Aggravated assault requires a heightened form of recklessness; manslaughter and robbery do not. One element of robbery is theft, normally a felony of no more than the third degree, and theft requires proof of a purpose to deprive the owner permanently of possession. 1962 Code Sections 223.1(2), 223.2. But the distinctive element that raises theft to robbery, a felony of the second degree, is the infliction or threat to inflict serious bodily injury, and with respect to that aggravating factor, the required mens rea is recklessness. 1962 Code Section 222.1.

⁹⁸ 1962 Code Sections 223.1(2), 223.2.

⁹⁹ 1962 Code Section 213.1(1)(a). Because the language of this Section is silent as to mens rea, the MPC default rule stipulates that proof of at least recklessness is necessary and sufficient. See 1962 Code Section 2.02(3).

¹⁰⁰ 1962 Code Section 213.1(2)(a). Again, because the language of this Section is silent as to mens rea, the MPC default rule stipulates that proof of at least recklessness is necessary and sufficient. See 1962 Code Section 2.02(3).

¹⁰¹ See text at notes 90-96, *supra*.

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

1 convicted of rape or sexual assault under current law in most states, but that actor cannot be
2 convicted of Sexual Assault by Aggravated Physical Force or Restraint under Section 213.1
3 unless the prosecution proves beyond a reasonable doubt that the actor *knew* that his or her
4 actions were having this impact on the other person.¹⁰²

5 **4. Aggravating Circumstances.**

6 Section 213.1(2) lists three aggravating factors that raise the authorized punishment for
7 the offense defined in Section 213.1(1): (a) using or threatening to use a deadly weapon; (b)
8 multiple offenders; and (c) inflicting serious bodily injury. Aggravation when one of these
9 factors is present is not controversial, and is supported by an extensive body of contemporary
10 law.

11 The provision for treating the offense as aggravated when it involves using or threatening
12 to use a deadly weapon has longstanding and universal support; it requires no further
13 explanation. The decision in subsection (2)(b) to aggravate rapes committed by multiple
14 offenders merits brief discussion. This provision mirrors much of current law;¹⁰³ it applies to
15 sexual assaults involving the threat or use of aggravated physical force or restraint, when in
16 addition they involve one or more other persons who “(i) also engage in an act or acts of sexual
17 penetration or oral sex with the same victim at the same place at a time contemporaneous with
18 the actor’s violation of this Section, or (ii) assist in the use of or threat to use aggravated physical
19 force or restraint when the actor’s act of sexual penetration or oral sex occurs.”

20 By requiring active participation or assistance at the time the act occurs, the language of
21 paragraph (2)(b) distinguishes between active participation and remote forms of complicity. The
22 classically covered situation involves a “gang rape” in which multiple actors engage in serial acts
23 of sexual penetration. Also covered are scenarios in which the actor engages in sexual

¹⁰² Such an actor could, however, be liable for the third-degree felony of Sexual Assault by Physical Force or Restraint (Section 213.2) upon proof beyond a reasonable doubt that the actor was aware of, yet recklessly disregarded, a substantial and unjustifiable risk that this was the case.

¹⁰³ Specially designated provisions for multiple-offender sexual assaults can be found in the District of Columbia and 16 states. See CAL. PENAL CODE §§ 264.1, 286, 288a (West 2018); COLO. REV. STAT. ANN. § 18-3-402 (West 2018); CONN. GEN. STAT. ANN. § 53a-70 (West 2018); FLA. STAT. ANN. § 794.023 (West 2018); IOWA CODE ANN. § 709.3 (West 2018); MD. CODE ANN., CRIM. LAW §§ 3-303, 3-305(a)(2)(iv) (West 2018); MICH. COMP. LAWS ANN. §§ 750.520b, 750.520c (West 2018); MINN. STAT. ANN. § 609.342 (West 2018); N.J. STAT. ANN. § 2c:14-2 (West 2018); N.M. STAT. ANN. §§ 30-9-11, -12 (West 2018); N.C. GEN. STAT. ANN. §§ 14-27.2, -27.4 (West 2018); TENN. CODE ANN. §§ 39-13-502, -504 (West 2018); TEX. PENAL CODE ANN. § 22.021 (Vernon 2017); UTAH CODE ANN. § 76-5-405 (West 2018); VT. STAT. ANN. Tit. 13, § 3253 (2018); WIS. STAT. ANN. § 940.225 (West 2018); D.C. CODE § 22-3020 (2018). Most simply define culpability in terms of conventional accomplice laws. Other formulations include application to instances in which “more than one person committed an act of sexual battery on the same victim,” FLA. STAT. ANN. § 794.023(2) (2018); see also TEX. PENAL CODE ANN. § 39-13-504 (WEST 2017), or in which “two or more other persons [are] actually present,” CONN. GEN. STAT. ANN. § 53A-70 (2018).

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

1 penetration while other participants restrain the complainant or serve as guards to prevent
2 interruption of the attack. Assistance sufficient to trigger this enhancement does not necessarily
3 require physical presence in the same room as the assault but could include, for instance,
4 presence outside the door to “stand guard.”

5 The multiple-offender provision is *not* intended, however, to cover all sexual assaults that
6 entail aggravated physical force and the involvement of accomplices. Attacks involving an
7 accomplice who is not present at the time of the attack should not trigger an aggravated penalty
8 on this basis, because the justification for that enhanced penalty rests in part on the heightened
9 threat posed by the presence of multiple aggressive actors. The other rationale for enhancing the
10 penalty when multiple actors are directly involved is the aggravated harm to the victim. All
11 sexual assault is frightening and dehumanizing, but these psychological and emotional harms are
12 particularly severe and the risk of physical injury is particularly great, as the accused will
13 inevitably know, when multiple assailants act in concert at the scene.

14 Section 213.1(2)(c) applies to attacks resulting in serious bodily injury, an aggravating
15 circumstance that finds longstanding and universal support in the law. Section 213.1(2)(c), in
16 accord with generally prevailing law,¹⁰⁴ does not treat pregnancy as a “serious bodily injury,”
17 however. Although pregnancy arguably is (to track the definitional language of Section
18 213.0(2)(f)(ii)) “capable of inflicting death, serious bodily injury, or extreme physical pain,”
19 pregnancy, unlike the other injuries that fall within the scope of Section 213.0(2)(f)(ii), is
20 typically neither life-threatening nor an intended consequence of the assault. Sanctions that can
21 rise to the level of those authorized for a second-degree felony ought to be available only in
22 cases of exceptional violence or other especially egregious misconduct; the fact that pregnancy
23 may ensue does not, by itself, signal an offense of this character. Absent other aggravating
24 circumstances, the sanctions applicable to the basic Section 213.1 offense afford ample scope for
25 deserved punishment. Although the question is not free from difficulty, Section 213.1(2)(c) does
26 not treat pregnancy as a consequence sufficient by itself to place the offense in the most
27 aggravated category for grading purposes.

28 With respect to the mens rea required under Section 213.1(2)(c), that Section follows the
29 generally prevailing principle that when the grading of an offense depends in part on the actual
30 results of wrongful conduct, a requirement to prove that the actor committed the underlying
31 misconduct purposely or knowingly typically does not carry over to the result element of the
32 offense. Indeed, at common law, liability for a harmful result that triggers a more serious offense

¹⁰⁴ Six state statutes explicitly recognize pregnancy as a bodily harm or form of personal injury. See 720 ILL. COMP. STAT. ANN. 5/11-0.1, 5/11-1.30, 5/11-1.60 (WEST 2018); MICH. COMP. LAWS ANN. §§ 750.520A, 750.520B, 750.520C (WEST 2018); MINN. STAT. ANN. §§ 609.341, 609.342 (WEST 2018); NEB. REV. STAT. §§ 28-318, 28-319, 28-320 (2018); N.M. STAT. ANN. §§ 30-9-10, 30-9-11, 30-9-12 (WEST 2018); WIS. STAT. ANN. § 940.225 (WEST 2018).

is often a matter of strict liability.¹⁰⁵ Consistent with the approach of the Model Penal Code generally, however, Section 213.1 requires subjective culpability with respect to any fact that affects the applicable punishment. Section 213.1(2)(c) therefore requires the prosecution to prove that the defendant was at least reckless in that regard. That is, so long as the prosecution proves beyond a reasonable doubt that a defendant knowingly caused submission to or engagement in the sexual act by using aggravated physical force or restraint, the prosecution's burden with respect to the resulting injury is to prove recklessness—that the defendant knew of, and disregarded, a substantial and unjustifiable risk that such injury would result. A penalty enhancement is appropriate when, in addition to *knowingly* using aggravated physical force or restraint, the defendant actually inflicted serious bodily injury and did so knowing of this risk.

5. Grading. The more serious version of the Section 213.1 offense, one that meets the requirements of subsection (2)(a), (b), or (c), is the gravest of the sexual offenses. Under current law, authorized sentences for state offenses comparable to Section 213.1(2)(a), (b), or (c) range from a high of life (Florida) or life without parole (Georgia, Tennessee, Texas) to maximums (absent recidivist enhancements) of 16.5 years in Ohio and 20 years in Pennsylvania and New Jersey.¹⁰⁶ Most if not all jurisdictions classify the offense at a level below, sometimes well below, that reserved for the most aggravated homicides. In the Model Penal Code framework, a comparable judgment accordingly does not support classification in the highest grading category—the first-degree felony, often associated with a maximum sentence of life imprisonment. The offense therefore is appropriately placed just below this level, as a felony of the second degree.

The less serious version of the Section 213.1 offense lacks the especially egregious aggravating factors required for conviction under subsection (2)(a), (b), and (c), and therefore it should not be graded at the same level as a second-degree felony. On the other hand, simply grading it at the next level below, a third-degree felony, would not distinguish it from the offense of Sexual Assault by Physical Force or Restraint under Section 213.2, which is appropriately graded as a felony of the third degree. Therefore, although the less serious version of the Section 213.1 offense is also graded as a third-degree felony, it carries a maximum term of imprisonment

¹⁰⁵ See, e.g., *People v. Lopez*, 77 Cal. Rptr. 59 (Cal. Ct. App. 1969) (“[A] mistake of fact relating only to the gravity of an offense will not shield a deliberate wrongdoer from the full consequences of the wrong actually committed.”).

¹⁰⁶ FLA. STAT. §§ 775.082(3)(a)(3), 794.011(3) (2019) (life imprisonment); GA. CODE ANN. § 16-6-1(b) (2019) (life without parole); N.J. STAT. ANN. §§ 2C:14-2(a), 2C:43-6(1) (2019) (maximum term of imprisonment, absent recidivist enhancements, of 20 years); OHIO REV. CODE ANN. §§2907.02(b), 2929.14(a)(1)(a), 2929.144(b)(1) (LexisNexis 2019) (maximum term of imprisonment, absent recidivist enhancements, of 16.5 years); 18 PA. CONS. STAT. §§ 3121(a), 1103(1) (2020) (maximum term of imprisonment, absent recidivist enhancements, of 20 years); TENN. CODE ANN. § 40-35-120(g) (2019) (life without parole); TEX. PENAL CODE ANN. § 12.42(c)(4) (West 2019) (life without parole). In some states additional enhancements apply when the victim is a young child.

Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint

1 that may be up to five years longer than the term of imprisonment otherwise authorized for a
2 felony of the third-degree.

3 With respect to registration and other sex-offender collateral consequences, even the least
4 serious of the offenses punishable under Section 213.1 involves an actor who has deployed
5 physical force or restraint so severe that it inflicted (or was capable of inflicting) serious bodily
6 injury, extreme physical pain, or prolonged confinement. Moreover, conviction requires proof
7 that the actor did so knowingly. Behavior of this extremely dangerous and culpable nature
8 presents the quintessential situation justifying (if anything does) the actor's eligibility for law-
9 enforcement registration and related collateral consequences. Section 213.1(2) therefore provides
10 that Sexual Assault by Aggravated Physical Force or Restraint is a registrable offense.

SECTION 213.2. SEXUAL ASSAULT BY PHYSICAL FORCE OR RESTRAINT

(1) *Sexual Assault by Physical Force or Restraint.* An actor is guilty of Sexual Assault by Physical Force or Restraint when:

(a) the actor causes another person to submit to or perform an act of sexual penetration or oral sex; and

(b) the act is without effective consent because:

(i) the actor uses or explicitly or implicitly threatens to use physical force or restraint against anyone; and

(ii) the actor's use of or threat to use physical force or restraint causes the other person to submit to or perform the act of sexual penetration or oral sex; and

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (a) and (b) are present.

(2) *Grading.* Sexual Assault by Physical Force or Restraint is a felony of the third degree [10-year maximum]. It is a registrable offense when the actor has previously been convicted of a felony sex offense.

(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the other person submitted to or performed the act of sexual penetration or oral sex under the circumstances described in subsection (1)(b). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a circumstance described in that subsection. If applicable, the actor may raise an affirmative defense of Explicit Prior Permission according to the terms of Section 213.10.

Comment:

Under Section 213.2, an actor commits the offense of Sexual Assault by Physical Force or Restraint, a felony of the third degree, if the actor knowingly or recklessly causes another person to submit to or perform an act of sexual penetration or oral sex by using or threatening to use physical force or restraint. The offense requires proof of four elements: (1) an act of sexual penetration or oral sex; (2) the actor's use of or threat to use physical force or restraint; (3) the other person's submission to or performance of the sexual act *because of* that force or restraint; and (4) the mental culpability of the actor with respect to each of those first three elements. This

Section 213.2. Sexual Assault by Physical Force or Restraint

Comment explains (1) the need for the concurrence of all four of these elements; (2) the nature of the required force or restraint; (3) the qualifying threats; (4) the required causal connection; (5) the required mens rea; and (6) the role of consent.

1. Concurrence of Elements. As with any criminal offense, liability cannot rest simply on proof sufficient to establish some of the required elements. The prosecution must prove beyond a reasonable doubt *all* of the required elements of the offense. This basic principle needs emphasis in the context of Section 213.2, in order to avoid misunderstanding about the potential breadth of the offense. Liability cannot be sustained under Section 213.2 if any of the four elements just mentioned is absent. Thus, for example, if a person's words or conduct threaten physical force or restraint (element 2) and cause (element 3) another person to submit to an act of sexual penetration (element 1), those facts do not suffice to establish liability unless the actor had the required degree of awareness (element 4) that this was the case. Similarly, wrongful actions that cause another person to submit to or perform a sexual act (elements 1 and 3) are not enough to establish liability unless those actions fall within the defined scope of "physical force or restraint" (element 2).

Illustration:

1. Complainant takes several days off from work, falsely telling Complainant's employer that Complainant is sick. Accused threatens to reveal the deception to Complainant's employer unless Complainant submits to oral sex with Accused. Complainant agrees to do so, in order to prevent Accused from carrying out the threat. Although Accused's actions cause Complainant to submit to Accused's demand for oral sex, Accused is not liable for Sexual Assault by Physical Force or Restraint under Section 213.2 because those actions do not amount to a threat of "physical force or restraint" within the meaning of Section 213.0(2)(e)(i). On these facts, Accused might be liable for Sexual Assault by Extortion under Section 213.4(1)(b)(iii), but only if the trier of fact found beyond a reasonable doubt that Accused's threat "would cause submission ... by someone of ordinary resolution in [Complainant]'s situation under all the circumstances."

The required concurrence of elements also may be absent if a person's actions involve physical force or physical restraint (element 2) but are not *the cause* (element 3) of the other person's submission to or performance of the sexual act, as in situations in which the encounter

1 is entirely consensual. An encounter of that kind presumably would not lead to a criminal
2 complaint, and the actor would not become “the accused” in a criminal prosecution. But it is
3 important to see that, even in theory, the absence of the required causal element precludes a
4 successful criminal prosecution.

5 **Illustrations:**

6 2. Logan invites Kyle to Logan’s apartment. After the two participate in mutually
7 consensual acts of sexual intimacy, Logan encourages Kyle to participate in an act of
8 sexual penetration, to which Logan willingly submits. The act proves unexpectedly
9 painful to Logan, who suffers some tearing of internal tissue and bleeding as a result.

10 Even though Kyle’s actions constitute “physical force” within the meaning of
11 Section 213.0(2)(f)(i) (i.e., “a physical act ... that inflicts more than negligible physical
12 harm”), that use of force under these circumstances cannot support liability for Sexual
13 Assault by Physical Force or Restraint under Section 213.2. Logan’s physical pain and
14 injury did not precede Logan’s consent to sexual penetration and did not cause Logan to
15 submit to the sexual act (as Section 213.2 requires). Rather, the pain and injury *were*
16 *caused by* the sexual activity in which Logan willingly engaged without prior force or
17 threat.

18 3. Tracy invites Ryan to Tracy’s apartment. After the two participate in mutually
19 consensual acts of sexual intimacy, Tracy encourages Ryan to lie on top of Tracy and
20 engage in an act of sexual penetration, to which Tracy willingly submits. Because Ryan is
21 much taller and much heavier than Tracy, Ryan’s physical act “significantly restricts
22 [Tracy]’s ability to move freely,” and it therefore constitutes a physical restraint within
23 the meaning of Section 213.0(2)(f)(i). Nonetheless, Ryan cannot be convicted of Sexual
24 Assault by Physical Force or Restraint under Section 213.2 because the significant
25 impediment to Tracy’s freedom of movement did not precede Tracy’s consent to sexual
26 penetration and did not cause Tracy’s submission; Tracy’s submission resulted in the
27 restraint rather than (as Section 213.2 requires) the other way around.

28 **2. Physical Force or Restraint.** As stipulated in Section 213.0(2)(f)(i), an act involves
29 physical force or restraint only when it “inflicts more than negligible physical harm, pain, or
30 discomfort or ... significantly restricts a person’s ability to move freely.” More than negligible

physical harm “includes but is not limited to a burn, black eye, or bloody nose,” and more than negligible pain or discomfort “includes but is not limited to the pain or discomfort resulting from a kick, punch, or slap on the face.”

Illustration:

4. Complainant and Accused have drinks together in Accused’s apartment. While the two sit side by side on a sofa, Accused expresses an interest in sex. Complainant declines and says, “It’s late. I should go home.” But as Complainant starts to open the door, Accused rushes ahead to lock it, stands in front of it, and says, “Now no one can disturb us.” Complainant backs up and says, “No! I’m not interested in getting involved that way with you. Let me leave!” Complainant tries to go around Accused, but Accused steps forward to block Complainant’s path, puts a hand in Complainant’s pants, and engages in an act of digital penetration. Complainant testifies that Complainant was not willing to engage in sexual activity with Accused but stopped protesting when Accused prevented Complainant from leaving and ignored Complainant’s verbal objections. Because Accused knew that Complainant had not consented, Accused is, at minimum, guilty of Sexual Assault in the Absence of Consent under Section 213.6, and the offense is a felony of the fourth degree under that Section because Accused knowingly disregarded Complainant’s express rejection of Accused’s advances.¹ The remaining question is whether Accused is guilty of the more serious offense of Sexual Assault by Physical Force or Restraint, a felony of the third degree under Section 213.2(1).

By locking the door and blocking Complainant’s access to it, Accused knowingly took physical steps that thwarted Complainant’s desire to depart, even though Accused did not tackle Complainant to the floor to prevent Complainant from leaving. But because the force used did not threaten serious bodily injury, extreme physical pain, or prolonged confinement, Accused could not be convicted of Sexual Assault by Aggravated Physical Force or Restraint under Section 213.1. The lesser degree of force (the indirect physical restraint on Complainant’s freedom of movement) nonetheless constitutes “physical force

¹ See Section 213.6(2) (providing that the offense of Sexual Assault in the Absence of Consent is “a felony of the fourth degree [when] the other person has, by words or actions, expressly communicated unwillingness to submit to or perform the act”)

Section 213.2. Sexual Assault by Physical Force or Restraint

or restraint” under Section 213.0(2)(f)(i) because it “significantly restricts [Complainant]’s ability to move freely.” And that force supports liability for Sexual Assault by Physical Force or Restraint under Section 213.2(1), provided that the trier of fact finds beyond a reasonable doubt the other two necessary elements of the offense (causation and the required level of mental culpability).

The bodily harm that falls within Section 213.0(2)(f)(i) must be of a *physical* nature; psychological and emotional injury do not suffice, though they might afford a basis for liability under another provision of Article 213, such as Section 213.4. Impediments to movement within the meaning of Section 213.0(2)(f)(i) likewise must be *physical*; psychological or contractual limitations do not suffice unless they constitute implicit threats to use physical force or restraint.

Illustration:

5. Complainant asks Accused, her employer, for permission to leave work early in order to visit an ailing relative before visiting hours end. Accused refuses but adds that Accused will permit Complainant to leave right away if Complainant first performs an act of oral sex with Accused; otherwise if Complainant leaves before 5:00 p.m., Accused will fire Complainant. Determined to see the relative, Complainant performs an act of oral sex with Accused. Although Accused’s threat significantly restricted Complainant’s freedom of movement, Accused is not liable for Sexual Assault by Physical Force or Restraint under Section 213.2, because the restriction was not physical in nature. On these facts, Accused might be liable for Sexual Assault by Extortion under Section 213.4(1)(b)(iii), but only if the trier of fact found beyond a reasonable doubt that Accused had knowingly or recklessly made a threat that “would cause submission ... by a person of ordinary resolution in [Complainant]’s situation under all the circumstances.”

The bodily harm sufficient to indicate a use of “physical force” under Section 213.0(2)(f)(i) must be more than negligible; trivial feelings of physical discomfort do not suffice. Whether pain is appropriately characterized as “more than negligible” will be debatable in many cases, but the issue can safely be left to the factfinder’s common sense. The focus must be on whether the degree of discomfort is sufficient to cause behavior or whether it is commonplace or would ordinarily be disregarded. The room for disagreement on this score is no wider than the

1 potential ambiguity of terms like “reasonableness.” Indeed, any such ambiguity is considerably
2 less problematic in this context, because even when pain is classified as “more than negligible,”
3 it can ground liability under Section 213.2 only when such pain *causes* the person affected to
4 submit to or perform the sexual act, and when the accused *knows* or *recklessly disregards the*
5 *risk* that this is the case. Pain that the accused knows to create a substantial, unjustifiable risk of
6 causing another person’s sexual submission is, for that reason alone, “more than negligible,” and
7 an accused can hardly complain of unfairness if found liable under those circumstances.

8 **Illustration:**

9 6. Accused and Complainant are standing at a bar chatting and drinking. When
10 Complainant leaves to go to the rest room, Accused follows right behind Complainant,
11 and once in the restroom, Accused leans against Complainant and suggests a sexual act.
12 Complainant expressly refuses, but Accused holds Complainant’s hips steady and
13 engages in an act of sexual penetration. Because Complainant is recovering from a
14 serious hip injury, Accused’s actions prior to penetration cause pain, and Complainant
15 submits to the penetration in order to avoid even greater physical pain and injury. These
16 facts would support a conviction under Section 213.6 for Sexual Assault in the Absence
17 of Consent. But absent additional facts, Accused could not be held liable for the more
18 serious offense of Sexual Assault by Physical Force or Restraint under Section 213.2. A
19 jury might find that the Accused had used physical force (element 2) because the pain
20 Complainant experienced was “more than negligible,” and might also find that that this
21 pain caused Complainant to submit to the sexual acts (elements 1 and 3). Even so, a
22 conviction under Section 213.2 could not be sustained because the necessary mental
23 culpability (element 4) is absent: these facts, without more, cannot establish that Accused
24 knew, or recklessly disregarded the risk, that touching Complainant’s hips would cause
25 significant pain or that any such pain would cause Complainant to submit to Accused’s
26 sexual proposal.

27 A different result might be appropriate if Complainant had a visible injury and
28 Accused proposed a sexual encounter while pressing on the wound and observing that
29 Complainant grimaced or gasped in pain. With additional supporting facts of this sort, a
30 trier of fact potentially could find beyond a reasonable doubt that the pain was more than
31 negligible, that it caused Complainant to submit to the sexual act, and that Accused knew,

or recklessly disregarded the risk, that this was the case. If so, Accused could properly be held liable for Sexual Assault by Physical Force or Restraint under Section 213.2.

3. *Qualifying Threats.* Section 213.2 prohibits threats of physical force or restraint that cause a person to submit to or perform an act of sexual penetration or oral sex. These threats are covered not only when explicit in the actor's words or conduct, but also when the actor's behavior suggests an implicit threat under all the circumstances. Similarly, Section 213.2 reaches threats of physical harm or physical restraint (whether express or implied) that target third parties; these threats are just as serious as threats aimed directly at a complainant.

Illustration:

7. Complainant, a college student, periodically babysits for Accused, the parent of a small child. One evening, Accused returns home late at night, and Complainant prepares to leave. Accused asks Complainant to stay a little longer, stating that Accused is lonely because Accused's spouse is traveling out of town. When Complainant declines to do so, Accused opens a nearby drawer and removes a pistol. Holding but not pointing the weapon, Accused says, "Are you sure you have to leave? That's a bad idea. I know we will be safe with my friend Glock here to protect you." Complainant does not respond verbally but stares at the weapon as Accused approaches, kisses Complainant, removes Complainant's clothing, and sexually penetrates Complainant. At trial, Complainant testifies that Complainant understood Accused's comments as a threat and submitted only out of fear. Accused testifies that Accused had no desire to threaten or harm Complainant and believed Complainant's participation was fully consensual.

Even though Accused did not expressly threaten to harm Complainant, Accused's actions could constitute a proscribed "threat" under Sections 213.1 and 213.2 if the factfinder concludes beyond a reasonable doubt that those actions *implied* Accused's willingness to use the weapon or otherwise physically restrain or injure Complainant. Whether Accused can be convicted of Sexual Assault by Aggravated Physical Force or Restraint under Section 213.1 or Sexual Assault by Physical Force or Restraint under Section 213.2 then depends on the factfinder's conclusions about Accused's mental state and causation. If the trier of fact finds beyond a reasonable doubt that Accused *knew* the display of the deadly weapon and Accused's other actions caused Complainant to submit

Section 213.2. Sexual Assault by Physical Force or Restraint

1 to the sexual act, Accused can properly be convicted of Sexual Assault by Aggravated
2 Physical Force or Restraint under Section 213.1(2)(a). If the factfinder finds that Accused
3 did not know this but nonetheless recklessly disregarded the risk that Complainant
4 submitted to the sexual act because of those actions, then Accused may be convicted of
5 the lesser included offense of Sexual Assault by Physical Force or Restraint under
6 Section 213.2. If the factfinder concludes that a reasonable person would have been
7 aware of this risk but that Accused was not (or if the factfinder entertains a reasonable
8 doubt with regard to Accused's awareness), the trier of fact cannot convict Accused
9 under either Section 213.1 or Section 213.2.

10 **4. Causal Effect.** An actor's use or threat of physical force or restraint cannot establish
11 liability under Section 213.2 unless the acts or threats *cause* the other person to submit to or
12 perform the act of sexual penetration or oral sex when that person would not otherwise do so.
13 Causation is defined in Section 2.03 of the 1962 Code; it requires the actor's conduct to be both
14 the *but-for* and *proximate* causes of the other person's submission to or performance of the
15 relevant sexual acts.² Examples illustrating the contours of this two-pronged causation
16 requirement are given (with respect to situations involving aggravated physical force) in the
17 Comment to Section 213.1. The same analysis applies when an actor's conduct involves one of
18 the lesser forms of physical force or restraint addressed in Section 213.2.

19 **5. The Required Mental State (*Mens Rea*).** Statements and conduct often are perceived
20 as threatening even when the actor does not realize that others feel endangered. The problems of
21 specifying the mental state required for conviction in those situations and proving it at trial are
22 important throughout the criminal law, which typically does not assume that a specific intent or
23 purpose to threaten is inherent in the concept of threat.³

² 1962 Code Section 2.03 (1962) ("Conduct is the cause of a result when . . . it is an antecedent but for which the result in question would not have occurred; and . . . the actual result . . . is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability . . .").

³ See Reporters' Note 3 to Section 213.1 (discussing *Elonis v. United States*, 575 U.S. 723 (2015)).

Section 213.2. Sexual Assault by Physical Force or Restraint

1 For situations involving the use or threat of aggravated physical force or restraint, Section
2 213.1 requires proof of knowledge for all elements of the offense of Sexual Assault by
3 Aggravated Physical Force or Restraint. For the lesser included offense of Sexual Assault by
4 Physical Force or Restraint, involving the use or threat of either aggravated or lesser degrees of
5 physical force or restraint, Section 213.2 imposes liability when the actor is aware of, yet
6 recklessly disregards, the risk that his or her conduct will be perceived as a threat and will have
7 the required causal effect.

8 The decision to impose liability on the basis of recklessness, even when an actor may not
9 know to a practical certainty that all required circumstances exist,⁴ follows the mens rea norm
10 throughout the 1962 Code.⁵ In the context of the sexual offenses, that decision has especially
11 important practical consequences. It is not unusual for an actor to be aware that the actor's
12 conduct could be perceived as threatening. The actor might even be aware that this conduct
13 *probably would be* perceived as threatening. Nonetheless, that actor often can plausibly claim not
14 to be absolutely certain that this was the case. If a mens rea of *knowledge* must be proved beyond
15 a reasonable doubt, that actor could not be convicted under these circumstances. Or an actor
16 might even deliberately make threatening remarks but plausibly claim not to be 100% sure that
17 the other person was submitting to a sexual advance only for that reason. Again, if actual
18 knowledge must be proved beyond a reasonable doubt, this actor could not be convicted under
19 these circumstances. Any reasonable doubt about whether the actors knew that the essential facts
20 were "practically certain[]"⁶ would require acquittal. Yet it would be unconscionable to permit
21 actors to engage in threatening behavior of these kinds with impunity, even when well aware of a
22 substantial, unjustifiable risk that another person might feel threatened and might be submitting
23 to sexual acts only for that reason. A person who recklessly disregards risks of this nature is

⁴ Under the 1962 Code Section 2.02(2)(b), a person acts knowingly only when:

"(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

"(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result."

⁵ Model Penal Code and Commentaries, Comment to Section 2.02, at 239-241 (AM. L. INST.1985).

⁶ See note 4, *supra*.

Section 213.2. Sexual Assault by Physical Force or Restraint

engaging in dangerous, highly culpable behavior that warrants emphatic condemnation and punishment.

Section 213.2 therefore accepts conscious recklessness as a sufficient mens rea for conviction of Sexual Assault by Physical Force or Restraint. Section 2.02(2)(c) of the 1962 Code specifies that a person is reckless when he or she “consciously disregards a substantial and unjustifiable risk that the material element exists or will result from [the person’s] conduct.” The risk “must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to [the actor], its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.” Thus, when the actor is aware of and recklessly disregards a substantial and unjustifiable risk that the other person is submitting to or performing the relevant sexual act because of a perceived threat of physical force or restraint, the actor can be convicted of Sexual Assault by Physical Force or Restraint.

Illustration:

8. Complainant and Accused have drinks together in Accused’s apartment. While the two sit side by side on a sofa, Accused expresses an interest in sex. Complainant declines and seeks to leave. Accused responds by locking the door and standing in front of it, saying, “Now no one can disturb us.” Complainant says, “No! Let me go!” But Accused nonetheless steps forward, puts a hand in Complainant’s pants, and engages in an act of digital penetration.

As previously discussed in connection with Illustration 4, a jury could find that by physically restraining Complainant’s freedom of movement, Accused used “physical force or restraint” under Section 213.0(2)(f)(i). And a jury could find the causation requirement met as well, namely that Complainant would not have submitted if Accused had not thwarted Complainant’s desire to depart. If the jury further finds beyond a reasonable doubt that Accused was aware of, and consciously disregarded, a substantial, unjustifiable risk that Accused’s actions had restrained Complainant and that Complainant had submitted as a result, Accused could be convicted of Sexual Assault by Physical Force or Restraint under Section 213.2. Alternatively, a jury might conclude that Accused had no such awareness but was negligent, in that a reasonable person would have known that Accused’s actions restrained Complainant and caused Complainant’s

Section 213.2. Sexual Assault by Physical Force or Restraint

sexual submission. On those findings, Accused could not be convicted under Section 213.2. But if the trier of fact nonetheless found that Accused was aware of, and consciously disregarded, a substantial, unjustifiable risk that Complainant did not consent to sexual penetration, Accused could be convicted of the lesser included offense of Sexual Assault in the Absence of Consent under Section 213.6.

6. Grading. Sexual Assault by Physical Force or Restraint is graded as a third-degree felony. It is a registrable offense when the actor has previously been convicted of a felony sex offense.

Section 213.2 covers reckless conduct of widely varying culpability, from the use of physical force or restraint that leaves no mark to slaps, punches, and kicks that result in cuts, bruises, and traumatizing fear. It can even extend to the use of aggravated physical force or restraint that causes serious bodily injury; that conduct is covered by Section 213.1 only when the actor *knows* that such force or restraint causes the other person to submit to or perform the sexual act. If the actor is only reckless in that regard, Section 213.1 is not available, and the lesser penalties of Section 213.2 apply, up to the maximum authorized for a felony of the third degree.⁷ Within that authorized range, the sentence imposed, as with any criminal conviction, ought to reflect the relative severity of the offense in the context of all the circumstances, as discussed in revised Article 10 of the Code.⁸

7. Consent. As explained in the Comment to Section 213.1, the freely given consent of a competent adult usually transforms a potentially harmful sexual interaction into one that is not a proper subject of legal concern. Yet persons who appear to assent to sexual acts do not do so freely when they submit only because they face a threat of physical force or physical restraint.

⁷ The revised sentencing provisions of the Model Penal Code provide that this offense level is subject to “a term of incarceration ... [that] shall not exceed [10] years.” MODEL PENAL CODE: SENTENCING (AM L. INST., Official Statutory Text, May 24, 2017), Section 6.06(6)(b). The brackets indicate that the appropriate level of punishment is regarded as a “fundamental policy question[] that must be confronted by responsible officials within each state.” See Comment 2 to Section 213.1, at note 16, quoting *id.*, at Comment *k*, p. 157.

⁸ MODEL PENAL CODE: SENTENCING, *supra* note 7, Art. 10 (Judicial Sentencing Authority).

Section 213.2. Sexual Assault by Physical Force or Restraint

1 Apparent consent under these circumstances is universally regarded as legally ineffective.⁹ Thus
2 when the circumstances described in Section 213.2 are proved beyond a reasonable doubt—that
3 the actor knowingly or recklessly used or threatened physical force or restraint against another
4 person, that the other person submitted to or performed the sexual act because of that force or
5 restraint, and that the defendant was aware of and disregarded a substantial, unjustifiable risk that
6 this was the case, those circumstances preclude the possibility of legally effective consent and
7 establish the defendant’s culpable awareness of that fact. Section 213.2(2) makes this well-
8 understood principle explicit.

9 As in the case of aggravated force addressed in Section 213.1, this principle applies even
10 when bodily injury is threatened in a manner that the complainant allegedly desires. To preclude
11 liability in such situations, Section 213.10 provides an affirmative defense, narrowly framed. But
12 when an actor has used physical force to cause sexual submission and the safeguards of Section
13 213.10 are not met, the actor does not escape liability merely by suggesting that he or she
14 believed the other person might “like it rough.” Once the prosecution has proved beyond a
15 reasonable doubt that a complainant submitted *because of* a specified degree of physical force or
16 restraint and that the actor knew as much, or was aware of and disregarded a substantial,
17 unjustifiable risk that this was the case, criminal culpability attaches whenever the actor has not
18 taken the special care required by Section 213.10 to assure that the other party indeed welcomed
19 that use of physical force or restraint as part of the sexual encounter.

20 For the reasons discussed above in connection with aggravated physical force and
21 restraint under Section 213.1, Article 213 does not generally require an actor to obtain an express
22 statement of “affirmative consent” before sexual interaction takes place. Moreover, Sections
23 213.2(2) and 213.10 do not nullify the stipulation in the Section 213.0(2)(e)(ii) definition of
24 consent that such consent can be inferred from behavior, including “inaction—in the context of
25 all the circumstances.” In the context of Section 213.2, the requirement of clearly expressed
26 permission described in Section 213.10 comes into play only as a prerequisite to an actor’s use of
27 “physical force or restraint.” The distinction is readily understood. Despite intense debate about
28 the conception of consent that should apply to sexual interaction generally, the need for explicit,

⁹ See Comment 3 to Section 213.1, *supra*. See also 1962 Code Section 2.11(3) (“*Ineffective Consent*. . . . [A]ssent does not constitute consent if . . . it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.”).

1 fully informed permission is fundamental and rarely disputed with regard to acts that
2 “significantly restrict[.] a person’s ability to move freely,” or portend “physical harm, pain, or
3 discomfort.”¹⁰

4 Examples illustrating the operation of this principle are given in the Comments to Section
5 213.1 and Section 213.10. The same analysis applies when an actor’s conduct involves the lesser
6 mens rea of recklessness or one of the lesser forms of physical force or restraint addressed in
7 Section 213.2.

REPORTERS’ NOTES

8 **1. Physical Force and Restraint – Section 213.2.** Criminal punishment for using physical
9 force or restraint to obtain sexual submission is not controversial in principle and has been a
10 fixture of Anglo-American law for centuries. The 1962 Code reflected that judgment but
11 restricted the scope of criminal liability in two ways. Liability for “Rape,” a felony of the first or
12 second degree, was limited to situations in which the actor “compels [the other person] to submit
13 by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping.”¹¹ A
14 lesser degree of physical force could trigger liability for the third-degree felony of Gross Sexual
15 Imposition, but only when the actor “compels [the other person] to submit by any threat that
16 would prevent resistance by a [person] of ordinary resolution.”¹²

17 Today, many states retain the customary term “rape,” but others prefer the term “sexual
18 assault,” particularly for offenses defined to include a broad range of coercive and/or
19 nonconsensual sexual misconduct. Although the choice of terminology appears to have few
20 practical consequences, the decision to label the Article 213 offenses as “sexual assault” rather
21 than “rape” serves to emphasize the revised Code’s departure from traditional requirements of
22 overwhelming force and victim resistance. As discussed in the Reporters’ Notes to Section
23 213.1, the 1962 Code’s requirement that physical force be sufficiently overpowering to “compel”
24 submission and “prevent resistance” are now widely criticized, and in contemporary law those
25 requirements are widely (if not universally) deemed too restrictive. In accord with this view and
26 for the reasons discussed in detail in connection with Section 213.1, revised Article 213 rejects
27 compulsion and resistance as essential touchstones of liability. Instead, the use of “physical force
28 or restraint” (together with the required mens rea) is sufficient to support conviction under

¹⁰ See National Coalition for Sexual Freedom, “Statement on Consent” (Feb. 15, 2013), available at <https://www.ncsfreedom.org/key-programs/consent-counts-64083/consent-counts-44979>.

¹¹ 1962 Code Section 213.1(1).

¹² 1962 Code Section 213.1(2).

1 Section 213.2 whenever it causes the other person to submit to or perform an act of sexual
2 penetration or oral sex.

3 **2. *Mens Rea.*** With respect to the required mental state, American jurisdictions vary
4 widely. At one end of the spectrum, a few require proof of purpose or knowledge, especially
5 when the offense carries an authorized sentence of life imprisonment or other very lengthy term.
6 At the other end of the spectrum, many jurisdictions permit conviction based on negligence or
7 even strict liability.¹³ Section 213.2 adheres to the more demanding view requiring proof that the
8 actor was at least reckless, the position accepted as the “basic norm” throughout the 1962
9 Code.¹⁴ Under the 1962 Code recklessness is sufficient culpability for most of the major
10 offenses, including aggravated assault, manslaughter, and robbery.¹⁵ The 1962 Code also
11 imposed liability on the basis of recklessness for most of the sexual offenses, including its
12 offense most closely analogous to Section 213.2, the third-degree felony of Gross Sexual
13 Imposition.¹⁶

14 Section 213.2 carries forward this mens rea judgment. When an actor is aware of, yet
15 disregards, a substantial and unjustifiable risk that a perceived use or threat of physical force or
16 restraint will cause a person to submit to or perform a sexual act, the actor’s conduct is
17 undeniably culpable and dangerous. A more stringent standard, requiring proof beyond a
18 reasonable doubt that the actor knew all these facts to a practical certainty, too often would be
19 difficult to meet and—more fundamentally—would be wrong; conscious disregard of these risks
20 to the sexual autonomy and bodily integrity of another person is in itself egregious and
21 inexcusable. Accordingly, Section 213.2 provides that Sexual Assault by Physical Force or
22 Restraint is committed when a person recklessly disregards these risks and causes another person
23 to submit to or perform an act of sexual penetration or oral sex.

24 **3. *Causation.*** The element of causation required for conviction under Section 213.2 is
25 governed by the same principles discussed in the Reporters’ Note to Section 213.1 in connection
26 with the causation requirement under that Section.

¹³ See Reporters’ Note 3 to Section 213.1, *supra*.

¹⁴ Model Penal Code and Commentaries, Comment to Section 2.02, at 239-241 (1985).

¹⁵ See Reporters’ Note 3 to Section 213.1, *supra*.

¹⁶ See 1962 Code Section 213.1(2) (imposing liability on “[a] male who has sexual intercourse with a female not his wife [if] he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution.” The 1962 Code likewise treats recklessness as a sufficient mens rea for more serious sexual offenses, including those at the highest end of the grading spectrum. See, e.g., 1962 Code Section 213.1(1) (punishing as first-degree felony, with maximum sentence of life imprisonment, actor who compels another person to submit by perceived threats of serious bodily injury, when victim was not a “voluntary social companion”; reckless mens rea is made sufficient by the default rule in 1962 Code Section 2.02(3)).

1 **4. Grading.** This offense, though less serious than the offense of Sexual Assault by
2 Aggravated Physical Force or Restraint under Section 213.1, nonetheless involves the use of
3 physical force or restraint to cause the victim’s submission to or performance of an act of sexual
4 penetration or oral sex. Under current law, authorized sentences for state offenses comparable to
5 Section 213.2 range from a high of life (Florida) or life without parole (Georgia) to maximums
6 (absent recidivist enhancements) of eight years (California), 10 years (New Jersey), 12-15 years
7 (North Carolina, Michigan), and 16.5 years (Ohio).¹⁷

8 Given the classification of Sexual Assault by Aggravated Physical Force or Restraint as
9 either a felony of the second degree or a felony of the third degree—enhanced by an authorized
10 maximum sentence five years greater than that ordinarily applicable to a third-degree felony, the
11 less serious offense of Sexual Assault by Physical Force or Restraint (involving either non-
12 aggravated physical force or restraint, or aggravated physical force or restraint used with a
13 reckless rather than a knowing mens rea) is properly placed at the next lowest grading level, that
14 of a third-degree felony.¹⁸ The next lower grade for this offense, the fourth-degree felony, would
15 likely place the offense at a lower level than that found in any American jurisdiction.

16 With respect to registration and other collateral consequences applicable primarily to
17 persons convicted of a sexual offense, it is significant that the conduct sufficient for conviction
18 under Section 213.2 spans a wide range of potentially threatening behavior. The covered acts
19 include the threat of more than negligible force that causes the other person to submit to or
20 perform a sexual act and also conduct that is reckless but not necessarily purposeful or knowing.
21 Registration as a sex offender therefore is not inevitably appropriate in the case of every person
22 convicted under this Section. Potentially mitigating circumstances carry little or no weight,
23 however, when a defendant has previously been convicted of a serious sex offense. Accordingly,
24 a person convicted under Section 213.2 who has no prior convictions is not subject to sex-
25 offender registration, but Section 213.2(2) provides that the offense is registrable when that
26 person was previously convicted of a felony sex offense.

¹⁷ CAL. PENAL CODE § 264(a) (Deering 2020); FLA. STAT. §§ 794.011(5)(b), 775.084(4)(b)(1) (2019); GA. CODE ANN. § 16-6-1(b) (2019); N.J. STAT. ANN. §§ 2C:14-2(c), 2C:43-6(a)(2); MICH. COMP. LAWS § 750.520d(2) (2020); N.C. GEN. STAT. §§ 14-27.22(b), 15A-1340.17(c), (f) (2020); OHIO REV. CODE ANN. §§ 2907.02(b), 2929.14(a)(1)(a), 2929.144(b)(1) (LexisNexis 2019). In some states additional enhancements apply when the victim is a young child.

¹⁸ See note 7, *supra*.

SECTION 213.3 SEXUAL ASSAULT OF AN INCAPACITATED, VULNERABLE, OR LEGALLY RESTRICTED PERSON

(1) *Sexual Assault of an Incapacitated Person.* An actor is guilty of Sexual Assault of an Incapacitated Person when:

(a) the actor causes another person to submit to or perform an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act, the other person:

(i) is sleeping, unconscious, or physically unable to communicate lack of consent; or

(ii) lacks substantial capacity to appraise, control, or remember the person's own sexual conduct or that of anyone else because of a substance administered to that person, without that person's knowledge or consent; and the actor administered the incapacitating substance for the purpose of causing that incapacity or knows that it was surreptitiously administered by another for that purpose; and

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (a) and (b) are present.

Sexual Assault of an Incapacitated Person is a felony of the third degree [10-year maximum]. It is a registrable offense when the actor has previously been convicted of a felony sex offense.

(2) *Sexual Assault of a Vulnerable Person.* An actor is guilty of Sexual Assault of a Vulnerable Person when:

(a) the actor causes another person to submit to or perform an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act, the other person:

(i) has an intellectual, developmental, or mental disability, or a mental illness, that makes the person substantially incapable of appraising the nature of the sexual activity involved, or of understanding the right to

1 give or withhold consent in sexual encounters, and the actor has no
2 similarly serious disability; or

3 (ii) is passing in and out of consciousness; or

4 (iii) lacks substantial capacity to communicate lack of consent; or

5 (iv) is wholly or partly undressed, or in the process of undressing,
6 for the purpose of receiving nonsexual professional or commercial services
7 from the actor and has not given the actor explicit prior permission to
8 engage in that act; and

9 (c) the actor is aware of, yet recklessly disregards, the risk that the
10 circumstances described in paragraphs (a) and (b) are present.

11 Sexual Assault of a Vulnerable Person is a felony of the fourth degree [*five-year*
12 *maximum*].

13 (3) *Sexual Assault of a Legally Restricted Person*. An actor is guilty of Sexual Assault
14 of Legally Restricted Person when:

15 (a) the actor, who did not have a consensual sexually intimate relationship with
16 the other person at the time that a state-imposed restriction on that person's liberty
17 began, causes the other person to submit to or perform an act of sexual penetration or
18 oral sex; and

19 (b) the act is without effective consent because at the time of the act, the other
20 person is:

21 (i) in custody, incarcerated, on probation, on parole, under civil
22 commitment, in a pretrial release or pretrial diversion or treatment program,
23 or in any other status involving a state-imposed restriction on liberty; and

24 (ii) the actor is in a position of actual or apparent authority or
25 supervision over the restriction on the other person's liberty; and

26 (c) the actor knows that the circumstances described in paragraphs (a) and (b)
27 are present.

28 Sexual Assault of a Legally Restricted Person is a felony of the fifth degree [*three-*
29 *year maximum*].

30 (4) *Effective consent*. Consent is ineffective under Section 213.0(2)(e)(iv) when a

1 **condition or circumstance described in subsections (1)(b), (2)(b), or (3)(b) existed at the**
2 **time the other person submitted to or performed the act of sexual penetration or oral sex.**
3 **Submission, acquiescence, or words or conduct that would otherwise indicate consent do**
4 **not constitute effective consent when occurring in a condition or circumstance described in**
5 **these subsections.**

6 **Comment:**

7 Section 213.3 sets out circumstances in which acts of sexual penetration or oral sex with
8 an incapacitated, vulnerable, or legally restricted person constitute a felony of the third, fourth, or
9 fifth degree. Section 213.3 makes clear that the actor can be held liable under this provision
10 when the actor is aware of and disregards a substantial and unjustifiable risk that the specified
11 circumstances are present. Proof of the conditions described in Section 213.3 make consent by
12 the other person ineffective, even if that person’s words or behavior, or the totality of the
13 circumstances, would otherwise signify apparent consent as defined by Section 213.0(2)(e). As a
14 matter of law, a person in one or more of the conditions described by this Section—such as
15 sleep, unconsciousness, physical or mental incapacity, or custodial status—lacks the capacity to
16 give valid, effective consent. Section 213.0(2)(e)(iv), a subsection of the definition of consent,
17 makes this principle explicit, and Section 213.3(4) reiterates that consent is ineffective when the
18 circumstance described in subsections (1), (2), or (3) existed at the time the other person
19 submitted to or performed the act of sexual penetration or oral sex. Absence of consent is neither
20 an element of these offenses, nor available as a defense, because proof beyond a reasonable
21 doubt of the existence of the specified condition establishes the complainant’s inability to
22 consent.¹ That proof, along with proof of the remaining elements (including the actor’s mens rea
23 and actus reus), are the bases for conviction.

¹ Cf. *People v. Dancy*, 124 Cal. Rptr. 2d 898, 910-911 (Cal. Ct. App. 2002) (“Defendant argues that criminal intent does not exist if the unconscious victim consented in advance or the defendant reasonably believed that the victim would have consented or would not have resisted if conscious. . . . The concept of an ‘advance consent’ to unconscious sexual intercourse is based on a fallacy. A decision to engage in sexual intercourse is necessarily an ad hoc decision made at a particular time with respect to a particular act. While a woman may expressly or impliedly consent to *conscious* sexual intercourse in advance, she remains free to withdraw that consent, and ordinarily has the ability to do so since she is conscious. Even if a woman expressly or impliedly indicates in advance that she is willing to engage in *unconscious* sexual intercourse, a man who thereafter has sexual intercourse with her while she is unconscious necessarily deprives her of the opportunity to indicate her lack of consent. The inherent risk that a man may misinterpret a woman’s prior statements or conduct weighs strongly against recognizing ‘advance consent’ as a defense to rape of an unconscious person since the woman’s lack of consciousness absolutely precludes her from making her lack of consent known at the time of the act.”).

1 ***1. Persons Vulnerable as a Result of Mental or Physical Conditions.***

2 The common law historically equated rape by force with the sexual penetration of a
3 person “wholly insensible so as to be incapable of consenting,” which included intoxicated and
4 mentally impaired persons.² Similarly, the 1962 Code punishes sexual penetration as rape, a
5 felony of the first or second degree, when the actor knows or is recklessly aware of the risk that
6 the other person is unconscious or surreptitiously drugged.³ And the 1962 Code punishes sexual
7 intercourse as a third-degree felony when the actor knows that the other person “suffers from a
8 mental disease or defect which renders her incapable of appraising the nature of her conduct” or
9 “is unaware that a sexual act is being committed upon her.”⁴

10 Today, contemporary law uniformly protects persons who are too impaired to give
11 effective consent, whether the impairment is a result of permanent or temporary disability,
12 whether the disability is physical or mental, and whether it is voluntary or involuntary.⁵

13 Section 213.3 lists several circumstances in which a mental or physical impairment
14 prevents a person from giving effective consent to a sexual act. Section 213.3(1)(b)(i) protects
15 persons physically unable to consent as a result of sleep, unconsciousness, or a physical
16 impediment that leaves the person with no ability to communicate consent or its absence. Section

² Commonwealth v. Burke, 105 Mass. 376 (1870). As explained by the Supreme Judicial Court of Massachusetts, “[i]f it were otherwise, any woman in a state of utter stupefaction, whether caused by drunkenness, sudden disease, the blow of a third person, or drugs which she had been persuaded to take even by the defendant himself, would be unprotected....” Id. at 381; see also MODEL PENAL CODE Section 213.1 Comment at 276 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980) [hereinafter 1962 Code] (“Rape was also extended to situations where the woman was incapable of meaningful consent for reasons other than immaturity. The chief examples were intercourse with a woman who was unconscious, drugged, or mentally incompetent to understand the significance of the sexual act.”).

³ 1962 Code Section 213.1(1)(b) (surreptitious intoxication) and (c) (“the female is unconscious”). The offense was second-degree rape (10-year maximum) if the victim was a “voluntary social companion” who “previously permitted [the actor] sexual liberties,” and first-degree (life maximum) if not. See also 1962 Code Section 213.2(1)(b), (c) (deviate sexual intercourse). Because the Code did not specify a mental state for these attendant circumstances, the offenses require a mens rea of at least recklessness. 1962 Code Section 2.02(3) (“When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.”). The Commentary to the 1962 Code affirms this reading. See, e.g., 1962 Code Commentary at 316 (“Subsection (1)(b) requires . . . that he be at least reckless with respect to her lack of awareness.”); id. at 319 (noting that “[i]ntercourse with an unconscious female was an established species of rape at common law” and rejecting knowledge standard, noting that “the Model Penal Code follows prior law” and requires that the actor “be reckless with regard to [the Complainant’s] condition”).

⁴ 1962 Code Section 213.1(2)(b) and (c). These offenses exempted spouses. See also 1962 Code Section 213.2(2)(b), (c) (the same for “deviate sexual intercourse”).

⁵ See Reporters’ Notes, *infra*.

Section 213.3 Sexual Assault of an Incapacitated, Vulnerable, or Legally Restricted Person

213.3(1)(b)(ii) applies to the egregious situation in which a person lacks substantial capacity to appraise, control, or remember the sexual conduct of any person, because of a substance administered, without that person's knowledge or consent, and the actor either surreptitiously administered that substance for the specified culpable purpose or knew that an incapacitating substance was administered surreptitiously by someone else for that purpose.

Section 213.3(2)(b)(i) governs persons whose ability to appraise the nature of the sexual activity or to understand their right to give or withhold consent is substantially incapacitated as a result of mental disability or mental illness. Section 213.3(2)(b)(ii) covers situations in which the capacity to give or withhold consent is impaired because the person, though not totally unconscious, is passing in and out of consciousness, whether due to an intoxicant or other cause. Section 213.3(2)(b)(iii) covers situations in which the person lacks substantial capacity to communicate lack of consent, whether because of mental impairment, physical disability, or other condition that has the stipulated effect. Thus, subparagraph (i) applies when mental disability impairs the capacity for understanding, while subparagraphs (ii) and (iii) apply when any disability impairs the capacity to communicate. Section 213.3(2)(b)(iv) covers situations in which the vulnerability occurs as a result of circumstances that require undressing before a professional or commercial service provider.

The offenses identified in subsection (1) are graded as third-degree felonies and those identified in subsection (2) as fourth-degree felonies, because greater culpability is associated with assaults on persons who are vulnerable because of incapacities that more fully deprive the person of the ability to exercise sexual autonomy. To find an accused guilty under any of these circumstances, subsections (1)(c) and (2)(c) require proof that the accused was at least aware of a substantial, unjustifiable risk of the condition's existence.⁶

a. Sleeping, Unconscious, and Physically Impaired Victims – Section 213.3(1)(b)(i).

Intercourse with a sleeping or unconscious woman was a well-established form of rape at

⁶ 1962 Code Section 2.02(2)(c). The Code's definition of recklessness is subject to the Section 2.08(2) proviso, applicable to all offenses of the 1962 Code, which holds that "[w]hen recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial." Revised Article 213, however, leaves the application of rules regarding the relevance of evidence of the actor's voluntary intoxication to state law. See Section 213.0(1)(b).

Section 213.3 Sexual Assault of an Incapacitated, Vulnerable, or Legally Restricted Person

common law.⁷ The 1962 Code, as well as every American jurisdiction, treats the decision to intrude sexually on an unconscious or physically incapacitated person as a serious criminal offense, and the great majority explicitly cover sleep as a state of unconsciousness.⁸ Section 213.3(1)(b)(i) equates unconsciousness and sleep with the situation in which the victim is conscious but physically unable to communicate.

Section 213.1(1)(b)(i) includes sleeping complainants within its protections. In a significant number of cases in which a person awakens as a result of the sensation of being penetrated by another person (typically an intruder, family member, or nonintimate cohabitant).⁹ Relying on a standard like “unconscious” or “physically unable to communicate lack of consent” creates unnecessary ambiguity. And in the absence of a provision expressly covering persons who were asleep, all such acts—whether committed by an actor in the course of a home invasion

⁷ See 4 HENRY JOHN STEPHENS, NEW COMMENTARIES ON THE LAWS OF ENGLAND 66 (L. Crispin Warmington ed., 21st ed. 1950) (“[S]imilarly, if the carnal knowledge takes place while the woman is asleep or in a stupefied condition, it is rape.”); see also *Burke*, 105 Mass. at 380-381.

⁸ Every state criminalizes sexual intercourse with a sleeping, unconscious or physically helpless person, and nearly every state expressly covers sleeping persons either explicitly by statute or in clear case law applying incapacitation provisions. See Reporters’ Note. See also, e.g., CAL. PENAL CODE § 261(a)(4)(A) (Deering 2020) (defining “unconscious of the nature of the act” as “incapable of resisting because the victim . . . [w]as unconscious or asleep”); 720 ILL. COMP. STAT. ANN. 5/11-1.20(a)(2) (LexisNexis 2019) (“A person commits criminal sexual assault if that person commits an act of sexual penetration and: . . . knows that the victim is unable to understand the nature of the act or is unable to give knowing consent”); MICH. COMP. LAWS SERV. § 750.520a(m) (LexisNexis 2019) (“‘Physically helpless’ means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act.”); N.Y. PENAL LAW § 130.00(7) (Consol. 2019) (“‘Physically helpless’ means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.”); 18 PA. CONS. STAT. § 3121(a)(3) (2019) (defining “rape” in part as sexual intercourse with a complainant who “is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring”); WIS. STAT. ANN. § 940.225(2)(d) (LexisNexis 2019) (defining second-degree sexual assault as when an actor “[h]as sexual contact or sexual intercourse with a person who the defendant knows is unconscious”). Although the 1962 Code used only “unconscious,” it is clear from the commentary that the drafters perceived that sleep was a state of unconsciousness. MODEL PENAL CODE Section 213.1 Comment at 319 & nn.122-23 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980) (citing statutes and the Commentaries on the Laws of England, also cited in *supra* note 7); see also *id.* (“Moreover, unconsciousness is conclusively demonstrative of present inability to consent, and it renders more or less irrelevant any prior course of voluntary behavior by the female.”).

⁹ See, e.g., *United States v. Fasthorse*, 639 F.3d 1182, 1184 (9th Cir. 2011) (affirming a guilty verdict where the complainant testified to waking up with the accused’s penis inside her); *People v. Rouse*, 2019 IL App (4th) 160854-U, ¶ 11 (2019) (discussing a case in which a man entered a woman’s apartment and “she woke up after feeling an erect penis inside her vagina”); *People v. Williams*, 688 N.Y.S.2d 734, 735 (N.Y. App. Div. 1999) (affirming a guilty verdict where the complainant woke up to “heavy breathing on her neck and someone ejaculating inside her”); *State v. Hines*, 112 N.E.3d 10, 15 (Ohio Ct. App. 2018) (affirming a rape conviction where the complainant “awoke to sharp pain inside her vagina” and realized that the accused had “his fingers inside her vagina”); *State v. Snow*, 70 A.3d 971, 975 (Vt. 2013) (quoting a police officer’s affidavit that the complainant awoke to the accused “having intercourse with her”); see also Reporters’ Notes, *infra*. An extraordinary number of cases involve youthful complainants, but the fact pattern appears regularly among adult complainants as well.

or by a sexually aggressive roommate—would at best fall within the lowest tier of sexual offense, Sexual Assault in the Absence of Consent. But an actor should not assume that a sleeping person has consented to an act as intimate as sexual penetration or oral sex. Nor should the law tolerate legal arguments that would exculpate these actors from liability when the nature of the act forecloses the other person’s ability to communicate refusal or lack of consent. Even the act of rousing a sexual partner with a sexually intimate act is often preceded by physical touches that first stir the other person from unconsciousness. But to the extent that an actor engages in an act of sexual penetration or oral sex with a fully unconscious individual, who then awakens to the sensation of that penetration, it is the actor who assumes the risk that the penetration or oral sex is not in fact welcome. A property trespass does not become lawful just because the actor entered without permission with the intent to beautify the place or please the property owner; so too is a bodily trespass not rendered lawful simply because the actor’s intent was to please the unconscious recipient of the sexual act.

Illustrations:

1.¹⁰ Complainant is asleep when Accused, a neighbor with whom Complainant has been friendly but has no personal, much less intimate, relationship, enters through an unlocked window. Accused goes into the bedroom where Complainant sleeps and sexually penetrates Complainant. Complainant wakes up on feeling the sexual penetration and screams. Accused immediately withdraws, saying “Sorry—I thought you had a crush on me.” These facts support a finding of guilt under Section 213.3(1)(b)(i), because Complainant was asleep at the time of the act of penetration. Even if the actor withdrew immediately when Complainant woke and expressed nonconsent, and even if the actor had genuinely believed the act was welcome, if the factfinder believes that Accused initiated the act of sexual penetration while Complainant was asleep, Accused is liable under Section 213.3(1)(b)(i).

¹⁰ Illustration 1 is loosely based on the facts of *State v. Pittman*, 496 N.W.2d 74, 77, 84 (Wis. 1993) (affirming conviction where the accused initiated intercourse with the complainant, an acquaintance, while she slept, but stopped and left the room when she woke up, though “[n]either she nor [the accused] spoke”).

1 2.¹¹ After a car accident, Complainant is confined to a hospital bed. Although
2 conscious, Complainant has trouble speaking as a result of a broken jaw and has internal
3 injuries that limit Complainant’s range of motion. Late one night, Accused, a nurse at the
4 hospital, enters the room to wake Complainant and take vital signs. Accused then lifts
5 Complainant’s gown and, for no medical reason, inserts various objects into
6 Complainant’s anus. Based on this evidence, a factfinder could find Accused guilty of a
7 violation of Section 213.3(1)(b)(i). Although Complainant is not unconscious or sleeping,
8 Complainant is physically unable to communicate lack of consent as a result of
9 Complainant’s physical impairments.

10 3.¹² Same facts as Illustration 2, except that Complainant’s jaw is not injured.
11 Complainant retains the ability to speak even though Complainant’s body is immobilized.
12 After checking Complainant’s vitals, Accused inserts a finger into Complainant’s anus.
13 Complainant, shocked, exclaims, “What are you doing? Stop that!” Based on these facts,
14 Accused cannot be charged with a violation of Section 213.3(1)(b)(i). Complainant is not
15 asleep or unconscious, and although Complainant is physically incapacitated,
16 Complainant remains capable of verbal expression. Note, however, that these facts might
17 support liability under Section 213.3(2)(b)(iii), which covers persons who lack substantial
18 capacity to communicate lack of consent, or Section 213.3(2)(b)(iv), which covers acts of
19 penetration that occur while a person is partly undressed for the purposes of receiving
20 professional or commercial services, or Section 213.6, which covers acts of penetration
21 done without the other person’s consent.

22 4.¹³ Complainant, an 85-year-old woman, has developed physical and intellectual
23 disabilities that severely inhibit her capacity to live independently. Complainant cannot

¹¹ Illustration 2 is drawn loosely from the facts of *Goka v. State*, 657 S.W.2d 20, 21-22 (Tex. Ct. App. 1983) (upholding conviction under a state statutory provision requiring that the victim be “physically unable to resist,” where a nurse penetrated a patient who “was unable, as a consequence of an automobile accident, to sit up in bed or care for herself; that she could not speak and could communicate only by turning her thumb up or down to signify ‘yes’ or ‘no’”).

¹² Illustration 3 is based on the facts of *State v. Hufford*, 533 A.2d 866, 869, 873-874 (Conn. 1987) (finding that the victim, who was restrained by straps on a medical stretcher, was not “physically helpless” because the state statute defined that condition as “physically unable to communicate unwillingness,” and the complainant, although immobile, could still protest verbally).

¹³ Illustration 4 is loosely based on the facts of *State v. Atkins*, 666 S.E.2d 809, 811, 814 (N.C. Ct. App. 2008) (upholding conviction where the accused had “vaginal intercourse” with the complainant—an 83-year-old

1 move without assistance, and she has trouble with both the intellectual and physical
2 dimensions of speech. She is able to live at home as a result of 24-hour care from
3 relatives and paid caregivers, who bathe, feed, and otherwise provide for her. Accused
4 lives across the street and occasionally helps out around Complainant's house. One day
5 while Complainant's caregivers are momentarily away, Accused enters Complainant's
6 home, surprising her. Accused carries Complainant from her wheelchair to a nearby bed,
7 where Accused lifts Complainant's clothing and sexually penetrates her. Accused
8 whimpers and cries during the act, but is unable to move, leave, or articulate clear words.
9 When one of Complainant's caretakers returns home and finds Complainant in a
10 disheveled state on the bed, the caretaker notifies police. Complainant identifies Accused
11 as her assailant. Based on this evidence, a jury could find that Complainant was
12 "physically unable to communicate lack of consent" at the time of the act under Section
13 213.3(1)(b)(i), based on Complainant's mental and physical disabilities. Although
14 Complainant had some ability to communicate through both words and behavior,
15 Complainant's impairments satisfy the standard of "physically unable to communicate
16 lack of consent."

17 ***b. Mental Impairments – Section 213.3(2)(b)(i).***

18 Section 213.3(2)(b)(i) addresses a victim whose capacity to consent is impaired due to
19 some form of mental impairment. The covered mental impairments include "intellectual,
20 developmental, or mental disability or a mental illness." Although there is no medical or legal
21 consensus on consistent terminology, and a person may have overlapping conditions, Section
22 213.3(2)(b)(i) is intended to cover the full array of mental impairments, using contemporary
23 terms.¹⁴ As described by the National Institute of Health:¹⁵

woman who relied on a caretaker and was known to be of "frail condition"—during which she "hollered, screamed, and begged for him to stop"). See also *State v. Cuni*, 733 A.2d 414, 418-419 (N.J. 1999) (upholding conviction where an expert testified that the complainant, a "mentally deficient adult," "knows that intercourse is where a penis is inserted in a vagina. She knows that prophylactics are used for safe sex. She knows that people don't have the right to invade your body. . . . She intellectually knows that she has a right to refuse," but it was the expert's "clinical judgment that she doesn't have the functional ability to say no").

¹⁴ The 1962 Code Section 213.1(2)(b) refers to "mental disease or defect," outdated language that remains in common use in statutes today.

1 Intellectual and developmental disabilities (IDDs) are disorders that are usually
2 present at birth and that negatively affect the trajectory of the individual's physical,
3 intellectual, and/or emotional development. Many of these conditions affect multiple
4 body parts or systems. Intellectual disability starts any time before a child turns 18 and is
5 characterized by problems with both:

- 6 • Intellectual functioning or intelligence, which include the ability to learn,
7 reason, problem solve, and other skills; and
- 8 • Adaptive behavior, which includes everyday social and life skills.

9 The term “developmental disabilities” is a broader category of often lifelong disability
10 that can be intellectual, physical, or both.

11 A mental disability or mental illness, in contrast, is a “mental, behavioral, or emotional
12 disorder” that may be permanent or transient.¹⁶

13 The principal challenge is to identify the degree of disability that precludes a person from
14 the capacity to give legally effective consent. The difficulties are compounded by an underlying
15 tension: concern for protecting persons with a mental impairment from exploitation and abuse,
16 which points toward setting the baseline for capacity to consent at a relatively high level of
17 mental and social functioning, versus setting such a high standard that many such persons will be
18 precluded from experiencing sexual intimacy and sexually fulfilling relationships, even with
19 peers who pose no danger to them.¹⁷

20 Section 213.3(2)(b)(i) strikes a balance between the desire to honor the capacity of
21 persons with mentally impairments to express their sexuality while also protecting those persons
22 from exploitation or abuse. Subsection (2)(b)(i) sets out a high bar for negating the capacity of a
23 person with a mental impairment to consent. In addition, subsection (2)(b)(i) requires the
24 prosecutor to prove that the accused “has no similarly serious disability.” That provision has two
25 aims. First, it recognizes the equal standing of both parties to a sexual encounter when those
26 parties each have mental disabilities that rise to the level governed by subsection (2)(b)(i). In that
27 situation, both parties are “victims” and “actors.” It should not be left to discretion to determine
28 whether one party deserves blame. Second, precluding liability for a person with a mental

¹⁵ *Intellectual and Developmental Disabilities (IDDs): Condition Information*, EUNICE KENNEDY SHRIVER
NAT'L INST. CHILD HEALTH & HUM. DEV., <https://www.nichd.nih.gov/health/topics/idds/conditioninfo/default> (last
updated Dec. 1, 2016).

¹⁶ *Mental Illness*, NAT'L INST. MENTAL HEALTH, <https://www.nimh.nih.gov/health/statistics/mental-illness.shtml> (last updated Feb. 2019).

¹⁷ See Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. ILL. L. REV. 315, 319-320.

1 disability akin to that of the complainant further safeguards the right of disabled and mentally ill
2 persons to engage sexually with peers in situations less fraught with the risk of exploitation.¹⁸

3 But to be clear, subsection (2)(b)(i) does not preclude prosecution of an actor—whether
4 mentally disabled or not—who engages in a sexual act with a person with mental impairments
5 in circumstances involving impermissible force, extortion, or deception. The other provisions of
6 Article 213 remain applicable, and all are felonies carrying roughly equivalent or more serious
7 penalties. Similarly, sexual acts with a person with a mental impairment who does not consent to
8 that act is governed by Section 213.6. In addition, the fact that the victim is a person with a
9 mental disability might be considered in sentencing for those offenses, just as the sentencing
10 judge might impose a more severe sentence when a victim is elderly or otherwise vulnerable. But
11 the offense set out in subsection (2)(b)(i), a fourth-degree felony, is addressed to a different
12 circumstance: it applies even when the person nominally consents to the sexual act, because
13 proof of the disability makes any apparent consent ineffective. Thus, subsection (2)(b)(i) applies
14 only when the mental disability or mental illness “makes the person substantially incapable of
15 appraising the nature of the sexual activity involved, or of understanding the right to give or
16 withhold consent in sexual encounters,” and the actor “has no similarly serious disability.”

17 Existing law addresses the circumstances covered by Section 213.3(2)(b)(i), although the
18 precise standard adopted varies. Most jurisdictions use some version of the language found in the
19 1962 Code, which precludes a person from giving effective consent when the person is
20 “incapable of appraising the nature of her conduct” as a result of the impairment.¹⁹ Subsection
21 (2)(b)(i) builds on this standard and incorporates three other features, the first two of which are
22 found in existing law. First, subsection (2)(b)(i) expands the relevant standard to include not just
23 persons “incapable of appraising the nature of the sexual activity involved,” but also persons
24 who lack the capacity to “understand[] the right to give or withhold consent in sexual

¹⁸ There is little empirical evidence about the frequency with which a person with a mental impairment is charged with a sexual offense in connection with nominally consensual sexual activity engaged in with another person with a mental impairment. One recent review of 172 appellate cases of sexual offenses involving mental incapacity statutes revealed that in 97.7 percent of cases the defendant was described as nondisabled. Jasmine E. Harris, *Sexual Consent and Disability*, 93 N.Y.U. L. Rev. 480, 533, 542 tbl.3 (2018).

¹⁹ Section 213.1(2)(b) of the 1962 Code provided that: “A male who has sexual intercourse with a female not his wife commits a felony of the third degree if: . . . he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct. . . .” This language has been widely copied in existing law, although it has also been widely criticized. See Reporters’ Note, *infra*.

1 encounters.” Second, subsection (2)(b)(i) explicitly applies a standard of substantial, rather than
2 total, incapacity to these criteria. Lastly, subsection (2)(b)(i) adopts a novel clause that requires
3 the prosecution to prove that the actor does not have an intellectual, developmental, or mental
4 disability or mental illness of similar seriousness to that of the complainant.

5 The standard set by subsection (2)(b)(i) seeks to ensure that an individual consenting to a
6 sexual act possesses a baseline of capacity to make an autonomous choice. The appraisal
7 standard finds the broadest support in existing law, despite its imperfections.²⁰ To establish a
8 lack of capacity to choose, it is not sufficient to show that a victim did not have a fully informed
9 understanding of sexual intercourse. For example, a person might believe that the first time a
10 person engages in intercourse cannot result in pregnancy; this person would not be incompetent
11 to consent for that reason alone, even if the person’s cognitive capacity is below average. Rather,
12 a conviction under this provision requires the prosecution to prove that the person affected
13 lacked the capacity to understand. When that capacity is absent, a statement of willingness to
14 engage in sexual penetration has no meaningful content for the person expressing it, and its
15 validity or effectiveness should be precluded *per se*.

16 The second factor, which requires that the person have the capacity to understand the
17 right to give or withhold consent,²¹ similarly states a basic prerequisite to the exercise of an
18 autonomous decision to engage in sexual intimacy. A person’s mental impairment may not
19 preclude that person from understanding the nature of sexual intimacy, but it may nonetheless
20 prevent the person from understanding that the decision to engage willingly (or to express
21 unwillingness) belongs to that person alone. An actor who engages in sexual intimacy, knowing

²⁰ E.g., *People v. Cratsley*, 615 N.Y.S.2d 463, 464 (App. Div. 1994), *aff’d*, 653 N.E.2d 1162 (N.Y. 1995) (affirming conviction where the victim could not spell her name or correctly state her age, did not know where babies came from or “what it mean[t] to be pregnant,” and had “no knowledge of AIDS or venereal disease”).

²¹ See, e.g., ME. REV. STAT. ANN. tit. 17-A, § 253(2)(C) (LexisNexis 2019) (categorizing gross sexual assault as a Class B crime where the victim is “substantially incapable of appraising the nature of the contact involved or of understanding that the person has *the right to deny or withdraw consent*” (emphasis added)); *State v. Olivio*, 589 A.2d 597, 605 (N.J. 1991) (interpreting “mentally defective” under state law as a condition that “rendered him or her unable to comprehend the distinctively sexual nature of the conduct, or incapable of understanding or exercising the right to refuse to engage in such conduct with another”); cf. 10 U.S.C. § 920(b)(3)(B) (2018) (in the context of the armed forces, proscribing sexual conduct with another person who is “incapable of consenting to the sexual act due to . . . a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person”); D.C. CODE § 22-3003(2)(C) (2019) (defining second-degree sexual abuse in part as situations where the actor “knows or reasonably should know that the other person is . . . [i]ncapable of communicating unwillingness to engage in that sexual act”).

1 of a substantial risk that the other person is substantially incapable of understanding that the
2 person has a right to give or withhold consent, unjustly exploits that person's mental incapacity
3 and is rightly punished. To be clear, this standard rejects the position that the factfinder should
4 make a moral determination about the wisdom of consenting. It does not require that the person
5 have the mental capacity to make "good" decisions about consent, only that the person
6 understand that it is that person's right to give or withhold consent as a general matter.²²

7 **Illustrations:**

8 5.²³ Accused, a handyman, often performs repairs at the home of Complainant at
9 the behest of Complainant's brother, who also lives in the home. Complainant is a 60-
10 year-old woman who is blind, partially physically disabled, severely intellectually
11 disabled, and incapable of speech as a result of a stroke. Complainant spends most days
12 sitting in a wheelchair in a minimally conscious state. One day, the brother leaves
13 Accused in the home to finish repairs while Complainant is present. When the brother
14 returns unexpectedly, he encounters Accused sexually penetrating Complainant, who is
15 grunting and writhing. Accused testifies that the act was consensual, and that the grunting
16 and writhing indicated Complainant's pleasure. The prosecution offers medical and other
17 evidence that Complainant does not possess the intellectual capacity to understand or
18 communicate in spoken or written language and to recognize people, and has lost the
19 physical capacity to speak. Moreover, although Complainant may make facial
20 expressions, cry, or smile, these displays occur without apparent cause. If the jury
21 believes the prosecution's evidence beyond a reasonable doubt, then with added proof of
22 Accused's mens rea and actus reus, the jury may convict the defendant under Section
23 213.3(2)(b)(i). Complainant's grunts and writhing are irrelevant; the prosecution's

²² Cf. MINN. STAT. § 609.341(6) (2019) ("Mentally impaired" means that a person, as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration.").

²³ Illustration 5 is based loosely on the facts of *Dabney v. State*, 930 S.W.2d 360, 361-362 (Ark. 1996) (finding that the victim was physically helpless because, as a woman who was "blind, mentally impaired, partially handicapped, and unable to speak," she was "physically unable to communicate the lack of consent" the state statute required). Cf. *State v. Fourtin*, 52 A.3d 674, 687 (Conn. 2012) (noting that the "physically helpless" standard generally applies to persons incapable of any means of communication, but that it might apply to a severely disabled person who, evidence shows, uses "biting, kicking, scratching, screeching, groaning or gesturing" to express displeasure, if a jury found that such expressions were more part of a "startle reflex, or a sign of generalized anger, frustration or even mischievousness" as opposed to a "conduit for communication").

1 evidence proves beyond a reasonable doubt that Complainant is substantially incapable of
2 appraising the nature of the sexual activity or the right to consent and thus cannot give
3 effective consent.

4 6.²⁴ Accused is charged with engaging in an act of sexual penetration with
5 Complainant, who lives next door with Complainant's parents. Complainant is 26 years
6 old. As a result of an intellectual disability, Complainant scored in the lowest .1 percent
7 of scores on a standard intelligence test, cannot read, cannot write, speaks at the level of a
8 seven-year-old, has the personal-care ability of a nine-year-old, and cannot self-feed or
9 understand how to purchase groceries. When asked, Complainant describes intimate
10 sexuality in terms of hugging and affection, rather than intercourse. Based on these facts,
11 a jury could find that Complainant is "substantially incapable of appraising the nature of
12 the sexual activity involved," even though complainant is not totally incapable of
13 comprehending sexual intimacy, and may understand the right to give or withhold
14 consent. With added proof of defendant's actus reus and mens rea, a jury could properly
15 convict under Section 213.3(2)(b)(i).

16 7.²⁵ Complainant has an intellectual disability and resides in a group home. While
17 getting groceries one day, Complainant encounters Accused, and they begin a
18 conversation. Accused invites Complainant to Accused's home, where the two drink
19 alcohol and joke with one another. Accused then leads Complainant to a bedroom, where
20 a bow and arrow hangs from the wall. According to Complainant, Accused stated that
21 Accused would shoot Complainant with the bow and arrow if Complainant did not
22 comply, and proceeded to perform acts of sexual penetration and oral sex. Complainant
23 reports the incident to police. At trial, the prosecution introduces evidence that

²⁴ Illustration 6 is loosely based on the facts of *Schimele v. State*, 784 So. 2d 591, 593 (Fla. Dist. Ct. App. 2001) (finding that, regardless of whether "the victim's low IQ, relatively young development age and mental impairment" established that he was mentally defective, it did establish that he was "incapable of appraising the nature of his conduct").

²⁵ Illustration 7 is loosely based on the facts of *Righter v. State*, 752 P.2d 416, 417 (Wyo. 1988) (affirming conviction where the accused invited the victims to his home to "party" and indicated he would shoot them with the bow and arrow on his wall if they tried to leave). Cf. *State v. Hunt*, 722 S.E.2d 484, 487-488 (N.C. 2012) (finding that the victim lacked the "mental capacity to consent," despite being "highly functional in her daily activities," where her IQ indicated "mental retardation" and she feared the accused would "hurt [her] more"); *State v. Weisberg*, 829 P.2d 252, 253, 255-256 (Wash. Ct. App. 1992) (finding "sufficient evidence of lack of consent to support a conviction of the lesser included offense of rape in the third degree" where the victim was "mentally retarded" but there was no threat to injure the victim).

1 Complainant could understand the social implications of engaging in sexual intercourse,
2 but that Complainant was vulnerable to manipulation, had poor judgment, and needed
3 significant assistance to function socially. Based on this evidence, a jury could not find
4 that Accused violated Section 213.3(2)(b)(i). Complainant has a basic understanding of
5 the nature of sexual activity and the right to give or withhold consent. However, in light
6 of Complainant's assertion that Accused threatened to shoot Complainant with an arrow,
7 Accused may properly face liability under a Section related to the threat of physical
8 force, such as Section 213.1 or 213.2.

9 8.²⁶ Complainant is the 18-year-old friend of Accused's daughter, who volunteers
10 in a mentorship program that pairs neurotypical youth with persons with mental
11 disabilities. One day Accused drives Complainant home after an event that Complainant
12 attended with Accused's daughter. On the trip, Accused pulls the car over and engages in
13 oral sex with Complainant. Complainant's parents eventually learn of the incident and
14 report it to police, and Accused is charged with a violation of Section 213.3(2)(b)(i).

15 According to the prosecution's expert, Complainant ranks in the bottom two
16 percent on intellectual scales and functions socially at the level of a seven-year-old.
17 Complainant has a minimal comprehension of the mechanics of sex, but does not
18 "understand that her body is private and that she had a right to be free from the invasions
19 of others, and capacity to refuse to engage in sexual activity." The defense expert testifies
20 that Complainant has a slightly higher level of functioning and is able to attend school
21 and develop meaningful relationships. This expert witness testifies that Complainant not
22 only understands the basics of sexual intimacy but also is aware of and capable of
23 refusing consent, even though Complainant may be readily manipulated and is eager to
24 please others.

25 Whether or not Accused may be properly convicted turns on whether the jury
26 believes the prosecution or the defense expert. If the jury believes the prosecution expert,
27 then under Section 213.3(2)(b)(i), liability is supported even if Complainant understands

²⁶ Illustration 8 is loosely based on the facts of *State v. Olivio*, 589 A.2d 597, 599 (N.J. 1991) (remanding the matter for new trial because the lower court reversed conviction where the accused had intercourse with the "mentally defective" victim after she asked him for a ride).

1 the basics of sex, because Complainant remains substantially incapable of understanding
2 the right to refuse sexual intimacy.

3 9. Accused and Complainant participate in a day program for adults with severe
4 intellectual and developmental disabilities and describe themselves as “best friends.” At
5 one of the program’s events, the program organizers notice that Accused and
6 Complainant are missing. They are found in a wooded area nearby engaging in oral sex.
7 Evidence establishes that both Accused and Complainant have intellectual disabilities
8 that make them “substantially incapable of understanding the nature of the sexual activity
9 involved,” but only Accused is charged with an offense. Given these facts, Accused may
10 not be found guilty under subsection (2)(b)(i). Although Complainant’s mental
11 impairment may have precluded Complainant from being able to give legally effective
12 consent, Accused’s equivalent mental impairment excludes Accused from the class of
13 persons for whom sexual behavior, even if nominally consensual, is considered
14 exploitative, and instead places Accused within the class of persons that subsection
15 (2)(b)(i) aims to protect.

16 ***c. Intoxication: Surreptitiously Induced – Section 213.3(1)(b)(ii).***

17 Three provisions address acts of sexual penetration or oral sex with a person impaired by
18 an intoxicant: Section 213.3(1)(b)(ii), Section 213.3(2)(b)(ii), and Section 213.3(2)(b)(iii). The
19 first addresses the most culpable conduct in these provisions. Section 213.3(1)(b)(ii) penalizes
20 surreptitiously administering a substance (such as an intoxicant) to another person for the
21 purpose of obtaining submission to sexual penetration or oral sex by impairing the person’s
22 ability to appraise, control, or remember any person’s sexual conduct. Although the frequency
23 of these kinds of incidents is unknown, furtive administration of alcohol and certain other
24 intoxicants—most notably GHB²⁷ and Rohypnol (commonly called “roofies”)²⁸—as a means of

²⁷ GHB, or Gamma-Hydroxybutyric acid, is the name for sodium oxybate, a drug used legally as an industrial solvent. It is also used illegally for a number of purposes, such as fat loss or treatment of insomnia. U.S. DRUG ENFORCEMENT ADMIN., DRUG FACT SHEET: GHB 1 (2020) https://www.dea.gov/sites/default/files/2020-06/GHB-2020_0.pdf. In the sexual-assault context, GHB, particularly when taken in combination with drugs or alcohol, induces an “increase[d] libido, suggestibility, passivity, and . . . amnesia.” *Id.* at 2. Because it can be easily dissolved surreptitiously in liquids (as it is clear and has only a “slightly salty” taste), it emerged as a date-rape drug in the 1990s. *Id.* at 1-2.

²⁸ Flunitrazepam, marketed as Rohypnol and commonly known as “roofies,” is a potent drug in a class that also includes diazepam. Kelly M. Smith et al., *Club Drugs: Methylenedioxymethamphetamine, Flunitrazepam,*

sexual exploitation occurs sufficiently often that a special provision is warranted. The 1962 Code included provisions covering these kinds of cases,²⁹ and these provisions are common in current law, either in statutes that explicitly address this conduct, or in case law interpreting general incapacitation provisions. Nearly half of U.S. jurisdictions have dedicated statutory provisions governing surreptitious intoxication.³⁰ The elements of these offenses commonly require the person's substantial impairment as a result of an intoxicant administered without that person's knowledge or consent, administered for the purpose of facilitating the actor's sexual purpose.³¹ The remaining statutory schemes typically cover this kind of behavior under their "mental

Ketamine Hydrochloride, and γ -Hydroxybutyrate, 59 AM. J. HEALTH-SYS. PHARMACY 1067, 1070 (2002). At low doses, the effects of flunitrazepam include drowsiness, decreased anxiety, and muscle relaxation. M.A.K. Mattila & H.M. Larni, *Flunitrazepam: A Review of Its Pharmacological Properties and Therapeutic Use*, 20 DRUGS 353, 356, 358, 362 (1980); Smith et al., *supra*, at 1071. Moreover, "[a]t higher doses, the drug can cause lack of muscle control[,] . . . loss of consciousness," and depressed respiration. Smith et al., *supra*, at 1071; Mattila & Larni, *supra*, at 354, 366; see also Jørgen G. Bramness et al., *Flunitrazepam: Psychomotor Impairment, Agitation and Paradoxical Reactions*, 159 FORENSIC SCI. INT'L 83, 83, 88 (2006). Flunitrazepam can produce anterograde amnesia, so that a person may not remember what occurred while under its influence. Mattila & Larni, *supra*, at 357; see also NAT'L INST. ON DRUG ABUSE, DRUGFACTS, CLUB DRUGS (GHB, KETAMINE, AND ROHYPNOL) 2 (2014), www.drugabuse.gov/sites/default/files/drugfacts_clubdrugs_12_2014.pdf. Some people may experience less common, paradoxical reactions, such as "agitation, talkativeness, confusion, disinhibition, aggression, violent behavior, and loss of impulse control." Bramness et al., *supra*, at 83. Research suggests that the effects of the drug may be exacerbated by alcohol use. Smith et al., *supra*, at 1071.

²⁹ 1962 Code Sections 213.1(1)(b) and 213.2(1)(b).

³⁰ Twenty-four states, Washington, D.C., and the federal system all have provisions expressly addressing purposeful intoxication. See 18 U.S.C. § 2241(b)(2) (2018); ARIZ. REV. STAT. ANN. §§ 13-1401(7)(b), -1406(A) (LexisNexis 2020); COLO. REV. STAT. §§ 18-3-402(4)(d), -404(1)(d) (2018); DEL. CODE ANN. tit. 11, § 761(k)(5) (2019); D.C. CODE §§ 22-3002(a)(4), -3004(4) (2019); FLA. STAT. ANN. § 794.011(4)(e)(4) (LexisNexis 2019); HAW. REV. STAT. § 707-730 (2019)(1)(e); IDAHO CODE § 18-6101(5) (2019); 720 ILL. COMP. STAT. ANN. 5/11-1.30(a)(7), -1.60(a)(7) (LexisNexis 2019); IND. CODE ANN §§ 35-42-4-1(b)(4), 35-42-4-8(b)(4) (LexisNexis 2019); IOWA CODE ANN. § 709.4(c)-(d) (LexisNexis 2019); LA. STAT. ANN. § 14:42.1(A)(2) (2018); ME. REV. STAT. ANN. tit. 17-A, § 253(2)(A) (LexisNexis 2019); MASS. ANN. LAWS ch. 272, § 3 (LexisNexis 2020); MO. ANN. STAT. §§ 566.030(1), 566.060(1) (LexisNexis 2019); N.H. REV. STAT. ANN. § 632-A:2(I)(f) (LexisNexis 2019); N.Y. PENAL LAW § 130.90 (Consol. 2019) ; N.D. CENT. CODE §§ 12.1-20-03(1)(b), -07(1)(c) (2019); OHIO REV. CODE ANN. §§ 2907.02(A)(1)(a), .05(A)(2) (LexisNexis 2020); OKLA. STAT. ANN. tit. 21, §§ 1111(A)(4), 1114(A)(3) (LexisNexis 2019); 18 PA. CONS. STAT. §§ 3121(a)(4), 3123(a)(4), 3125(a)(5), 3126(a)(5) (2019); S.C. CODE ANN. § 16-3-652(1)(c) (2019); TEX. PENAL CODE ANN. §§ 22.011(b)(6), 22.021(a)(2)(A)(iv) (LexisNexis 2019); UTAH CODE ANN. § 76-5-406(2)(h) (LexisNexis 2019); VT. STAT. ANN. tit. 13, § 3252(b) (2019); WYO. STAT. ANN. § 6-2-303(a)(iii) (2019). The majority of these provisions are limited to surreptitious or nonconsensual administration of intoxicants.

³¹ See, e.g., COLO. REV. STAT. § 18-3-402(4)(d) (2018) ("The actor has substantially impaired the victim's power to appraise or control the victim's conduct by employing, without the victim's consent, any drug, intoxicant, or other means for the purpose of causing submission."); DEL. CODE ANN. tit. 11, § 761(k)(5) (2019) ("The defendant had substantially impaired the victim's power to appraise or control the victim's own conduct by administering or employing without the other person's knowledge or against the other person's will, drugs, intoxicants or other means for the purpose of preventing resistance.").

incapacitation” provisions,³² but retain similar elements. Section 213.3(1)(b)(ii) reflects a well-established category of liability.

Section 213.3(1)(b)(ii) is consistent with prevailing law. It retains three requirements prevalent in many contemporary statutes: administration of the substance either by the defendant or with the defendant’s knowledge, without the other person’s knowledge or consent, and for the purpose of impairing the other person’s ability to appraise, control, or remember any person’s sexual conduct. The inclusion of “remember,” a standard not typically found in existing law, includes surreptitiously administered intoxicants that target memory and recollection, rather than solely capacity. The actor need not administer the intoxicant personally nor direct its administration; it is enough if the actor knows that the other person unknowingly or unwillingly ingested it.³³

Illustration:

10. Complainant meets Accused and Accused’s friend at a local bar, where they chat over drinks. Accused knows that the friend has brought a powerful odorless and tasteless intoxicant known as GHB, commonly referred to as a “date-rape drug,” in order to incapacitate persons surreptitiously and facilitate sexual encounters. When

³² See, e.g., ALA. CODE § 13A-6-60(6) (LexisNexis 2020) (defining “incapacitated” in part as “[a] person is temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or intoxicating substance and the condition was known or should have been reasonably known to the offender”); CONN. GEN. STAT. ANN. § 53A-65(5) (LexisNexis 2019) (“‘Mentally incapacitated’ means that a person is rendered temporarily incapable of appraising or controlling such person’s conduct owing to the influence of a drug or intoxicating substance administered to such person without such person’s consent, or owing to any other act committed upon such person without such person’s consent.”).

³³ See Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 133-134 (2002) (referring to the act of administering an intoxicant before sexually assaulting a victim and the act of sexually assaulting a victim who is already intoxicated as two separate offenses). Many of the state statutes apply to intoxicants administered without the victim’s knowledge, but do not impose the additional requirement, present in MODEL PENAL CODE Section 213.1(1)(b) (AM. L. INST., Proposed Official Draft 1962), that the defendant be the agent of the surreptitious administration. See, e.g., MINN. STAT. § 609.341(7) (2019) (“‘Mentally incapacitated’ means that a person under the influence of alcohol, a narcotic, anesthetic, or any other substance, administered to that person without the person’s agreement, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration.”); N.J. STAT. ANN. § 2C:14-1(i) (LexisNexis 2019) (“‘Mentally incapacitated’ means that condition in which a person is rendered temporarily incapable of understanding or controlling his conduct due to the influence of a narcotic, anesthetic, intoxicant, or other substance administered to that person without his prior knowledge or consent, or due to any other act committed upon that person which rendered that person incapable of appraising or controlling his conduct”); N.Y. PENAL LAW § 130.00(6) (Consol. 2019) (“‘Mentally incapacitated’ means that a person is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent, or to any other act committed upon him without his consent.”).

1 Complainant gets up to use the restroom, Accused sees the friend pour some GHB in
2 Complainant's drink. Complainant returns and finishes the drink, unaware that it has been
3 spiked. A short time later, Complainant, feeling sleepy and confused, says, "I should go."
4 Accused offers to walk Complainant to Complainant's car, steadying Complainant on
5 Accused's arm. At the car, Accused kisses and touches Complainant, and then helps
6 Complainant into the back seat and engages in an act of sexual penetration. Complainant,
7 dizzy and disoriented, does not protest. Based on this evidence, a factfinder could find
8 Accused guilty of a violation of Section 213.3(1)(b)(ii). Even though Accused neither
9 administered nor directed the friend to administer the GHB, a consciousness-altering
10 substance, into Complainant's drink, Accused knew that the friend surreptitiously
11 administered the substance for the purpose of impairing Complainant's capacity to
12 appraise, control, or remember the sexual conduct. Aware that Complainant's capacity
13 was substantially impaired, Accused then engaged in an act of sexual penetration. A
14 factfinder could further find Accused's friend guilty as an accomplice, if it found that the
15 friend gave Complainant the GHB with the purpose of aiding Accused's commission of
16 the offense.

17 Section 213.3(1)(b)(ii) does not apply in two situations that arguably occur more
18 regularly than those defined by the elements of the offense. In the first situation, the actor
19 provides intoxicants to another person and perhaps even encourages that person to use them,
20 such as by offering drugs or encouraging the person to drink more alcohol, hoping that they will
21 lower the person's sexual inhibitions. However, the actor does not mislead the other person about
22 the substances being consumed. In the second situation, the actor furtively slips an intoxicating
23 substance into the food or drink of another person, but without a purpose of gaining sexual
24 advantage.

25 Both situations are outside the scope of Section 213.3(1)(b)(ii). The first situation
26 normally constitutes an offense only if the intoxicant is a controlled substance or if one of the
27 parties is under age. The second situation may constitute a crime other than a sex offense: the
28 actor perpetrates a bodily intrusion without the informed consent of the other party. Although
29 serious, furtively administering intoxicants to another person, without the goal of gaining sexual
30 advantage, is a different crime from those addressed in Article 213.

To be clear, if either situation resulted in sexual conduct under circumstances prohibited by other provisions of Article 213, then liability might be established for an offense other than Section 213.3(1)(b)(ii). For instance, if the intoxicant makes the other person unconscious or physically incapable of expressing nonconsent, sexual penetration or oral sex is governed by Section 213.3(1)(b)(i). Or if the intoxicated person intermittently loses consciousness or lacks a substantial capacity to communicate, then the sexual penetration or oral sex would be covered under Section 213.3(2)(b)(ii) or (iii).

Illustration:

11. A prankster invites a group of friends over for dinner. As a joke, the prankster uses “magic” mushrooms (an illicit intoxicant) in one of the dishes in order to “lighten this party up.” When everyone has finished eating, the prankster watches with amusement as the guests experience the hallucinogenic effects. One guest notices everyone acting peculiarly, and asks the prankster what is going on. The prankster says, “Don’t tell—I drugged everyone!” The guest waits for the drugging to affect Complainant, then ushers Complainant to a private room and engages in an act of sexual penetration. Based on these facts, neither the prankster nor the guest may be charged with a violation of Section 213.3(1)(b)(ii). Although the prankster surreptitiously administered a consciousness-altering substance, this was not done with the purpose of impairing any person’s capacity to appraise, control, or remember sexual conduct. Nor is the prankster an accomplice of the guest, because the prankster did not purposefully aid the guest’s act of sexual penetration. Although the guest knew that Complainant was surreptitiously intoxicated by the prankster, the guest did not cause that intoxication, and the guest knows that the prankster did not cause the intoxication for the purpose of impairing anyone’s ability to appraise, control, or remember sexual conduct. At best, the prankster may be liable for a nonsexual offense for surreptitiously drugging Complainant. The guest may be liable, with additional evidence, under Section 213.3(1)(b)(i) if the evidence shows that the substance rendered Complainant unconscious or physically unable to communicate; under Section 213.3(2)(b)(ii) or (iii) if Complainant was not continuously conscious or lacked substantial capacity to communicate; or under Section 213.6 if the guest engaged in an act of sexual penetration with a nonconsenting person. But the evidence does not support liability for either party under Section 213.3(1)(b)(ii).

1 Section 213.3(1)(b)(i), (1)(b)(ii), (2)(b)(ii), and (2)(b)(iii)—the quartet of provisions
2 addressing unconsciousness, surreptitious drugging, and the effects of extreme intoxication—
3 reflect current understandings regarding the dynamics of intoxication-fueled situations and
4 responds to concerns that the reach of the 1962 Code and similar statutes was inadequate.³⁴

5 As a grading matter, the 1962 Code equated sexual penetration in conditions involving
6 the deliberate, surreptitious administration of intoxicants, or involving a sleeping or unconscious
7 victim, with forcible penetration. That judgment remains sound. Arguably, the actor who
8 surreptitiously drugs another person to gain sexual advantage merits greater punishment than one
9 who uses physical force or who takes advantage of an unconscious person. A surreptitiously
10 drugged person is stripped of bodily autonomy, not just sexual autonomy, and the intoxicant's
11 effect on memory and perception may help the offender evade accountability.³⁵ And unlike an
12 actor who simply takes advantage of another person's unconsciousness, the actor who
13 surreptitiously drugs another affirmatively disables that person in a manner that aggravates the
14 actor's culpability and exposes the other person to additional harm from the effects of the
15 intoxicants.

16 But although arguments for enhanced punishment are persuasive, in absolute terms a
17 third-degree felony provides adequate penalty to serve the purposes of punishment. The
18 collateral effects of surreptitious drugging, and the added culpability of engaging in such an act,
19 can be punished with separate charges specifically addressed to that behavior. To the extent that
20 a sexual intrusion is the core of the offense of Section 213.3, the act is properly analogized to
21 intruding upon an unconscious person.

22 ***d. Voluntary Intoxication and Substantial Incapacity – Section 213.3(2)(b)(ii) and (iii).***

23 A high proportion of sexual assaults occur while a complainant is under the influence of
24 an intoxicant that was consumed voluntarily rather than surreptitiously administered.³⁶ This

³⁴ E.g., STEPHEN J. SCHULHOFER, UNWANTED SEX 7-9, 273 (1998). See generally Karen M. Kramer, *Rule By Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115 (1994) (acknowledging shortcomings of the legal standard of consent in sexual-assault cases, particularly as compared to the Canadian criminal code).

³⁵ See, e.g., *Sera v. State*, 17 S.W.3d 61, 65-69 (Ark. 2000) (describing a case involving several victims known to defendant, where the defendant periodically spiked their drinks with Rohypnol without their knowledge and then filmed sexual encounters, but victims had no memory of the incidents).

³⁶ The data are conflicting, but according to one estimate, roughly 35 percent to 55 percent of adult victims were under the influence of an intoxicant at the time of a sexual assault, most commonly alcohol. Leanne R.

1 circumstance is particularly common among young people assaulted by persons they know.³⁷
2 Subparagraphs (ii) and (iii) of Section 213.3(2)(b) impose a penalty in sexual-penetration and
3 oral-sex cases in which a person's condition is so severe that it renders the person incapable of
4 consent. Although these provisions address the common circumstance of impairments caused by
5 voluntary intoxication, their application is not limited to that circumstance. A person passing in
6 and out of consciousness due to an injury or illness, for instance, would be equally covered.

7 The terms of Section 213.3(2)(b)(ii) and (iii) respond to two conflicting concerns. On the
8 one hand, a great deal of harmful sexual activity occurs between intoxicated parties. On the other
9 hand, a great deal of *desired* sexual activity also occurs between intoxicated parties. Indeed, both
10 parties often intentionally employ alcohol and other intoxicants as a welcome means of lowering
11 sexual inhibitions. It is therefore inappropriate to presume in law that an intoxicated person
12 cannot give consent, or to proscribe all sexual activity with an intoxicated individual. Yet, it is
13 also important not to *equate* voluntary intoxication with consent, or to leave willingly intoxicated
14 persons unprotected when their condition falls short of total lack of consciousness.

15 Voluntary intoxication does not waive a victim's right to autonomous choice and bodily
16 integrity. Stealing property is no less an offense when an intoxicated victim leaves items
17 unguarded; so too, sexual assault is no less a crime because an individual was too intoxicated to
18 communicate an objection to another person's advances. Accordingly, the standard for alcohol-
19 induced incapacity must be sufficiently protective of impaired individuals but not so broad that it
20 sweeps in common circumstances involving consensual sexual acts.

Brecklin & Sarah E. Ullman, *The Roles of Victim and Offender Substance Use in Sexual Assault Outcomes*, 25 J. INTERPERSONAL VIOLENCE 1503, 1504 (2010). But see David Light & Elizabeth Monk-Turner, *Circumstances Surrounding Male Sexual Assault and Rape: Findings from the National Violence Against Women Survey*, 24 J. INTERPERSONAL VIOLENCE 1849, 1854 (2009) (indicating low rates (about 16 percent) of intoxication in a study of non-penal male rape victims).

³⁷ The percentages rise dramatically among college-aged victims and among those who describe their assailant as an acquaintance. Brecklin & Ullman, *supra* note 36, at 1511 tbl.1. By one count, "approximately half of all sexual assault incidents among college and young adult populations involve the use of alcohol or other drugs by the perpetrator, the victim or both." Maria Testa et al., *The Role of Victim and Perpetrator Intoxication on Sexual Assault Outcomes*, 65 J. STUD. ON ALCOHOL 320, 320 (2004). In one study, moreover, in more than half the cases of sexual assault, the victim reported that the perpetrator "just did it before you had a chance to protest." Laurel Crown & Linda J. Roberts, *Against Their Will: Young Women's Nonagentic Sexual Experiences*, 24 J. SOC. & PERS. RELATIONSHIPS 385, 392, 396 tbl.2 (2007); see also Sharon Cowan, *The Trouble with Drink: Intoxication, (In)capacity, and the Evaporation of Consent to Sex*, 41 AKRON L. REV. 899, 904-905 (2008) (reporting that "in student populations, up to 81% of [sexual] incidents can involve drinking on the part of the victim.").

Existing law takes a range of approaches to cases involving voluntary intoxication.³⁸ However, many of the current standards are so broad as to risk criminalizing innocent conduct, or so vague as to provide inadequate guidance as to what degree of incapacity triggers liability.³⁹

Section 213.3(2)(b)(ii) and (iii) draws upon existing law while clarifying its application. Subparagraph (ii) identifies an objective, specific circumstance that indicates a degree of intoxication so severe that, even though it did not lead to continuous unconsciousness (a condition that would support liability under Section 213.3(1)(b)(i)), and even though it did not come about involuntarily (a condition that could support liability under Section 213.3(1)(b)(ii)), it places the person in a vulnerable condition: passing in and out of consciousness. In contrast, if an actor purposefully and surreptitiously uses intoxicants to disable another person, then subsection (1)(b)(ii) applies, and in cases where intoxication, whether voluntary or involuntary, renders a person continuously unconscious, subsection (1)(b)(i) applies. In both of those circumstances, the felony is graded as one of the third degree.

But if an individual is no longer firmly and continuously conscious, neither the fact that the individual voluntarily became intoxicated nor the fact that the individual does not expressly protest can be considered a sufficient indication of consent to sexual activity. Although the transient and unstable nature of the person's consciousness diminishes the culpability of the actor compared with one who sexually intrudes upon a person who is fully and steadily unconscious, the act remains a serious affront. Under Section 213.3(2)(b)(ii), sexual penetration or oral sex is a felony of the fourth degree when the actor knows or is aware of a substantial, unjustifiable risk that the person is passing in and out of consciousness at the time of the act.

Even in the absence of this specific indicator, however, Section 213.3(2)(b)(iii) permits liability when the actor is aware of a substantial, unjustifiable risk that the other person lacks substantial capacity to communicate, whether through words or conduct, lack of consent. The standard described in Section 213.3(2)(b)(iii) narrows the most common formulations in statutory law, which focus on "helplessness" or on the "appraise or control conduct" standard. Both of these standards are fuzzy. Even low levels of intoxication tend to impair the ability of

³⁸ See Reporters' Note. States tend to follow one of three models: the state expressly includes an intoxication standard within its definition of "mental incapacitation"; the state sweeps intoxication under a provision covering "physically helpless" victims; or the state outlines a specific substantive standard for an intoxicated person.

³⁹ See Reporters' Note.

people to appraise their own conduct, and sexual contexts may involve ambiguous signals. Because of these complications, the inquiry in Section 213.3(2)(b)(iii) is concerned solely with whether a person's condition substantially inhibits the person from communicating unwillingness, not with whether that person had the mental ability to appraise or control his or her conduct. The logic behind such a standard is clear: Just as consent cannot be inferred when a person is sleeping or unconscious, it likewise cannot be inferred when that person has lost substantial ability to communicate lack of willingness. In most cases, an inability to communicate will be clear, because the person will be substantially incapable of both coherent speech *and* coherent physical movement. A pronounced incapacity of this sort should be readily apparent, even to an actor who is quite intoxicated; if that kind of incapacity is not readily apparent to anyone in the defendant's position, then the mens rea element cannot be proved and liability cannot attach.

Illustrations:

12. Accused and Complainant meet at a party where Complainant ingests alcohol and controlled substances. The evidence shows that Accused and Complainant joined several friends outside in a hot tub, where Complainant had slurred but comprehensible speech, was laughing and talking loudly, and seemed "all over the place." Late in the evening, Complainant ordered the friends out of the hot tub, stating that Complainant wanted "alone time" with Accused. The friends complied. Once they were alone, Complainant kissed Accused. Accused then removed Complainant's bathing suit and sexually penetrated Complainant's anus. Complainant later testifies that Complainant was heavily intoxicated and not in full control of Complainant's judgment or behavior. These facts do not support liability under Section 213.3(2)(b)(ii) or (iii). Although Complainant was heavily intoxicated, slurring speech, and acting atypically, there is no indication that Complainant was incapable of communicating lack of consent.

13. Same facts as Illustration 12, except that when the friends go outside, Complainant is so intoxicated that Accused has to carry Complainant and place Complainant in the hot tub. Complainant does not participate in the conversation once there. Twice Complainant starts to slip under the water while mumbling incoherently, and Accused has to prop Complainant up to prevent Complainant from drowning. When the friends go inside, Accused takes off Complainant's bathing suit and anally penetrates

1 Complainant. Based on these facts, a factfinder could find that Accused was aware of a
2 substantial, unjustifiable risk that Complainant lacked substantial capacity to
3 communicate lack of consent. Complainant's inability to walk to or get in the hot tub,
4 lack of speech while there, and lack of sufficient bodily control to react to or prevent
5 drowning indicate that Complainant was substantially incapacitated even if technically
6 conscious. On that basis, the trier of fact could find Accused guilty of violating Section
7 213.3(2)(b)(iii).

8 Some commentators express concern about holding an accused who is intoxicated
9 responsible for a sexual offense cases involving an equally intoxicated complainant, worrying
10 that holding an accused liable under these circumstance may be unjust. Section 2.08 of the 1962
11 Code provided that evidence of intoxication could be used to negate a mental state of knowledge
12 or purpose, but not recklessness, without regard to the nature of the offense charged or the
13 intoxication status of any complainant in the case. That general rule endures in some
14 jurisdictions, although generally it has not applied in sexual-assault cases.⁴⁰ As revised, Section
15 213.0(1)(b) specifies that state law governs the treatment of an accused's evidence of
16 intoxication.

17 The impairments covered by subsection (2)(b)(ii) and (iii) are transient in nature. More
18 permanent physical and mental impairments, such as longstanding cognitive, intellectual, or
19 physical incapacities, are addressed in subsections (1)(b)(i) and (2)(b)(i). Subparagraphs (ii) and
20 (iii) of subsection (2)(b) also apply without regard to how the incapacity came about. Although
21 the most frequent circumstances are likely to involve intoxicated persons, these subparagraphs
22 are equally applicable to a person who is intermittently losing consciousness or lacks substantial
23 capacity to communicate as a result of injury or illness. When Section 213.3(2)(b)(ii) or (iii)
24 applies, the offense is graded as a felony of the fourth degree.

25 ***2. Nonsexual Professional or Commercial Services – Section 213.3(2)(b)(iv).***

⁴⁰ See Reporters' Note to Section 213.0(1)(b) (explaining that many sexual offenses are strict liability, or apply negligence or recklessness—and under both the common law and 1962 Code, intoxication defenses are only available for proof of the mental states of knowledge or purpose).

Section 213.3 Sexual Assault of an Incapacitated, Vulnerable, or Legally Restricted Person

1 Section 213.3(2)(b)(iv) addresses a vulnerability created as a result of the need to undress
2 in order to obtain nonsexual professional or commercial care. A “nonsexual” service is one that
3 does not typically entail sexual penetration or oral sex, even though disrobing or nudity may be
4 involved. Accordingly, sexual therapy and prostitution, while commercial in nature, are not
5 covered by this provision. Typical activities covered by this provision include massage or
6 personal-care services, or caretaking of physically disabled or elderly persons. A service need
7 not be formally licensed or certified to satisfy the “professional or commercial” element. Those
8 qualifiers are present to exclude social and other occasions when persons may be wholly or
9 partially undressed (for example, a clothing-optional hot tub at a resort). Sexual acts in the
10 professional or commercial context are not wholly foreclosed; rather, the actor is required to seek
11 explicit prior permission before engaging in an act of sexual penetration or oral sex with a person
12 who is undressed before the actor in order to receive a professional service.

13 The prohibition of subsection (2)(b)(iv) is narrower than that of Section 213.3(3) (Sexual
14 Assault of a Person Subject to a State-Imposed Restriction on Liberty) but broader than that of
15 Section 213.6 (Sexual Assault in the Absence of Consent). It is narrower than Section 213.3(3)
16 because that provision prohibits all sexual acts, even those with nominal consent, due to the
17 inherently coercive conditions of confinement. In contrast, Section 213.3(2)(b)(iv) does not
18 impose a blanket prohibition on all sexual acts that occur within the context of a nonsexual
19 professional service. It is broader than Section 213.6, because Section 213.6 asks only about
20 whether an actor was aware of a substantial risk that the other person did not consent. In contrast,
21 Section 213.3(2)(b)(iv) presumes that persons who are receiving professional services do not
22 also consent to acts of sexual penetration, and thus requires that an actor obtain explicit
23 permission to engage in the sexual act. Subsection (2)(b)(iv) thus reflects the uncontroversial
24 understanding that sexual intimacy in these circumstances is unexpected and would be unwanted,
25 and makes sexual acts impermissible in the absence of explicit prior permission from the
26 customer or patient.

27 The nonsexual nature of the services justifies a presumption of lack of consent that is
28 more robust than in circumstances in which the sexual intentions of an individual who has
29 already voluntarily disrobed may be more ambiguous. Whereas voluntary nudity in a social
30 encounter may signal sexual availability, the act of disrobing to receive a massage or depilatory

1 service carries no connotation other than desire for a professional service. Although such a
2 presumption may be overcome, it should be overcome explicitly.

3 Conversely, although a clothed person may be intruded upon sexually by an actor
4 providing nonsexual commercial or professional services, the liability provisions of other parts
5 of Article 213, including Section 213.6, adequately cover these situations. A hygienist
6 performing a dental cleaning may impermissibly fondle the breasts of the patient, but Section
7 213.7 (Offensive Sexual Contact) adequately penalizes such behavior when undertaken in the
8 absence of consent. The evidence can rightfully focus on whether, in the context of all the
9 circumstances, the person welcomed the sexual contact. But when an actor takes advantage of
10 the other person's physical vulnerability in order to engage in sexual penetration or oral sex, this
11 kind of ordinary inquiry into consent feels misplaced. The special vulnerability to sexual
12 penetration of a person who must disrobe to receive professional or commercial services,
13 particularly if the services involve physical contact between the provider and consumer,⁴¹
14 justifies a heightened standard that requires those providers to first seek explicit permission
15 before engaging in the sexual act.

16 However, the fact that sexual acts are not likely in the professional or commercial context
17 does not mean they are inconceivable. Section 213.3(2)(b)(iv) recognizes that a person receiving
18 professional or commercial services while undressed may expressly consent to sexual activity, so
19 long as the consent is explicit and precedes the sexual act. The prosecution must prove beyond a
20 reasonable doubt the absence of explicit prior permission, as defined in Section 213.10, to secure
21 a conviction under Section 213.3(2)(b)(iv).

22 **Illustrations:**

23 14. Complainant makes an appointment with Accused for Complainant's first
24 massage at a local parlor. Complainant is naked, except for a pair of thin disposable
25 underwear provided by the parlor, under a sheet that Accused moves to expose different
26 parts of Complainant's body. Complainant's sense of tranquility is jolted when
27 Complainant feels Accused's fingers touching high up on Complainant's inner thigh.
28 Dismissing a sense of discomfort as the product of inexperience, Complainant says

⁴¹ The risk of such intrusion is less in a tanning booth than in a massage parlor, for instance.

1 nothing. Complainant then feels Accused slide Complainant's underwear aside and
2 digitally penetrate Complainant's vagina. Complainant sits up and says, "No, thank you."
3 Accused immediately withdraws his hand, and shortly thereafter Complainant leaves and
4 reports the incident to police. In the course of the investigation, police find other patrons
5 who report having had similar experiences with Accused, who says, "I just want to make
6 sure my guests are happy; I always stop if they don't like it!" when asked about the
7 incidents.

8 Based on these facts, a jury could find Accused guilty of a violation of Section
9 213.3(2)(b)(iv). Complainant was undressed for the purpose of receiving nonsexual
10 professional and commercial services from Accused, and Complainant did not give
11 explicit prior permission to Accused to engage in the act of sexual penetration. Even
12 though Complainant did not protest until after the penetration occurred, Accused's belief
13 that Complainant would consent to sexual penetration and Accused's good-faith intention
14 to stop and withdraw if asked are not pertinent, as Accused needed to have explicit prior
15 permission before engaging in an act of sexual penetration or oral sex under the
16 circumstances. A jury could find that Complainant did not expressly consent before the
17 act of penetration and that Accused knew or was aware of a substantial risk of no prior
18 consent.

19 15. Same as in Illustration 14, except that Accused asks Complainant at the start
20 of the massage if Complainant would like "sexual massage," and gestures toward the
21 Complainant's genital area. Complainant smiles, asks how much such services cost, and
22 then accepts Accused's offer. Accused then engages in an act of oral sex with
23 Complainant, who sits up and exclaims, "I thought you were going to use your hands!"
24 and later reports the incident to police. Based on these facts, a jury cannot find Accused
25 guilty of a violation of Section 213.3(2)(b)(iv). First, although Complainant's initial
26 appointment with Accused was for professional or commercial nonsexual services, the
27 subsequent agreement between Accused and Complainant transformed the encounter into
28 a sexual (if still commercial) transaction. Second, Complainant gave explicit prior
29 permission to Accused to engage in a sexual act. Even if Complainant understood that
30 permission to apply to a different act than the one engaged in by Accused, the two acts
31 are not so dissimilar that a jury could find beyond a reasonable doubt that Accused was

1 aware of a substantial risk that Complainant's permission did not extend to Accused's
2 acts.

3 Section 213.3(2)(b)(iv) is graded as a felony in the fourth degree, although in some
4 respects this offense resembles the offenses of greater severity defined in Section 213.3(1)(b)(i)
5 (unconscious persons) and punished as a felony in the third degree. Section 213.3(1)(b)(i)
6 punishes a sexual intrusion that occurs in a situation in which the other person has no capacity to
7 refuse. Neither the unconscious victim of a sexual intrusion nor the victim of a sexual intrusion
8 in a commercial or professional setting has an opportunity to refuse. In both situations, the
9 intrusion is unexpected and without prior warning.⁴² But an unconscious victim is also simply
10 unaware of what is happening. A person who is unexpectedly penetrated while having a massage
11 or medical exam has no opportunity to resist or even express unwillingness before the act, but
12 remains aware of what is happening and retains the ability to communicate.

13 Thus a better analogy might be to the offenses defined by Section 213.3(3), which covers
14 custodial relationships, and is punished as a felony in the fifth degree. In both Section
15 213.3(2)(b)(iv) and Section 213.3(3), the other person is in a sense vulnerable to the actor, who
16 exploits that vulnerability for the actor's own sexual satisfaction. At the same time, the behavior
17 covered under Section 213.3(3) will in many instances be nominally consensual; clearly
18 nonconsensual sexual acts that occur in a custodial setting remain governed by the provisions
19 requiring force (Sections 213.1 and 213.2), extortion (Section 213.4) or the absence of consent
20 (213.6). The availability of more serious penalties for more egregious forms of sexual intrusion
21 in the commercial or professional setting—such as those involving the use or threatened use of
22 physical force—and the difference from the offenses described in Section 213.3(1) and (3),
23 which require that the other person's vulnerability be so extreme that it effectively forecloses the
24 person's awareness of what is happening or ability to consent, militate in favor of a penalty more
25 in line with that of Section 213.3(2), which involves situations of vulnerability precluding
26 meaningful consent and is graded as a felony of the fourth degree. A fourth-degree felony also
27 appropriately mirrors Section 213.6(2)(a), which carries the same penalty. The aggravated
28 penalty of Section 213.6 punishes acts of sexual penetration or oral sex that occur by surprise or

⁴² See Reporters' Note *infra*.

1 despite the other person's expressed unwillingness. The behavior proscribed by Section
2 213.3(2)(b)(iv) is effectively analogous, because a person who has disrobed for a professional
3 service has consented only to a professional service, not to an act of sexual penetration, and thus
4 the person is appropriately analogized to one who is surprised or has expressly indicated
5 unwillingness.

6 ***3. Abuse of Custodial Authority – Section 213.3(3).***

7 Section 213.3(3) defines a felony of the fifth degree for persons in a vulnerable status
8 relationship to the actor as a result of a custodial relationship. Subparagraphs (i) and (ii) of
9 subsection (3)(b) reach abuses that call for criminal prohibition, even in the absence of overtly
10 coercive means, because of the inherent abuse of power present when the actor holds a position
11 of authority with a substantial degree of control over a person in a legal status of custody or
12 detention. Of course, when a person in authority—such as a prison guard—knowingly obtains
13 sexual consent by threatening an inmate with physical harm or other coercive pressure, the
14 offense may constitute Sexual Assault by Aggravated Physical Force or Restraint under Section
15 213.1, or Sexual Assault by Physical Force or Restraint under Section 213.2, or Sexual Assault
16 by Extortion under Section 213.4, even in the absence of a provision specifically addressed to the
17 prison setting. And if the actor engages in sexual penetration or oral sex knowing that the other
18 person does not consent, even in the absence of added force or threats, the actor is punishable
19 under Section 213.6 for Sexual Assault in the Absence of Consent.

20 Subparagraphs (i) and (ii) go further by imposing liability when a correctional officer or
21 other actor is in a position of actual or apparent power over a person's liberty and engages in an
22 act of sexual penetration or oral sex with that person, regardless of whether the person in
23 authority believes that the other party is willing or has even voiced express consent, and
24 regardless of whether the actor in authority makes tacit threats.⁴³ Existing law varies widely in
25 the authorized sentences for comparable conduct. Some jurisdictions authorize a maximum
26 sentence of 25 to 40 years,⁴⁴ others five to seven years,⁴⁵ others one to four years,⁴⁶ and some do

⁴³ See *Crawford v. Cuomo*, 796 F.3d 252, 259-260 & nn.5-6 (2d Cir. 2015) (noting that as of 2015, all 50 states criminalize sexual intercourse between correctional officers and inmates, and all but two criminalize sexual contact).

⁴⁴ See, e.g., FLA. STAT. ANN. §§ 775.082(3)(b)(1), 794.011(4)(b), (e)(7) (LexisNexis 2019) (defining sexual battery as a felony of the first degree if “without consent” under certain custodial situations, where the maximum penalty for such a felony is imprisonment of 30 years); WIS. STAT. ANN. §§ 939.50(3)(c), 940.225(2)(g)-

1 not expressly punish this conduct at all. Section 213.3 grades the offense as a felony of the fifth
2 degree, akin to the lower threshold of punishment for Sexual Assault in the Absence of Consent.
3 The two offenses are effectively equivalent: both involve acts of penetration or oral sex with a
4 person who either has not or cannot express willingness, but in the absence of added factors such
5 as expressed refusal, force, a condition of vulnerability, or other explicit coercion.

6 Liability under these subparagraphs is subject to an exception when the person in
7 authority is a prior consensual sexual partner of the person subject to that power or control, at the
8 time when the power or control began. Ordinarily, professional and ethical norms preclude the
9 exercise of custodial authority by anyone who has a close personal or familial relationship with
10 the person who is confined. But it is possible to foresee local circumstances in which such an
11 exercise of custodial authority or other official influence over the conditions of individual liberty
12 might occur. Accordingly, paragraph (a) makes clear that the per se prohibition on sexual
13 relationships between (for example) an inmate and a guard does not apply when the danger of
14 implicit coercion of an unwilling person is markedly reduced—namely, when the parties had a
15 consensual sexual relationship at the time that the custody or other legal restrictions on liberty
16 were imposed. Of course, if an actor with a pre-existing sexual relationship uses the position of
17 authority to extort or otherwise coerce sexual submission, such conduct remains punishable
18 under Section 213.4, Sexual Assault by Extortion.

19 Ultimately the factfinder must determine what qualifies as a prior consensual sexual
20 relationship. Some boundaries are clear. First, the relationship must be ongoing at the beginning
21 of the restriction on liberty, as captured by the requirement that the relationship be in place “at

(i) (LexisNexis 2019) (defining sexual contact in a wide array of custodial situations as a Class C felony, which carries a maximum sentence of 40 years’ imprisonment).

⁴⁵ See, e.g., 720 ILL. COMP. STAT. ANN. 5/11-9.2(c) (LexisNexis 2019) (defining “custodial misconduct” as a “Class 3 felony”); id. ch. 730, § 5/5-4.5-40(a) (setting the punishment for a Class 3 felony at 2-5 years).

⁴⁶ See, e.g., OHIO REV. CODE ANN. § 2907.03(A)(6) (LexisNexis 2020) (“No person shall engage in sexual conduct with another . . . when . . . [t]he other person is in custody of law or a patient in a hospital or other institution, and the offender has supervisory or disciplinary authority over the other person.”); id. § 2907.03(A)(11) (“No person shall engage in sexual conduct with another . . . when . . . [t]he other person is confined in a detention facility, and the offender is an employee of that detention facility.”); id. § 2307.03(B) (prescribing the penalty for listed offenses as felony of the third degree); id. § 2929.14(A)(3) (punishing felonies of the third degree with nine to 36 months for nonrecidivists, and one to five years for recidivists).

1 the time that a state-imposed restriction on that person’s liberty began.”⁴⁷ Accordingly, separated
2 spouses or prior sexual partners are excluded from coverage. Second, the relationship must be
3 sexually intimate and consensual in nature; a relationship in which the parties have not yet been
4 sexually intimate, or in which the intimacy occurred nonconsensually, does not qualify. Third,
5 the statute does not impose any additional requirements on the quality of the relationship—it
6 need not involve marriage, cohabitation, or other formal legal status. It is enough if the
7 relationship is sexually intimate and ongoing at the time of the restriction on liberty.

8 These provisions apply when one of the parties is subject to custody or supervision, and
9 they apply to actors “in a position of actual or apparent authority or supervision” over the
10 restriction.

11 Subsection (3)(b)(i) makes sexual penetration or oral sex a criminal offense when the
12 actor knows that the other person is “in custody, incarcerated, on probation, on parole, under
13 civil commitment, in a pretrial release or pretrial diversion or treatment program, or in any other
14 status involving state-imposed restrictions on liberty.” The use of the term “custody” is not
15 meant to imply formal arrest, or application of constitutional standards of “custody”; rather, it is
16 meant in its ordinary meaning and includes a person who is not free to leave. Thus, for instance,
17 this language covers all instances of state-imposed liberty restrictions, including transient
18 restrictions such as participation in court-ordered programming pretrial or during probation or
19 parole or encounters colloquially known as *Terry* stops. It also covers all forms of custodial
20 commitment, including preventative detention or civil commitment for persons with mental
21 illness. However, although some may view a public school as a “state-imposed restriction[] on
22 liberty,” public schools are not meant to be covered by subsection (3). Rather, the relationship
23 between persons in authority in a school system and their charges is covered directly in Section
24 213.8, which deals with offenses involving children.

25 Subsection (3)(b)(ii) limits the actors governed by this restriction to those who, at the
26 time of the sexual act, are “in a position of actual or apparent authority or supervision over the

⁴⁷ Section 213.3(3)(a); cf. 720 ILL. COMP. STAT. ANN. 5/11-9.2(f) (LexisNexis 2019) (exempting persons lawfully married at the time of custody).

Section 213.3 Sexual Assault of an Incapacitated, Vulnerable, or Legally Restricted Person

1 restriction on the other person’s liberty.”⁴⁸ This language expressly embraces not just those
2 formally employed by the custodial agency, but also those holding any position, opportunity, or
3 privilege to exercise authority within these institutions. In addition, this provision covers persons
4 other than formal law enforcement; it ordinarily would apply to a drug-abuse counselor
5 employed by an outside contractor that provides services to defendants subject to drug-treatment
6 requirements in a pretrial diversion program, or even a fellow inmate placed in a position of
7 authority vis-à-vis other inmates would qualify under this provision.⁴⁹ Section 213.3(3) therefore
8 ceases to apply when a sexual act occurs after the period of authority terminates, nor would it
9 apply to a drug-abuse counselor whom a parolee chooses to see of his or her own volition.

10 These provisions carry forward a comparable provision of the 1962 Code, which applied
11 when a person was in “custody of law or detained in a hospital or other institution and the actor
12 has supervisory or disciplinary authority over him.”⁵⁰ The 1962 Code graded this offense as a
13 misdemeanor, whereas the revised Code grades the offense as a fifth-degree felony. The 1962
14 Code commentary does not offer much explanation for grading the offense as a misdemeanor,
15 other than to observe that the more severe penalties found in most states often applied to statutes

⁴⁸ See, e.g., *State v. Walker*, 748 N.E.2d 79, 85 (Ohio Ct. App. 2000). In *Walker*, a police officer’s offer to forgo bringing victim in his custody to jail was held sufficient to support charge of sexual battery by a person who “has supervisory or disciplinary authority over [the complainant].” *Id.* at 85-86 (quoting OHIO REV. CODE ANN. § 2907.03(A)(6) (West 1998)). Section 213.3(3)(a), like the Ohio statute, would impose liability on a police officer who had sex with an arrestee in his custody, regardless of whether any specific offer or threat had been articulated.

Under revised Article 213, the analysis would change if an officer approaches a vehicle without making a formal “stop” or placing the driver in custody. In those circumstances, if the officer offers not to arrest the driver in return for an act of oral sex, and the driver engages in the act, the officer would be guilty of Sexual Assault by Extortion under Section 213.4(1)(a)(ii). If the officer neither explicitly nor implicitly suggests such an exchange, Section 213.4(1)(a)(ii) would not apply. And so long as the driver is not deemed to be in the officer’s custody, Section 213.3(3)(a) would not apply either; in those circumstances and in the absence of additional facts, the officer would commit no offense under Article 213. That conclusion crucially depends, however, on the premise that all the circumstances do not at least indirectly imply a threat that the exercise of the officer’s discretion will be contingent on sexual compliance.

⁴⁹ E.g., *Bailey v. United States*, 10 A.3d 637, 640 (D.C. 2010) (upholding conviction of a defendant who worked for a nonprofit that advocated on behalf of parolees, where the defendant had forged letters explaining that two parolees should be reincarcerated, then showed the letters to them and explained that he would make recommendations on their behalf if they submitted to a sexual encounter); cf. *State v. Calor*, 585 A.2d 1385, 1386, 1389 (Me. 1991) (imposing liability on a counselor at a “residential treatment facility” who offered a patient the opportunity to live with him upon completion of the program, but the applicable statute applied only when the complainant was under age 18; Section 213.3(3) would impose liability in this situation regardless of the age of the complainant).

⁵⁰ 1962 Code Section 213.3(1)(c).

that also punished a broader array of conduct, such as incest.⁵¹ In current law, the penalty for conduct equivalent to Section 213.3(3) exhibits far greater variation, and some jurisdictions authorize as much as a 30-year maximum sentence.⁵² As described in greater detail in the Reporters' Note, the problem of sexual abuse of persons in custody has garnered significantly more attention in the decades since the 1962 Code. In particular, empirical efforts to document the extent and scope of abuse have prompted legislative responses.⁵³ Given that other provisions of Article 213 remain available to penalizes the sexual assault of persons in custody by means of force or threats, and even in the presence of expressed unwillingness, the terms of Section 213.3(3) are most likely to apply to situations in which either adequate proof of force, threats, or unwillingness is unavailable, or the claim is made that the act was at least nominally consensual. Although such behavior merits punishment and deterrence, it is appropriately analogized, and accordingly graded, as akin to the base-level offense of sexual assault in the absence of consent.

Illustrations:

16. A man is charged with a residential burglary. At the arraignment, the judge agrees to release the man to the custody of his girlfriend, with whom he shares a child and remains intermittently sexually intimate. At a later hearing, the prosecutor overhears the girlfriend commenting that “him catching this charge has been great for our relationship; he’s so grateful to me for agreeing to this that our sex life is the best it’s ever been.” The prosecutor then files charges against the girlfriend for a violation of Section 213.3(3), hoping in part to use them as leverage for testimony the prosecutor needs in the burglary case. These facts do not support the girlfriend’s liability under Section 213.3(3). Although the man’s release to the custody of the girlfriend as a condition of bail in the burglary case means that the girlfriend holds a position of authority or supervision with

⁵¹ That justification itself seems odd, given that the 1962 Code placed its custodial provision in Section 213.3, titled “Corruption of Minors and Seduction,” which also includes provisions, similarly graded as misdemeanors, for sex with a person younger than 21 when the actor is a guardian, and “false promise of marriage” cases.

⁵² See, e.g., FL. STAT. § 794.011(4)(b), (e)(7) (30-year maximum); GA. STAT. § 16-6-5.1(b)(2), (3), (5), and (f) (25-year maximum); WIS. STAT. ANN. § 940.225(2)(g-i) (25-year maximum).

⁵³ See, e.g., Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & LAW 185, 187-188 (2006) (documenting series of reports and legislative responses, include passage of Custodial Sexual Assault Act and the Prison Rape Elimination Act).

1 respect to the man’s pretrial liberty, the girlfriend and the man had a “consensual sexually
2 intimate relationship ... at the time that the restriction” on the man’s liberty began. The
3 fact that the relationship was not exclusive, or that they only engaged in intermittent
4 sexual intimacy, is irrelevant. The important fact is that the sexually intimate relationship
5 was ongoing at the time the restriction was initially imposed.

6 17. Same as in Illustration 16, except the prosecutor overhears the girlfriend say,
7 “I love that he’s released to my custody, because he has to do whatever I say now.
8 Yesterday he didn’t want to have sex, and all I had to do was remind him of the
9 alternative: one call and he’s back in prison.” For the reasons discussed in Illustration 16,
10 the prosecutor cannot charge the girlfriend with a violation of Section 213.3(3). However,
11 the facts may support a charge under Section 213.4 (Sexual Assault by Extortion), or
12 Section 213.6 (Sexual Assault in the Absence of Consent). The provisions of Section
13 213.3(3) apply to nominally consensual sexual behavior that may not be covered by any
14 other provision of Article 213, but that merit punishment because the custodial status
15 taints that supposed consent (when the parties have no prior sexual relationship). The
16 remaining provisions of Article 213, which address other forms of sexual intrusion, apply
17 without regard to the parties’ relationship.

18 18. Police officers pull over a car with a driver and passenger, suspecting that the
19 driver is intoxicated. One officer arrests the driver and calls to have the car impounded;
20 the other officer stays behind with the passenger, who is too intoxicated to drive but
21 remains fully lucid. The passenger begs the officer for a ride home, saying that it is a long
22 walk and the passenger does not have an easy alternative. The officer responds, “Well,
23 you’re too attractive to stay here on your own,” and offers the passenger a ride home in
24 exchange for an act of oral sex. The passenger agrees. Based on these facts, the office
25 may not be charged with a violation of Section 213.3(3). Although the officer’s actions
26 violate professional standards, the passenger was not in the officer’s custody or control.

27 19. Same as in Illustration 18, except that a single officer pulls over a car with a
28 single driver. The driver, who is clearly not intoxicated, says, “Sorry for the swerve—I
29 dropped my drink on my lap!” The officer, seeing the spill, replies, “That’s too bad—but
30 you still look really good in that outfit.” The officer then says, “Now that you’re here, I
31 think you should stay a while so we can get the drug-sniffing dog out.” The driver says,

1 “Is that really necessary?” and the officer replies, “Well, there is one thing that could get
2 you on your way a little faster,” and asks the driver to perform an act of oral sex. The
3 driver complies. When these facts come to light, the officer is charged with a violation of
4 Section 213.3(3). Admitting that the conduct was unprofessional, the officer nonetheless
5 contends that the encounter was consensual. These facts support a charge under Section
6 213.3(3). Although the officer never placed the driver under formal arrest, and although
7 the subsequent threat to conduct a search for drugs was illegitimate, the officer’s actions
8 satisfy the requirement that the person be in “custody ... or any other status involving
9 state-imposed restrictions on liberty.” The test for custody under Section 213.3(3)(b)(i) is
10 not the constitutional test under the Fourth or Fifth Amendments; rather, it is a common-
11 sense application of the word. A jury could therefore find that the driver was in state-
12 imposed “custody” at the time of the sexual act.

13 On these facts, the driver’s consent to the sexual act the officer requested is
14 irrelevant. Section 213.3(4) makes clear that proof of the elements of Section 213.3(3)
15 establishes the ineffectiveness of any nominal consent. The officer may alternatively be
16 liable under Section 213.4(1)(b)(ii) for Sexual Assault by Extortion. The officer offered
17 to withhold official action (calling the police dogs) in exchange for the driver’s sexual
18 submission; it does not matter that the threatened official action was illegitimate or that
19 the threat may have been a hollow one.

20 20. Accused is a guard at the prison facility where Complainant is incarcerated.
21 They have fallen in love. A supervisory officer catches Accused and Complainant in a
22 bathroom engaging in an act of sexual penetration. Against Complainant’s wishes, the
23 supervisor files a charge against Accused under Section 213.3(3). Based on these facts,
24 Accused may be convicted under Section 213.3(3). Complainant is detained in a prison
25 where Accused, as a guard, is in a position of authority over Complainant. Although
26 Complainant consented to the sexual interaction, the custodial relationship between
27 Accused and Complainant makes that consent ineffective. A standard that attempted to
28 differentiate between authentic consent and coerced consent, when the liberty of the
29 nominally consenting party is restricted by the actor, is simply too unworkable.

30 21. Same facts as Illustration 20, except that Accused works as a delivery person
31 for an outside vendor of groceries who meets Complainant as a result of Complainant’s

1 work in the prison commissary. These facts do not support conviction under Section
2 213.3(3), because Accused does not have an actual or apparent “position of authority” in
3 the prison where Complainant is detained.

4 **4. *Mens Rea.*** Existing law varies markedly in the degree to which it requires proof that
5 the accused was aware of the other person’s vulnerable condition. For unconsciousness and
6 surreptitious intoxication, the 1962 Code imposed a recklessness standard;⁵⁴ for mental
7 infirmities and when the victim was “unaware,” the 1962 Code required knowledge.⁵⁵ The
8 majority of jurisdictions with an explicit statutory mens rea set the threshold standard at
9 negligence; typical statutory language provides for liability if the actor “knows or *should*
10 *reasonably know.*”⁵⁶ In case law, jurisdictions without statutory standards generally describe the

⁵⁴ 1962 Code Section 213.1(1)(b), (c); *see id.* Section 2.02(3) (providing for a recklessness standard when the provision is silent on the requisite mens rea). See also Comment to Section 213.1, at 319 (“Of course, by operation of the general culpability provisions, the actor must be at least reckless with respect to the female’s unconsciousness, but he need not be in any way responsible for that condition.”).

⁵⁵ 1962 Code Section 213.1(2)(b), (c).

⁵⁶ ARIZ. REV. STAT. ANN. § 13-1401(7)(b) (LexisNexis 2020) (“The victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant.”); CAL. PENAL CODE § 261(a)(1), (3) (Deering 2020) (proscribing intercourse where the victim is “incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act” and where the victim “is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused”); FLA. STAT. ANN. § 794.011(4)(e)(5) (LexisNexis 2019) (“The victim is mentally defective, and the offender has reason to believe this or has actual knowledge of this fact.”); IOWA CODE ANN. § 709.4(1)(c) (LexisNexis 2019) (“The act is performed while the other person is under the influence of a controlled substance, which may include but is not limited to flunitrazepam, and all of the following are true: (1) The controlled substance, which may include but is not limited to flunitrazepam, prevents the other person from consenting to the act. (2) The person performing the act knows or reasonably should have known that the other person was under the influence of the controlled substance, which may include but is not limited to flunitrazepam.”); KAN. STAT. ANN. § 21-5503(a)(2), -5504(b)(3)(C) (2018) (defining both rape and aggravated criminal sodomy in part as where “the victim is incapable of giving consent because of mental deficiency or disease, or when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by . . . or was reasonably apparent to the offender”); LA. STAT. ANN. § 14:43(A)(1) (2018) (defining third-degree rape in part as rape where the victim is in “a stupor or abnormal condition of mind produced by an intoxicating agent or any cause and the offender knew or should have known of the victim’s incapacity”); ME. REV. STAT. ANN. tit. 17-A, § 253(2)(C) (LexisNexis 2019) (“The other person suffers from mental disability that is reasonably apparent or known to the actor”); MD. CODE ANN., CRIM. LAW § 3-304(a)(2) (LexisNexis 2019) (proscribing sexual acts where the actor “knows or reasonably should know that the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual”); MICH. COMP. LAWS SERV. § 750.520b(d)(i) (LexisNexis 2019) (“The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.”); MINN. STAT. § 609.342(1)(e)(2) (2019) (defining sexual penetration as “criminal sexual conduct in the first degree” where the actor causes injury to the complainant and “the actor knows or has reason to know that the complainant is mentally impaired, mentally

mens rea requirement as one of “general intent,”⁵⁷ which typically is viewed as setting a threshold of recklessness or negligence. But at least one jurisdiction has held actors strictly liable on proof of the other person’s incapacitation.⁵⁸ Roughly five jurisdictions require knowledge of the condition, excluding those who are reckless or negligent as to whether it exists.⁵⁹

incapacitated, or physically helpless”); NEB. REV. STAT. ANN. § 28-319(1) (LexisNexis 2019) (proscribing sexual contact where the actor “knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct,”); NEV. REV. STAT. ANN. § 200.366(1)(a) (LexisNexis 2019) (proscribing sexual penetration where “the perpetrator knows or should know that the victim is mentally or physically incapable of resisting”); N.H. REV. STAT. ANN. § 632-A:2(I)(h) (LexisNexis 2019) (finding liability where “the actor knows or has reason to know that the victim is mentally defective”); N.J. STAT. ANN. § 2C:14-2(a)(7) (LexisNexis 2019) (defining aggravated sexual assault in part as under circumstances in which the victim “is one whom the actor knew or should have known was: (a) physically helpless or incapacitated; (b) intellectually or mentally incapacitated . . .”); N.M. STAT. ANN. § 30-9-10(A)(4) (LexisNexis 2019) (defining “force or coercion” as criminal sexual contact where the actor “knows or has reason to know that the victim is unconscious, asleep or otherwise physically helpless or suffers from a mental condition that renders the victim incapable of understanding the nature or consequences of the act”); N.C. GEN. STAT. § 14-27.22(a)(2) (2019) (proscribing vaginal intercourse where the actor “knows or should reasonably know the other person has a mental disability or is mentally incapacitated or physically helpless”); N.D. CENT. CODE § 12.1-20-03(1)(e) (2019) (“That person knows or has reasonable cause to believe that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct.”); OHIO REV. CODE ANN. § 2907.02(A)(1)(c) (LexisNexis 2020) (proscribing sexual contact where “the offender knows or has reasonable cause to believe that the other person’s ability to resist or consent is substantially impaired because of a mental or physical condition”); 11 R.I. GEN. LAWS §§ 11-37-2, -4 (2019) (“[The actor] knows or has reason to know that the victim is mentally incapacitated, mentally disabled, or physically helpless.”); S.C. CODE ANN. § 16-3-654(1)(b) (2019) (“The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless . . .”); TENN. CODE ANN. § 39-13-502 (2019)(a)(3)(B) (“The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.”); WYO. STAT. ANN. § 6-2-302(a)(iv) (2019) (“The actor knows or reasonably should know that the victim through a mental illness, mental deficiency or developmental disability is incapable of appraising the nature of the victim’s conduct.”). Washington provides an affirmative defense for reasonably mistaken beliefs as to whether the victim was incapacitated. WASH. REV. CODE ANN. § 9A.44.030(1) (LexisNexis 2020).

⁵⁷ See, e.g., *State v. Lopez*, 892 P.2d 898 (Idaho Ct. App. 1995).

⁵⁸ E.g., *State v. Sullivan*, 298 N.W.2d 267, 273 (Iowa 1980) (interpreting mental-incapacity statute provision, and concluding: “As in the case of sexual abuse due to age status, the policies in support of protecting those who suffer mental incapacities outweigh the danger of mistake. . . . We hold the standard imposed by [the statute] is clear: To avoid the proscribed conduct one must refrain from performing a sex act with a person who is mentally incapable of understanding the nature and possible consequences of sexual activity.”). That case addressed IOWA CODE ANN. § 709.4(1)(b)(1) (LexisNexis 2019), which penalized sex acts when “[t]he other person is suffering from a mental defect or incapacity which precludes giving consent,” and involved a 25-year-old complainant with cognitive impairments. *Sullivan*, 298 N.W.2d at 269. That statute also has provisions that apply when “[t]he person performing the act knows or reasonably should have known that the other person was under the influence of [a] controlled substance” and the substance “prevents the other person from consenting to the act,” as well as when the “act is performed while the other person is mentally incapacitated, physically incapacitated, or physically helpless.” IOWA CODE ANN. § 709.4(1)(c)-(d) (LexisNexis 2019). A separate provision defines incapacitation, and specifically states that “mentally incapacitated” includes a person who “is temporarily incapable of appraising or controlling the person’s own conduct due to the influence of a narcotic, anesthetic, or intoxicating substance.” *Id.* § 709.1A(1).

⁵⁹ ALASKA STAT. § 11.41.410(a)(3)(A) (2019) (defining sexual assault in the first degree as “sexual penetration” with a person who “the offender knows is mentally incapable”); DEL. CODE ANN. tit. 11,

Despite the variations in existing law and the prevalence of a negligence standard, Section 213.3 rejects negligence. Because a negligence standard requires only that a reasonable person would have known of a condition, it punishes actors who had no subjective awareness of a substantial risk that the condition existed, or who were aware only of a small or insubstantial risk. The 1962 Code argued powerfully that a subjective awareness of the conditions that make behavior culpable should be a threshold requirement for criminal liability,⁶⁰ and that principle has been repeatedly affirmed, including by the Supreme Court.⁶¹

Conversely, for some conditions, knowledge is too high a threshold, as reflected by its general rejection in current law. That standard requires proof beyond a reasonable doubt that the actor knows the condition exists, which the Code identifies with a notion of “practical certainty.”⁶² A knowledge standard would introduce proof problems in establishing what a person knows or does not know with “practical certainty,” which in turn fails to adequately protect vulnerable persons.

§ 761(k)(3) (2019) (“The defendant knew that the victim suffered from a cognitive disability, mental illness or mental defect which rendered the victim incapable of appraising the nature of the sexual conduct or incapable of consenting”); TEX. PENAL CODE ANN. § 22.011(b)(4) (LexisNexis 2019) (considering sexual assault to be “without consent” when “the actor knows that as a result of mental disease or defect the other person is at the time of the sexual assault incapable either of appraising the nature of the act or of resisting it”); UTAH CODE ANN. § 76-5-406(2)(f) (LexisNexis 2019) (defining a sexual offense as one where “the actor knows or reasonably should know that the victim has a mental disease or defect, which renders the victim unable to: (i) appraise the nature of the act; (ii) resist the act; (iii) understand the possible consequences to the victim’s health or safety; or (iv) appraise the nature of the relationship between the actor and the victim”); WIS. STAT. ANN. § 940.225(2)(c) (LexisNexis 2019) (defining as a Class C felony sexual contact with a person with “a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person’s conduct, and the defendant knows of such condition”).

⁶⁰ 1962 Code, Comment to Section 2.02, at 229 (“This section expresses the Code’s basic requirement that unless some element of mental culpability is proved with respect to each material element of the offense, no valid criminal conviction may be obtained.”).

⁶¹ See, e.g., *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019) (noting the “longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding ‘each of the statutory elements that criminalize otherwise innocent conduct.’”); *Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016) (“In general, courts interpret criminal statutes to require that a defendant possess a *mens rea*, or guilty mind, as to every element of an offense.”); *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) (observing that “a ‘reasonable person’ standard is a familiar feature of civil liability in tort law, but is inconsistent with ‘the conventional requirement for criminal conduct—*awareness* of some wrongdoing’”); *Staples v. United States*, 511 U.S. 600 (1994) (“[O]ffenses that require no *mens rea* generally are disfavored, and have suggested that some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime.”).

⁶² 1962 Code Section 2.02(2)(b).

1 The exception to this general principle relates to Section 213.3(3), pertaining to sexual
2 assault of persons in a state-imposed restriction on liberty. The facts of custody or other state-
3 imposed restrictions are often clear and undisputed; either a person is detained or not, or under
4 another's actual or purported authority or not. In addition, the acts proscribed by Section
5 213.3(3) may appear truly consensual, because it is only the custodial status alone that precludes
6 consent. As such, there should be no liability unless it is proved that the actor knew with
7 practical certainty of the other person's restriction of liberty. Finally, although some cases may
8 be ambiguous, but in light of the general readiness with which such conditions are ascertained,
9 the knowledge standard applied in Section 213.3(3)(c) is appropriate for the offenses described
10 in that section.

11 ***5. Consent – Section 213.3(4).***

12 The freely given consent of a competent adult usually places sexual interaction outside
13 the reach of criminal law. But certain persons, as a result of conditions or circumstances, lack the
14 capacity to give effective consent. The conditions and circumstances that foreclose a person's
15 ability to give legally effective consent to sexual activity are few and narrow, and they are
16 specified in part by the terms of Section 213.3. When the conditions or circumstances described
17 in Section 213.3 are proved beyond a reasonable doubt, they establish lack of consent and make
18 irrelevant any argument about apparent consent.⁶³ Section 213.3(4) makes this principle explicit.

REPORTERS' NOTES

19 Every jurisdiction has laws that penalize sexual penetration and oral sex involving
20 vulnerable persons. Surreptitious intoxication was covered by the 1962 Code, is uncontroversial,
21 and finds strong support in existing law.⁶⁴ This Section addresses the remaining provisions.

22 ***1. Sleeping or Unconscious Persons.***

23 The prohibition on sexual acts with an unconscious or sleeping person is also
24 longstanding and uncontroversial, although the precise language covering sleeping victims varies

⁶³ Section 213.3(2)(b)(iv), which addresses sexual acts undertaken in a nonsexual professional service context, includes the absence of explicit prior permission as an element of the charge that must be proved beyond a reasonable doubt. Thus, it is not simply that the defendant may raise that claim in defense, but rather that the affirmative proof of the charge requires the government to establish beyond a reasonable doubt that the accused had not been given explicit prior permission to engage in the act. Once that element is proved, however, no further inquiry into consent or willingness is necessary.

⁶⁴ See *supra* notes 30-32.

among states. The 1962 Code prohibited intercourse with “unconscious” females.⁶⁵ In current law, 14 states have statutory provisions that mention sleep expressly.⁶⁶ In another 29 states, courts have interpreted statutory language to apply to complainants asleep at the time the sexual act is initiated—most commonly under provisions covering persons who are “unconscious” or “physically helpless.”⁶⁷ Three more states have, in dicta, strongly suggested that similar

⁶⁵ See 1962 Code Section 213.1(1)(c) (defining an element of rape, a second-degree felony, as sexual intercourse where “the female is unconscious”). The 1962 Code, Commentary to Section 213.1 (“Thus, rape has traditionally included not only intercourse by force or threat, but also sexual imposition on an unconscious or otherwise incapacitated female . . .”).

⁶⁶ ARIZ. REV. STAT. ANN. § 13-1401(7)(b) (LexisNexis 2020) (“‘Without consent’ includes . . . sleep”); CAL. PENAL CODE § 261(a)(4)(A) (Deering 2020) (“defining ‘unconscious of the nature of the act’ as ‘incapable of resisting because the victim . . . [w]as unconscious or asleep’”); COLO. REV. STAT. § 18-3-401(3) (2018) (“‘Physically helpless’ means . . . asleep”); DEL. CODE ANN. tit. 11, § 761(k)(2) (2019) (defining “without consent” to include that fact that the victim was asleep); FLA. STAT. ANN. § 794.011(1)(e) (LexisNexis 2019) (“‘Physically helpless’ means . . . asleep”); IDAHO CODE § 18-6101(7)(a) (2019) (defining rape as “[w]here the victim . . . [w]as unconscious or asleep”); IOWA CODE ANN. § 709.1A(2) (LexisNexis 2019) (“‘Physically helpless’ means that a person is . . . asleep”); MICH. COMP. LAWS SERV. § 750.520a(m) (LexisNexis 2019) (“‘Physically helpless’ means that a person is . . . asleep”); MINN. STAT. § 609.341(9) (2019) (“‘Physically helpless’ means that a person is . . . asleep”); N.M. STAT. ANN. § 30-9-10(A)(4) (LexisNexis 2019) (defining “force or coercion” to include criminal sexual contact where the actor knows the victim is “asleep”); 11 R.I. GEN. LAWS § 11-37-1(6) (2019) (“‘Physically helpless’ means a person who is . . . asleep”); S.C. CODE ANN. § 16-3-651(g) (“‘Physically helpless’ means that a person is . . . asleep”); TENN. CODE ANN. § 39-13-501(5) (2019) (“‘Physically helpless’ means that a person is . . . asleep”); WYO. STAT. ANN. § 6-2-301(a)(iii) (2019) (“‘Physically helpless’ means . . . asleep”).

⁶⁷ *Lucas v. State*, 204 So. 3d 929, 935 (Ala. Crim. App. 2016) (finding that a victim is considered “physically helpless” when asleep); *Bartman v. State*, No. A-9876, 2009 Alaska App. LEXIS 17, at *6 (Ct. App. Jan. 7, 2009) (finding that a victim who was asleep was both “incapacitated” and “unaware” under the statute); *Harris v. State*, 2014 Ark. App. 264 (2014) (“physically helpless” includes sleep); *People v. Lloyd*, 987 N.E.2d 386, 396 (Ill. 2013) (“[T]he accused knew the victim’s state of mind prevented him or her from understanding the nature of the act, or from giving knowing consent, because the accused knew the victim was . . . asleep”); *Birari v. State*, 968 N.E.2d 827, 835-836 (Ind. Ct. App. 2012) (finding sufficient evidence that the victim was unaware because the victim was asleep); *State v. Wright*, 224 P.3d 1159, 1163, 1167 (Kan. 2010) (finding enough evidence to convict the defendant under the “unconscious or physically powerless” statute provision due to the victim being asleep when the penetration occurred); *Boone v. Commonwealth*, 155 S.W.3d 727, 731 (Ky. Ct. App. 2004) (“Although sleep may not always be a fully unconscious condition . . . being in the state of sleep renders one unable of making a conscious choice [for purposes of KY. REV. STAT. ANN. § 510.010(6) (LexisNexis 2002)].”); *State v. Fruge*, 34 So. 3d 422, 432 (La. Ct. App. 2010) (affirming the defendant’s rape conviction because the victim was sleeping, so “she could not consent to a sexual act, and the defendant was aware of her inability to consent”); *State v. Preston*, 581 A.2d 404, 409 (Me. 1990) (finding that a sleeping victim is “unconscious” under the state statute because a sleeping woman is incapable of exercising consent); *Travis v. State*, 98 A.3d 281, 293-295 (Md. Ct. Spec. App. 2014) (finding that sleeping persons are “physically helpless individual[s]” who are incapable of giving consent); *Commonwealth v. Urban*, 880 N.E.2d 753, 757-758 (Mass. 2008) (listing sleep as a condition wherein a complainant is “so impaired as to be incapable of consenting to intercourse”); *Trigg v. State*, 759 So. 2d 448, 450 (Miss. Ct. App. 2000) (affirming the defendant’s conviction for sexual battery for “orally and digitally penetrat[ing] [his wife’s] vagina while she was” asleep, unconscious, and incapable of consent); *State v. Shields*, 122 P.3d 421, 424 (Mont. 2005) (finding that, because a victim who is sleeping is “physically helpless,” she was “incapable of consent”); *State v. Ruffin*, No. A-04-313, 2004 Neb. App. LEXIS 335, at *7 (Ct. App. Dec. 7, 2004) (determining that the fact that the complainant was asleep at the time of the assault could be considered “without consent” under the state statute); *State v. Moeller*, 510 N.W.2d 500, 502-503 (Neb. Ct. App. 1993) (finding that a sleeping victim could be considered “physical incapable” under the state statute); *State v. Flynn*, 855 A.2d 1254, 1260-1261 (N.H.

Section 213.3 Sexual Assault of an Incapacitated, Vulnerable, or Legally Restricted Person

- 1 statutory language in their jurisdiction applies to sleep.⁶⁸ Four more states have statutory
- 2 language that is uniformly interpreted to cover sleep, but no case law in those states addresses
- 3 the question directly.⁶⁹

2004) (affirming the defendant's conviction for aggravated felonious sexual assault—for which N.H. REV. STAT. ANN. § 632-A:2.I(b) (1996) requires the “physically helpless” of the victim—where the defendant performed cunnilingus on the victim while she was asleep); *State v. Rush*, 650 A.2d 373, 374-375 (N.J. Super. Ct. App. Div. 1994) (finding that a sleeping victim meets the “physically helpless” standard under the statute); *People v. Krzykowski*, 742 N.Y.S.2d 138, 140 (App. Div. 2002) (holding that the fact that the victim was asleep “satisfies the element of physical helplessness”); *State v. Moorman*, 347 S.E.2d 857, 859 (N.C. Ct. App. 1986), rev'd on other grounds, 358 S.E.2d 502 (N.C. 1987) (“A person who is asleep is ‘physically helpless’ within the meaning of the statute.”); *State v. Midell*, 798 N.W.2d 645, 648-649 (N.D. 2011) (finding sufficient evidence to establish the crime where the victim testified that she was asleep and awoke to the defendant having sex with her); *State v. Oswald*, C.A. No. 28633, 2018 Ohio App. LEXIS 248, at *19 (Ct. App. Jan. 24, 2018) (upholding conviction under an “unaware” statute provision where the victim was asleep); *In re Torrence T.*, Court of Appeals No. L-06-1089, 2006 Ohio App. LEXIS 5263, at *5-6 (Ct. App. Oct. 6, 2006) (upholding conviction under an “[in]ability to appraise” statute provision because the victim was asleep); *State v. Marker*, 329 P.3d 781, 784-785 (Or. Ct. App. 2014) (concluding that “a person who is asleep is ‘physically helpless’”); *Commonwealth v. Price*, 616 A.2d 681, 683 (Pa. Super. Ct. 1992) (“We conclude that a sleeping victim is ‘unconscious’” under the statute); *State v. Mesa*, 681 N.W.2d 84, 89 (S.D. 2004) (holding that “the jury could determine that the victim was sleeping at the time she was raped,” which could satisfy the statutory element of “physical or mental incapacity to consent”); *Jennings v. State*, No. 07-09-00047-CR, 2010 Tex. App. LEXIS 10241, at *8 (Ct. App. Dec. 29, 2010) (noting that the provision covering “unaware” persons is “commonly . . . applied” to victims asleep at the time sexual contact starts); *State v. Salazar*, 114 P.3d 1170, 1171-1172 (Utah Ct. App. 2005) (finding lack of consent under UTAH CODE ANN. § 76-5-406(5) (LexisNexis 2003) where the defendant initiated oral sex upon the victim while she was asleep); *Quisque v. Commonwealth*, Record No. 1372-14-4, 2016 Va. App. LEXIS 57, at *5 (Ct. App. Feb. 23, 2016) (“Sleep can constitute the requisite ‘physical helplessness.’”); *State v. Mohamed*, 301 P.3d 504, 511 (Wash. Ct. App. 2013) (“[The victim’s] state of sleeping rendered her ‘physically helpless’ for the purpose of the . . . statute.”); *State v. Pittman*, 496 N.W.2d 74, 83-84 (Wis. 1993) (finding that being “asleep” is equivalent to being “unconscious” under the statute). The standard in Vermont is arguably open to further interpretation. In *State v. Snow*, 70 A.3d 971, 973 (Vt. 2013), the court held that sleep qualified as lack of consent, but in dicta observed that “[t]he victim testified that she did not consent to sexual contact with defendant before she went to sleep, and it is self evident that she could not do so once asleep because a person who is not awake is physically incapable of consenting.” It is not clear whether the court meant to leave open the possibility that a person could consent to a sexual act prior to falling asleep. In a later part of the opinion, the court wrote that “[a] sleeping person—adult or juvenile—cannot consent while asleep.” *Id.* at 974.

⁶⁸ E.g., *State v. Fournier*, 982 A.2d 261, 265 (Conn. App. Ct. 2009) (implying in dicta that a victim who is “asleep” could be considered “physically helpless”); *State v. Santos*, 947 A.2d 414, 416-419 (Conn. App. Ct. 2008) (deciding that the lower court properly found, “by a preponderance of the evidence,” that the defendant committed sexual assault in the second degree when the victim was asleep); *Brown v. State*, 331 S.E.2d 891, 891 (Ga. Ct. App. 1985) (finding that “forcibly and against her will” means “without consent” which includes drugged, unconscious, or “[a]sleep”); *Dozier v. State*, 178 P.3d 149, 150-51 (Nev. 2008) (affirming conviction of a defendant who “perform[ed] sexual acts” with an unconscious person).

⁶⁹ HAW. REV. STAT. § 707-700 (2019) (“‘Physically helpless’ means a person who is unconscious or for any other reason physically unable to communicate unwillingness to an act.”); MO. ANN. STAT. §§ 566.030(1), 566.060(1) (LexisNexis 2019) (proscribing sexual intercourse with a “person who is incapacitated, incapable of consent, or lacks the capacity to consent”); OKLA. STAT. ANN. tit. 21, § 1111(A)(5) (LexisNexis 2019) (defining rape in part as sexual intercourse “[w]here the victim is at the time unconscious of the nature of the act and this fact is known to the accused”); W. VA. CODE ANN. § 61-8B-1(5) (LexisNexis 2019) (“‘Physically helpless’ means that a person is unconscious or for any reason is physically unable to communicate unwillingness to an act.”).

One of these states, Missouri, added the relevant statutory language following a case where the court refused to find liability where the victim was asleep. In 2001, the Court of Appeals of Missouri held that the

Section 213.3 Sexual Assault of an Incapacitated, Vulnerable, or Legally Restricted Person

1 The prohibition on sexual activity with a sleeping person is longstanding and uniform. Its
2 contemporary importance is made clear by common scenarios in which a person wakes to find an
3 intruder preparing to engage in an act of sexual intercourse. The intruder may be a stranger,
4 former romantic partner, a casual acquaintance or neighbor, or a roommate or family member.

5 Current law also overwhelmingly applies the prohibition on sexual intercourse with a
6 sleeping person to all persons, even current spouses.⁷⁰ Only six states retain a marital exemption
7 that would permit acts of penetration or oral sex with a sleeping spouse.⁷¹ The rest of the states

evidence presented was insufficient to convict the defendant of forcible sodomy where the 16-year-old victim testified that she was asleep when defendant awoke her with his finger in her vagina. *State v. Niederstadt*, No. 23612, 2001 Mo. App. LEXIS 1297, at *3-4, 9 (Ct. App. July 23, 2001). At the time, the forcible sodomy statute prohibited “deviate sexual intercourse with another person without that person’s consent by the use of forcible compulsion.” *Id.* at *2-3 (quoting MO. REV. STAT. § 566.060(1) (Cum. Supp. 1991)). The Eighth Circuit subsequently affirmed, holding that reading Section 566.060 to cover victims who are asleep violated the defendant’s right to due process because the statute does not give sufficient notice that a sleeping or unconscious victim can be “compelled”. *Niederstadt v. Nixon*, 465 F.3d 843, 848 (8th Cir. 2006). The statute was subsequently amended to include language about incapacitation, as reflected in the current MO. ANN. STAT. § 566.060(1) (LexisNexis 2019), but the specific question of sleep has not yet been addressed.

⁷⁰ That said, the limited case law involving spouses tends to involve facts that underscore that the acts of penetration or oral sex arise in a context of a clearly deteriorated relationship, rather than as a result of innocent misunderstanding. For instance, in *Trigg*, 759 So. 2d at 450, during a period of difficulty in the marriage, the defendant recorded himself “orally and digitally penetrat[ing] [his wife’s] vagina.” His wife learned of the video and reacted angrily, filing for divorce two days later and making a criminal complaint. There was also evidence that the defendant had surreptitiously drugged his wife the evening of the recording. *Id.*

⁷¹ IDAHO CODE § 18-6107 (citing § 18-6101) (2019) (excluding application of the rape statute to spouses in instances in which the victim was mentally or developmentally disabled, or unconscious of the act occurring); MD. CODE ANN., CRIM. LAW § 3-318(a), (b)(2) (LexisNexis 2019) (exempting spouses from liability for rape and sexual offenses in the third or fourth degree, unless “the person in committing the crime uses force or threat of force and the act is without the consent of the spouse”); MISS. CODE ANN. § 97-3-99 (2019) (“A person is not guilty of [sexual battery] if the alleged victim is that person’s legal spouse”); OHIO REV. CODE ANN. §§ 2907.02(A)(1), .03(A) (LexisNexis 2020); 11 R.I. GEN. LAWS § 11-37-2(1) (2019) (“The accused, not being the spouse, knows or has reason to know that the victim is mentally incapacitated, mentally disabled, or physically helpless.”); S.C. CODE ANN. § 16-3-658 (2019) (exempting liability for spouses “unless the couple is living apart” and the offense is criminal sexual conduct in the first or second degree); see also *State v. Huggins*, 665 P.2d 1053, 1054-1055 (Idaho 1983) (reversing conviction and barring retrial where defendant was convicted of the rape of his wife, because the government bore the burden of proving absence of marriage and had not done so).

Two additional states, Utah and Nevada, have an exemption but the application is unclear. The Nevada law states: “It is no defense to a charge of sexual assault that the perpetrator was, at the time of the assault, married to the victim, if the assault was committed by force or by the threat of force.” NEV. REV. STAT. ANN. § 200.373 (LexisNexis 2019). The statute further penalizes sexual acts with a person “physically incapable of resisting.” *Id.* § 200.366(1)(a) (LexisNexis 2019). There are no decisions explaining the interplay of these statutes. The Utah marital exemption applies to most of the sexual offense article, and states that “[t]he provisions of this part do not apply to consensual conduct between individuals married to each other.” UTAH CODE ANN. § 76-5-407(1) (LexisNexis 2019). But it is not clear that Utah would deem a sleeping person capable of consent, as the Utah statute states that “without consent” includes when “the actor knows the victim is unconscious, unaware that the act is occurring, or is physically unable to resist.” *Id.* § 76-5-406(2)(e). Moreover, Utah courts have also interpreted “without consent” to include sleeping persons. See, e.g., *Salazar*, 114 P.3d at 1172.

1 treat spouses as equivalent to other actors.⁷² And five of the six states with marital exemptions
 2 do not apply the exemption to separated spouses.⁷³ And the unmistakable trend is to eliminate
 3 spousal exemptions; for example, Minnesota recently repealed their spousal exemption precisely
 4 in these kinds of circumstances.⁷⁴

5 The remainder of this Note focuses on the other categories of vulnerable persons
 6 addressed in Section 213.3—persons who are mentally impaired, who become heavily
 7 intoxicated or are otherwise vulnerable, or who are in a custodial relationship with the actor.
 8 Although nearly every jurisdiction prohibits sexual penetration with vulnerable persons in most
 9 of those categories, the precise dimensions of those categories are less universal. These
 10 categories can overlap, in that voluntary intoxication can be viewed as a (temporary) mental
 11 impairment, and both mental impairments and voluntary intoxication can result in physical
 12 impairments. Jurisdictions have struggled to determine how to separate and define three general
 13 conditions: physical incapacities that stem from mental incapacities (whether temporary or
 14 permanent, and including self-induced intoxication), mental incapacities that result from longer-
 15 lasting mental or developmental disabilities, and mental incapacities that result from temporary,
 16 voluntarily induced intoxication. This Note provides a sense of the scope of existing law, an
 17 assessment of various approaches, and an explanation of the approach taken in Section 213.3.

18 **2. Mental Disability.**

19 According to one recent study, rates of violent victimization of persons with disabilities
 20 were roughly 2.5 times that of persons without disabilities; for serious sex offenses, the rate was
 21 3.5 times as great.⁷⁵ Moreover, the study found that “persons with cognitive disabilities had the

⁷² California has a spousal exemption to its generally-applicable provision, but then defines a separate crime of spousal rape. CAL. PENAL CODE § 261 (Deering 2020). That provision, which is identically punishable, states:

(a) Rape of a person who is the spouse of the perpetrator is an act of sexual intercourse accomplished under any of the following circumstances:

....

(3) Where a person is at the time unconscious of the nature of the act, and this is known to the accused. As used in this paragraph, “unconscious of the nature of the act” means incapable of resisting because the victim meets one of the following conditions:

(A) Was unconscious or asleep.

Id. § 262(a)(3)(A).

⁷³ MD. CODE ANN., CRIM. LAW § 3-318(b)(1) (LexisNexis 2019); MISS. CODE ANN. § 97-3-99 (2019); OHIO REV. CODE ANN. § 2907.01(L) (LexisNexis 2020); 11 R.I. GEN. LAWS §§ 11-37-1(9), -2(1) (2019); S.C. CODE ANN. § 16-3-658 (2019).

⁷⁴ MINN. STAT. § 609.349 (2018), repealed by Act of May 2, 2019, No. 15, 2019 Minn. Laws 16.

⁷⁵ See ERIKA HARRELL, U.S. BUREAU OF JUSTICE STATISTICS, NCJ 250632, CRIMES AGAINST PERSONS WITH DISABILITIES, 2009-2015 STATISTICAL TABLES 3 tbls.1 & 2 (2017) (finding the 2011-2015 rate of violent victimization of disabled persons to be 32.3 per 1,000 persons and 20.4 per 1,000 for persons without disabilities, and finding the 2011-2015 rate of rape/sexual assault of persons with disabilities to be 2.1 per 1,000 persons, compared to a rate of .6 per 1,000 for persons without disabilities). This report also indicated that “[o]ne in 5 crime

1 highest rates of total violent crime . . . and serious violent crime” victimization.⁷⁶ Convictions
2 can be harder to secure in these than in other cases, because the same disabilities that make the
3 person incapable of consenting may interfere with the person’s ability to report the offense or a
4 prosecutor’s ability to prove it in court.⁷⁷

5 At the same time, many persons with mental impairments are able to enjoy rich and full
6 lives that include consensual, intimate sexual relationships.⁷⁸ The desire to protect vulnerable
7 persons from abuse must be weighed against the necessity of safeguarding the fundamental right
8 of competent persons to control and fulfill their sexuality.⁷⁹

9 Existing law uniformly punishes an actor who engages in intimate sexual activity with a
10 person who has a significant mental impairment. But the cases underscore the difficulty in
11 striking that balance and the degree to which ordinary measures of mental health or cognitive
12 ability may point in conflicting directions. For example, in *Kortner v. Martise*,⁸⁰ plaintiff was the
13 mother of a woman who “struggled with a severe eating disorder and other psychological issues,
14 which required repeated hospitalizations. During her lifetime, she was diagnosed with clinical
15 depression, borderline personality disorder, obsessive compulsive disorder, anorexia nervosa,
16 bulimia nervosa, and periodic dystonia and catatonia.” At the same time, she managed to
17 graduate at the top of her high school class and matriculate at an elite college. Eventually, a court
18 appointed her mother as her conservator because she was “unable to manage her own affairs,”
19 although she lived independently with the help of an aide. She later suffered a stroke that
20 impaired her ability to walk without assistance and made her incontinent. Shortly after, she
21 began a sadomasochistic sexual relationship with a man she had met over the internet and
22 conversed with online for years, which allegedly involved “tying her up, abusing her; hitting her

victims with disabilities believed they were targeted due to their disability.” *Id.* at 4. Another study found that women with disabilities are four times more likely to be sexually assaulted than nondisabled women. Sandra L. Martin, et al., *Physical and Sexual Assault of Women With Disabilities, Violence Against Women*, Vol. 12, No. 9, 834(2006). And one estimate, based on “unpublished data provided by the Justice Department,” placed the ratio of victimization of those with disabilities to those without as seven times greater. Joseph Shapiro, *How Prosecutors Changed the Odds to Start Winning Some of the Toughest Rape Cases*, NAT’L PUB. RADIO (Jan. 16, 2018), <https://www.npr.org/2018/01/16/577063976/its-an-easy-crime-to-get-away-with-but-prosecutors-are-trying-to-change-that>.

⁷⁶ HARRELL, *supra* note 75, at 4.

⁷⁷ See, e.g., Shapiro, *supra* note 75 (characterizing “the rape of someone with an intellectual disability [as] one of the easiest crimes to get away with” and citing data from its own investigation). Still, the availability of DNA evidence has made prosecution easier in cases in which a victim is incapable of speech, but an intimate sample matches the accused. *Id.*

⁷⁸ See, e.g., James Sinclair et al., *Barriers to Sexuality for Individuals with Intellectual and Developmental Disabilities: A Literature Review*, 50 EDUC. & TRAINING IN AUTISM & DEVELOPMENTAL DISABILITIES 3, 10-11 (2015) (discussing how the perceptions of others create an obstacles that disabled people face in “accessing their sexuality and sexuality education”).

⁷⁹ See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

⁸⁰ *Kortner v. Martise*, 91 A.3d 412, 418 (2014).

1 with belts, burning wax on her,” as well as urinating on her and leading her around on a dog
2 collar.⁸¹ When her mother noticed bruising and observed changes in the woman’s personality,
3 she successfully convinced the woman to break off the relationship and file a police complaint.
4 The mother also filed a civil tort action for sexual battery and other offenses, based on her status
5 as conservator.

6 The critical question in the case concerned whether the woman, in light of her condition,
7 was capable or incapable of sexual consent. A key piece of evidence consisted of a letter she had
8 written to the housing authority, complaining of the sexual advances of an employee—affirming
9 her understanding of sex and her capacity to refuse sexual overtures. But other evidence, such as
10 the conservatorship granted by the court, suggested that she had lost the ability to make basic
11 decisions of life-governance. Finding that “the fact that a conservator is appointed does not mean
12 that the conserved person loses all of his or her civil rights,”⁸² the court held that “the issue of
13 whether a conserved person is able to consent to sexual conduct is a factual question for the jury
14 to decide based on the nature of the particular conservatorship and the abilities of the conserved
15 person.”⁸³

16 In another case, a former chair of the philosophy department at Rutgers, Anna
17 Stubblefield, engaged in what she alleged was consensual sex with a 32-year-old man with
18 “significant developmental disabilities.”⁸⁴ Evidence at trial, including the jury’s observations,
19 indicated that the man used “diapers,” and “was unable to walk, non-verbal, and prone to
20 drool.”⁸⁵ Stubblefield was introduced to the man by his brother, who heard a lecture she gave on
21 “facilitated communication,” a method by which a severely disabled person purportedly can
22 communicate via assistance typing on a keyboard. After two years working with the man,
23 Stubblefield informed his parents that she had been sexually intimate with him and planned to
24 leave her husband. The parents, who did not believe that the man could communicate as
25 Stubblefield maintained, notified the police. Stubblefield was convicted at trial and received a
26 15-year sentence, but the verdict was overturned and she ultimately entered a plea agreeing to a
27 four-year term.

28 As with *Kortner*, the *Stubblefield* case ignited fierce debate in academic and popular
29 circles. In the words of one scholar, “some characterized Stubblefield as ‘sick’ and a ‘predator,’
30 while others viewed her and [the man] as victims of classism, ‘ableism,’ and racism that deny
31 them the opportunity for a loving, sexual relationship.”⁸⁶

⁸¹ Id. at 419, 433; Brief of the Plaintiff-Appellant, *Kortner v. Martise*, 91 A.3d 412 (2014) (No. SC 18793), 2011 CT S. Ct. Briefs LEXIS 175, at *14, 17-18.

⁸² *Kortner*, 91 A.3d 412 at 445, 454.

⁸³ Id. at 445.

⁸⁴ Harris, *supra* note 18, at 481-482.

⁸⁵ Id. at 483.

⁸⁶ Id. at 484 (citations omitted).

Although many cases do not involve this degree of subtlety, these cases underscore the difficulty of setting a legal standard for consent with respect to mental impairments, as even incorporation of existing standards for institutionalization or conservatorship may prove too restrictive.

Despite subtle variations in the precise terms of the standard, current law exhibits a significant degree of uniformity. Slight differences in the conditions covered, the mental state required, the precise standard for incapacity, and the penalty imposed make a concise statement of the law impossible. But broad trends are evident.

Most statutes use language like “mentally defective” or mentally incapable, without further elaboration, to describe the covered conditions.⁸⁷ A handful of jurisdictions, however, provide more tailored guidance or use more specific, or even quasi-medical, terms.⁸⁸ Terminology has evolved over time; one survey noted that “[m]ost of the statutory amendments regarding incapacity . . . remove antiquated references to ‘idiocy,’ ‘imbecility,’ ‘feeble-mindedness,’ and ‘mental retardation.’”⁸⁹ Nevertheless, “twenty-two states continue to use ‘mentally defective’ or its variants including ‘unsoundness of mind’ . . .”⁹⁰

As to the substantive standard of incapacity, the vast majority of jurisdictions use similar phrasing, whether through definitional provisions (defining who qualifies as “mentally

⁸⁷ See, e.g., *id.* at 521-522.

⁸⁸ Michigan has perhaps the most elaborate scheme, expressly covering and carefully defining “[d]evelopmental disability”—which includes “[i]ntellectual disability, cerebral palsy, epilepsy or autism” or “[a]ny other condition . . . that produces a similar impairment”—as well as “mental illness.” MICH. COMP. LAWS SERV. § 750.520a(b), (h) (LexisNexis 2019). Delaware has a highly articulated definition, covering persons with “cognitive disability, mental illness or mental defect,” where “cognitive disability” is defined as “a developmental disability that substantially impairs an individual’s cognitive abilities including, but not limited to, delirium, dementia and other organic brain disorders for which there is an identifiable pathologic condition, as well as nonorganic brain disorders commonly called functional disorders.” DEL. CODE ANN. tit. 11, § 761(a), (k)(3) (2019). Idaho law applies to any “unsoundness of mind due to any cause including, but not limited to, mental illness, mental disability or developmental disability, whether temporary or permanent.” IDAHO CODE § 18-6101(3) (2019). Kentucky’s law applies to persons with an “intellectual disability” or those who have a “mental illness.” KY. REV. STAT. ANN. § 510.020(3)(c) (LexisNexis 2019). The law further defines “mental illness” as “a diagnostic term that covers many clinical categories, typically including behavioral or psychological symptoms, or both, along with impairment of personal and social function, and specifically defined and clinically interpreted through reference to criteria contained in the Diagnostic and Statistical Manual of Mental Disorders (Third Edition) and any subsequent revision thereto, of the American Psychiatric Association.” *Id.* § 510.010(3). It defines an “individual with an intellectual disability” as “a person with significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, as defined” in another part of the code. *Id.* § 510.010(4). California has a number of statutory provisions, some of which govern persons with a “mental disorder or developmental or physical disability.” See, e.g., CAL. PENAL CODE §§ 261(a)(1), 286(g)-(h), 287(d), (g)-(h), 289(b)-(c) (Deering 2020). A couple states expressly cover “frail elders.” See, e.g., WASH. REV. CODE ANN. § 9A.44.010(16) (LexisNexis 2020).

⁸⁹ Harris, *supra* note 18, at 520-521.

⁹⁰ Harris, *supra* note 18, at 520-521. Professor Harris notes that such language persists despite the passage of the Americans with Disabilities Act almost three decades ago, and the enactment of Rosa’s Law, which “call[s] for federal and state expungement of stigmatizing and antiquated statutory references to intellectual and developmental disabilities.” *Id.* at 521.

defective”) or the substantive terms of the statute (stating the applicable limitations for a “mentally defective” person). Statutes often differentiate between standards of “physical helplessness” that include incapacity due to a mental disability,⁹¹ as well as expressly addressing mental incapacity.⁹² The most common formulation has a provision specific to mental incapacity and invalidates consent from a person “incapable of appraising the nature and consequences of a sexual act”⁹³ or some close variation thereof.⁹⁴ Several jurisdictions lump together and grade equally all forms of physical or mental impairment, including transient conditions caused by intoxication.⁹⁵ Others simply say “incapable of giving consent,”⁹⁶ or “incapable of declining

⁹¹ Treating physical incapacity due to mental impairment under the same statutory standard as physical incapacity due to other reasons raises a number of issues, as recently highlighted in a case from the Ninth Circuit. Namely, it precludes the jury from assessing a baseline of the complainant’s mental function, and instead assumes capacity to consent and inquires only into the limitation posed in that moment. See *United States v. James*, 810 F.3d 674, 679 (9th Cir. 2016) (holding that “‘physically incapable’ . . . should be defined broadly and not confused with the more narrow ‘physically helpless’ standard”); see also *id.* at 684-685 (Kozinski, J., dissenting) (concluding that prosecution under a physical incapacity standard rather than a mental incapacity standard meant the only question is whether the complainant had the physical ability to express unwillingness, not whether complainant had the mental ability to do so); *Platt v. People*, 201 P.3d 545, 548-549 (Colo. 2009) (en banc) (resolving application of a statute addressing both physical helplessness and incapacity to appraise by noting that the latter may also apply to cognitively typical persons, who as a result of sleep cannot appraise conduct).

⁹² See, e.g., Harris, *supra* note 18, at 514 fig.1 (classifying “Incapacity Statutes Across 50 States and the District of Columbia as of October 2017”).

⁹³ See, e.g., ALA. CODE §§ 13A-6-61(a)(2), -63(a)(2) (LexisNexis 2020) (requiring incapacitation as an element of Class A felonies); CONN. GEN. STAT. ANN. §§ 53A-65(5), -70(a) (LexisNexis 2019) (requiring mental incapacitation as an element of a Class A or B felony); DEL. CODE ANN. tit. 11, §§ 761(k)(3), 770-73 (2019) (applying the “without consent” standard to class A, B, and C felonies); FLA. STAT. ANN. § 794.011(1)(b), (4)(e)(5) (LexisNexis 2019) (defining sexual battery as a first-degree felony where the victim is mentally defective); HAW. REV. STAT. § 707-700 (2019) (defining “mentally defective” as when a person is “incapable of appraising the nature of the person’s conduct”); LA. STAT. ANN. § 14:43(A)(1), (B) (setting the penalty for third-degree rape, which is found where “the victim is incapable of resisting or of understanding the nature of the act” at a maximum of 25 years’ imprisonment) (2018).

⁹⁴ See, e.g., ALASKA STAT. §§ 11.41.425(a)(1)(A), .470(4) (2019) (defining the class C felony of sexual assault in the third degree as sexual contact with a person who is “mentally incapable,” which means that the person is “incapable of understanding the nature or consequences of the person’s conduct, including the potential for harm to that person”); ARK. CODE ANN. § 5-14-101(4)(A)(i), -125(a)(2)(B) (2019) (defining the class B felony of sexual assault in the second degree as sexual contact with a person who is “mentally defective,” meaning “[i]ncapable of understanding the nature and consequences of a sexual act”); IOWA CODE ANN. § 709.1(2) (LexisNexis 2019) (defining sexual abuse as when the victim “lacks the mental capacity to know the right and wrong of conduct in sexual matters”).

⁹⁵ See, e.g., ARIZ. REV. STAT. ANN. § 13-1401 (LexisNexis 2020) (defining persons “incapable of consent” as including those “incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant. For purposes of this subdivision, “mental defect” means the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another”); KAN. STAT. ANN. § 21-5503(a)(2) (2018) (defining rape as “sexual intercourse with a victim when the victim is incapable of giving consent because of mental deficiency or disease, or when the victim is incapable of giving consent because of the effect of any [intoxicating] substance”); MINN. STAT. § 609.344(1)(d) (2019) (defining criminal sexual conduct in the third degree as sexual penetration where “the actor knows or has

1 participation in, or communicating unwillingness to engage in, the sexual act”⁹⁷ without defining
 2 how to judge that capacity. A handful of statutes explicitly require only “substantial”
 3 incapacity,⁹⁸ although case law has also placed that interpretive gloss on seemingly totalizing
 4 language.⁹⁹ Some courts have even overtly welcomed a component of moral judgment in
 5 determining the required degree of incapacity, with one explaining that:

6 Consent has been defined . . . as requiring the exercise of intelligence based upon
 7 knowledge of its significance and moral quality.

8 . . . An understanding of coitus encompasses more than a knowledge of its
 9 physiological nature. An appreciation of how it will be regarded in the framework
 10 of the societal environment and taboos to which a person will be exposed may be
 11 far more important. In that sense, the moral quality of the act is not to be
 12 ignored.¹⁰⁰

reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless,” where “mentally incapacitated” applies to intoxicated persons per MINN. STAT. § 609.341(7) (2019)).

⁹⁶ See, e.g., IDAHO CODE § 18-6101(3) (2019); IND. CODE ANN. § 35-42-4-1(a)(3) (LexisNexis 2019).

⁹⁷ See, e.g., 18 U.S.C. § 2242(2)(B) (2018); see also *id.* § 2242(2)(A) (finding liability for the same offense where the victim is “incapable of appraising the nature of the conduct”).

⁹⁸ See, e.g., ME. REV. STAT. ANN. tit. 17-A, § 253(2)(C) (LexisNexis 2019) (proscribing sexual acts with a person who is “substantially incapable of appraising the nature of the contact involved or of understanding that the person has the right to deny or withdraw consent” as a Class B crime); MD. CODE ANN., CRIM. LAW § 3-301(b), (f) (LexisNexis 2019) (defining “mentally incapacitated individual” and “substantially cognitively impaired individual” as individuals who are, by reason of intoxicating substance or mental disorder respectively, “rendered substantially incapable of: (1) appraising the nature of the individual’s conduct; or (2) resisting vaginal intercourse, a sexual act, or sexual contact,” or, in the case of substantially cognitively impaired individuals, “(3) communicating unwillingness to submit to vaginal intercourse, a sexual act, or sexual contact”); N.C. GEN. STAT. § 14-27.20(2a) (2019) (defining “[p]erson who has a mental disability” as “substantially incapable of appraising the nature of his or her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act”); OHIO REV. CODE ANN. § 2907.02(A)(1)(c) (LexisNexis 2020) (proscribing sexual contact where “[t]he other person’s ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age”); see also DEL. CODE ANN. tit. 11, § 761(a) (2019) (defining “cognitive disability” as “a developmental disability that substantially impairs an individual’s cognitive abilities”); MICH. COMP. LAWS SERV. § 750.520a(b)(iii), (h)-(i) (LexisNexis 2019) (defining “mentally disabled” as including persons with “mental illness,” which is in turn defined as “a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life,” and defining “developmental disability” in part as “a substantial burden to the impaired person’s ability to perform in society”).

⁹⁹ *United States v. James*, 810 F.3d 674, 680-682 (9th Cir. 2016) (holding that “‘physically incapable’ does not require total incapacity”); *People v. Easley*, 364 N.E.2d 1328, 1332 (N.Y. 1977) (“An ability to ‘appraise’ is, of course, a qualitative matter, all the more so when the appraisal is one to be made of the ‘nature’ of ‘conduct’, with the variety of factors that the one ‘appraising’ may have to take into account for such purposes. Cognitive understanding is involved. In a case such as the one before us, it includes being substantially able to understand what she was doing.”).

¹⁰⁰ *People v. Easley*, 42 N.Y.2d 50, 364 N.E.2d 1328 (1977). See, e.g., *People v. McMullen*, 414 N.E.2d 214, 217 (Ill. App. Ct. 1980) (quoting this language with approval).

In sum, as concisely stated by one scholar, “A review of the case law reveals that [all tests] generally reduce to a two-step legal inquiry for establishing legal incapacity to consent to sex: (1) a threshold inquiry of the existence of a cognitive impairment ... and (2) a causal analysis regarding the effect of that impairment on the victim’s ability to meet the standard set forth in the statute, which can be (a) nature of the conduct, (b) nature and consequences, (c) morality, or (d) judgment.”¹⁰¹ Importantly, claims that existing standards are constitutionally vague have been rejected.¹⁰²

A number of jurisdictions also provide specific coverage for sexual acts that occur within a custodial setting with a person who is mentally impaired, or when committed by a person with authority over the individual with the mental impairment.¹⁰³

Despite the imperfections of these standards, a superior formulation remains elusive. Section 213.3(2)(b)(i) draws on these standards, and endeavors to minimize the circularity and moral judgment of some approaches.

3. *Voluntary Intoxication.*

Drafting a legal standard to determine the criminal liability of an actor who sexually penetrates an intoxicated person presents a considerable challenge. The law must draw an identifiable line between intoxication that makes a person’s compliant behavior an indication of willingness and intoxication that does not. One solution (endorsed by the 1962 Code) is to limit criminal sanctions to situations involving surreptitious administration of intoxicants for the specific purpose of impairing the victim’s ability to resist, or intoxication that renders the other person unconscious or incapable of appraising the nature of the person’s sexual conduct. This solution seeks to ensure that the potential for criminal liability remains a safe distance from any slippery slope,¹⁰⁴ but it does so only by exposing blameless victims to unwanted sexual violation.

¹⁰¹ See Harris, *supra* note 18, at 530.

¹⁰² See, e.g., *Anderson v. Morrow*, 371 F.3d 1027,1032 (9th Cir. 2004); see also Harris, *supra* note 18, at 488, 499-503 (challenging the reliance of existing scholarship on a pathbreaking but dated study by Deborah Denno that examined case law from the 1970s to 1990s, and challenging the conclusions reached as a result—including concerns about vagueness—which in fact fail to reflect the actual state of current law).

¹⁰³ ALASKA STAT. § 11.41.410(a)(3)(B), (b) (punishing sexual penetration with a victim “who is in the offender’s care,” either “by authority of law” or “in a facility or program that is required by law to be licensed” as a felony) (2019); ME. REV. STAT. ANN. tit. 17-A, § 253(E)-(J) (LexisNexis 2019) (categorizing the conduct as a Class B crime if the victim is detained or on probationary release, or as a Class C crime in other custodial circumstances); MICH. COMP. LAWS SERV. § 750.520c(1)(b), (1)(i)-(l), (2)(a) (LexisNexis 2019) (felony punishable by a maximum of imprisonment of 15 years); TENN. CODE ANN. § 39-13-527 (2019) (categorizing sexual battery by an authority figure as a Class C felony); WASH. REV. CODE ANN. § 9A.44.050(1)(c), (2) (LexisNexis 2020) (categorizing rape in the second degree, which covers actors with “supervisory authority over the victim,” as a class A felony).

¹⁰⁴ See MODEL PENAL CODE AND COMMENTARIES, PART II, Sections 210.0 to 213.6 (AM. L. INST. 1980), Section 213.1, Comment 5, at 315-318 (discussing the rationale behind the construction of the incapacity provision of Section 213.1).

Section 213.3 Sexual Assault of an Incapacitated, Vulnerable, or Legally Restricted Person

1 Some safeguard is needed for victims who are not so intoxicated that they lose consciousness but
2 nonetheless are too intoxicated to communicate consent.¹⁰⁵

3 A more common solution is to fold intoxication into existing statutory provisions
4 covering physical incapacitation or mental incapacitation (with or without specifically including
5 intoxicants), or to craft a specific standard for voluntary intoxication.¹⁰⁶ These three approaches
6 also may also overlap.¹⁰⁷ For instance, in one jurisdiction, a standard of “physically helpless”
7 may be read by courts expansively to include conscious but heavily intoxicated persons,¹⁰⁸ while
8 in another jurisdiction, case law interprets a “physical helplessness” statutory provision to

¹⁰⁵ A couple of states have less clear paths to liability in these circumstances. For instance, North Carolina lacks a statutory provision that covers voluntary intoxication explicitly, and instead North Carolina’s second-degree rape statute covers those who “ha[ve] a mental disability or who [are] mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know the other person has a mental disability or is mentally incapacitated or physically helpless.” N.C. GEN. STAT. § 14-27.22(a)(2) (2019). “Mentally incapacitated” is in turn defined as where “[a] victim who due to any act is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act.” Id. § 14-27.20(2). However, the courts have expressly refused to interpret the mental-incapacity standard capaciously to include voluntary intoxication, because the “committed upon” language suggests lack of agency. *State v. Haddock*, 664 S.E.2d 339, 346 (N.C. Ct. App. 2008) (“[T]he protection of the statute does not serve to negate the consent of a person who voluntarily and as a result of her own actions becomes intoxicated to a level short of unconsciousness or physical helplessness [covered in other statutes].”). Nevertheless, the Court of Appeals has held that the “physically helpless” provision may apply to a situation in which the complainant was passing in and out of consciousness due to self-induced intoxication. E.g., *State v. Buff*, 612 S.E.2d 366, 370-371 (N.C. Ct. App. 2005).

¹⁰⁶ See, e.g., KAN. STAT. ANN. § 21-5503(a)(2) (2018) (defining rape as “sexual intercourse with a victim when the victim is incapable of giving consent because of mental deficiency or disease, or when the victim is incapable of giving consent because of the effect of any [intoxicating] substance”); accord ARIZ. REV. STAT. ANN. § 13-1401(7)(b) (LexisNexis 2020) (“The victim is incapable of consent by reason of mental disorder, mental defect, drugs, [or] alcohol”); S.D. CODIFIED LAWS § 22-22-1(4) (2019) (“[T]he victim is incapable of giving consent because of any intoxicating, narcotic, or anesthetic agent or hypnosis”); WIS. STAT. ANN. § 940.225(2)(cm) (LexisNexis 2019) (defining sexual contact as second-degree sexual assault where the victim “is under the influence of an intoxicant to a degree which renders that person incapable of giving consent”).

¹⁰⁷ In *State v. Khalil*, --- N.W.2d --, 2021 WL 1112444 (Minn. 2021), the Supreme Court of Minnesota interpreted a statute, Minn. Stat. § 609.341(7), that defined “mentally incapacitated” as “a person under the influence of alcohol, a narcotic, anesthetic, or any other substance, administered to that person without the person’s agreement, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration.” Opening its opinion by noting that “This case arises from an experience no person should ever have to endure,” the court recited the facts, which included the Complainant’s voluntary intoxication, exclusion from a bar as a result, and agreement to follow the defendant to a “party” at a nearby house. In fact, there was no party, and as the Complainant passed in and out of consciousness on a couch, the defendant engaged in an act of sexual penetration.

The Court held that the plain language of the statute excluded application of the “mentally incapacitated” provision to voluntarily intoxicated persons. Id. at *13. It remanded for a new trial, however, because the jury might nonetheless have found the defendant guilty under the statute’s parallel “physically helpless” provision. Minn. Stat. § 609.344(1)(d) (2020) (defining third-degree criminal sexual conduct as sex with a mentally incapacitated or physically helpless person).

¹⁰⁸ See, e.g., *State v. Grimes*, 876 A.2d 753, 755-756 (N.H. 2005) (rejecting the defendant’s argument that the victim’s occasional efforts at resistance during bouts of consciousness indicated victim was not “physically helpless,” and holding that “[a]lthough the victim was conscious at certain times during the incident, it is not necessary for the victim to be ‘unconscious or in any particular state of intoxication at the time of the offense’ to be rendered physically helpless to resist”).

1 require total incapacity, and nearly incapacitating intoxication is instead covered by a separate
 2 provision.¹⁰⁹ Or a state may cover intoxication under the mental-impairment provision as well as
 3 a separate provision.¹¹⁰

4 Whatever the approach, there are recurring expressions of the standard. The common-law
 5 standard protected those “insensibly drunk,”¹¹¹ but that finds little trace in current law.
 6 Contemporary formulations of the standard forbid sexual penetration and oral sex with a person
 7 who “was so impaired as to be incapable of consenting,”¹¹² or who “was drunk enough to be
 8 unable to consent to sex,”¹¹³ or who was “incapable of giving consent.”¹¹⁴ Several jurisdictions,
 9 following the 1962 Code, focus on whether the intoxication impairs or eliminates “to appraise or
 10 control her conduct.”¹¹⁵ Each of these standards poses problems. What does the complainant’s

¹⁰⁹ See, e.g., *State v. Stevens*, 53 P.3d 356, 364 (Mont. 2002) (reversing conviction for sexual intercourse without consent where the victim was in a “dream state” because such a state was not “physically helpless” under the statute); *State v. Gould*, 902 P.2d 532, 540 (Mont. 1995) (interpreting a provision that “provides that a person is mentally incapacitated when, due to the influence of an intoxicating substance, she is temporarily incapable of appreciating or controlling her conduct” as including voluntary intoxication).

¹¹⁰ See, e.g., IOWA CODE ANN. § 709.1A(1) (LexisNexis 2019) (“‘Mentally incapacitated’ means that a person is temporarily incapable of apprising or controlling the person’s own conduct due to the influence of a narcotic, anesthetic, or intoxicating substance.”); id. § 709.4(1)(c)(2) (LexisNexis 2019) (defining sexual abuse as when the victim “knows or reasonably should have known that the other person was under the influence of [a] controlled substance”).

¹¹¹ See, e.g., *State v. Aiken*, 326 S.E.2d 919, 926 (N.C. Ct. App. 1985) (“Intercourse under these circumstances would have been rape even at common law since the rule was that an unconscious or insensibly drunk victim could not consent to intercourse.” (citing *Commonwealth v. Burke*, 105 Mass. 376, 380 (1870))). In *Commonwealth v. Blache*, 880 N.E.2d 736, 743 (Mass. 2008), the court reversed an instruction based on the “wholly insensible” standard for intoxication, finding the language “archaic and confusing.”

¹¹² E.g., *Commonwealth v. Blanche*, 880 N.E.2d 736, 743 n.14 (Mass. 2008).

¹¹³ E.g., *State v. Smith*, 178 P.2d 672, 677 (Kan. Ct. App. 2008).

¹¹⁴ See, e.g., KAN. STAT. ANN. § 21-5503(a)(2) (2018) (defining rape as “sexual intercourse with a victim when the victim is incapable of giving consent” due to mental deficiency or intoxicating substance); accord ARIZ. REV. STAT. ANN. § 13-1401(7)(b) (LexisNexis 2020) (“The victim is incapable of consent by reason of mental disorder, mental defect, drugs, [or] alcohol”); S.D. CODIFIED LAWS § 22-22-1(4) (2019) (“[T]he victim is incapable of giving consent because of any intoxicating, narcotic, or anesthetic agent or hypnosis”); WIS. STAT. ANN. § 940.225(2)(cm) (LexisNexis 2019) (defining sexual contact as second-degree sexual assault where the victim “is under the influence of an intoxicant to a degree which renders that person incapable of giving consent”).

¹¹⁵ 1962 Code Section 213.1(1)(b) (defining “rape” to include cases in which intoxicants have “substantially impaired [the victim’s] power to appraise or control her conduct”). For other formulations that require only impairment rather than complete elimination of the capacity to appraise or control, see, e.g., IOWA CODE ANN. § 709.4(1)(c) (LexisNexis 2019) (requiring only that the actor know that “the other person was under the influence of [a] controlled substance”); ME. REV. STAT. ANN. tit. 17-A, § 253(2)(A) (LexisNexis 2019) (“The actor has substantially impaired the other person’s power to appraise or control the other person’s sexual acts”); MASS. ANN. LAWS ch. 272, § 3 (LexisNexis 2020) (“[The actor] applies, administers to or causes to be taken by a person any drug, matter or thing with intent to stupefy or overpower such person so as to thereby enable any person to have sexual intercourse or unnatural sexual intercourse”).

For statutes that require not merely *impairment* but an *inability* to appraise, control, or resist, see, e.g., IDAHO CODE § 18-6101(5) (2019) (“[T]he victim . . . is unable to resist due to any intoxicating, narcotic, or anesthetic substance.”); OKLA. STAT. ANN. tit. 21, §§ 1111, 1114 (LexisNexis 2019) (defining rape in part as

ability to “appraise” one’s conduct mean in this context, and what is the standard for an actor to know or be reckless as to whether it is absent? Some standards are circular or question-begging, for example those that ask whether the complainant was “so impaired as to be incapable of consenting” or “was drunk enough to be unable to consent to sex” or was “incapable of giving consent.”

Judicial efforts to apply these standards in specific cases has shed little light on the relevant criteria. In *People v. Giardino*,¹¹⁶ for example, a California appellate court held that incapacity sufficient to support conviction could be established by showing that the victim either was “unable to make a reasonable judgment as to the nature or harmfulness of the conduct” or “would not have engaged in intercourse with [the defendant] had she not been under the influence of the [intoxicants].”¹¹⁷ The latter but-for test is unacceptable; it would transform many willing participants into serial sex offenders. A test of this sort gives juries license to convict either party almost any time alcohol has mixed with sex. In contrast, the former test is not inherently overbroad, but its standard—whether a person has the ability to make “a *reasonable* judgment as to the *nature or harmfulness* of the conduct” (emphasis added)—provides no clear boundary.

Seeking to clarify the “reasonable judgment” test, a different California Court of Appeal subsequently said that “a poor judgment is [nonetheless] a reasonable judgment so long as the woman is ‘able to understand and weigh the physical nature of the act, its moral character, and its probable consequences.’”¹¹⁸ One element of this standard—the complainant’s understanding of the act’s physical nature—is clear, but the two additional requirements—the complainant’s understanding of the moral character and the consequences (perhaps including the emotional consequences) of intercourse—is again vague and broad. In other jurisdictions, courts have upheld convictions on the basis of a similarly vague judgment that a complainant was too drunk to “appreciate the consequences of [her] actions.”¹¹⁹ In a case turning on whether the complainant was “incapable of giving valid consent due to the effect of alcoholic liquor,” a Kansas court concluded that the trial judge had not erred in refusing to give the jury a standard for making this determination, stating that because jurors “are familiar with the effects of alcohol,” the courts should simply “give great deference to [the jury’s] finding.”¹²⁰

intercourse where the victim is “incapable through mental illness or any other unsoundness of mind . . . of giving legal consent”); MONT. STAT. ANN. § 45-2-101(41) (“‘Mentally incapacitated’ means that a person is rendered temporarily incapable of appreciating or controlling the person’s own conduct as a result of the influence of an intoxicating substance.”).

¹¹⁶ *People v. Giardino*, 98 Cal. Rptr. 2d 315 (2000).

¹¹⁷ *Id.* at 321-322.

¹¹⁸ *People v. Smith*, 120 Cal. Rptr. 3d 52, 56 (Cal. Ct. App. 2010).

¹¹⁹ *State v. Al-Hamdani*, 36 P.3d 1103, 1108 (Wash. Ct. App. 2001).

¹²⁰ *State v. Smith*, 178 P.3d 672, 677 (Kan. Ct. App. 2008).

1 In place of those approaches, Section 213.3(2)(b)(ii) and (iii) establishes clearer lines.
2 The subparagraphs clearly describe conditions and circumstances that individually or collectively
3 reliably show that the other person is too impaired to consent. Section 213.3(2)(b)(ii) prohibits
4 sexual penetration and oral sex when the person is not continuously conscious. In contrast to
5 standards that rely on the factfinder's speculation about the inner workings of the actor's and the
6 other person's mind, that condition—whether the person is continuously conscious—is capable
7 of ready determination by an actor who intends to sexually penetrate another person. It is also a
8 condition that communicates the absence of effective consent to sexual penetration or oral sex
9 under the circumstances, as a matter of law. A person who is intermittently unconscious is in a
10 condition that makes the person incapable of even the most basic judgment, as a matter of law.
11 The circumstances require the actor to presume lack of consent, not permission to proceed. This
12 basic precept remains true whether the cause of that intoxication is voluntary or involuntary and
13 regardless of the identity of the person who administered the intoxicants.¹²¹

14 Section 213.3(2)(b)(iii) adds a circumstance intended to avoid gaps. A heavily
15 intoxicated person might retain all bodily functions and consciousness, yet nonetheless lack
16 substantial capacity to communicate. For instance, intoxicants may make the person incapable of
17 comprehensible speech or cause the person to lose control over physical movements. An
18 example is a person who is so intoxicated as to be unable to stand or sit independently, or who is
19 actively vomiting. As is the case with an actor who engages in penetration with a person is
20 intermittently conscious, an actor who engages in an act of penetration or oral sex when the other
21 person cannot effectively communicate consent cannot presume that the other person consented.

22 The standard in Section 213.3(2)(b)(iii) allows liability when the other person “lacks
23 substantial capacity to communicate lack of consent” and thus overlaps with the standard in
24 Section 213.3(1)(b)(i) that requires that the person be “physically unable to communicate lack of
25 consent.” But Section 213.3(1)(b)(i) requires a much steeper showing: a person must be
26 *physically unable* to communicate. Thus, for incapacity to count under Section 213.3(1)(b)(i), it
27 must render a person *physically* incapable. Someone under the influence of a heavy narcotic or
28 sedative who is glassy-eyed, staring, and paralyzed may be “physically unable to communicate.”
29 But an intoxicant that renders a person's speech sloppy but not “unable,” or that affects *mental*
30 coherence cannot satisfy Section 213.3(1)(b)(i); rather, it is appropriately considered under
31 Section 213.3(2)(b)(iii). Similarly, the standard of “an intellectual, developmental, or mental
32 disability or a mental illness” described in subsection (2)(b)(i) applies to disabilities that are
33 more permanent than the transient impediments caused by intoxication; that said, a person who

¹²¹ Cf. *United States v. Morgan*, 164 F.3d 1235, 1237-1240 (9th Cir. 1999) (rejecting the defendant's argument that “date rape” was not that serious, especially since both parties had engaged in consensual kissing and had been drinking, because the complainant was “in and out of consciousness”; and affirming the trial court's admonition to the defendant that “you let your physiological drives overcome your human nature, and in the process dehumanized another individual”).

1 develops intellectual or mental disabilities as a result of longstanding alcohol or drug use would
2 be covered by those provisions.

3 Similarly, although subparagraphs (ii) and (iii) of Section 213.3(2)(b) apply most
4 commonly when the complainant is intoxicated, they are not limited to circumstances triggered
5 by that condition. There are other circumstances that may cause a person to lose continuous
6 consciousness or a substantial capacity to communicate. If so, then subparagraphs (ii) and (iii)
7 have equal force. For instance, a person receiving treatment at a hospital may be intermittently
8 conscious or may lack substantial capacity to communicate lack of consent as a result of injury
9 or illness. If an actor engages in an act of sexual penetration or oral sex while the other person is
10 in such a condition, that act could be subject to Section 213.3(2)(b)(ii) or (iii).

11 A final question remains: should the law prohibit sexual penetration and oral sex with an
12 intoxicated person who has not lost consciousness or bodily control, but who nonetheless has
13 severely impaired judgment or motor skills, even if that person has expressed consent? One
14 might expect that cases involving clear manifestations of willingness would seldom if ever
15 warrant prosecution. But the problem is not purely theoretical, because the currently prevalent,
16 highly elastic definitions of “incapacity,” formulated primarily to protect individuals who are too
17 drunk to protest or resist, can be interpreted to invalidate consent even when willingness has
18 been expressed actively and unequivocally.

19 Undoubtedly, there are cases in which intoxication, though voluntary, affects individuals
20 so profoundly that they are too easily induced to engage in actions that would otherwise be
21 repugnant to them. Nonetheless, for the reasons canvassed above, it is not merely difficult but
22 metaphysical and quixotic to attempt to distinguish such cases from the many in which alcohol
23 influences behavior in a manner that the intoxicated person genuinely accepts and perhaps even
24 welcomes.¹²² In principle, the law should require the actor in such a situation to clarify the nature
25 of the other person’s condition and determine whether it falls on the incapacity side of the line.

26 But in this context, it is hard to imagine what steps a person could take *ex ante* (or even
27 *ex post*) to resolve an issue (the *authenticity* of another person’s choices) that turns almost
28 entirely on a philosophical abstraction. In this narrow setting—that of a voluntarily intoxicated
29 person in control of basic bodily functions who has clearly expressed consent to sexual
30 activity—the judgment presented in the Commentary to the 1962 Code remains sound: “From
31 the actor’s perception, at least, this situation is exceedingly difficult to identify and perilously
32 close to a common kind of social interaction.”¹²³ Accordingly, Article 213 does not impose
33 criminal punishment in cases where affirmatively expressed consent is present and not otherwise
34 tainted, regardless of whether voluntary intoxication contributed to that consent.

¹²² See Stephen J. Schulhofer, *Rape-Law Reform Circa June 2002: Has the Pendulum Swung Too Far?*, 989 ANNALS N.Y. ACAD. SCI. 276, 281-282 (2003) (discussing the difficulty of determining the boundaries of incapacity due to intoxication when the victim “actively participated, with apparent pleasure and enthusiasm, in the sexual conduct”).

¹²³ MODEL PENAL CODE AND COMMENTARIES, PART II, Sections 210.0 to 213.6 (AM. L. INST. 1980), Section 213.1, Comment 5(a), at 318.

4. Nonsexual Professional and Commercial Services – Section 213.3(2)(b)(iv).

Subsection (2)(b)(iv) addresses a recurrent pattern in which professionals—for example, medical professionals or massage therapists—take advantage of unclothed customers to perpetrate acts of sexual penetration or oral sex.¹²⁴ Although this conduct may be captured by Section 213.6, which prohibits sexual penetration in the absence of consent, a specific Section addressing this particular situation is justified for two reasons.

First, the abuse of trust and authority associated with the sexual exploitation of a person in a vulnerable state is appropriately graded as akin to cases of Sexual Penetration in the Absence of Consent that involve expressed unwillingness. Consumers of massage, personal grooming, medical, or other services that entail nakedness are often placed in a vulnerable position to receive the expected services. They are often isolated in a closed room, reclined, unclothed, and without quick access to shoes or their personal belongings in the event of a need for flight. Some services may lull a person into deep rest or meditation. Moreover, consistent with the services sought, the actor may also apply physical pressure or using other immobilizing techniques that are innocuous in the context of the delivery of the service but have the potential to underscore the physical vulnerability of the customer. Indeed, initiating sexual intimacy in such an environment can easily create an implied atmosphere of physical restraint commensurate with that punished by Section 213.2(1), or exploit a vulnerability such as that covered by Section 213.3(2)(b)(ii), which addresses sexual activity with an intermittently conscious person.¹²⁵

Second, while sexual intrusions that occur in socially intimate situations may raise fears of overreach, few such concerns arise in the professional or commercial services context. Inquiries into “consent” are misguided in this context. Rather, when a person disrobes solely to obtain services typically considered to have no sexually intimate dimension, the strong expectation should be that sexual penetration is not desired. A provider who believes that the customer would welcome such advances is properly expected to take positive steps to get express prior permission before engaging in any sexual intimacy. Conversely, the other person who suffers the unexpected and unwelcome sexual intrusion should not be expected to explain why

¹²⁴ See, e.g., *State v. Cardell*, 970 P.2d 10, 11 (Idaho 1998) (“[D]uring the massage, [the appellant, a masseur] had [the complainant] disrobe and then massaged her breasts and genital area and placed her hand near his groin.”); *Wright v. State*, 294 P.3d 1201, 1203 (Kan. Ct. App. 2013) (“[The defendant] provided massages out of her home, and the rape charge stemmed from a client’s allegations that [the defendant] had penetrated her vagina with two fingers during a May 2005 massage.”); *State v. Taylor*, 231 P.3d 79, 81 (Mont. 2010) (considering charges based on multiple incidents in which the defendant, a massage therapist, either nearly or actually penetrated his clients’ vaginas with his hand); *State v. Harrison*, 286 P.3d 1272, 1274 (Utah Ct. App. 2012) (upholding the conviction of a defendant massage therapist who groped and sexually penetrated his complainant client).

¹²⁵ See, e.g., *Ritter v. State*, 97 P.3d 73, 77-78 (Alaska Ct. App. 2004) (concluding that, where the defendant was a massage therapist known to the victims and who “could have reasonably foreseen that [they] would be surprised and alarmed by his actions,” the evidence supported a finding that the victims were coerced).

passive behavior did not signal consent, or justify why an ambiguous comment or gesture did not invite a sexual intrusion.¹²⁶

Despite the recurring nature of this scenario, existing law clumsily addresses such situations. At times such behavior is folded into all-purpose provisions intended to address abuse of the therapeutic relationship.¹²⁷ In other instances, courts reach for statutes that are ill-suited to the harm. The result makes criminal liability turn on factual findings that seem trivial or incidental to the effect and nature of the actor’s behavior, or permit extreme levels of punishment in an effort to penalize wrongful acts that might otherwise go unpunished.

*State v. Stevens*¹²⁸ is instructive. The defendant was convicted of assaulting six separate clients of his massage business. In each case, the defendant would begin a normal massage but then would unexpectedly sexually penetrate the complainants. The complainants, in turn, would be enjoying the massage when they suddenly became aware of the penetration. One fell asleep and awoke to the sensation; one remained silent until the massage ended and she felt she could leave safely; and four others were in relaxed states until the assault occurred and then momentarily “froze,” eventually voicing opposition that caused the defendant to stop.¹²⁹

Interpreting a state statute that required evidence that the complainant is “compelled to submit by force,” or “incapable of consent because . . . physically helpless,”¹³⁰ the court in *Stevens* struggled to apply the law to each factual scenario. It affirmed the conviction related to the sleeping complainant, finding sleep a condition of “physical[] helpless[ness].”¹³¹ However, the court overturned the convictions as to two other “frozen” complainants, noting that while they both “were in a relaxed or dream state during their massages, there is simply no credible evidence in the record demonstrating that they were unconscious or otherwise physically unable to communicate unwillingness to act.”¹³² The court did, however, enter convictions on a lesser charge of sexual contact knowingly without consent, rejecting the defendant’s claim to have misread the signals in a manner analogous to a “dating scenario,” remarking that “[a]nalogizing a professional massage by a licensed massage therapist with dating is ludicrous.”¹³³

¹²⁶ Cf. Section 213.0(2)(e)(ii) (“Consent may be . . . inferred from behavior. . .”).

¹²⁷ See, e.g., N.H. REV. STAT. ANN. § 632-A:2(I)(g) (LexisNexis 2019) (“When the actor provides therapy, medical treatment or examination of the victim and in the course of that therapeutic or treating relationship or within one year of termination of that therapeutic or treating relationship:

(1) Acts in a manner or for purposes which are not professionally recognized as ethical or acceptable; or
(2) Uses this position as such provider to coerce the victim to submit.”).

¹²⁸ 53 P.3d 356, 358 (Mont. 2002).

¹²⁹ *Id.* at 359-361.

¹³⁰ *Id.* at 361 (quoting MONT. CODE ANN. § 45-5-501 (1999)).

¹³¹ *Id.* at 363.

¹³² *Id.* at 364. The court also found that there was no evidence of force, especially since the defendant stopped once the complainants objected. *Id.*

¹³³ *Id.* at 365.

1 Distinguishing among the described victims based on whether or not they testified to
2 dozing off during the massage versus being in a “dream state” seems to miss the point: each
3 victim sought commercial, nonsexual massage services and the defendant exploited their
4 vulnerable position for his own sexual advantage. It strains statutory meaning to apply a
5 provision intended for situations involving actual force or restraint,¹³⁴ particularly when the
6 grading of such offenses would authorize equal punishment for an actor of this kind and for one
7 who inflicted actual violence.

8 Section 213.3(2)(b)(iv) is a narrow provision that more precisely addresses these
9 recurring factual situations by focusing on what is central to culpability—the nonsexual,
10 professional, or commercial nature of the service provided. The Section avoids overbreadth by
11 not categorically prohibiting sexual intimacy in such contexts, but requires express prior
12 permission before engaging in the sexual act. To convict under this provision, the prosecution
13 must prove beyond a reasonable doubt not only that the setting was one of nonsexual
14 professional or commercial services but also that the complainant did not expressly consent
15 before the act of sexual penetration or oral sex.

16 **5. Abuse of Custodial Authority – Section 213.3(3).**

17 Section 213.3(3) addresses sexual abuse that can occur even in the absence of an explicit
18 or implicit threat. Subsection (3)(b) deals with situations in which the actor’s actual or apparent
19 authority over the person consenting is so substantial that the subordinate person’s ability to
20 accept or decline sexual intimacy with the actor is unacceptably constrained, even when no threat
21 has been articulated or implied. These subsections punish Sexual Assault of a Legally Restricted
22 Person as a felony of the fifth degree and define a narrow category in which penal sanctions are
23 necessary.

24 Section 213.3(3) carves an exception for consensual sexual acts between the two persons
25 when the actor and the other person had a consensual sexual relationship at the time that the
26 restriction on liberty began. This limitation applies *only* to encounters under Section 213.3(3),
27 which are based entirely on the status of the actor as a person in authority over someone else.
28 When a sexual encounter between an actor with such authority over another is abusive or without
29 consent in any other way, prosecution of the actor may proceed under other applicable provisions
30 of Article 213 regardless of whether the parties had a consensual sexual relationship at any prior
31 time.

¹³⁴ See, e.g., *Ritter v. State*, 97 P.3d 73, 76-78 (Alaska Ct. App. 2004) (applying a consent standard that required that the person be “coerced by the use of force . . . or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone” to be met by massage therapist who violated patients sexually, because the defendant “could reasonably have foreseen that the circumstances of the massage therapy would make his victims afraid to protest or resist: they were alone with him, they were undressed, and it was not feasible to run outside into the cold”).

1 The prison guard’s power over an inmate presents a clear case. The guard’s power is so
2 strong and the inmate’s ability to resist it or seek redress for unwanted overtures is so limited that
3 the inmate has little scope for exercising authentic choice about whether sexual interaction is
4 truly desired. Correctional facilities universally bar sexual contact between guards and inmates,
5 and so penal sanctions also risk no interference with otherwise permissible acts of sexual
6 intimacy.¹³⁵ As a result, the decision to criminalize prisoner and guard sexual interactions is not
7 controversial.

8 The near-universal criminal prohibition on sexual activity between prison guards and
9 inmates post-dates the 1962 Code. The Code defined a misdemeanor offense (labeled
10 “Corruption of Minors and Seduction”) applicable to cases in which the victim (including an
11 adult victim) “is in custody of law or detained in a hospital or other institution and the actor has
12 supervisory or disciplinary authority over [the victim].”¹³⁶ That position was and remained for
13 some time a minority view.¹³⁷ By the late 1990s, increasing numbers of women prisoners (a
14 population especially vulnerable to this form of abuse by male guards) and increasing awareness
15 of the prevalence of this problem¹³⁸ had prompted many states to criminalize nonviolent,
16 ostensibly “consensual” sexual activity in this setting. By the late 1990s, two-thirds of the states
17 had done so,¹³⁹ often at the felony level and subject to sentences running as high as 25 or 30
18 years’ imprisonment.¹⁴⁰ Currently, every state except Vermont imposes criminal punishment on

¹³⁵ See SCHULHOFER, *supra* note 34, at 201-205 (“A few states have long-standing prohibitions on sexual contact between prisoners and their guards.”).

¹³⁶ 1962 Code Section 213.3(1)(c).

¹³⁷ See MODEL PENAL CODE AND COMMENTARIES, PART II, Sections 210.0 to 213.6 (AM. L. INST. 1980), Section 213.3, Comment 4, at 390 (citing 12 states that had adopted similar provisions as of 1980). E.g., *State v. Foss*, 804 A.2d 462 (N.H. 2002). Absent statutory provisions addressed specifically to the custodial context, courts have held that a correctional officer does not necessarily commit sexual assault by having a sexual encounter with an inmate under his or her control. E.g., *State v. Foss*, 804 A.2d 462 (N.H. 2002). In *Foss*, the defendant was a male correctional officer at the facility where female complainant was an inmate. After a sexual encounter, defendant gave her cigarettes and other favorable treatment. *Id.* at 463-464. The court reversed a conviction for sexual assault, because coercion was an element of the offense, and held that *subsequent* favors were not sufficient to establish that element under N.H. REV. STAT. ANN. § 632-A:2(I)(n) (Supp. 2001). *Foss*, 804 A.2d at 465, 467. The New Hampshire statute was and continues to be applicable “[w]hen the actor is in a position of authority over the victim and uses this authority to coerce the victim to submit under any of the following circumstances: (1) When the actor has direct supervisory, disciplinary, or other authority authorized by law over . . . the victim by virtue of the victim being detained or incarcerated in a correctional institution . . .” N.H. REV. STAT. ANN. § 632-A:2(I)(n)(1) (LexisNexis 2019).

¹³⁸ See, e.g., HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996) (reporting on “sexual abuse of female prisoners largely at the hands of male correctional employees” at U.S. state prisons in response to the growing number of female prisoners).

¹³⁹ SCHULHOFER, *supra* note 34, at 203-204.

¹⁴⁰ See, e.g., FLA. STAT. § 794.011(4)(b), (e)(7) (30-year maximum); GA. STAT. § 16-6-5.1(b)(2), (3), (5), and (f) (25-year maximum); WIS. STAT. ANN. § 940.225(2)(g-i) (25-year maximum). See also MODEL PENAL CODE AND COMMENTARIES, PART II, Sections 210.0 to 213.6 (AM. L. INST. 1980), Section 213.3, Comment 4, at 390 & n.47 (noting sentence maximums of 10 years).

1 correctional officers and similar officials who have sex with inmates subject to their authority. At
2 least 22 of the state statutes expressly foreclose the option of claiming consent as a defense,
3 while nearly all the remaining statutes, though silent on the subject, implicitly treat sexual
4 relationships between guards and inmates as illegal per se, regardless of consent.¹⁴¹

5 The principle prohibiting such acts extends beyond correctional officers to other officials
6 who have actual or apparent authority over a person's state-restricted liberty. As noted above, the
7 1962 Code made sexual activity between officials and persons under their authority a
8 misdemeanor offense. Currently, many states prohibit sexual activity between parole officers and
9 persons subject to their supervision.¹⁴² This judgment is well justified in light of the similar
10 potential for abuse and the similar absence of countervailing interests in unrestricted sexual
11 freedom. It is also common for statutory language to extend protection to persons at liberty but
12 mandated to participate in certain programs, such as a pretrial diversion or treatment plan.

13 Section 213.3(3)(b)(i) covers a broad array of state-imposed restrictions. It states an act is
14 without effective consent if, at the time of the act, the other person is "in custody, incarcerated,
15 on probation, on parole, under civil commitment, in a pretrial release or pretrial diversion or
16 treatment program, or in any other status involving state-imposed restrictions on liberty," and the
17 actor "holds or purports to hold any position of authority or supervision" with respect to that
18 person's state-ordered restrictions on liberty. The principle underlying this provision is
19 elementary: consent cannot be considered effective when an actor has sufficient authority,
20 whether actual or perceived, to substantially impair the subordinate individual's ability to choose
21 freely.

22 The seriousness of this form of misconduct and the difficulty of deterring it¹⁴³ warrant
23 sanctions more severe than the misdemeanor punishment available under the 1962 Code. Section
24 213.3(3), notwithstanding grading judgments that are significantly more severe in comparable
25 state legislation,¹⁴⁴ classifies the offense as a felony of the fifth degree. This grading equates the
26 punishment for sexual intercourse between subordinates and those who control their liberty with
27 sex in the absence of consent under Section 213.6.

28 **6. *Mens rea.***

29 Section 213.3 requires proof of the actor's recklessness (for liability under subsection (1)
30 or (2)) or knowledge (for liability under subsection (3)) with regard to the pertinent

¹⁴¹ See Smith, *supra* note 53, at 220 & n.161.

¹⁴² See *id.*

¹⁴³ See Jamie Fellner, *Ensuring Progress: Accountability Standards Recommended by the National Prison Rape Elimination Commission*, 30 PACE L. REV. 1625 (2010); Anthony C. Thompson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 33 NEW ENG. J. CRIM. & CIV. CONFINEMENT 119 (2009).

¹⁴⁴ See Smith, *supra* note 53, at 219-220 (discussing various forms of statutory law on the subject of custodial sexual relationships).

1 circumstances. These standards represent a departure from the common requirement that permits
2 liability for mere negligence, for reasons given in the Commentary.

3 Typically the actor clearly knows the circumstances described in Section 213.3(3), which
4 addresses persons in custody. Moreover, the sexual acts covered by Section 213.3(3) may
5 factually appear consensual, as it is only the status-relationship that renders consent ineffective.
6 It is thus essential to ensure that the actor know with certainty that the status exists, and in most
7 cases such knowledge will be readily provable.

8 In contrast, the actor may hold a strong suspicion as to the existence of the conditions
9 described in Section 213.3(1) and (2), and yet claim lack of certainty. An individual snoring with
10 eyes closed in bed is *substantially likely* to be asleep, perhaps even *almost certain* to be asleep.
11 But can the actor be *practically certain* the person is asleep? Given that an act of sexual
12 penetration or oral sex is among the most intimate and personal forms of bodily contact with
13 another person, it is proper to hold an actor responsible not only when the actor knows with
14 certainty that the impairing condition exists, but also when the actor is aware of a substantial,
15 unjustifiable risk of its existence. Unlike the actor in Section 213.3(3), where the other person is
16 likely nominally consenting, an actor in a situation as defined by Section 213.3(1) and (2) is on
17 notice that the other person may not be capable of consent. An actor must have no substantial
18 reservations about the other person's condition, and capacity to consent, before proceeding with
19 penetration.

20 Accordingly, Section 213.3 requires that the actor be aware of yet disregard a substantial,
21 unjustifiable risk as the threshold mental state for liability under subsections (1) and (2).¹⁴⁵ Some
22 commentators critique the operation of this standard in conjunction with provisions akin to
23 Section 2.08 of the 1962 Code,¹⁴⁶ which in effect allows liability for negligence for actors whose
24 self-induced intoxication prevents them from perceiving a substantial risk that a reasonable
25 person would have perceived. The Comment to Section 213.0(1)(b), which leaves the issue to
26 resolution under state law, addresses concerns about the application of intoxication rules to the
27 mental state of the defendant.¹⁴⁷

28 The incapacity standards in Section 213.3 represent a baseline of competence that, as a
29 matter of law, the other person must possess before an actor proceeds. An actor may inflict great

¹⁴⁵ See 1962 Code Section 2.02(2)(c) (requiring, where the applicable mens rea is recklessness, that the person "consciously disregards a substantial and unjustifiable risk" that the other person is incapacitated by one of the enumerated conditions, and such disregard of that risk is a "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation").

¹⁴⁶ 1962 Code Section 2.08 ("[Voluntary] intoxication is not a defense unless it negatives an element of the offense" and "When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such awareness is immaterial."). Evidence of intoxication typically does not exculpate a crime of general intent. See generally Commentary to Section 213.0(1)(b).

¹⁴⁷ See Section 213.0(1)(b) ("The general provisions of the criminal law and rules of evidence of this jurisdiction shall govern the materiality of the actor's intoxication in determining the actor's culpability of an offense.").

Section 213.3 Sexual Assault of an Incapacitated, Vulnerable, or Legally Restricted Person

1 harm by proceeding to penetrate a person despite awareness of a substantial risk that the person
2 is asleep, unconscious, physically incapacitated, mentally incapacitated, passing in and out of
3 consciousness, or incapable of communicating lack of consent, or is seeking no more than
4 nonsexual professional services. An actor aware of a substantial risk that the other person is in a
5 vulnerable situation must take steps to learn whether this situation is present or risk liability.
6 Similarly, an actor who knows that the other person is within the actor's custodial care should
7 abstain from engaging in acts of penetration or oral sex.

1 **SECTION 213.4. SEXUAL ASSAULT BY EXTORTION**

2 **(1) *Sexual Assault by Extortion.*** An actor is guilty of Sexual Assault by Extortion
3 **when:**

4 **(a)** the actor causes another person to submit to or perform an act of sexual
5 penetration or oral sex; and

6 **(b)** the act is without effective consent because the actor explicitly or
7 implicitly threatened:

8 **(i)** to accuse that person or anyone else of a criminal offense or of a
9 failure to comply with immigration regulations; or

10 **(ii)** to take or withhold action as an official, or cause an official to take
11 or withhold action, whether or not the purported official has actual authority
12 to do so; or

13 **(iii)** to take any action or cause any consequence that would cause
14 submission to or performance of the act of sexual penetration or oral sex by
15 someone of ordinary resolution in that person's situation under all the
16 circumstances; and

17 **(iv)** the actor's threat causes the other person to submit to or perform
18 the act of sexual penetration or oral sex; and

19 **(c)** the actor is aware of, yet recklessly disregards, the risk that the
20 circumstances described in paragraphs (a) and (b) are present.

21 **(2) *Grading.*** Sexual Assault by Extortion is a felony of the fourth degree [*five-year*
22 *maximum*].

23 **(3) *Effective consent.*** Consent is ineffective under Section 213.0(2)(e)(iv) when the
24 other person submitted to or performed the act of sexual penetration or oral sex because
25 of a threat described in subsection (1)(b). Submission, acquiescence, or words or conduct
26 that would otherwise indicate consent do not constitute effective consent when occurring
27 in a circumstance described in that paragraph. If applicable, the actor may raise an
28 affirmative defense of Explicit Prior Permission under Section 213.10.

Comment:

Section 213.4 addresses three situations in which apparent consent, even when explicit, is not legally effective because of specified threats, and therefore does not preclude an actor's criminal liability. These Comments address: (1) the particular threats prohibited by Section 213.4; (2) liability when such threats are implicit or indirect; (3) the required causal effect; (4) the required culpable state of mind; (5) the grading of the offense; and (6) the relevance of consent.

1. Which Threats Can Trigger Liability?

Section 213.4 addresses liability for sexual penetration and oral sex when the actor makes certain specified threats of nonphysical harm. The nonphysical threats covered under Section 213.4 are a long-accepted basis for criminal liability when they induce nonsexual conduct that the actor has no right to demand. Under the 1962 Code, for example, an actor who obtains *property* by making a specified threat is guilty of Theft by Extortion,¹ and an actor who makes a specified threat “with a purpose unlawfully to restrict another’s *freedom of action* to his detriment” is guilty of Criminal Coercion.² Both are potentially third-degree felonies.

In those nonsexual contexts, criminal liability does not depend on proof that the person confronted with such a threat had no other choice or was *compelled* to submit. Suppose, for example, that a public official obtains substantial sums of money by threatening to oppose a real estate developer’s application for a zoning variance if the developer does not meet the official’s financial demands. On these facts, the official would be guilty of Theft by Extortion under the 1962 Code, and an equivalent offense under the laws of virtually every state, without regard to whether a reasonable person in the developer’s position could have resisted in some way or simply refused the official’s demand. The offense of Sexual Assault by Extortion under Section 213.4 rests on the same principle. Paragraphs (a) and (b) of subsection (1) require proof that one of the designated threats caused the victim to submit to or perform the sexual act, but—like the offenses of Theft by Extortion and Criminal Coercion—they do not require proof that the actor’s threat was so compelling that the victim could not possibly resist or had no reasonable alternative.

¹ 1962 Code Section 223.4

² 1962 Code Section 212.5 (emphasis added).

Section 213.4. Sexual Assault by Extortion

1 Subsection (1)(b)(i) covers threats to accuse someone of a criminal offense or an
2 immigration violation. These threats amount to classic and uncontroversial forms of extortion,
3 and subsection (1)(b)(i) unconditionally prohibits them when they induce sexual submission.
4 Threats to report an irregularity in a person's immigration status are a newly visible form of such
5 extortion, which targets immigrants who reluctantly submit to sexual acts to avoid possible
6 deportation.³ Subsection (1)(b)(i) includes such threats explicitly to remove any doubt that they
7 fall within the same unconditional prohibition as threats to accuse a person of a crime; they are
8 impermissibly coercive per se, without regard to whether the victim arguably could have or
9 should have resisted.

10 Subsection (1)(b)(ii) applies to proposals to take or withhold official action of any kind,
11 regardless of whether the official action or inaction might be justified on the merits when not
12 linked to a sexual demand. Cases in which the threat emanates from an official with law-
13 enforcement authority are especially egregious.⁴ But comparable dangers, and the same lack of

³ Under current law in many states, criminal liability in such cases is not necessarily straightforward. See, e.g., *State v. Kittilstad*, 603 N.W.2d 732 (Wis. 1999) (defendant, a Lutheran minister, sponsored several Panamanian students as they studied at a local American college; he threatened to get one of the students expelled from school and deported back to Panama if the student did not have sex with a woman in defendant's presence; court held that the threat was sufficient to sustain charge of extortion). Compare *Liu v. Striuli*, 36 F. Supp. 2d 452 (D.R.I. 1999) (professor accused of obtaining sexual submission by threat to delay filing documents necessary to protect student from deportation; held, no individual liability in civil suit under Title IX; possible criminal liability not addressed). See also Michael Blanding, *Crimes Against Illegal Immigrants*, BOSTON MAGAZINE (Dec. 2010) (discussing case of immigrant coerced into sex by threat of deportation, and noting study showing that "90% of migrant workers cite sexual harassment as a problem"); Nina Bernstein, *Immigration Officer Pleads Guilty to Coercing Sex From a Green Card Applicant*, N.Y. TIMES, Apr. 15, 2010, at A22 (reporting on the conviction of an immigration official for threatening an immigrant with adverse immigration consequences if refused sexual favors).

⁴ See, e.g., *State v. Knight*, 749 N.E.2d 761 (Ohio Ct. App. 2000) (police officer's offer not to arrest complainant was sufficient to support charge of sexual battery); *State v. Walker*, 748 N.E.2d 79, 85 (Ohio Ct. App. 2000) (police officer's offer to forgo bringing victim in his custody to jail was sufficient to support charge of sexual battery by a person who "has supervisory or disciplinary authority over [the complainant]"; *Gober v. State*, 416 S.E.2d 292 (Ga. Ct. App. 1992) (holding that police officer's offer to drop DUI charges against motorist in his custody was covered by rape statute, but suggesting in dicta that mere offer to quash a ticket for a person not in custody might not constitute rape); *Commonwealth v. Caracciola*, 409 Mass. 648, 650 (Mass. 1991) (police officer's threat to arrest victim held sufficient to sustain charge of forcible rape "by force and against [the person's] will").

Compare *Blasingame v. State*, 706 S.W.2d 682 (Tex. App. 1986) (threat to arrest victim when defendant (a city mayor) did not actually have arrest power was not covered by official oppression statute). Section 213.4 could support the opposite result, because the mayor had threatened to take action

any possible justification for linking the proposal to a sexual demand, are present in the case of other officials—for example, a judge who has authority over a litigant’s case,⁵ a case worker in Children’s Protection Services who tells a mother that the case worker will seek to revoke her custody over her children,⁶ or an official who threatens a government employee with demotion or termination for failing to meet sexual demands.⁷ Criminal liability is well settled when an official demands a financial kickback in return for taking or withholding official action of these sorts,⁸ and the same result follows under subsection (1)(b)(ii) when the official demands sex instead.

Demands for sex or money in these situations are extortionate, even when the official threatens no adverse consequence and instead merely proposes to confer an undeserved advantage. A police officer who obtains a cash payment for not issuing a traffic ticket can be convicted of Theft by Extortion under Section 223.4 of the 1962 Code, even though the motorist committed the infraction and had no right to escape the charge.⁹ For analogous reasons, a police officer who makes a *sexual* demand under the same circumstances can be convicted of Sexual Assault by Extortion under subsection (1)(b)(ii). Whether the officer’s demand is for cash or

as an official; whether he actually had power to do so would not be relevant unless the victim had been aware that the threat was an empty one.

⁵ E.g., *Jackson v. State*, 352 S.W.3d 288 (Tex. App. 2011) (judge’s threat to refuse to appoint competent counsel and to convict complainant was covered by official oppression statute); *Commonwealth v. Checca*, 341 Pa. Super. 480 (Pa. Super. Ct. 1985) (judge’s offer to dismiss charges against complainant was covered by official oppression statute). In a contrasting decision, *State v. Maestas*, 140 N.M. 836 (2006), a judge had had sexual encounters with women who submitted in response to the judge’s threats of harsher punishment; the judge’s conviction was overturned on the ground that judges were not included on the list of officials covered by the applicable official corruption statute. Section 213.4 eliminates that arbitrary distinction and accordingly would permit a court to uphold the conviction in a case like *Maestas*.

⁶ *People v. Green*, 313 Mich. App. 526 (Ct. App. 2015).

⁷ *Bryson v. State*, 807 S.W.2d 742 (Tex. Crim. App. 1991) (police chief’s threat to terminate female patrol officer if she failed to fulfill her “duties” (i.e., letting him grab her breasts and buttocks) was covered by official oppression statute).

⁸ *United States v. Wright*, 797 F.2d 245 (9th Cir. 1986) (prosecutor convicted of extortion for demanding that law firm pay \$3,000 in return for dropping drunk-driving charge against one of its clients); *United States v. Hathaway*, 534 F.2d 383, 395 (1st Cir. 1976) (Redevelopment Authority director convicted of extortion for demanding that engineer pay \$25,000 to get consulting contract).

⁹ Cf. *Wright*, *supra* note 8 (prosecutor convicted of extortion for demanding financial payment in return for dropping drunk-driving charge).

Section 213.4. Sexual Assault by Extortion

1 sexual compliance, the proposal is not merely an offer of beneficial treatment, because it takes
2 from the motorist the right to the unbiased exercise of the officer's discretion; it deprives the
3 individual of "the right to impartial determination of the issue on the merits (i.e., whether to
4 enforce the law)" ¹⁰ Similarly, subsection (1)(b)(ii) would support conviction of a judge who
5 obtains sexual consent by offering to sentence a defendant more leniently than the facts would
6 justify ¹¹ or a teacher who obtains a student's sexual cooperation by offering to give a higher
7 grade than the student's work would warrant. ¹² A high-school principal who proposes, in return
8 for sex, to permit a student to graduate despite the student's failing grades (Illustration 6 below)
9 could be convicted under subsection (1)(b)(ii), even though under the circumstances the student
10 had no right to graduate. ¹³

11 Although a person confronted by such a proposal gains special privileges by accepting it,
12 the law has long viewed such proposals as extortionate in a property-transfer context, and it
13 treats the individual who submits as a victim, not as an offender guilty of bribery. The distinction
14 between the two offenses of bribery and extortion is developed in an extensive jurisprudence. ¹⁴
15 Exchanges of these kinds are coercive and victimizing whenever the official makes clear that
16 favorable exercise of public responsibilities can occur only in return for some *quid pro quo*. Such
17 exchanges typically lose their coercive character only when the person who receives the
18 undeserved benefit initiates the proposal and actively orchestrates the corrupt arrangement; the
19 transaction then becomes bribery, and the person who received favorable official action becomes

¹⁰ *United States v. Hyde*, 448 F.2d 815, 833 (5th Cir. 1971). For discussion of this principle, and the reasons why such proposals are properly regarded as *threats*, even when the target is offered an undeserved advantage, see STEPHEN J. SCHULHOFER, *UNWANTED SEX* 139-143 (1998); JOHN T. NOONAN, *BIBES* 584-587 (1984).

¹¹ *Maestas*, *supra* note 5.

¹² Cf. *People v. Walker*, 321 P.3d 538 (Colo. App. 2011). In *Walker*, the court affirmed a sexual-contact conviction on these facts, under a statute applicable only to coercion of minors. Under subsection (1)(b)(iii) such a proposal would be impermissibly coercive even in the case of an adult student and would support a conviction under Section 213.4 if it led to sexual penetration or oral sex.

¹³ Compare *State v. Thompson*, 792 P.2d 1103 (Mont. 1990) (holding defendant not guilty of sexual offense because state statute required proof that submission was coerced by threat of physical force).

¹⁴ See NOONAN, *supra* note 10, at 584-587.

an offender rather than a victim.¹⁵ But subsection (1)(a)(ii) does not apply to threats by private individuals who exercise authority (for example, a company manager’s threat to fire an employee), because the obligation to exercise discretion in an unbiased fashion can be less clear-cut in the private sector.

The range of threats that subparagraphs (i) and (ii) prohibit on a *per se* basis is narrower than that which is usually sufficient in a nonsexual context to trigger liability for criminal coercion or theft of property by extortion.¹⁶ Therefore, they do not *automatically* reach threats to inflict reputational harm (for example, by disclosing an extramarital affair); “revenge porn” (for example, by disclosing sexual promiscuity or posting sexually explicit images of the victim online); or threats to inflict economic harm (for example, by withholding a needed job recommendation). And as just mentioned, subparagraph (ii) does not apply to threats to take or withhold action by individuals who exercise authority in the private sector.

Because threats like these are excluded from subparagraphs (i) and (ii), they are not prohibited *per se* in a sexual context. But they are not insulated from all scrutiny; they can nonetheless result in liability for Sexual Assault by Extortion when they become unduly coercive under the circumstances specified in subparagraph (iii). This subparagraph punishes sexual penetration or oral sex when the actor causes the other person to comply by making a threat that would, under all the circumstances, cause submission by an individual of ordinary resolution. It thus reaches conduct that, although outside the narrow *per se* prohibitions in subparagraphs (i) and (ii), nonetheless is unduly coercive in its context.

¹⁵ In exceptional circumstances, a citizen who apparently initiated the proposal may nonetheless be considered the victim of extortion—for example, when public officials actively foster expectations that contractors cannot do business with the government until they offer an ostensibly unsolicited kickback. See *United States v. Kenny*, 462 F.2d 1205, 1211 (3d Cir. 1972); NOONAN, *supra* note 10, at 584-585. Such a situation, where an official bears responsibility for creating the implicit threat, could support conviction under subsection (1)(b)(ii) when sex was the expected *quid pro quo*. Some jurisdictions go further than subsection (1)(b)(ii) and 1962 Code Section 223.4(4) by permitting an extortion conviction even without proof that the public official did anything to initiate the corrupt exchange. This distinct form of extortion—extortion “under color of official right,” see *Ocasio v. United States*, 136 S Ct. 1423, 1428 (2016); *United States v. Evans*, 504 U.S. 255, 260, 268 (1992)—does not support conviction under subsection (1)(b)(ii), which requires proof that the official expressly or implicitly initiated the threat to tie official action to a sexual *quid pro quo*.

¹⁶ Compare 1962 Code Section 212.5(1)(c) (including, in addition, threats to reveal a discrediting secret); *id.* Section 223.4(3), (5)-(7) (including in addition threats to reveal a discrediting secret, to bring about a strike, to testify, and to inflict “any other harm which would not benefit the actor”).

Illustrations:

1. ¹⁷ Complainant hitchhikes from Complainant's small hometown to the state capital, where Complainant finds a job in a restaurant. After three months, during which Complainant's work has consistently been flawless, Accused, the restaurant manager, threatens to fire Complainant unless Complainant agrees to submit to an act of sexual penetration. Complainant agrees to do so. But after several more weeks on the job, during which Accused makes repeated sexual demands, Complainant quits and reports Accused for Sexual Assault, alleging that Complainant did not want to engage in the sexual conduct and submitted only because of Accused's threat to put Complainant out of work.

On these facts, Accused's conduct might expose his company to civil liability for workplace sexual harassment under state employment-discrimination law or under Title VII (if the company is subject to that statute). But Section 213.4 does not categorically treat sexual harassment of this kind as a felony sex offense. Accused can be convicted under subsection (1)(b)(iii) only if the trier of fact concludes beyond a reasonable doubt that (1) Complainant submitted because of Accused's threat, (2) an individual of ordinary resolution would have submitted to the sexual demands in the same situation, and (3) Accused was aware of, yet disregarded, a substantial, unjustifiable risk that Accused's threat to Complainant's job caused Complainant to submit. The trier of fact would have to assess all the circumstances in order to make these determinations. If Complainant was far from home and had little support, scant resources, and few prospects for other adequate employment, and if Accused knew as much, conviction under subsection (1)(b)(iii) could be supported. Conversely, if Complainant had other reasonable job opportunities, a trier of fact might find that Accused's actions, while inappropriate and unfair, were not sufficiently coercive to meet the requirements for criminal punishment under subsection (1)(b)(iii).

2. After a date, Accused and Complainant return to Complainant's apartment for some wine. When Complainant rebuffs Accused's sexual advances, Accused becomes angry, accuses Complainant of being a "tease," and grabs the wine glasses, threatening to smash them in the fireplace and then leave to spend the night elsewhere. Upset by this

¹⁷ Based on the facts of *State v. Lovely*, 480 A.2d 847 (N.H. 1984).

Section 213.4. Sexual Assault by Extortion

1 display of anger, Complainant apologizes for not understanding the depth of Accused's
2 feelings and agrees to submit to sexual penetration. Later, Complainant charges Accused
3 with Sexual Assault and testifies that Complainant submitted only because of the steps
4 Accused threatened to take if Complainant did not submit.

5 If Accused's rage led Complainant to fear physical force and Accused was aware
6 of, yet disregarded, a substantial, unjustifiable risk that this was the case, Accused could
7 be convicted of Sexual Assault by Physical Force or Restraint under Section 213.2. But
8 absent proof beyond a reasonable doubt that Accused was at least aware of, and
9 disregarded, a substantial, unjustifiable risk that Complainant had this fear of physical
10 force, Accused cannot be convicted on that basis under Section 213.2.

11 A different analysis is required with respect to Accused's announced intention to
12 start smashing Complainant's glassware and, perhaps implicitly, other household
13 possessions. A threat to destroy property does not automatically qualify as a threat of
14 "physical force" under Section 213.2. (Such a threat could qualify under Section 213.2,
15 however, if it implied a threat to resort to physical force.) Nonetheless, apart from any
16 implicit threat to use physical force, Accused could be convicted of Sexual Assault by
17 Extortion under Section 213.4(1)(b)(iii) if Accused's behavior was sufficiently
18 intimidating under all the circumstances. A conviction under Section 213.4(1)(b)(iii)
19 would require the trier of fact to find beyond a reasonable doubt that (1) Complainant
20 submitted to the sexual act because of Accused's threatening behavior, (2) an individual
21 of ordinary resolution would have done so, and (3) Accused was aware of and
22 disregarded a substantial, unjustifiable risk that this was the case.

23 3. Accused, the owner of a small computer-repair company, employs
24 Complainant as a student intern while Complainant is in the United States attending
25 university on a student visa. At the end of the internship, Accused is expected to write to
26 Complainant's university evaluating Complainant's performance, which has been
27 excellent, and a strongly positive evaluation will likely enable Complainant to qualify for
28 a green card. Nonetheless, Accused tells Complainant to expect a negative evaluation
29 unless Complainant accepts a sexual relationship with Accused. Complainant does so, but
30 later reports Accused for Sexual Assault. Complainant testifies that Complainant did not
31 want a sexual relationship with Accused but needed a good evaluation to get a green card,

1 had no other way to get the green card, would have faced deportation without it, and as a
2 result had no viable choice but to accede to Accused's demands.

3 These facts cannot support liability under subsection (1)(b)(i) because Accused
4 does not threaten to report Complainant for violating any immigration regulations.
5 Subsection (1)(b)(ii) is inapplicable because Accused is a private citizen, not a public
6 official. But subsection (1)(b)(iii) could apply if Accused's threat was sufficiently
7 intimidating under all the circumstances. The trier of fact would have to assess the entire
8 context in order to make that determination. If lack of a green card would leave
9 Complainant with little prospect of avoiding deportation to a country enmeshed in
10 political violence or civil war, and if Accused was well aware of this, conviction under
11 subsection (1)(b)(iii) could be readily supported. Conversely, if Complainant had other
12 opportunities to obtain a visa extension or green card, or if Complainant's home was in a
13 peaceful and prosperous country where Complainant had attractive employment
14 opportunities, a trier of fact might find that Accused's actions, however inappropriate,
15 were not coercive enough to warrant criminal punishment under subsection (1)(b)(iii).

16 4.¹⁸ Accused tricked Complainant into installing malware that searched
17 Complainant's computer for sexually explicit photographs and switched on webcams
18 allowing Accused to record Complainant undressing and having sex. Accused then
19 threatened to release the photos and videos if Complainant did not make pornographic
20 videos for Accused. Complainant, an assistant pastor in a local church, feared that such
21 publicity would devastate Complainant's reputation and destroy Complainant's career in
22 the clergy, causing Complainant to be fired with little prospect of ever regaining similar
23 employment. As a result, Complainant acceded to Accused's demands. On Accused's
24 instructions, Complainant made several pornographic videos in which Accused and
25 Complainant engaged in acts of oral sex. Later, Complainant reports Accused for Sexual
26 Assault and testifies that Complainant participated in the sexual acts only because of
27 Accused's threat to release the photos and videos.

¹⁸ Based on facts reported in Margaret Talbot, *The Attorney Fighting Revenge Porn*, THE NEW YORKER, Dec. 5, 2016.

Section 213.4. Sexual Assault by Extortion

On these facts, Accused illegally obtained sexually explicit material from Complainant's computer and had no right to publicly release that material without Complainant's permission.¹⁹ Accused could be convicted of Sexual Assault under Section 213.4(1)(b)(iii) if the trier of fact concluded beyond a reasonable doubt that (1) Complainant submitted to the sexual acts because of Accused's threats, (2) a person of ordinary resolution would have done so under similar circumstances, and (3) Accused was aware of, yet disregarded, a substantial, unjustifiable risk that this was the case.

2. Implicit and Indirect Threats.

Section 213.4(1) identifies threats that are impermissibly coercive when they cause a person to submit to or perform an act of sexual penetration or oral sex. Such threats are covered not only when made in explicitly threatening words or gestures, but also when the actor's words or behavior suggests an implicit threat under all the circumstances. Similarly, Section 213.4(1) reaches threats (whether express or implied) made to the complainant but threatening to harm third parties; such threats are just as serious as threats aimed directly at a complainant.

Illustration:

5. Complainant and Accused have drinks together in Accused's apartment. While the two sit side by side on a sofa, Accused expresses an interest in sex. Complainant declines and says, "It's late. I should go home." When Complainant tries to leave,

¹⁹ States have a complex web of statutes prohibiting computer trespassing, invasion of sexual privacy, and/or dissemination without consent of sexual images under circumstances like those described in Illustration 4. Such statutes do not include sexual penetration or oral sex as an element of the offense and are typically graded as misdemeanors. See, e.g., CAL. PENAL CODE § 647(j)(4)(A) (2018) (making it a misdemeanor to distribute image of intimate body parts of another person or of a person engaged in sexual acts, when the understanding was that the image would remain private); 18 PA. CONS. STAT. § 3131 (2018) (making it a misdemeanor to disseminate visual depiction of current or former sexual partner when nude or engaged in sexual conduct, with intent to harass, annoy, or alarm such partner); TEX. PENAL CODE § 21.16(2018) (making it a misdemeanor to disclose or threaten to disclose material depicting another person's intimate parts exposed or engaged in sexual conduct, without that person's consent, when the depicted person had a reasonable expectation of privacy with regard to such material). The colloquial rubric for such conduct ("revenge porn") is a misnomer because perpetrators often are not motivated by revenge or other hostility to the victim; the statutes typically seek to prohibit more generally the distribution of sexually explicit images of individuals without their consent. One recent survey finds that such laws now exist in at least 40 states and the District of Columbia. See <https://www.cybercivilrights.org/revenge-porn-laws/>, visited July 30, 2018.

1 Accused remarks, “By the way, how are your parents? You said they came into this
2 country illegally. I saw this hotline that people can call to notify the authorities about
3 immigration violations—sure would be a shame if the government found that out and
4 tried to deport them.” Complainant freezes and turns pale as Accused approaches, kisses
5 Complainant, removes Complainant’s clothing, and sexually penetrates Complainant. At
6 trial, Complainant testifies that Complainant understood Accused’s comments as a threat
7 and submitted only out of fear of harm to Complainant’s parents. Accused testifies that
8 Accused had no desire to threaten or harm Complainant’s parents and believed
9 Complainant’s participation was fully consensual.

10 Even though Accused did not expressly threaten harm to Complainant’s parents,
11 the “threat” element can be satisfied if the factfinder concludes beyond a reasonable
12 doubt that Accused’s words and actions implied Accused’s willingness to report
13 Complainant’s parents to immigration authorities in the event that Complainant tried to
14 leave. If so, whether Accused can then be convicted of Sexual Assault by Extortion under
15 Section 213.4(1)(b)(i) depends on whether the trier of fact also finds, beyond a
16 reasonable doubt, the additional elements necessary for conviction under this Section—
17 namely, that the threat caused the Complainant to submit to the sexual act and that
18 Accused was aware of, yet disregarded, a substantial, unjustifiable risk that the threat
19 caused Complainant to submit.

20 ***3. Causal Effect.***

21 An actor’s express or implied threat to take any of the coercive actions addressed in
22 Section 213.4(1)(b)(i)-(iii) does not suffice to establish liability under Section 213.4 unless the
23 threat causes the other person to submit to or perform an act of sexual penetration or oral sex
24 when that person would not otherwise do so. The actor’s conduct must be both the but-for and
25 the proximate causes of the other person’s submission to or performance of the relevant sexual
26 acts. Examples illustrating this two-pronged causation requirement are given (with respect to
27 situations involving aggravated physical force or restraint) in the Comment to Section 213.1
28 above. The same causation analysis applies when an actor’s conduct involves one of the coercive
29 threats addressed in Section 213.4(1)(b)(i)-(iii). Thus, for example, when a prohibited threat is
30 the proximate cause of the complainant’s submission to an act of sexual penetration, the accused

1 can be convicted of Sexual Assault by Extortion even if the threat was not so compelling as to
2 preclude any possible resistance.

3 **Illustration:**

4 6.²⁰ Accused, a high-school principal, states that Complainant will not be
5 permitted to graduate unless Complainant performs an act of oral sex upon Accused.
6 Complainant then complies with Accused's demand.

7 Accused's actions suggest the kind of threat described in Section 213.4(1)(b)(ii).
8 If a factfinder concludes beyond a reasonable doubt that Complainant understood
9 Accused's statement as a threat and would not otherwise have complied with Accused's
10 demand, then the threat and causation requirements of Section 213.4(1)(b)(ii) are both
11 met. Such a threat need not overwhelm the complainant or preclude any possibility of
12 resistance; unlike the 1962 Code, Section 213.4(1) does not require a threat that
13 "compels" submission.²¹ Therefore, Accused would not necessarily escape liability by
14 proving that the student could have sought help from another school official or ignored
15 the threat and run the risk of reprisal. The threat is wrongful in itself. Liability under
16 Section 213.4 does not require proof that the threat was "compelling," so long as the
17 actor makes a forbidden threat with the required mens rea and thereby causes a person to
18 engage in the sexual act. The mens rea requirement means that Accused could be
19 convicted under this Section only if a jury found beyond a reasonable doubt that Accused
20 knew—or was aware of, yet disregarded, a substantial, unjustifiable risk—(1) that
21 Complainant understood Accused's statement as a threat to take official action, and (2)
22 that Complainant complied for that reason.

23 Although the perceived threat need not "compel" the complainant, it must meet the
24 requirement of proximate causation. Accordingly, there is no liability under Section 213.4 if a
25 person's actions involve a perceived threat but are not the cause of the other person's submission
26 to or performance of the sexual act, as in situations in which an encounter is entirely consensual.
27 An encounter of that kind presumably would not lead to a criminal complaint, and the actor

²⁰ Based on the facts of *State v. Thompson*, 792 P.2d 1103 (Mont. 1990).

²¹ Compare 1962 Code Section 213.1(1), (2).

would not become “the accused” in a criminal prosecution. But it is important to see that the absence of the required causal element precludes a successful criminal prosecution, even in theory.

Illustration:

7. Avery is a law-school classmate of Cass, but the two have not previously spoken. Avery approaches Cass and says, “I just heard your parents came to this country illegally. It would be terrible if the government found that out and tried to deport them.” Cass turns pale and begins to panic. Avery helps Cass walk to a quiet corner and then suggests that they have a drink to talk it over. Cass is terrified but agrees only because Cass believes that otherwise Avery will report Cass’s parents to immigration authorities. Over drinks, Avery realizes that Cass thought Avery was threatening to make that report; Avery then explains that Avery had no such intention and that, to the contrary, Avery knows an excellent immigration lawyer who can help. Cass, much relieved, agrees to have dinner with Avery. Afterwards the two engage in acts of oral sex.

Because the sexual encounter was consensual, Cass presumably would not file a criminal complaint. But even as a theoretical matter, Avery’s perceived threat cannot support liability under Section 213.4. Avery cannot be convicted of Sexual Assault by Extortion unless the trier of fact finds both the required causal connection and the necessary mens rea—specifically, that (1) Avery’s comment was a but-for cause of the interactions that followed, (2) it was “not too remote . . . in its occurrence to have a [just] bearing on liability,”²² and (3) Avery was aware of, yet disregarded, a substantial, unjustifiable risk that the comment had that causal effect.

Avery’s comment could be found to meet the first (but-for) requirement because in the absence of that comment, Cass arguably would not have had drinks with Avery, might not have learned about Avery’s willingness to help, and in consequence might not have agreed to the dinner that led to sexual intimacy. Moreover, the third requirement (mens rea) arguably could be met if the trier of fact finds that Avery knew of the risk that

²² See 1962 Code Section 2.03.

their sexual interaction resulted from that chain of events. Nonetheless, even if the first (but-for) and third (mens rea) requirements could be established, the second requirement (*proximate* cause) could not be, because (1) Avery took effective steps to dissipate the coercive effect of the parties' initial interaction and the misunderstanding that resulted from it, and (2) Cass agreed to meet Avery for the dinner that led to sex, only after realizing that Avery's comment did not involve threat. Given these intervening events, Avery's initial comment, despite its but-for link to the later sexual conduct, was too remote to have a just bearing on liability and therefore cannot be considered the proximate cause of Cass's subsequent consent to engage in the acts of oral sex.

4. *The Required Mental State (Mens Rea).*

Statements and conduct often are perceived as threatening even when the actor does not realize, much less intend, that others feel endangered. As discussed in connection with the threat requirement under Section 213.1, the criminal law typically does not assume that a specific intent or purpose to threaten is inherent in the concept of threat.²³ For situations involving a threat to use aggravated physical force or restraint, Section 213.1, Sexual Assault by Aggravated Physical Force or Restraint, requires proof that the actor *knew* of the threatening character of the relevant actions. For lesser threats, Section 213.4, like Section 213.2 (pertaining to physical threats not covered by Section 213.1), requires at least recklessness, that is, proof that the accused acted knowingly or was aware of, yet recklessly disregarded, the risk that the other person would perceive the actor's words or actions as a threat and that this perception would have the required causal effect.

The decision to impose liability on the basis of recklessness is in accord with the basic mens rea norm throughout the 1962 Code.²⁴ As discussed in connection with the recklessness standard under Section 213.2,²⁵ an actor whose behavior is perceived as threatening might

²³ See Reporters' Note 3 to Section 213.1 (discussing *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001 (2015)).

²⁴ Model Penal Code and Commentaries, Comment to Section 2.02, at 239-241 (AM. L. INST. 1985).

²⁵ See Comment 5 and Reporters' Note 2 to Section 213.2, *supra*.

1 plausibly claim not to be absolutely sure that others are interpreting the actor's behavior in that
2 way. Or an actor might make intentionally threatening remarks but plausibly profess to think that
3 the other person did not necessarily submit to the sexual advance for that reason. If proof of
4 actual knowledge is required, claims of this sort would prevent conviction because a knowing
5 mens rea requires the actor to be "practically certain" that the relevant facts exist.²⁶ Yet, it is
6 unacceptable to allow conduct of this kind to escape with impunity, simply because those who
7 engage in this behavior can credibly claim not to be sure about its causal impact. A person who
8 consciously chooses to disregard substantial, unjustified risks of this nature is engaging in
9 dangerous, highly culpable behavior that warrants emphatic condemnation and punishment.

10 Section 213.4 therefore accepts conscious recklessness as a sufficient to meet the mens
11 rea requirement. Section 2.02(2)(c) of the 1962 Code specifies that a person is reckless when he
12 or she "consciously disregards a substantial and unjustifiable risk that the material element exists
13 or will result from [the person's] conduct." The risk must be "of such a nature and degree that,
14 considering the nature and purpose of the actor's conduct and the circumstances known to [the
15 actor], its disregard involves a gross deviation from the standard of conduct that a law-abiding
16 person would observe in the actor's situation." Thus, when the actor is aware of, yet consciously
17 disregards, a substantial and unjustifiable risk that the other person is submitting to the relevant
18 sexual act because of a perceived threat that the actor will employ one of the means specified in
19 Section 213.4(1)(b)(i)-(iii), the actor can be convicted of Sexual Assault by Extortion.

20 **5. Grading.**

21 Under revised Article 213, it is a felony of the third degree to use *physical* force or
22 restraint that causes another person to submit to or perform an act of sexual penetration or oral
23 sex. The use of *nonviolent* threats to induce sexual compliance likewise deserves to be classified
24 as a felony, and in its violation of sexual autonomy, it is not categorically less injurious than
25 sexual assault by physical force. In the ordinary case, however, nonviolent threats present much
26 less risk of physical injury to the complainant (beyond that associated with the unwanted sexual
27 intrusion itself), and society has traditionally regarded sexual extortion as a less serious form of

²⁶ Under the MPC, a person acts knowingly only when "(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and "(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result." 1962 Code Section 2.02(2)(b).

1 sexual wrongdoing than obtaining sexual compliance through physical violence. Indeed, under
2 traditional rape law, the use of nonviolent threats to compel sexual compliance was not
3 criminally punishable at all, and this remains the case in many jurisdictions.²⁷ Accordingly, the
4 use of nonviolent threats is classified as a less serious offense than the third-degree felony of
5 Sexual Assault by Physical Force or Restraint. Under Section 213.4, Sexual Assault by Extortion
6 is a felony of the fourth degree.²⁸

7 **6. Consent.**

8 As explained in the Comment to Section 213.1, the freely given consent of a competent
9 adult usually transforms a potentially harmful sexual interaction into one that is not a proper
10 subject of legal concern. Yet consent is not freely given when a person submits to a sexual act
11 only because he or she faces an extortionate threat. Thus, when the circumstances described in
12 Section 213.4 are proved beyond a reasonable doubt (that the actor made a prohibited threat and
13 that the other person submitted to or performed the sexual act because of that threat), Section
14 213.0(2)(e)(iv), in defining consent, provides that those circumstances render any apparent assent
15 legally ineffective. Section 213.4(3) makes explicit this well-understood, long-accepted
16 principle, and Section 213.4(1)(c) provides that the actor has the requisite mental culpability
17 when the actor knows, or recklessly disregards the risk, that those circumstances are present.

18 As in the case of threats to use physical force or restraint, this principle applies to
19 extortionate but nonviolent threats even when the other person allegedly wants to be threatened
20 in that manner prior to submitting to or performing the sexual acts. Yet sexual encounters
21 between competent adults should not be categorically prohibited in these circumstances. Section
22 213.10 acknowledges this concern by affording an affirmative defense for situations of this kind
23 when adequate safeguards are present to prevent abuse. Where its limitations are met, Section
24 213.10 precludes liability for the actor who reasonably believes the other individual personally
25 gave explicit prior permission for the actor to make the extortionate threat.²⁹ But when those
26 safeguards are not satisfied, an actor cannot escape liability merely by claiming a belief that, for

²⁷ See Reporters' Notes to Section 213.1, *supra*.

²⁸ For comparison of the grading of Section 213.4 to comparable offenses under current law and under the 1962 Code, see Reporters' Note 5, *infra*.

²⁹ See Section 213.10, *infra*.

1 example, the other person might find it sexually stimulating to be coerced into sexual
2 submission. As previously discussed in connection with the “rough sex” defense,³⁰ once the
3 prosecution proves beyond a reasonable doubt that the other person submitted because of a
4 specified threat and that the actor knew, or recklessly disregarded the risk, that this was the case,
5 criminal culpability justifiably attaches, unless the defendant has taken the special care required
6 by Section 213.10 to assure that the other party is indeed willing to be subjected to such
7 treatment.

8 Sections 213.4(3) and 213.10 do not require the actor to obtain an express statement of
9 “affirmative consent” before any sexual interaction. Nor do these provisions nullify the
10 stipulation in Section 213.0(2)(e)(ii) that consent can be inferred from behavior, including
11 “inaction—in the context of all the circumstances.” The Section 213.10 requirement of clearly
12 expressed prior permission comes into play only as a prerequisite to an actor’s use of means of
13 coercion that are prima facie suspect and generally illegal, such as the threats specifically
14 identified in Section 213.4(1)(b).

15 Examples illustrating the operation of this principle are given (with respect to situations
16 involving aggravated physical force) in the Comment to Section 213.1 above. The same analysis
17 applies when an actor’s conduct involves one of the coercive nonphysical threats addressed in
18 Section 213.4.

REPORTERS’ NOTES

1. *Sexual Extortion Generally – Current Law.*

20 Criminal liability for nonviolent sexual intimidation is a relatively modern development,
21 but American law has long since moved beyond the early-20th-century view that physical harm
22 and threats of violence were the only impermissible means to secure submission to a sexual
23 demand. For reasons already discussed, sexual assault now is widely understood as a violation of
24 sexual autonomy. An unwanted sexual intrusion upon another person constitutes socially
25 intolerable misconduct, even in the absence of violence, when consent to that intrusion has been
26 coerced by any impermissible pressure or threat. The abuses associated with nonphysical

³⁰ See Section 213.1, Comment 3, *supra*.

coercion are now widely acknowledged.³¹ But criminal offenses to deter and punish this misconduct are vaguely or inaptly worded in many jurisdictions and nonexistent in many others.

The range of incentives and threats used to induce sexual submission is broad and varied. They can include: a police officer's threat to arrest or offer not to make a justifiable arrest; a job supervisor's proposal to fire an employee, block a promotion, or expedite an undeserved promotion; a threat to expose another person's adultery, embezzlement, irregular immigration status, or sexual orientation; a wealthy person's threat to stop supporting a paramour; a person's threat to publicize salacious photos or break off a dating relationship—the list is endless, and the criteria for distinguishing between legitimate inducement and impermissible coercion are by no means uniformly agreed upon.

Many states continue to restrict sexual offenses to situations involving the use of or threat to use physical violence.³² Where a broader conception of unacceptable coercion is recognized, the prevalent statutory formulas use a variety of terms to identify its boundaries. Some of the prohibited threats, such as threats to accuse the victim of a crime,³³ have clear content. Others found in current law are more elastic or largely undefined—for example, threats of “intimidation”³⁴ or “public humiliation,”³⁵ and threats to “expose a secret . . . tending to subject

³¹ See Legal Momentum, “A Call to Action: Ending ‘Sextortion’ in the Digital Age 10 (July 2016), available at https://www.scribd.com/document/318591674/A-Call-to-Action-Ending-Sextortion-in-the-Digital-Age#from_embed:

Judges demand sex in exchange for visas or favorable custody decisions, landlords threaten to evict tenants unless they have sex with them, supervisors condition job security on sex, and principals condition student graduation on sex. These are only a few faces of “sextortion.” Throughout the world, those in power extort vulnerable women and girls by demanding sex, rather than money. Victims have no choice but to comply. Noncompliance leads to life-altering and irreversible harm, such as losing one's children, deportation, homelessness, incarceration, or unemployment.

In the United States, extortion has proliferated in the digital age. Whereas traditionally, sextortion was perpetrated by abusers who knew their victims, today anyone with a computer keyboard can perpetrate cyber-sextortion and exert power over strangers.

Perpetrators hack into personal computers and use deceptive practices, obtain private information (including sexual images) and then demand sex or more sexual imagery. Many perpetrators have victimized multiple, even hundreds, of victims. . . .

³² See Reporters' Note to Section 213.1.

³³ E.g., DEL. CODE ANN. tit. 11, § 774 (2018).

³⁴ John F. Decker & Peter G. Baroni, “No” Still Means “Yes”: The Failure of the “Non-Consent” Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1121 & n.265 (2011) (collecting statutes of roughly seven states) (“none of these . . . states . . . further define what constitutes ‘extortion’”). North Dakota defines “coercion” as imposing “fear or anxiety through intimidation, compulsion, domination, or control with the intent to compel conduct or compliance.” Id. at 1121 & n.268.

³⁵ Id. at 1121 (three states).

any person to hatred, contempt or ridicule.”³⁶ A threat that “places a person in fear of . . . financial loss”³⁷ could extend to anything from the freezing the person’s bank account to the prospect of losing (or not winning) a profitable business contract. Even more broadly, Texas defines sexual assault, a felony of the second degree with a maximum sentence of up to 20 years’ imprisonment, to include “compel[ling] the other person to submit or participate by threatening . . . to cause harm to the other person,”³⁸ with “harm” defined as “anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.”³⁹ Another approach, similarly vague or implausibly broad, is to require that consent be “voluntary” or “freely given.”⁴⁰

In drawing the line between permissible and impermissible sexual interaction, as in setting boundaries for property exchanges and other transactions, the law cannot guarantee absolute self-determination, free of all influences and constraints that arise from background conditions and the legitimate actions of others.⁴¹ The challenge for a Model Penal Code is to identify in a clear, predictable manner the pressures, inducements, and threats that will be deemed impermissibly coercive, and to distinguish them from the constraints on autonomy that are either inevitable or avoidable only at undue cost to other important values. Particularly important among the other values that must not be unduly constrained is the interest in “positive” sexual autonomy, the freedom of a competent adult to pursue an intimate relationship with another person who is also competent and willing to consent.⁴²

³⁶ IDAHO CODE ANN. § 18-6101(8) (West 2018); TEX. PENAL CODE § 1.07(a)(9)(D) (2017) (any threat “to expose a person to hatred, contempt, or ridicule”).

³⁷ HAWAII REV. STAT. ANN. § 707-700 (2018); TEX. PENAL CODE § 1.07(a)(9)(E) (2017) (any threat “to harm the credit or business repute of any person....”)

³⁸ TEX. PENAL CODE § 22.011(a)(1), (b)(2) (2017).

³⁹ TEX. PENAL CODE § 1.07(a)(25) (2017).

⁴⁰ E.g., M.T.S., 609 A.2d 1266, 1277 (N.J. 1992) (“[A]ny act of sexual penetration [without] freely given permission”); CAL PENAL CODE § 261.6 (2018) (“[T]he person [giving consent] must act freely and voluntarily”); FLA. STAT. § 794.011(4)(b), (5) (“‘Consent’ means intelligent, knowing, and voluntary consent and does not include coerced submission”); WIS. STAT. § 940.225(4) (2018) (“Consent . . . means . . . freely given agreement”).

⁴¹ Patricia J. Falk, *Not Logic but Experience: Drawing on Lessons from the Real World in Thinking About the Riddle of Rape-by-Fraud*, 123 YALE L.J. ONLINE 353 (2013), <http://www.yalelawjournal.org/forum/not-logic-but-experience-drawing-on-lessons-from-the-real-world-inthinking-about-the-riddle-of-rape-by-fraud>.

⁴² See *Lawrence v. Texas*, 539 U.S. 558 (2003). See also SCHULHOFER, *supra* note 10, at 15 (explaining that “[r]espect for sexual autonomy requires protecting sexual privacy against abuse and overreaching. But—equally important—it also requires that the law protect our freedom to seek emotional intimacy and sexual fulfillment with willing partners. . . . [F]reedom from unwanted sex and freedom to seek mutually desired sex sometimes seem to be in tension.”)

Section 213.4. Sexual Assault by Extortion

1 In states where statutory language reaches nonviolent coercion, many of the operative
2 terms receive scant clarification from statutory definitions or case law. For instance, statutes
3 stipulating that consent must be “voluntary” or “freely given” rarely provide any criteria for
4 determining which circumstances impair voluntariness or freedom of choice to an extent
5 sufficient to render consent ineffective. Language of that kind gives insufficient notice as to the
6 line between permissible and impermissible sexual conduct. Other jurisdictions prohibit
7 “duress,” “extortion,” or “retaliation,”⁴³ terms that in themselves offer little guidance. For
8 example, the New Hampshire statute provides that prohibited coercion includes threats to
9 “retaliate” against the victim.⁴⁴ Does the term “retaliate,” not further defined, apply to threats to
10 fire an employee, not hire an employee, accuse someone of a crime, break off a dating
11 relationship, evict a tenant, or turn down a potential business deal? If it applies only to some of
12 these, which ones are included?

13 Nearly all contemporary statutes prohibiting nonviolent coercion require attention to
14 similar issues. One of the broadest formulas, that of the Pennsylvania Penal Code, defines
15 impermissible coercion as “[c]ompulsion by use of physical, intellectual, moral, emotional, or
16 psychological force.”⁴⁵ Under that test, criminal sanctions could attach whenever a sexual
17 encounter is prompted by strong intellectual or emotional influence—for example, emotional
18 appeals for intimacy or the expression of deep feelings of hurt and rejection. To avoid that
19 obviously unintended implication, the Pennsylvania Supreme Court added an important gloss,
20 stating that the standard “requires much more than simply . . . moral, psychological or
21 intellectual persuasion [It] requires actual forcible compulsion . . . which is used to compel
22 the victim to engage in sexual intercourse against that person’s will such that the act of sexual
23 intercourse cannot be regarded as consensual.”⁴⁶ Pennsylvania’s seemingly broad standard thus
24 comes with crucial (but undefined) limitations—allowing pressures to be classified as mere
25 persuasion and prohibiting even truly “forcible” pressures only when they *compel* submission,
26 *against the victim’s will*, in a way that *cannot be considered consensual*. And these open-ended
27 criteria have had predictable results, sometimes failing to afford a sufficiently definite basis for

⁴³ E.g., CAL. PENAL CODE § 261(a)(2) (2018) (prohibiting “duress”); MICH. COMP. LAWS ANN. § 750.520d(1)(b) and § 750.520B(f)(iii) (2018) (“extortion”); N.H. REV. STAT. ANN. § 632-A:2(I)(e) (2018) (“submits under circumstances involving . . . extortion” or a threat “to retaliate against the victim”); N.M. STAT. ANN. § 30-9-10 (A)(3) (2018) (defining force to include “extortion or retaliation”); S.C. CODE ANN. § 16-3-651 (2018) (defining impermissible coercion to include “extortion”).

⁴⁴ See, e.g., N.H. REV. STAT. ANN. § 632-A:1(II) (2018) (“‘Retaliate’ means to undertake actions against the interests of the victim, including but not limited to: . . . extortion . . . [and] public humiliation or disgrace.”); N.H. REV. STAT. ANN. § 632-A:2 (2018) (defining offense of aggravated felonious sexual assault when “the actor coerces the victim to submit by threatening to retaliate . . .” and “[w]hen the victim submits under circumstances involving . . . extortion”); *State v. Lovely*, 480 A.2d 847 (N.H. 1984).

⁴⁵ PA. CONS. STAT. ANN. 18 § 3101 (2018).

⁴⁶ *Commonwealth v. Rhodes*, 510 A.2d 1217, 1227 n.15 (Pa. 1986) (emphasis added) (discussing standard subsequently codified at PA. CONS. STAT. ANN. 18 § 3101(2018)).

1 justified prosecutions, and sometimes permitting prosecutions and convictions merely on the
2 basis of legitimate emotional give and take.⁴⁷

3 The California statute relies on the concept of “duress,” defined to include “a direct or
4 implied threat of . . . retribution sufficient to coerce a reasonable person of ordinary
5 susceptibilities to acquiesce”⁴⁸ This formula provides a metric of assessment, but it does not
6 unconditionally prohibit nonviolent threats that arguably ought to be impermissible *per se*—for
7 example, a threat to notify federal authorities that a foreign national enrolled in college has
8 overstayed a student visa. Persons “of ordinary susceptibilities” might submit to unwanted sex
9 rather than risk that consequence, or they might not. They might consult a lawyer to seek another
10 solution, or they might not. Yet a threat of that sort should be deemed unacceptable *per se*,
11 regardless of the individual student’s resources, options, and strength of character.

12 The 1962 Model Code broadened prior law by permitting a conviction for Gross Sexual
13 Imposition, in the case of some nonviolent pressures and inducements, specifically “any threat
14 that would prevent resistance by a woman of ordinary resolution.” While this standard
15 represented an important step forward, it—like the subsequent California formula—made the
16 problematic notion of resistance the measure of *which* threats suffice to establish the offense.
17 Moreover, regardless of the nature of the nonviolent threat, the 1962 Code made the required
18 degree of resistance turn on a conception of reasonableness (the “woman of ordinary
19 resolution”). That flexibility makes sense in the context of the conventional give-and-take of
20 ordinary sexual negotiation. But the standard becomes less satisfactory if it allows a blatantly
21 unacceptable threat to escape legal condemnation simply because a subsequent factfinder
22 considers the threat not powerful enough to prevent the ordinary person from defying it.

23 A 1990 Montana case illustrates this difficulty. A high-school principal allegedly
24 convinced one of his students to submit to acts of sexual penetration by threatening to prevent
25 her from graduating.⁴⁹ The Montana Supreme Court, despite acknowledging that the principal’s
26 alleged behavior was abusive and inexcusable, was unable to uphold liability because Montana
27 law, as it stood at the time, required coercion by using or threatening to use physical force. The
28 1962 Code’s offense of Gross Sexual Imposition was designed to fill this gap. Yet under that
29 provision, criminal liability would attach (in the case of a student over the age of consent) only if
30 the principal had “compelled her to submit by [a] threat that would prevent resistance by a

⁴⁷ E.g., *Commonwealth v. Meadows*, 553 A.2d 1006, 1013 (Pa. Super. Ct. 1989) (finding forcible compulsion and upholding conviction based in part on the fact that “the victim had an adolescent crush on the Defendant” and the defendant exploited those feelings to obtain consent). Cf. *State v. Lovely*, 480 A.2d 847 (N.H. 1984) (upholding conviction, under statutory prohibition of “retaliation,” in part because defendant pressured the victim to consent by threatening to stop paying the victim’s rent on the victim’s apartment).

⁴⁸ CAL. PENAL CODE §§ 261(a)(2), 261(b) (2018).

⁴⁹ *State v. Thompson*, 792 P.2d 1103 (Mont. 1990).

woman of ordinary resolution.” Of course, a person of this student’s age, in her circumstances, might well feel she had no realistic choice. But that conclusion is by no means inescapable. The principal’s defense counsel could argue that the student, if really unwilling, could have sought help from her parents, complained to a guidance counselor, or even gone to the police. Counsel might add that even if the student was too meek to seek such help, a student of “ordinary resolution” would not have been. The defense might even suggest that the student must, at some level, have felt a sexual attraction, or she would not have acquiesced.

These kinds of arguments, of course, will strike many as offensive, and a reasonable jury would often find them repugnant or at least implausible. But history and criminal-justice experience counsel against taking that outcome for granted.⁵⁰ In any case, the important point is that attempts to judge the culpability of a person’s behavior in this way are fundamentally misdirected when the actor uses leverage in a manner that by every measure is illegitimate and inexcusable. If the principal secured the student’s sexual submission by the means alleged, neither the student’s own fortitude nor her resourcefulness should have any bearing on the obvious conclusion—that regardless of other details, the alleged facts, if true, are sufficient to establish criminal misconduct. The illegitimacy of the principal’s action is enough in itself to justify serious criminal sanctions, without inquiry into the victim’s disposition or resoluteness.

Subparagraphs (i), (ii), and (iii) of Section 213.4(1)(b) avoid the accordion-like conceptions of sexual coercion prevalent in much of American law and mitigate the limitations of the 1962 Code. They do so by identifying two contexts in which nonviolent threats are impermissibly coercive *per se* and then identifying a third category governed by a more general standard. The first context (subparagraph (i)) covers threats to accuse another person of a criminal offense or immigration violation. The second (subparagraph (ii)) deals with a public officer’s threat to take or withhold official action. These classic forms of extortion are discussed in Note 2 below. The third (subparagraph (iii)), discussed in Note 3 below, addresses other unacceptably coercive threats.

2. Section 213.4 – Specified Coercive Threats (Subsection (1)(b)(i) and (ii)).

Subparagraphs (i) and (ii) of Section 213.4(1)(b) punish sexual penetration and oral sex whenever the actor uses certain threats that have long constituted unlawful extortion in connection with property transfers.⁵¹ In a property context, conviction does not require an assessment of whether the victim could have or should have resisted the extortionate demand,

⁵⁰ See Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J. L. & GENDER 381, 405-406 (2005) (noting that contemporary juries continue to be guided by traditional expectations of victim resistance).

⁵¹ See 1962 Code Section 223.4 (prohibiting Theft by Extortion). See also *id.* Section 212.5 (prohibiting Criminal Coercion when an actor, “with a purpose unlawfully to restrict another’s freedom of action to his detriment,” threatens specified actions all of which qualify as extortion under Section 223.4).

1 because there is no reason to impose this obligation on an innocent party confronted with
 2 impermissible intimidation; the wrongfulness of the threat is sufficient in itself to establish
 3 illegal coercion.⁵² Once the law acknowledges that sexual offenses protect autonomy rather than
 4 just the interest in avoiding physical violence, the right of individuals to control the boundaries
 5 of their sexuality ranks at least equal in importance to their right to control their property, and
 6 there is no more reason to require resistance in one case than in the other. Proof of the actor's
 7 culpability is therefore complete on showing that the actor has deployed one of the specifically
 8 enumerated threats, conduct that has no legitimate justification.

9 This approach is consistent with, but narrower and more specific than, much existing
 10 sexual-offense legislation, especially where provisions enumerate a broad list of prohibited
 11 threats⁵³ or rely on undefined concepts of extortion, retaliation, duress, or involuntariness.⁵⁴
 12 Concepts that are sweeping or vague in these ways pose unacceptable risks of overbreadth in the
 13 context of sexual interaction. In contrast, subparagraphs (i) and (ii) single out efforts to obtain
 14 sexual compliance by certain well-specified threats: to accuse a person of a crime, to report an
 15 immigration violation, and to take or withhold official action. These threats (“have sex with me
 16 or I will turn you in to immigration authorities”; “have sex with me or I will deny your housing
 17 permit”) have no place in legitimate social or sexual interaction, and have workable boundaries,
 18 well-defined in an extensive body of case law.⁵⁵ When a threat of this kind causes the target of
 19 the threat to comply with a sexual demand, it triggers liability automatically, without regard to
 20 whether the target of the threat had opportunities to resist. This kind of conduct lacks any
 21 legitimate justification and when deployed to acquire property, it is universally condemned as
 22 extortion or blackmail.⁵⁶

⁵² For further discussion, see SCHULHOFER, *supra* note 10, at 128-132 (1998).

⁵³ E.g., DEL. CODE ANN. tit. 11, § 774 (2018) (defining felony of sexual extortion to include threats to: “(1) Cause physical injury to anyone; (2) Cause damage to property; (3) Engage in other conduct constituting a crime; (4) Accuse anyone of a crime or cause criminal charges to be instituted against anyone; (5) Expose a secret or publicize an asserted fact, whether true or false, intending to subject anyone to hatred, contempt, or ridicule; (6) Falsely testify . . . (7) Perform any other act which is calculated to harm another person materially with respect to the other person’s health, safety, business, calling, career, financial condition, reputation, or personal relationships.”).

⁵⁴ See, e.g., N.H. REV. STAT. ANN. § 632-A:1 (2018) (defining “retaliate” as “to undertake action against the interest of the victim, including but not limited to . . . extortion . . . [or] public humiliation or disgrace”).

⁵⁵ For detailed discussion, see MODEL PENAL CODE & COMMENTARIES, PART II, Section 212.5, at 262-270 (1980) (discussing Criminal Coercion); *id.* Section 223.4 (discussing Theft by Extortion); ALAN WERTHEIMER, COERCION (1987); SCHULHOFER, *supra* note 10, at 114-167; Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOKLYN L. REV. 39 (1998).

⁵⁶ See, e.g., Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795 (1998); Wendy J. Gordon, *Truth and Consequences: The Force of Blackmail’s Central Case*, 141 U. PA. L. REV. 1741 (1993); George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617 (1993).

Statutes punishing extortion in nonsexual contexts often prohibit threats to inflict a more extensive list of harms. Under the 1962 Code, for example, threats to inflict economic or reputational harm trigger the offense of Criminal Coercion,⁵⁷ and Theft by Extortion extends more broadly still, covering in addition threats to “inflict any other harm which would not benefit the actor.”⁵⁸ The decision whether to criminalize threats to inflict broad harms of this sort is potentially problematic when such intimidation is allegedly used to obtain sex rather than property. The complication is not that the right to control sexual boundaries is any less important or less worthy of protection than the right to control property. If anything, the opposite is often the case. Rather, the difficulty stems from the distinct risks of overbreadth in the context of sexual interaction.

Unequivocal condemnation is easily justified for threats that lack redeeming value—for example, contingent threats to accuse a person of a crime. In the context of sexual interaction, that judgment is less straightforward when one of the parties threatens to spread information that could have financial consequences or expose the other person to such unspecific harm as “contempt or ridicule.” People do talk about their sex lives, and greater respect for privacy in this regard, even if desirable, can hardly be made a goal of criminal law enforcement.

In these circumstances, Article 213 therefore gives weight to the general principle of parsimony and to the likely overbreadth of statutory language that would automatically condemn any threat to inflict economic or reputational harm, regardless of the coercive force such harm might have and regardless of the other party’s ability to mitigate or escape it. Accordingly, Article 213 concludes that in the context of sexual interaction, threats to inflict broader harms of these sorts should not be considered impermissibly coercive *per se*.

Nonetheless, although threats of economic harm, reputational harm, and other unspecified harms do not fall within subparagraphs (i) and (ii), they may trigger liability under other provisions of Article 213 when additional aggravating factors are present. In particular, subparagraph (iii), discussed in the next Note, provides that threats of any sort, even when not categorically prohibited under subparagraphs (i) and (ii), become impermissibly coercive when—under all the circumstances—they would cause a person of ordinary resolution to submit).

3. Section 213.4 – Other Coercive Threats (Subsection (1)(b)(iii)).

Section 213.4(1)(b)(iii) punishes sexual penetration or oral sex when the actor compels the other person to submit by taking an action or making a threat that, although outside the *per se* prohibition of subparagraphs (i) and (ii) of subsection (1)(b), nonetheless would, under all the circumstances, cause submission by a person of ordinary resolution. The provision tracks, with

⁵⁷ 1962 Code Section 212.5(1)(c) (including threats to “expose any secret tending to subject any person to hatred, contempt or ridicule.”).

⁵⁸ 1962 Code Section 223.4(3), (7).

1 minor changes, the language defining the offense of Gross Sexual Imposition in the 1962 Code.⁵⁹
 2 That offense applied only to “[a] male who has sexual intercourse with a female not his wife [if]
 3 he compels her to submit by any threat that would prevent resistance by a woman of ordinary
 4 resolution.” Revised subparagraph (iii) eliminates the gender specificity of the 1962 language
 5 and replaces the language referencing “resistance” with a standard that focuses on the causal
 6 impact of the unwarranted threat, in accord with the framework that governs throughout the
 7 current revision.⁶⁰

8 In all other respects, subparagraph (iii) carries forward the essence of the offense of
 9 Gross Sexual Imposition set out in the 1962 Code.⁶¹ The coercive threat is sufficient if, under all
 10 the circumstances, it would cause submission to or performance of the sexual act by “*a person of*
 11 *ordinary resolution*.” That formulation has been in adopted in a number of state statutes⁶² and is
 12 regularly applied without difficulty in the case law.⁶³

13 **4. Mens Rea.**

14 When an actor arguably did not realize that another person submitted to a sexual advance
 15 out of fear, guilt depends on the degree of mental culpability required—whether it should suffice
 16 that the accused should have realized that risk, or whether recklessness, knowledge or even

⁵⁹ See 1962 Code Section 213.1(2)(a).

⁶⁰ See Section 213.0(2)(e)(iii) (stipulating that resistance is not required to establish the absence of consent); Section 213.1 (prohibiting the use or threat of aggravated physical force that causes compliance, regardless of whether such force is “compelling” or irresistible).

⁶¹ See MODEL PENAL CODE & COMMENTARIES, PART II, Section 213.1, at 312-315 (AM. L. INST. 1980).

⁶² E.g., WYO. STAT. ANN. § 6-2-303(a)(ii) (“Any actor who inflicts sexual intrusion on a victim commits sexual assault in the second degree if, under circumstances not constituting sexual assault in the first degree[,] ...[t]he actor causes submission of the victim by any means that would prevent resistance by a victim of ordinary resolution.”); OHIO REV. CODE ANN. § 2907.03(A)(1) (“No person shall engage in sexual conduct with another, not the spouse of the offender, when ... [t]he offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution”); cf. PA. CONS. STAT. ANN. § 3121(a)(2) (rape, a first-degree felony, occurs when a “person engages in sexual intercourse with a complainant ...[b]y threat of forcible compulsion that would prevent resistance by a person of reasonable resolution”; forcible compulsion includes “[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force” Id. § 3101.)

⁶³ See, e.g., *State v. Smith*, 2016 WL 5724021 (Ohio Ct. App. Sept. 30, 2016); *State v. Nierras*, 1980 WL 354075 (Ohio Ct. App. 1980) (upholding psychiatrist’s conviction for attempting to have sex with patient where “totality of the circumstances support[ed] beyond a reasonable doubt that [the physician] actually intended to coerce [patient] by threats which would, under the circumstances, cause a person of ordinary resolution to submit.”) *Williams v. State*, 354 P.3d 954 (Wyo. 2015); cf. *State v. Tolliver*, 360 N.E.2d 750, 756 (Ohio Ct. App. 1976) (holding that “ordinary resolution” standard is not unconstitutionally vague).

purpose should be required. A few states require knowledge or “intent,”⁶⁴ others require recklessness,⁶⁵ and—as in cases involving perceived threats of physical force⁶⁶—governing law on the mens rea issue is often less demanding, ambiguous, indeterminate, or contradictory.⁶⁷

The 1962 Code treats recklessness as the “basic norm” throughout.⁶⁸ Under the 1962 Code, a reckless mens rea is sufficient culpability for most of the major offenses, including aggravated assault, manslaughter, and robbery, all three felonies of the second degree;⁶⁹ and terroristic threats and causing a catastrophe, both felonies of the third degree.⁷⁰ The 1962 Code also imposed liability on the basis of recklessness for most of the sexual offenses, including its offense most closely analogous to Section 213.4, the third-degree felony of Gross Sexual Imposition.⁷¹

Section 213.4 carries forward this mens rea judgment. For reasons comparable to those discussed in connection with threats of physical force,⁷² when an actor is aware of, and consciously disregards, a substantial and unjustifiable risk that a specified nonviolent threat

⁶⁴ E.g., OHIO REV. CODE ANN. § 2907.03(A)(1), note 62, *supra*.

⁶⁵ E.g., MO. STAT. § 566.010 et seq. (2018) (sexual intercourse by forcible compulsion), see *State v. Bryant*, 756 S.W.2d 594 (Mo. Ct. App. 1988) (holding prosecution must prove at least recklessness); 18 PA. CONS. STAT. ANN. § 3121(a) (2018) (rape when a person engages in sexual intercourse by “forcible compulsion or . . . by threat of forcible compulsion”; because mens rea is not specified, default mens rea of recklessness applies, see 18 PA. CONS. STAT. ANN. § 302(c) (2018)).

⁶⁶ See Reporters’ Note 3 to Section 213.1 at notes 90-96, *supra*.

⁶⁷ Despite Pennsylvania statutes specifying a default mens rea of recklessness, see note 63, *supra*, some Pennsylvania decisions hold that the element of “forcible compulsion” is governed by a strict liability standard. See, e.g., *Com. v. Fischer*, 721 A.2d 1111 (Pa. Super. Ct. 1998).

⁶⁸ MODEL PENAL CODE AND COMMENTARIES, Comment to Section 2.02, at 239-241 (AM. L. INST. 1985).

⁶⁹ 1962 Code Sections 210.3, 211.1(2), 222.1. Aggravated assault requires a heightened form of recklessness; manslaughter and robbery do not. One element of robbery is theft, normally a felony of no more than the third degree, and theft requires proof of a purpose to deprive the owner permanently of possession. 1962 Code Sections 223.1(2), 223.2. But the distinctive element that raises theft to robbery, a felony of the second degree, is the infliction or threat to inflict serious bodily injury, and with respect to that aggravating factor, the required mens rea is recklessness. 1962 Code Section 222.1.

⁷⁰ 1962 Code Sections 223.1(2), 223.2.

⁷¹ See 1962 Code Section 213.1(2) (imposing liability on “[a] male who has sexual intercourse with a female not his wife [if] he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution.” The 1962 Code likewise treats recklessness as a sufficient mens rea for more serious sexual offenses, including those at the highest end of the grading spectrum. See, e.g., 1962 Code Section 213.1(1) (punishing as first-degree felony, with maximum of sentence of life imprisonment, actor who compels another person to submit by perceived threats of serious bodily injury, when victim was not a “voluntary social companion”; reckless mens rea is made sufficient by the default rule in 1962 Code Section 2.02(3)).

⁷² See Comment 5 and Reporters’ Note 2 to Section 213.2, *supra*.

Section 213.4. Sexual Assault by Extortion

1 would cause a person of ordinary resolution to unwillingly submit to or perform a sexual act, the
2 actor's conduct involves unnecessary danger and conscious awareness of wrongdoing, justifying
3 conviction for Sexual Assault by Extortion. A standard requiring proof that the actor knew all the
4 pertinent facts to a practical certainty often would be difficult or impossible to meet in a situation
5 where such certainty is largely beside the point; conscious disregard of these risks to the welfare
6 of another person is in itself egregious and inexcusable.

7 Accordingly, Section 213.4 provides that Sexual Assault by Extortion is committed when
8 a person, with a reckless mens rea, uses a specified nonviolent threat that causes another person
9 to submit to or perform an act of sexual penetration or oral sex. Section 2.02(2)(c) of the 1962
10 Code specifies that a person is reckless when he or she "consciously disregards a substantial and
11 unjustifiable risk that the material element exists or will result from the person's conduct." The
12 risk "must be of such a nature and degree that, considering the nature and purpose of the person's
13 conduct and the circumstances known to the person its disregard involves a gross deviation from
14 the standard of conduct that a law-abiding person would observe in the actor's situation."

15 5. Grading.

16 Sexual Assault by Extortion, though less serious than the offense of Sexual Assault by
17 Physical Force or Restraint under Section 213.2, nonetheless involves threats of serious harm
18 that cause the victim's unwilling submission to or performance of an act of sexual penetration or
19 oral sex. Under current law, authorized sentences for state offenses comparable to Section 213.4
20 range from a high of life (Florida, Texas) to maximums (absent recidivist enhancements) of eight
21 to 15 years (California, Michigan, New Jersey) and five years (Ohio).⁷³ At the other end of the
22 spectrum, however, a number of states (e.g., Iowa, Massachusetts, New York, North Carolina,
23 South Carolina) have not yet revised their codes to reach sexual assault by nonphysical threats;⁷⁴
24 in those states, conduct comparable to that covered by Section 213.4 is not punishable at all.

⁷³ CAL. PENAL CODE § 264(a) (Deering 2020); FLA. STAT. §§ 794.011(4)(b), 775.084(4)(b)(1) (2019); MICH. COMP. LAWS § 750.520d(2) (2020); N.J. STAT. ANN. §§ 2C:14-2(c), 2C:43-6(a)(2) (West 2019); OHIO REV. CODE ANN. §§ 2907.02(b), 2929.14(a)(1)(a), 2929.144(b)(1) (LexisNexis 2019); TEX. PENAL CODE ANN. § 12.42(c)(4) (West 2019). In some states additional enhancements apply when the victim is a young child.

⁷⁴ See, e.g., IOWA CODE ANN. § 709.1 (2018) (generally requiring physical, not nonphysical force); MASS. STAT. ANN. ch. 265 § 22 (same); N.Y. PENAL LAW § 130.25-35 (2018) (generally requiring physical force or clearly expressed absence of consent); N.C. GEN. STAT. ANN. § 14-27.2 et seq. (2018) (generally requiring physical, not nonphysical force); S.C. CODE ANN. § 16-3-651(2018) (same). See generally See John F. Decker & Peter G. Baroni, "No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1120-1121 (2011).

Section 213.4. Sexual Assault by Extortion

1 Given the classification of Sexual Assault by Physical Force or Restraint as a felony of
2 the third degree, the less serious offense of Sexual Assault by Extortion—i.e., nonphysical
3 force—is properly placed at the next lower level, that of the fourth-degree felony.⁷⁵

4 Under the 1962 Code, nonviolent threats could, in some circumstances, trigger liability at
5 the nominally higher level of a third-degree felony.⁷⁶ But grading categories under revised
6 Article 213 are not equivalent to similarly denominated grading categories under the 1962 Code.
7 The 1962 Code provided for only three felony grades; a felony of the third degree under the 1962
8 Code was the lowest felony category.⁷⁷ The revised sentencing provisions of the MPC provide
9 for five felony degrees. Thus, Sexual Assault by Extortion, a fourth-degree felony under revised
10 Article 213, is graded similarly to, not less severely than, the 1962 Code’s third-degree felonies
11 of extortion in the context of property transfers and other nonsexual actions.⁷⁸

12 Section 213.4(1) places extortion by private actors (subsection (1)(b)(i) and (iii)) in the
13 same category for grading purposes as official extortion under color of law (subsection
14 (1)(b)(ii)). Because, all else equal, abuse of office by a public official is substantially more
15 serious than private extortion, there is a case for treating the former offense as categorically more
16 serious. But at the same time, official extortion can involve threats of relatively minor retaliatory
17 action, while some instances of private extortion involve egregious coercion. A city inspector’s
18 threat to issue a summons for littering is a far less serious offense than a private party’s threat to
19 firebomb a grocery store. At the fourth-degree felony level, the authorized sentencing range

⁷⁵ The revised sentencing provisions of the Model Penal Code provide that this offense level is subject to “a term of incarceration ... [that] shall not exceed [five] years” and explain: “The revised Code does not offer exact guidance on the maximum prison terms that should be attached to different grades of felony offenses. Instead, maximum authorized terms are stated in brackets in part because judgments about the sanctions appropriate to a felony of the second degree are fundamental policy questions that must be confronted by responsible officials within each state.” MODEL PENAL CODE: SENTENCING, Section 6.06(6)(b), Comment *k*, p. 157 (AM. L. INST., Proposed Final Draft, April 10, 2017), approved May 2017.

⁷⁶ See 1962 Code Section 213.1(2), defining the offense of Gross Sexual Imposition (GSI). It also bears noting that although the 1962 Code’s third-degree felony of Gross Sexual Imposition encompassed some of the behavior that is now classified as a fourth-degree felony under Section 213.4, the GSI offense was considerably more serious because it also encompassed threats that now trigger liability for the revised Code’s third-degree felony of Sexual Assault by Physical Force or Restraint under Section 213.2. Specifically, GSI included *physical* threats short of the threats of death or serious bodily injury covered by 1962 Code Section 213.1(1). In addition, the 1962 Code’s GSI offense, unlike Sexual Extortion under revised Section 213.4, covered nonviolent threats only when they would *compel* submission and *prevent resistance* by a person of ordinary resolution. Accordingly, some of the wrongdoing covered by the fourth-degree felony offense of Sexual Assault by Extortion under Section 213.4 of the revised Code is less serious than the behavior that was covered by the third-degree felony of GSI under the 1962 Code.

⁷⁷ See 1962 Code Section 6.06(3).

⁷⁸ See 1962 Code Sections 212.5, 223.4.

Section 213.4. Sexual Assault by Extortion

1 permits consideration of the aggravated nature of official extortion, but also leaves room to
2 consider other facts that may aggravate the seriousness of an extortionate demand under all the
3 circumstances. Sentences within the range authorized at that level will vary widely as a function
4 of the severity of the offense and the background and criminal history of the offender: If a breach
5 of public trust is involved, that fact may call for a higher sentence.⁷⁹ When a pattern of
6 extortionate conduct involves multiple victims, the potential for conviction on multiple counts,
7 with consecutive sentences when warranted, assures that sentences well above the cap for a
8 single count will be available in egregious cases of public corruption.

⁷⁹ Cf. U.S. Sentencing Guidelines § 2C1.1 (a) (specifying two-level increase in Base Offense Level if defendant was a public official); id. § 2C1.1(b)(3) (specifying four-level increase in Base Offense Level if defendant was “an elected public official or any public official in a high-level decision-making or sensitive position”).

SECTION 213.5. SEXUAL ASSAULT BY PROHIBITED DECEPTION

(1) An actor is guilty of Sexual Assault by Prohibited Deception when:

(a) the actor causes another person to submit to or perform an act of sexual penetration or oral sex; and

(b) the act is without effective consent because:

(i) the actor caused the other person to believe falsely that the act had diagnostic, curative, or preventive medical properties; or

(ii) the actor caused the other person to believe falsely that the actor was someone else who was personally known to that person; and

(iii) the actor's deception causes the other person to submit to or perform the act of sexual penetration or oral sex; and

(c) the actor knows that the circumstances described in paragraphs (a) and (b) are present.

(2) *Grading.* Sexual Assault by Prohibited Deception is a felony of the fifth degree [three-year maximum].

(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the other person submitted to or performed the act of sexual penetration or oral sex because of a circumstance described in subsection (1)(b). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring under a circumstance described in that paragraph.

Comment:

Section 213.5 defines the offense of Sexual Assault by Prohibited Deception, a felony of the fifth degree. Section 213.5 provides for criminal penalties when an actor induces another person to submit to or engage in sexual penetration or oral sex with the actor by making false medical representations to that person or by impersonating someone personally known to that other person. As specified in subsection (3), proof of these circumstances causing the other person to submit to or perform the sexual act proves the absence of consent and makes any apparent consent ineffective.

The deception covered by Section 213.5 involve three core elements, and each requires proof of the actor's culpable mental state. First, the actor must engage in an act of sexual penetration or oral sex with another person. Second, the actor must knowingly deceive or exploit

Section 213.5. Sexual Assault by Prohibited Deception

1 the other person through medical misrepresentation or impersonation. An actor who genuinely
2 believes in the medical properties of the treatment offered, or who is unaware that the other
3 person has mistaken the actor's identity, is not liable under this Section. Third, the actor must
4 know that the misrepresentation or impersonation deceived the other person, and that deception
5 caused the other person to engage in the sexual act.

6 **1. Medical Misrepresentation – Section 213.5(1)(b)(i).**

7 Section 213.5(1)(b)(i) punishes sexual penetration and oral sex when the actor knowingly
8 misrepresents that the act has diagnostic, curative, or preventive medical properties, and knows
9 that the other person engaged in the sexual act as a result of those misrepresentations. These acts
10 exploit the trust or naiveté of those induced to consent to the most intrusive of sexual acts by a
11 false promise of medical benefit. This Section does not reach sex-based therapeutic treatments,
12 however controversial.¹ It is limited to deliberate misrepresentation—that is, claims of diagnosis,
13 cure, or prevention to lead another person to participate in sexual acts with the actor—when the
14 actor knows that the claims have no legitimate basis. The Section does not reach therapies that,
15 for example, encourage a couple to engage in more frequent or different kinds of sexual acts with
16 each other.

¹ Sex surrogacy was first described by William Masters and Virginia Johnson in their iconic text, *Human Sexual Inadequacy* (1970), and the International Professional Surrogates Association formed in 1973. *Sex Surrogate, Sex Therapist, or Swindler?*, IPSA INT'L PROF. SURROGATES ASS'N: IPSA BLOG (Oct. 22, 2012), <https://www.surrogatetherapy.org/sex-surrogate-sex-therapist-or-swindler>; *IPSA*, IPSA INT'L PROF. SURROGATES ASS'N, <https://www.surrogatetherapy.org> (last visited Oct. 15, 2020). For further background on this practice, see generally www.surrogatetherapy.org. Mark O'Brien, *On Seeing A Sex Surrogate*, SUN MAG., May 1990, at 31 (describing the author's experience as a man in his thirties who, while forced to live in an iron lung as a result of polio, engaged a sex surrogate); see also Michael Castleman, "I Was a Middle-Aged Virgin," SALON (Oct. 8, 2003), https://www.salon.com/2003/10/08/virgin_6 (accounting the experience of a man whose first sexual contact was with a surrogate).

Section 213.0(2)(a) defines "sexual penetration" as an "act involving penetration . . . except when done for legitimate medical, hygienic, or law-enforcement purposes." As explained in the commentary to 213.0, and as cited in Illustration 1 in the Comment to this Section, this language excludes even those acts that may be proven to be ineffective or unlawful (for instance, acts that may prove a claim of malpractice or a constitutional violation) so long as their purported basis is legitimate. See Comment to Section 213.0. Sexual treatments that offer defensible claims of therapeutic benefit, when expressly offered and consented to as such, fall outside the scope of covered acts.

Illustrations:

1:² Accused is a doctor whose practice focuses on injured athletes. Accused is treating an adult patient for muscle strain using a method that involves stretching and resistance. The patient's coach is present but standing to the side without a full view of Accused's actions. At one point during the session, Accused says, "You may feel a little pressure now," and then inserts ungloved fingers into Complainant's anus and vagina. Complainant is shocked, but does not say anything. After the appointment, Complainant tells the coach what happened, and says, "Is that part of his method?" The coach reports the incident to the police. Based on these facts, a prosecutor could charge Accused with Sexual Assault by Prohibited Deception.

Section 213.0(2)(a) defines "sexual penetration" as "an act involving penetration, however slight, of the anus or genitalia by an object or a body part, except when done for legitimate medical, hygienic, or law-enforcement purposes." The prosecutor introduces testimony from the coach and Complainant, who both state that Accused, the doctor, did not mention at any point that the procedure entailed an act of penetration, and that Accused did not use gloves, as well as expert testimony that the penetration was not a legitimate part of treatment. Accused testifies that the penetration was for a legitimate medical purpose. If the factfinder believes beyond a reasonable doubt that the penetration did not have any legitimate medical purpose, then the acts of penetration qualify as "sexual penetration" for the purposes of Article 213. The factfinder must also find beyond a reasonable doubt that Accused knew that the acts of penetration lacked a medical purpose, and falsely misrepresented the act as having medical properties. It is not necessary to prove by direct evidence that Accused stated that

² Loosely drawn from the facts found in JOAN MCPHEE & JAMES P. DOWDEN, ROPES & GRAY LLP, REPORT OF THE INDEPENDENT INVESTIGATION: THE CONSTELLATION OF FACTORS UNDERLYING LARRY NASSAR'S ABUSE OF ATHLETES (2018), <https://www.nassarinvestigation.com/en>. For another case with similar facts, see also Jan Ransom, *19 Women Accused a Gynecologist of Abuse. Why Didn't He Go to Prison?*, N.Y. TIMES (Oct. 22, 2019), <https://www.nytimes.com/2019/10/22/nyregion/robert-hadden-gynecologist-sexual-abuse.html> (describing the case of Robert A. Hadden, a doctor accused of sexual misconduct during gynecological exams by numerous patients).

Section 213.5. Sexual Assault by Prohibited Deception

1 the penetration was for a medical purpose; the factfinder may draw that
2 conclusion from all the circumstances of the context and manner in which the act
3 occurred. Lastly, the factfinder must find that Accused knew that Complainant
4 submitted to the act of sexual penetration because of Accused's false
5 representations.

6 2. Accused is an ophthalmologist who treats eye disorders. Accused's
7 practice involves medical fraud; Accused falsely tells people that they need
8 exploratory surgery and sedates them, but then performs no medical treatments.
9 While the patients are unconscious, Accused engages in acts of sexual
10 penetration. These facts do not support liability under Section 213.5, even though
11 they may support conviction under another provision of Article 213, such as
12 Section 213.3(1), which addresses Sexual Assault of an Incapacitated Person.
13 Although Accused is a doctor and knowingly misrepresents the medical properties
14 of the surgeries for the purpose of sexually exploiting patients, Accused's
15 deceptions do not cause the patient to believe that the act of sexual penetration is
16 medically justified.

17 ***2. Impersonation – Section 213.5(1)(b)(ii).***

18 Section 213.5(1)(b)(ii) punishes sexual penetration and oral sex when the actor
19 impersonates someone personally known to the other person. In an infrequent but recurring
20 situation, an actor takes advantage of another person's vulnerability by rousing that person from
21 sleep or slipping into bed in a dark room, and then engages in sexual acts aware that the other
22 person believes himself or herself to be consenting to sexual conduct with a different individual
23 known to the other person. Contemporary versions may involve an actor using social media or
24 other programs to deceive an individual into believing the actor is another person.³ While

³ In *State v. Kelso-Christy*, 911 N.W.2d 663 (Iowa 2018), the actor created a false Facebook account for a person who had attended the same high school as the actor and the complainant. After conversing for a while, the complainant agreed to meet the actor at her home, wearing a blindfold, for sex. The encounter occurred, but the complainant became suspicious when the actor's social accounts suddenly disappeared. The Iowa Supreme Court held that "consent to engage in a sexual act with one person is not consent to engage in the same act with another actor. Deception in this context is not collateral in any way, but goes to the very heart of the act." *Id.* at 670. Affirming the conviction, the court concluded that "The identity of a sexual partner is no mere collateral matter. Women, and men, must be

Section 213.5. Sexual Assault by Prohibited Deception

1 Section 213.5(1)(b)(ii) punishes this deception, the Section does not extend to instances in which
2 an actor engages in deception by pretending to be a famous person not previously known to the
3 other person, or by falsely claiming other attributes the other person will find attractive.

4 **3. *Mens Rea.***

5 Section 213.5(b)(iii) and (c) requires that the actor know that the actor has induced the
6 false belief, and that the actor know that this false belief has caused the other person to engage in
7 an act of sexual penetration or oral sex.

8 The 1962 Code punished acts of intercourse when an actor deceived a woman into
9 believing the actor was her husband.⁴ In applying a mens rea of knowledge, the Commentary
10 explained that “the statute in terms does not require that the woman’s mistaken belief must be
11 induced by the actor, he must have knowledge that her submission to his advances is based on a
12 mistaken supposition as to their marital status.”⁵

13 Consistent with Section 213.1(2)(c) of the 1962 Code, Section 213.5 imposes a mens rea
14 of knowledge. However, several additional points of clarification are required. First, Section
15 213.5 applies not just to deceptions as to the identity of a personally known individual, but also
16 to medical misrepresentations.

17 Second, Section 213.5—unlike the 1962 Code—require not just that the actor know that
18 the other person engaged in the act as a result of the false belief, but also that the actor
19 knowingly induced the false belief. Thus, an actor who knowingly takes advantage of a false
20 belief held by another person—but not caused by the actor—is not liable. Conversely, nor is an
21 actor liable if the actor knowingly causes another person to believe in a falsehood, but does not
22 know that this belief has caused the person to engage in the sexual act. Both culpable elements
23 are required: the actor’s knowing induction of the false belief and the actor’s knowledge that this
24 belief caused the act of sexual penetration or oral sex. Although it may be morally repugnant to

free to decide, on their own terms, who their sexual partners will be. Kelso-Christy’s actions denied S.G.
the “freedom of choice” that breathes life into our sexual abuse statutes. That she consented to an
encounter with another man is irrelevant.” *Id.* at 673.

⁴ 1962 Code Section 213.1(2)(c) (“Gross Sexual Imposition. A male who has sexual intercourse
with a female not his wife commits a felony of the third degree if: ... c) he knows ... that she submits
because she mistakenly supposes that he is her husband.”).

⁵ 1962 Code Comment to Section 213.1(2)(c), at 333.

exploit another person's ignorance for sexual gratification, it tests the boundaries of the penal law to enforce such a blurry line between ill-advised sexual decisions and exploitative ones.

Third, unlike the 1962 Code, Section 213.5 does not require that the actor be the person with whom the act of penetration or oral sex occurs. For instance, Section 213.5 applies to an actor who knowingly causes another person to believe falsely that sex with a third party will cure the person's cancer. The *actus reus* and *mens rea* of Section 213.5 require only that the actor know that the actor is inducing the false belief and know that this false belief causes the other person to engage in the act of penetration or oral sex; it does not require that the sexual act be with the actor.

Although recklessness is the default *mens rea* for the Model Penal Code, it sweeps too broadly in the case of deception. It is true that when a knowing *mens rea* is required, an intentionally deceptive actor may escape liability if that person is able to convince a jury that the actor was aware only of a substantial risk, but not a practical certainty, that deception induced the other person's willingness to participate in the sexual act. But allowing a deception-based conviction upon a lesser showing risks injustice. For this reason, a *mens rea* of purpose is often required in other offenses involving fraud and deception, such as the Model Penal Code provisions addressed to fraud and deception in taking property.⁶ For Section 213.5, *purpose* sets the bar too high, because an actor who knows with practical certainty that they are causing an erroneous belief and knows that this belief has caused the sexual act should be liable—even if the actor's conscious object was not to cause the sex act but rather something else (such as revenge). Thus requiring *knowledge* strikes the right balance between ensuring that actors who knowingly induce and capitalize on deception are punished and deterred, while avoiding liability for actors who engage in risky but not knowingly harmful behavior.

4. Grading.

Section 213.5(1)(b)(i) punishes penetration and oral sex when the actor misrepresents that the act has diagnostic, curative, or preventive medical properties. Section 213.5(1)(b)(ii)

⁶ See, e.g., 1962 Code Section 223.3 ("Theft by Deception. A person is guilty of theft if he *purposefully* obtains property of another by deception. A person deceives if he *purposefully*: creates or reinforces a false impression") (emphasis added); id. Section 224.1 ("Forgery. (1) Definition. A person is guilty of forgery if, with *purpose* to defraud or injure anyone....") (emphasis added); id. Section 224.3 ("Fraudulent Destruction, Removal or Concealment of Recordable Instruments. ... if with *purpose* to deceive or injure anyone, he destroys...") (emphasis added).

Section 213.5. Sexual Assault by Prohibited Deception

1 punishes sexual penetration and oral sex when the actor impersonates someone personally known
2 to the other person. Both offenses address the use of deception for the purposes of sexual
3 gratification. The range of penalties for this type of conduct varies widely. Some jurisdictions
4 do not punish sex by deception at all. Others authorize incarceration for more than 10 years for a
5 first-time offender.⁷ Although using certain extreme forms of deception should be a criminal
6 offense, it is of lesser severity than obtaining sexual submission by means of physical violence or
7 extortion, because in those circumstances the actor uses extreme levels of threat to overpower the
8 other person's capacity to refuse. Deception, as defined in Section 213.5(1)(b)(i) and (ii), while
9 worthy of significant punishment, is not as menacing as physical violence or extortion.
10 Accordingly it is punished as the lowest degree of felony: a felony in the fifth degree.

11 **5. Consent – Section 213.5(3).**

12 The freely given consent of a competent adult usually transforms a potentially criminal
13 sexual interaction into one that is not a proper subject of legal concern. Consent to sexual acts is
14 tainted when given only because of a material deception on the part of the actor. Although not all
15 deception is sufficiently serious to punish criminally,⁸ punishing the forms of deceit covered by
16 Section 213.5 find broad support in existing law. When the prosecution proves beyond a
17 reasonable doubt the circumstances described in Section 213.5(1)—that the actor made a false
18 representation that induced the other person's consent to sexual activity—there is no possibility
19 of legally effective consent. Section 213.5(3) makes this well-understood principle explicit.

REPORTERS' NOTES

20 **1. General Considerations.** In the context of medical examination, and occasionally in
21 other settings, a person may consent to the insertion of a medical instrument or similar device
22 into the anus or vagina, only to discover that the other party has inserted a penis or another object
23 instead. Deception of this sort, traditionally described as “fraud in the factum,” has long been

⁷ See, e.g., ARIZ. REV. STAT. ANN. §§ 13-1401(A)(7)(d), -1406 (LexisNexis 2020) (defining lack of consent such that it includes deception as to spouse, and then setting the maximum sentence for sexual intercourse without consent at 14 years); TENN. CODE ANN. § 39-13-503(a)(4), (b) (2019) (punishing penetration by fraud as a Class B felony, which, pursuant to TENN. CODE ANN. § 40-35-111(b)(2) (2019), carries a sentence of 8 to 30 years in prison); cf. ALA. CODE § 13A-6-65 (LexisNexis 2020) (punishing intercourse where consent is obtained by fraud as a misdemeanor).

⁸ See Reporters' Notes, *infra*.

Section 213.5. Sexual Assault by Prohibited Deception

1 treated as rape, because the victim did not consent to any act of a sexual nature.⁹ The revised
2 Code reaches the same result; valid consent must be given for the precise sort of sexual
3 penetration that occurred.¹⁰

4 Although the law punishes deception about the physical character of the act (fraud in the
5 factum), the law traditionally did not punish “fraud in the inducement” (the use of deception to
6 obtain consent to the act), provided that the ostensibly consenting party understood what the
7 physical act would be.¹¹ This remains the prevailing state of the law today.¹²

8 Nevertheless, consent prompted by misrepresentation is inherently tainted. One might
9 consider extending criminal sanctions to situations in which one party obtains consent to sex by
10 deliberately deceiving the other on any material matter. Some rape-law reformers take this view,
11 arguing that fraudulent inducements should be criminal in the context of sexual intercourse in the
12 same way they are criminal in the law that applies to theft of money or property.¹³

13 Most reformers, however, resist this step, even though in other respects they advocate
14 extending the law of rape and sexual assault.¹⁴ The reasons for that resistance become evident
15 when one considers society’s willingness to tolerate artifice and deception as methods of sexual
16 seduction. Individuals commonly lie about their age, occupation, job prospects, marital status,
17 involvement with others, parenthood status, and whether they are interested in a serious

⁹ ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 215 (3d ed. 1982); Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 53-54 (1998).

¹⁰ Article 213’s definition of “sexual penetration” includes penetration by a physical object, whether or not sexually motivated, but excludes acts of penetration done for a legitimate medical reason. See Section 213.0(2)(a). Sexual penetration not done for a legitimate medical reason thus may constitute the actus reus of the offense. Consent of the patient to such an act of “sexual penetration” requires the patient’s “willingness to engage in a specific act.” Section 213.0(2)(e)(i). Thus, consent to insertion of a medical device for examination purposes does not authorize insertion of a different object or a body part; a form of penetration different from that authorized (e.g., by some other object or sex organ) accordingly is (1) an act of “sexual penetration” that is (2) done without consent.

¹¹ E.g., *Don Moran v. People*, 25 Mich. 356, 365 (1872) (acknowledging the moral wrongness of sexual contact based on “fraudulently inducing a female patient to believe such connection essential to a course of medical treatment,” but finding that it is the legislature’s place to codify this into law); *State v. Lung*, 28 P. 235, 236 (Nev. 1891) (“Whether intercourse with a . . . woman is rape depends upon her capacity to understand the nature of the act . . .”).

¹² E.g., *Boro v. Superior Court*, 210 Cal. Rptr. 122, 122 (Ct. App. 1985) (finding that a person with “capacity to appreciate the nature of the sex act” cannot be said to be “unconscious of the nature of the act,” even if “motivated by a fear of disease, and death . . . [due] to petitioner’s fraudulent blandishments”); *People v. Evans*, 379 N.Y.S.2d 912, 922 (Sup. Ct. 1975) (“It is not criminal conduct for a male to make promises that will not be kept, [or] to indulge in exaggeration and hyperbole . . .”); see Falk, *supra* note 9, at 55-57 (considering case law prior to 1998).

¹³ SUSAN ESTRICH, *REAL RAPE* 103 (1987).

¹⁴ E.g., Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 SO. CAL. L. REV. 777, 832-833 (1988).

1 relationship. And people pervasively lie about the state of their affection for the other party.
2 Empirical research has not yet established how frequently the phrase “I love you” is uttered
3 untruthfully in an effort to gain sexual favor, but the number is undoubtedly high enough to
4 make criminal punishment of that behavior an unnerving prospect.

5 In the context of property transactions, the law has developed specific doctrines to ensure
6 that commonly tolerated misstatements do not become fodder for overzealous prosecution.
7 Crimes such as fraud and theft by deception exclude misrepresentations that are considered mere
8 “puffing” or “seller’s talk.”¹⁵ The falsehood must be material, and the other party must
9 justifiably rely on it.¹⁶ These limitations would probably preclude most prosecutions for sexual
10 fraud on the basis of insincere expressions of admiration or love. But doctrinal boundaries of this
11 sort would not always exclude criminal liability. When, for example, a relationship enters a
12 rocky moment, assurance that “I love you” may be essential for one party to agree to continued
13 intimacy. It is easy to imagine contexts in which a statement of that kind becomes material, and
14 where justified reliance on it plausibly enters the equation.

15 The question is whether a lie used to obtain sexual consent should be punished under the
16 same standards as a lie used to obtain a transfer of property. It is a truism that different rights
17 often warrant different remedies. The boundaries of the right to control one’s property are not the
18 same as those defining, for example, the right to freedom of worship or the right to vote. Indeed,
19 the law allows misrepresentation in connection with efforts to obtain a person’s vote that would
20 be intolerable in connection with efforts to obtain that person’s property. It does not diminish the
21 right to control one’s sexual boundaries—or the right to vote—to recognize that the safeguards
22 attached to those rights may differ from each other and from the safeguards that protect property
23 or freedom of worship. Each setting calls for discriminating judgment, sensitive to context.
24 Fraudulent behavior in sexual relationships may reach shocking and inexcusable levels.¹⁷ But in
25 any comparison of sexual consent with consent to a property transfer, major contextual
26 differences stand out.

¹⁵ E.g., MODEL PENAL CODE Section 223.3(1) (AM. L. INST., Proposed Official Draft 1962) (“The term ‘deceive’ does not, however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed.”); see Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611, 638 (2011) (“Fraud law must draw a line between wrongful deception and acceptable behavior in the rough-and-tumble of markets.”); STEPHEN J. SCHULHOFER, UNWANTED SEX 154 (1998) (giving examples of “puffing”).

¹⁶ See, e.g., *United States v. Regent Office Supply*, 421 F.2d 1174, 1181-1182 (2d Cir. 1970) (reversing conviction in a mail fraud case where defendant’s sales agents misrepresented who they were in order to induce purchasing agents to meet with them, and holding that “false representations not directed to the quality, adequacy or price of goods to be sold, or otherwise to the nature of the bargain, [do not] constitute a ‘scheme to defraud’ or ‘obtaining money by false pretenses’ within the prohibition of 18 U.S.C. § 1341”).

¹⁷ See, e.g., SCHULHOFER, SUPRA note 15, at 152-157 (discussing examples of shocking or inexcusable fraud used to induce consent to sexual relations).

One important consideration is that in sexual encounters, emotion and fantasy function in complex ways. Erotic experience often presupposes the “willing suspension of disbelief.”¹⁸ Materiality—the extent to which the accuracy of one party’s self-presentation, promises, or “pillow talk” was indispensable to the other party’s consent—is difficult to judge. This point shows the difficulty in sexual matters of proving materiality beyond a reasonable doubt. But this point does not justify impunity when materiality is clear. More fundamentally, criminal liability for sexual fraud remains highly problematic even when misrepresentations are clearly material.

Consider, for example, a promise to marry. Even today, it is far from rare for one party to threaten to leave a sexual relationship unless the other party commits to marriage. A deliberately false promise to marry in such circumstances may be egregiously immoral, but should it be subject to prosecution as a sexual crime? The law traveled that road for decades, with consequences that in the end few judged worthwhile. Civil and criminal penalties for breach of an intentionally false promise to marry (often labeled the offense of “seduction”) were common in the 19th century and well into the 20th. Article 213 of the 1962 Code treated this conduct as a sexual crime, classifying it as a misdemeanor.¹⁹ Nonetheless, most states had already begun to abolish the offense as early as the 1930s.²⁰ Almost none of the post-1962 legislative revisions followed the contrary recommendation of the 1962 Code.²¹ The offense survives in few jurisdictions, if any.²² The movement away from criminal liability in this context continued even

¹⁸ SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 207 (1978) (attributing the phrase “willing suspension of disbelief” to Coleridge); see also William Simon & John H. Gagnon, *Sexual Scripts: Permanence and Change*, 15 *ARCHIVES SEXUAL BEHAV.* 97, 108-109 (1986) (discussing the importance of fantasy in sexual interaction).

¹⁹ MODEL PENAL CODE Section 213.3(1)(d), (2) (AM. L. INST., Proposed Official Draft 1962); MODEL PENAL CODE Section 213.3 Comment 5, at 391 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980).

²⁰ MODEL PENAL CODE Section 213.3 Comment 5, at 394 & n.65 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980).

²¹ See *id.* at 397.

²² According to one recent count, only five states have legislation criminalizing seduction, i.e., intercourse induced by a false promise of marriage—see Falk, *supra* note 9, at 116 & n.364 (identifying six U.S. jurisdictions, including Puerto Rico, that do so)—and enforcement appears to be scant. See, e.g., *Franklin v. Hill*, 444 S.E.2d 778, 781 (Ga. 1994) (holding the state seduction statute to be unconstitutional, partly on grounds of nonuse); *People v. Evans*, 379 N.Y.S.2d 912, 919 (Sup. Ct. 1975) (“[T]his State looks with disfavor on actions for seduction since the civil action was abolished more than forty years ago[;] . . . there are no presently existing penal sanctions against seduction.”); M.B.W. Sinclair, *Seduction and the Myth of the Ideal Woman*, 5 *L. & INEQ.* 33, 59, 65-71 (1987) (noting that the tort action for seduction apparently survives in 19 jurisdictions, but that 13 of those had not had a single reported appellate decision in the preceding 30 years).

as the law of theft moved in the opposite direction, with false promise becoming widely and increasingly (though still not universally) accepted as a basis of liability for theft of property.²³

The prominent reason given in the last century for abolishing both civil and criminal liability for breach of an intentionally false promise to marry was the fear that women claiming to be victims of such fraud were instead more likely to be unscrupulous “gold-diggers” seeking to blackmail propertied gentlemen.²⁴ This reason makes little sense today (if it ever did). But other concerns were probably more important even in the 1930s. Prominent opponents of such liability included women who strenuously objected to a concept that seemed to reinforce stereotypes of women’s sexuality, poor judgment, and lack of economic independence.²⁵ In addition, while criminal condemnation of an egregious wrongdoer held obvious appeal, any deterrent effect was counterbalanced by the fear of coercing the dishonest party into consummating an unwanted marriage.²⁶

Many of the earlier reservations about punishing a breach of a promise to marry are thoroughly out of date today. But the prevalence of sexual relationships outside of marriage, and the complex emotions and expectations surrounding them, suggest that prosecutions for breach of promise to marry would be no more constructive now than in the past. Seemingly logical surface similarities between a false promise to induce sexual consent and a false promise to induce a property transfer are not similar. The interpersonal dynamic is radically different in the two settings.

Breach of promise to marry is not unique among the false promises that should not lead to prosecution. Consider another context in which materiality and justified reliance are unambiguous: an actor continues having sex with a spouse, without disclosing to the spouse that

²³ E.g., *Durland v. United States*, 161 U.S. 306, 313 (1896) (interpreting a federal mail-fraud statute to “include[] everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future”); *People v. Ashley*, 267 P.2d 271, 281 (Cal. 1954) (holding that “a promise made without intention to perform is a misrepresentation of a state of mind, and thus a misrepresentation of existing fact, and is a false pretense” in the context of a charge of grand theft); *Kennedy v. State*, 342 S.E.2d 251, 255 (W. Va. 1986) (“[T]he ‘false pretenses’ of th[e] statutory offense [of obtaining money by false pretenses] may be found in statements or promises relating to future acts.”). But see *People v. Reigle*, 566 N.W.2d 21, 24 (Mich. Ct. App. 1997) (“A false statement of promise or intention may not be the basis of a conviction for false pretenses.”); *State v. Allen*, 505 So. 2d 1024, 1025 (Miss. 1987) (“Our law requires that, before the factual representation becomes criminal, it must relate to present or past fact, thus excluding a representation such as that here made, i.e., a promise to repay money in the future.”).

²⁴ See Mary Coombs, *Agency and Partnership: A Study of Breach of Promise Plaintiffs*, 2 YALE J.L. & FEMINISM 1, 12-13 (1989) (discussing the history of heartbalm legislation).

²⁵ SCHULHOFER, *supra* note 15, at 154; see Coombs, *supra* note 24, at 13 (criticizing suits based on breach of promise for perpetuating the stereotype of women’s helplessness and dependency on marriage); Sinclair, *supra* note 22, at 90-91 (explaining the perspective that heartbalm law reform was “a matter of woman’s rights”).

²⁶ See SCHULHOFER, *supra* note 15, at 154.

the actor is also having an extramarital affair.²⁷ Judged by the standards that govern property transactions in a fiduciary setting, disclosure would be obligatory, and any consent procured without it would be a product of fraud. Yet the law surely risks dramatic overreach if it treats every instance of sex between spouses as a sexual crime when one of them has failed to disclose a sexual affair.

Similar difficulties arise even if criminal liability for sexual fraud is restricted to situations involving explicit (but false) denials of adultery. Again, the dishonesty is obviously central to the wronged spouse's continued willingness to give sexual consent. Should the lying spouse be subject to prosecution for a sexual crime? Doing so would come close to recriminalizing adultery, because sex within marriage may often continue while an extramarital affair remains undisclosed or affirmatively denied. Similar deceptions frequently occur between partners in nonmarital relationships, as when one of the parties becomes simultaneously involved in another affair, either when the committed relationship is heading toward a breakup or even when it is not.

Even though materiality may be clear in the infidelity cases, criminalization presents formidable problems, unlike those in prosecutions for theft of property by deception. Prosecution of an unfaithful partner for obtaining sexual consent by fraud entails many of the same difficulties that led adultery (itself a form of sexual fraud) to be seen as an inappropriate target of criminal sanctions. Experience showed that legal solutions beyond the obvious remedy of divorce were typically inappropriate and subject to abuse.²⁸

In sum, the policy impediments to criminalizing sexual fraud far exceed plausible concerns with criminalizing fraud in property transactions. Current law has strong grounding for its unwillingness to broadly criminalize even some material misrepresentations used to induce sexual consent.

In contrast, and notwithstanding the force of those concerns, some discrete and particularly egregious misrepresentations can be singled out for criminal prohibition without raising the difficulties just discussed. These are medical misrepresentation and impersonation.

2. Deceptive Medical Representations. Consider first the act of eliciting consent to intercourse by falsely claiming that it will serve a legitimate medical purpose. Unlike the patient who consents to insertion of a medical probe, only to realize that a sexual organ was inserted instead, the patient who knowingly consents to sexual intercourse is not the victim of “fraud in

²⁷ See, e.g., *Neal v. Neal*, 873 P.2d 877, 877 (Idaho 1994) (upholding civil liability for battery on basis of husband's having had intercourse with wife while failing to disclose his extramarital affair).

²⁸ See MODEL PENAL CODE Section 207.1, at 205-210, Section 207.5 Comment 1, at 277-279 (AM. L. INST., Tentative Draft No. 4, 1955) (discussing the rationale for criminalizing only certain categories of “illicit intercourse,” and then the rationale for not criminalizing private “sexual practices” between consenting adults); Louis B. Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 673-674 (1963) (discussing the Model Penal Code's “decision to keep penal law out of the area of private sexual relations”).

the factum.” This act, when not done for a legitimate medical purpose, constitutes “sexual penetration” within the meaning of the Code. But under a conventional analysis, the patient’s willingness to participate in a specific act of penetration, understanding the sexual nature of that act and believing the actor’s claim that it would have medical benefits, would be valid consent sufficient to preclude criminal liability—notwithstanding the deceptive inducement. Although most patients would be quite skeptical of a physician’s claim that sexual intercourse could help cure a physical ailment, there is disturbing evidence that some doctors and other health-care personnel systematically target vulnerable populations, such as victims with little education or command of English, for this form of exploitation.²⁹

Such deception has no plausible justification, and there is no good reason for the criminal law to tolerate it when it occurs. Section 213.5(1)(b)(i) provides that an actor is guilty of Sexual Penetration by Prohibited Deception when the actor knowingly misrepresents that the act will serve the purpose of medical treatment, and knows that the other person engages in the act as a result of that misrepresentation.

3. Impersonation of Someone Known to the Other Person. A second sexual-fraud situation worth singling out for criminal prohibition is a specific type of impersonation. An actor may obtain sexual consent by convincing the other person that the actor is someone whom the other person knows and is sexually attracted to. Although one might think that the other person would be able to distinguish between an intimate partner or attractive acquaintance and the imposter, truth is stranger than fiction, and such instances are not unknown. Examples include the imposter who is an identical twin,³⁰ or a victim who is half-asleep in a darkened room³¹ or is unclothed and in bed and approached by the imposter from behind.³²

When the actor has impersonated the other person’s spouse, some courts have been willing to convict on the theory that the situation involves fraud “in the factum,” in the sense that the act actually committed—adultery—is not the same as the act of marital love to which the

²⁹ See, e.g., *Boro v. Superior Court*, 210 Cal. Rptr. 122, 122 (Ct. App. 1985) (describing a case in which the defendant fraudulently claimed that he was a doctor, the complainant hotel clerk had a deadly disease, and the only financially feasible cure was for the complainant have intercourse with an “anonymous donor”).

³⁰ *People v. Hough*, 607 N.Y.S.2d 884, 885-887 (Dist. Ct. 1994) (deciding a case in which the defendant led the complainant to believe he was her boyfriend, his twin brother).

³¹ *Id.* at 885 (detailing circumstances in which the defendant, the twin brother of the complainant’s boyfriend, woke the complainant, entered her apartment with the lights off, and led her to believe he was his brother when he initiated intercourse); *Mathews v. Superior Court*, 173 Cal. Rptr. 820, 821 (Ct. App. 1981) (“[D]efendant sexually fondled and caressed a woman as she slept in the bed she usually shared with another man. The bedroom was dark and she assumed, as defendant intended, that he was the bedmate.”).

³² *United States v. Traylor*, 40 M.J. 248, 249 (C.M.A. 1994) (considering a case where a man began engaging in consensual intercourse with the complainant from behind, but the defendant took the man’s place without the complainant’s knowledge and penetrated her).

1 other person consented.³³ But this move is a conceptual stretch, and in any case some courts have
 2 refused to convict the actor who is impersonating the other person's committed but unmarried
 3 sexual partner.³⁴ Again, the deception has no plausible justification, and criminalization carries
 4 no risk of untoward public-policy consequences. Section 213.5(1) provides that an actor is guilty
 5 of Sexual Assault by Prohibited Deception when the actor knowingly leads the other person to
 6 believe that the actor is someone known to the other person, and knows that the other person
 7 submits to the act of sexual penetration or oral sex because of that misrepresentation.

8 Section 213.5(1)(b)(ii) applies only when the actor impersonates someone the other
 9 person already knows. This Section does not extend to instances in which the actor pretends to
 10 be a famous person not previously known to the other person or falsely claims other ostensibly
 11 attractive attributes. Although these kinds of deceptions are also highly offensive, they are hard
 12 to distinguish from common sorts of "puffing" about an actor's career, economic prospects, or
 13 personal circumstances. Treating these kinds of deceptions as criminal "impersonation" would
 14 overextend the reach of the sexual offenses. And these kinds of deceptions lack the aggravated
 15 wrongfulness of exploiting the vulnerability and diminished alertness of victims who mistakenly
 16 assume that they know the person initiating sexual contact with them.

17 **4. Other Specific Types of Misrepresentations.** Another plausible candidate for targeted
 18 criminalization is the act of deliberately misrepresenting (or failing to disclose) when the actor is
 19 infected with a sexually transmittable disease or not using a condom. These sorts of deceptions
 20 are especially worrisome because they occur much more frequently than medical fraud or
 21 impersonation and can have serious medical consequences. Conceptually, it is easy to conclude
 22 that this kind of deception nullifies consent. The situation sometimes approaches fraud in the
 23 factum. An actor who infects another person with a virus has penetrated the other person's body
 24 with a harmful physical substance without that person's knowledge, much less permission. On
 25 that basis, several courts have held that knowing concealment of a health condition establishes
 26 either assault, reckless endangerment, or a sexual offense,³⁵ and several states have enacted
 27 legislation to impose criminal sanctions for failure to disclose HIV status to a sexual partner.³⁶

³³ PERKINS & BOYCE, *supra* note 9, at 1079; see *Boro*, 163 Cal. App. 3d at 1228-1230.

³⁴ E.g., *Suliveres v. Commonwealth*, 865 N.E.2d 1086 (Mass. 2007) (concluding, in the case of a defendant who coerces the complainant into sexual intercourse by pretending to be her boyfriend, that "[f]raudulently obtaining consent to sexual intercourse does not constitute rape as defined in our statute"); *Hough*, 607 N.Y.S.2d at 887 (finding that the defendant, who impersonated the complainant's boyfriend, "cannot be found guilty of sexual misconduct"). *Contra Traylor*, 40 M.J. at 249-250 (upholding the conviction of a defendant who penetrated the complainant after switching places with her consensual partner, who had been engaging in intercourse with the complainant from behind, based on the definition of consent as "based on the identity of the prospective partner" (quoting *United States v. Booker*, 25 M.J. 114, 116 (C.M.A. 1987))). See generally Russell L. Christopher & Kathryn H. Christopher, *Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape*, 101 NW. U. L. REV. 75 (2007).

³⁵ E.g., *Hancock v. Commonwealth*, 998 S.W.2d 496, 498-499 (Ky. Ct. App. 1998) (upholding criminal liability for wanton endangerment where the defendant engaged in intercourse when "he knew he

1 The same logic could extend to “stealthing,” removing a condom after promising to use
2 one. The actor who says that a condom is being used but does not use one is responsible for
3 penetrating the other person’s body with a physical substance (semen), again without that
4 person’s knowledge or permission.³⁷

5 Deliberate concealment and, even worse, affirmative misrepresentation that endanger
6 health are well worth seeking to prevent, but criminal prosecution and punishment remain
7 controversial. Criminalizing the failure to disclose HIV status, for example, is sometimes seen as
8 a tool enabling the discriminatory prosecution of gay men. And criminalization can have
9 unintended public-health consequences, such as deterring potentially infected individuals from
10 being tested or even discouraging them from seeking medical treatment that might alert a health-
11 care provider to their condition.³⁸

had been diagnosed as having HIV and by so doing engaged in conduct which created a serious risk of death or serious physical injury”); cf. *Kathleen K. v. Robert B.*, 198 Cal. Rptr. 273, 274 (Ct. App. 1984) (reversing the lower court’s denial of civil liability where the defendant had intercourse while failing to disclose his status as “a carrier of venereal disease”); *Barbara A. v. John G.*, 193 Cal. Rptr. 422, 425 (Ct. App. 1983) (reversing the lower court’s denial of civil liability where the respondent fraudulently asserted that he was infertile to induce the appellant to engage in intercourse that resulted in an ectopic pregnancy). The Canadian Supreme Court has held that failure to disclose HIV status invalidates consent to a sexual encounter, and thus satisfies the elements of criminal offense of aggravated sexual assault, except when there was no significant risk of bodily harm because the defendant had an undetectable viral load and used a condom. *R. v. Mabior*, 2012 SCC 47, [2012] S.C.R. 584, paras. 107, 109 (Can.) (citing *R. v. Cuerrier*, [1998] 2 S.C.R. 371, paras. 1, 147 (Can.)).

³⁶ E.g., COLO. REV. STAT. § 18-3-415.5 (2018) (outlining mandatory sentences where the actor failed to disclose HIV status before committing a sexual penetration, defined pursuant to COLO. REV. STAT. § 18-3-401(1.7), (6) (2018)); MICH. COMP. LAWS SERV. § 333.5210 (LexisNexis 2019) (defining failure to disclose HIV status to an intercourse partner as a felony if HIV is transmitted, or a misdemeanor if not); N.J. STAT. ANN. § 2C:34-5(b) (LexisNexis 2019) (defining the sexual penetration of a person without “informed consent” of the actor’s known HIV status as a “crime of the third degree”); OHIO REV. CODE ANN. § 2903.11(B) (LexisNexis 2020) (defining sexual conduct with knowledge of HIV status without disclosing this status as “felonious assault”).

³⁷ On this basis, some advocates have sought to criminalize nonconsensual condom removal; others contend that such behavior should be—at most—a civil wrong. For a discussion of both viewpoints, see generally Alexandra Brodsky, *“Rape-Adjacent”: Imagining Legal Responses to Nonconsensual Condom Removal*, 32 COLUM. J. GENDER & L. 183 (2017).

³⁸ There is a vast empirical literature on the effects of such legislation—both negative public-health effects (generally found to be substantial) and positive deterrence effects on nondisclosure and risky sexual behavior (generally found to be limited or minimal). For a succinct overview of the research findings, see, e.g., WHITE HOUSE, NATIONAL HIV/AIDS STRATEGY FOR THE UNITED STATES 36-37 (2010), available at https://www.ucsf.edu/sites/default/files/legacy_files/NHAS.pdf (reporting that criminal prohibitions “do not influence the behavior of people living with HIV” and may undermine public-health efforts to encourage testing and treatment); Margo Kaplan, *Rethinking HIV-Exposure Crimes*, 87 IND. L.J. 1517, 1561-1565 (2012) (providing an overview of the debate regarding HIV criminalization). For in-depth works that center on this issue, see generally Aziza Ahmed et al., *Criminalising Consensual Sexual Behaviour in the Context of HIV: Consequences, Evidence, and*

Section 213.5. Sexual Assault by Prohibited Deception

1 Given these complexities and the wide range of sexually transmittable diseases that might
2 warrant consideration, the revised Code does not include these deceptions among the specific
3 sexual frauds that Section 213.5 singles out for criminal sanctions. Most current empirical
4 assessments suggest that criminalizing these deceptions is unwise or even counterproductive.³⁹
5 But in any case, the revised Code reflects only the more cautious view that public-health
6 ramifications in this area are sufficiently uncertain and sufficiently contingent on local
7 circumstances that the subject should not be addressed either way in a Code aiming to set
8 nationally appropriate standards for the definition of sexual crimes. Narrowly defined local
9 crimes, civil remedies, and broader public-health initiatives offer a safer and better potential for
10 more nuanced solutions.⁴⁰

Leadership, 6 GLOBAL PUB. HEALTH S357 (2011); Scott Burris & Edwin Cameron, *The Case Against Criminalization of HIV Transmission*, 300 JAMA 578 (2008); Zita Lazzarini et al., *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 30 J.L. MED. & ETHICS 239 (2002).

³⁹ See *supra* note 38.

⁴⁰ See RESTATEMENT THIRD OF TORTS: INTENTIONAL TORTS TO PERSONS § 102 Reporters' Note b(3)(B) at 79 (AM. L. INST., Tentative Draft No. 1, 2015) (citing *Hudson v. Michael J. O'Connell's Pain Care Ctr., Inc.*, 822 F. Supp. 2d 84, 95 (D.N.H. 2011)) (providing an example of a federal case applying New Hampshire law, wherein the court dismissed a battery claim because the plaintiff did not allege that defendant knew of his herpes infection)). See generally Brodsky, *supra* note 37 (advocating tort liability for nonconsensual condom removal during intercourse).

SECTION 213.6. SEXUAL ASSAULT IN THE ABSENCE OF CONSENT

(1) An actor is guilty of Sexual Assault in the Absence of Consent when:

(a) the actor causes another person to submit to or perform an act of sexual penetration or oral sex; and

(b) the other person does not consent to that act; and

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (a) and (b) are present.

(2) *Grading.* Sexual Assault in the Absence of Consent is a felony of the fifth degree [three-year maximum], except that it is a felony of the fourth degree [five-year maximum] when:

(a) the other person has, by words or actions, expressly communicated unwillingness to submit to or perform the act, or the act is so sudden or unexpected that the other person has no adequate opportunity to express unwillingness before the act occurs; and

(b) the actor is aware of, yet recklessly disregards, the risk that a circumstance described in paragraph (a) existed at the time of the act of sexual penetration or oral sex.

(3) If applicable, the actor may raise an affirmative defense of Explicit Prior Permission under Section 213.10.

Comment:

Section 213.6 defines the offense of Sexual Assault in the Absence of Consent. The offense requires proof beyond a reasonable doubt of (1) an act of either sexual penetration or oral sex, (2) the absence of the complainant's consent, and (3) the defendant's recklessness as to each of these elements.

1. *Absence of Consent.* "Consent," as defined in Section 213.0(2)(e), means that the other person was willing to engage in the specific act of sexual penetration or oral sex. In judging whether consent was absent, the factfinder must evaluate all the circumstances, including the nature, duration, and quality of the parties' relationship, any history of sexual activity between them, and other relevant facts. Under subparagraph (ii) of Section 213.0(2)(e) consent "may be inferred from behavior—both action and inaction—in the context of all the circumstances." In addition, under subparagraphs (iii) and (v) "[n]either verbal nor physical resistance is required to

1 establish that consent is lacking,” and “[a] clear verbal refusal—such as ‘No,’ ‘Stop,’ or
2 ‘Don’t’—establishes the lack of consent.”

3 Comment 2 below, addressing the required mental state of recklessness, provides
4 Illustrations demonstrating the meaning of this standard in the context of the Section 213.6
5 offense.

6 **2. The Required Mental State (*Mens Rea*).** Conviction under Section 213.6 requires
7 proof of recklessness—that the defendant was aware of, yet consciously disregarded, a
8 substantial, unjustifiable risk that the other person did not consent to the act of sexual penetration
9 or oral sex.

10 Imposing liability on the basis of recklessness reflects the “basic norm” of the 1962
11 Code,¹ which treats recklessness as sufficient culpability for most of its major offenses,
12 including aggravated assault, manslaughter, robbery, and the principal sexual offenses.² A lower
13 standard, such as negligence or strict liability, would be inconsistent with the Model Penal
14 Code’s foundational commitment to moral fault as a prerequisite to criminal liability.
15 Conversely, as explained in the Reporters’ Notes discussing the recklessness standard under
16 Section 213.2,³ a more demanding standard, such as a requirement of knowledge, would open
17 unwarranted loopholes, unjustifiably restrict the law’s message about the boundaries of tolerable
18 social behavior, and pose an unjust obstacle to effective enforcement of prohibitions that are
19 essential for personal safety and sexual well-being.

20 Sexual dynamics make the mens rea standard especially consequential. An actor who
21 initiates a sexual advance often will not be entirely sure how it will be received. This is
22 particularly common when the parties have not previously been sexually intimate, but some
23 uncertainty also is not unusual between parties who have had consensual sex with each other
24 many times in the past. The person who takes the initiative may assume that the other party is
25 receptive and may not be aware of any risk to the contrary. But often the person who takes the
26 initiative will not know at the outset exactly how the other party feels about being sexually

¹ MODEL PENAL CODE AND COMMENTARIES, Comment to Section 2.02, at 239-241 (AM. L. INST. 1985).

² See Reporters’ Notes to Section 213.1, *supra*.

³ See Comment 5 and Reporters’ Note 2 to Section 213.2, *supra*.

intimate at that particular time. The actor may think that the other party is *probably* receptive or that the other party, though *probably not* receptive, might be persuadable. The actor may even think that despite outward signs of unwillingness, the other party nonetheless might possibly be interested; after all, a common adage maintains (rightly or wrongly) that “there’s no harm in trying.” In communicating and enforcing minimally acceptable standards of conduct, a great deal therefore depends on how the law treats the actor who proceeds to penetration or oral sex while unsure in some way about the other party’s subjective attitude.

A mens rea of knowledge requires proof beyond a reasonable doubt that the accused was “practically certain” about the pertinent facts.⁴ That means, in this instance, requiring proof beyond a reasonable doubt that the accused was *practically certain* the other party was not willing for the act of sexual penetration or oral sex to occur. A knowledge requirement therefore precludes conviction of the actor who can plausibly claim not to be 100 percent sure that the other person was unwilling, even when the actor was well aware that the other party *probably was not consenting*. Indeed, a knowledge requirement precludes conviction even when the actor probably *knew* the other party was not consenting, if there is merely a reasonable doubt in this regard.

These consequences of a knowledge requirement are manifestly unacceptable. The law must not endorse a standard that allows individuals to engage in this deliberately risky behavior with impunity, merely because they may be able to credibly claim not to be certain that the other party was unwilling. Someone who engages in an act of sexual penetration or oral sex, when aware of a substantial and unjustifiable risk that the other party is not willing, commits an invasive, dangerous, blameworthy act for which criminal condemnation is fully justified.

Section 213.6 therefore specifies that recklessness is a sufficient mens rea for conviction of Sexual Assault in the Absence of Consent. Under Section 2.02(2)(c) of the 1962 Code, a

⁴ Under Section 2.02(2)(b) of the 1962 Code, a person acts knowingly when “(i) if the element involves ... the attendant circumstances, he is aware ... that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.” Because absence of consent is an attendant-circumstance element, knowledge under subparagraph (i) calls for proof that the actor “is aware . . . that [absence of consent] exist[s],” an apparently unequivocal level of certainty. The term “practically certain,” used in subparagraph (ii) to define knowledge of a result element, is slightly less exacting because, unlike a presently existing attendant circumstance, a future consequence (that “conduct will cause such a result”) cannot be known with absolute certainty. In either case, knowledge, as defined in the Code, is a demanding requirement.

person is reckless when he or she “consciously disregards a substantial and unjustifiable risk that the material element exists or will result from [the person’s] conduct.” Section 2.02(2)(c) further specifies that a risk is substantial and unjustifiable when disregarding that risk constitutes “a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”⁵ Thus, when the actor is aware of, yet consciously disregards, a substantial and unjustifiable risk that the other person did not consent to the sexual acts, the actor can be convicted of Sexual Assault in the Absence of Consent.

Illustrations:

1. Accused and Complainant have dinner and then go to Complainant’s apartment. They sit on Complainant’s couch and kiss. Accused escalates the level of contact by holding and caressing Complainant, who helps remove Accused’s jacket and shoes. Although neither Accused nor Complainant seeks or gives verbal consent for taking more intimate steps, Accused caresses Complainant more intimately, sliding a hand inside the waistband of Complainant’s pants and underclothing. After further mutual caressing, Accused digitally penetrates Complainant. Complainant testifies that when penetration occurred, Complainant did not anticipate that it was about to happen and was not willing for it to occur. Accused testifies that the mutually escalating intimacy, without any indications of reluctance, signified to Accused that Complainant consented to the act of penetration. Accused believed that Complainant was willing and was not aware of any significant possibility to the contrary.

A conviction under Section 213.6 requires the trier of fact to find beyond a reasonable doubt that: (1) Complainant did not consent to the act of penetration; and (2) Accused knew this or was aware of and disregarded a substantial, unjustifiable risk that Complainant did not consent. If the trier of fact entertains a reasonable doubt about whether Complainant consented, Accused cannot be found guilty. If the trier of fact instead finds credible Complainant’s testimony concerning Complainant’s lack of subjective willingness, that testimony is legally sufficient to support a finding that

⁵ See 1962 Code, Section 2.02(2)(c) (“To be substantial and unjustifiable, the risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to [the actor], its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”).

Section 213.6. Sexual Assault in the Absence of Consent

1 Accused committed the act of penetration without Complainant's consent. However,
2 conviction also requires proof of Accused's culpable mental state. Even though
3 Complainant did not verbally consent, Complainant's conduct—participating in acts of
4 increasing intimacy and expressing no reluctance before the penetration occurred—could
5 support Accused's testimony that Accused believed Complainant consented. Unless the
6 factfinder concludes beyond a reasonable doubt that Complainant was not willing and
7 also that Accused knew this or was aware of, yet consciously disregarded, a substantial,
8 unjustifiable risk that Complainant did not consent, Accused cannot be found guilty
9 under Section 213.6.

10 2. Same facts as Illustration 1, except that as soon as Accused penetrates
11 Complainant, Complainant says "Stop." Accused immediately withdraws. As in
12 Illustration 1, Complainant's testimony concerning the lack of willingness for the act of
13 penetration to occur is legally sufficient to support a finding that the act was without
14 consent. But the factfinder could also find that Accused did not have the necessary
15 culpability when the act of penetration occurred, for the reasons given in Illustration 1.
16 As soon as Complainant uttered "Stop," Accused became aware of Complainant's
17 unwillingness and immediately withdrew. As in Illustration 1, Accused cannot be found
18 guilty under Section 213.6 unless the factfinder concludes that credible testimony proves
19 beyond a reasonable doubt that at the time of penetration Accused knew—or was aware
20 of, yet consciously disregarded, a substantial, unjustifiable risk—that Complainant was
21 not willing. If the jury credits Accused's testimony, Accused cannot be found guilty
22 under Section 213.6.

23 Situations in which one party takes the sexual initiative while the other remains passive,
24 neither actively encouraging nor actively resisting, may fall at different points on a continuum.
25 Sometimes silence can lead one party to infer (justifiably or otherwise) that the other is willing
26 for an anticipated sexual act to occur (Illustration 1). In other situations, silence cannot support
27 this inference (Illustrations 7-10, below). Between these poles, the meaning of a person's
28 passivity often requires interpretation by the actor and, in the event of prosecution, by the trier of
29 fact. Determining whether the prosecution has proved beyond a reasonable doubt that the other
30 person did not consent and that the actor had the necessary culpable mental state requires
31 examining all the circumstances.

1 This type of determination is not unusual. Contextual factfinding pervades the criminal
2 law in general and the sex offenses in particular. Nearly all approaches to determining consent
3 turn on a contextual inquiry,⁶ as must any legal standard that attempts to accommodate the
4 variety and complexity of human interactions. Contextual standards of this sort are neither unfair
5 nor unconstitutionally vague, even when criminal sanctions are at stake.⁷ Imprecision poses no
6 fairness problem so long as the standard makes clear not only what to look at (the entire context
7 of the interaction), but also what to look for (the complainant’s willingness, the external behavior
8 from which willingness or unwillingness can be inferred, and the defendant’s awareness of those
9 facts).⁸

10 As always, the burden is on the prosecution to prove beyond a reasonable doubt all the
11 necessary elements of the offense—including, in this instance, that the complainant did not
12 consent. Of course, the defense may, if it chooses, offer in rebuttal any evidence that the
13 complainant did consent. But the defense has no formal burden to do so; the prosecution must

⁶ For examples of consent standards that differ from Section 213.0(2)(d) but nonetheless turn on context, see, e.g., FLA. STAT. § 794.011(4)(b), (5) (2018) (“‘consent’ means intelligent, knowing, and voluntary consent”); MO. REV. STAT. § 566.30 (2011) (requiring proof of force that overcomes “reasonable resistance”); N.Y. PENAL LAW § 130.05(2)(d) (2018) (consent is absent when “the victim clearly expressed that he or she did not consent to engage in such act, *and* a reasonable person in the actor’s situation would have understood such person’s words and acts as an expression of lack of consent to such act under all the circumstances” (emphasis added)); WIS. STAT. § 940.225(4) (2018) (consent is “freely given agreement”); MODEL PENAL CODE Section 213.1(2)(a) (AM. L. INST. 1962) (punishing conduct as a felony of the third degree when a person compels another to submit “by any threat that would prevent resistance by a woman of ordinary resolution”); *Hull v. State*, 687 So. 2d 708, 723 (Miss. 1996) (holding that victim must use “all reasonable physical resistance available to her under the circumstances”).

As explained in the Reporters’ Notes to Section 213.0, 21 jurisdictions do not define consent at all. Among the 32 jurisdictions that do define consent, many definitions offer little precise guidance, and application is heavily fact-dependent. Even when jurisdictions make “force” a required element of the offense, that element is typically defined or applied in a contextual manner. See Reporters’ Notes to Section 213.1. Thus, the consent standard proposed by Section 213.0(2)(e) is at least as clear as many of the consent standards found in existing sexual-assault law.

⁷ See *Nash v. United States*, 229 U.S. 373 (1913) (Holmes, J.) (“[The criminal] law is full of instances where a man’s fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.”).

⁸ Cf. *United States v. Mayfield*, 771 F.3d 417, 435 (7th Cir. 2014) (“Multifactor tests are common in our [criminal] law but they can be cryptic when unattached to a substantive legal standard Knowing what factors to look at is useless unless one knows what to look for.”).

1 present evidence (such as the complainant's testimony that complainant was not willing)
2 sufficient to prove the absence of consent beyond a reasonable doubt.

3 In Illustration 1, the trier of fact could find that Accused lacked the mental state required
4 for conviction because Complainant allowed increasingly intimate sexual acts and responded
5 without indicating unwillingness, in a context where mutually escalating intimacy was expected.
6 But in different circumstances, a trier of fact could conclude beyond a reasonable doubt that a
7 complainant, though silent, did not consent to the sexual act and that the accused knew this or
8 was aware of, yet recklessly disregarded, that risk. Such circumstances include when: (1) the act
9 of penetration occurred abruptly and in a context that made it unexpected, so that the
10 complainant did not have time to indicate willingness to participate in the sexual act; and (2)
11 nothing in the circumstances suggested that the sexual act was anticipated, much less consented
12 to.⁹

13 Intermediate cases can easily be imagined. In each case, the standard is whether, in the
14 context of all the circumstances, the complainant was willing to engage in the act of sexual
15 penetration or oral sex and, if not, whether the accused knew this or consciously disregarded a
16 substantial, unjustifiable risk that the complainant was not willing.

17 Situations involving the intoxication of one or more parties are a common arena for
18 abusive sexual misconduct and can present special difficulties for assessing culpability and the
19 presence or absence of consent.

20 **Illustrations:**

21 3. Accused and Complainant had been sexually intimate on two prior occasions.
22 They meet at a party and begin to flirt while drinking heavily. Throughout the evening,
23 they kiss and embrace in the view of other partygoers. Thoroughly intoxicated, they go
24 together to a back bedroom, where they remove one another's clothing and engage in
25 mutual sexual advances culminating in intercourse. The next morning, Complainant
26 wakes up next to Accused and thinks, "I would never have agreed to spend the night with
27 Accused if I had been sober." Complainant testifies that at the time of penetration,
28 Complainant had been drinking heavily, did not reflect carefully on the decision to be

⁹ See Illustrations 7-10, *infra*.

1 intimate, and was not willing for that act to occur. Accused testifies that because
2 Complainant participated in acts of increasing intimacy and expressed no
3 unwillingness—in a context of mutually escalating intimacy—Accused believed
4 Complainant to be willing and was not aware of any substantial risk to the contrary.

5 A conviction under Section 213.6 requires proof beyond a reasonable doubt that
6 Complainant did not consent to the act of penetration and that Accused knew this or was
7 aware of, yet consciously disregarded, a substantial, unjustifiable risk that Complainant
8 did not consent. If the trier of fact does not fully credit Complainant's testimony and
9 concludes that there is a reasonable doubt about whether Complainant consented when
10 penetration occurred, Accused cannot be convicted. If instead the trier of fact credits
11 Complainant's testimony that Complainant was not willing for the sexual act to occur,
12 that testimony is legally sufficient to find that Accused penetrated Complainant without
13 consent. But Accused cannot be found guilty under Section 213.6 if the factfinder
14 concludes, based on Complainant's participation in progressively more intimate acts at
15 the time, that there is at least a reasonable doubt about whether Accused knew, or was
16 aware of and disregarded a substantial, unjustifiable risk, that Complainant did not
17 consent to the act of penetration.

18 4. At a party, Accused and Complainant meet for the first time. Over several
19 hours, they flirt while drinking heavily. Well after midnight, Complainant steps away
20 from Accused and nearly falls to the floor from inebriation. Accused helps Complainant
21 lie down in a back room. Complainant babbles incoherently and vomits but does not lose
22 consciousness. Accused removes Complainant's boxer shorts and penetrates
23 Complainant. Complainant testifies that Complainant was not willing to have sex with
24 Accused, while Accused testifies that Accused thought Complainant was willing.

25 There is no evidence that Complainant physically or verbally resisted, and the
26 evidence might be insufficient to prove beyond a reasonable doubt that Complainant was
27 sufficiently incapacitated to trigger liability under Section 213.3(2) (Sexual Assault of a
28 Vulnerable Person). Nonetheless, if the trier of fact credits Complainant's testimony that
29 Complainant was not willing at the time when penetration occurred, that testimony is
30 legally sufficient to support a finding that Complainant did not consent. The trier of fact
31 also must find, however, that Accused had a culpable mental state with respect to

Section 213.6. Sexual Assault in the Absence of Consent

1 Complainant's lack of consent, evaluating Accused's awareness in light of all the
2 circumstances. Considering the absence of prior intimacy between the parties,
3 Complainant's heavy drinking and resulting nausea, vomiting, and impaired condition,
4 and the sudden act of penetration not preceded by reciprocated acts of sexual intimacy,
5 the factfinder could find beyond a reasonable doubt that Accused either knew that
6 Complainant was not willing or at least was aware of, yet consciously disregarded, a
7 substantial, unjustifiable risk that this was the case. These findings would be sufficient to
8 support conviction of Sexual Assault in the Absence of Consent under Section 213.6.

9 Between the intoxication cases in which lack of consent and a culpable mental state can
10 be found (Illustration 4) and those in which the trier of fact could find either actual consent or the
11 absence of a culpable mental state (Illustration 3) lies a range of intermediate situations. Whether
12 or not intoxication is involved, when one party is passive and neither encourages nor resists the
13 other's sexual advances, the meaning of that passivity requires interpretation. The standard is
14 whether, viewed in the context of all the circumstances, the passive party was unwilling for the
15 act of penetration to occur, and in that event, whether the actor knew this or was aware of, yet
16 recklessly disregarded, that risk.¹⁰

17 Penetration is an offense when the actor knows, or is aware of a substantial, unjustifiable
18 risk, that the other person is unwilling. But an actor who heeds a refusal and stops prior to
19 committing acts of penetration or oral sex will not be liable under Section 213.6 if the other
20 person subsequently has a change of mind and consents before penetration or oral sex occurs.
21 The change of mind from unwillingness to willingness may be expressed in words or conduct,
22 but as set out in Section 213.0(2)(e)(v), it must be sufficient in the context of all the
23 circumstances to override the prior lack of consent.

24 **Illustration:**

25 5. Accused and Complainant are friends who have not been sexually intimate in
26 the past. After having dinner at Accused's apartment, they engage in gradually escalating
27 and mutually reciprocated sexual advances. As physical intimacy increases, Accused tries

¹⁰ Section 213.0(1)(b) leaves to the law of the jurisdiction the treatment of evidence regarding the effects of the defendant's intoxication on the defendant's culpability.

to remove Complainant’s pants, but Complainant pushes Accused’s hands away, saying, “I’m not ready for this.” Accused heeds Complainant’s request. They continue kissing and touching, but Accused does not try to remove Complainant’s pants. Eventually, Complainant smiles and takes off Complainant’s own pants and underwear. The intimacy level escalates again. Accused removes Accused’s own clothes, and Complainant pulls Accused’s naked body down onto the bed. Accused then penetrates Complainant. At trial, Complainant testifies that when the penetration occurred, Complainant was not willing. Accused testifies that Accused honored Complainant’s initial expression of unwillingness; that Accused did not attempt penetration at that time; and that Complainant’s later actions—smiling, removing clothing, and embracing Accused’s naked body under circumstances consistent with willingness—led Accused to believe that Complainant had then consented.

If the trier of fact credits Complainant’s testimony, it is legally sufficient to find that Accused committed the act of penetration without Complainant’s consent. However, the trier of fact must not find Accused guilty unless also convinced beyond a reasonable doubt that Accused had the culpable mental state required for conviction. The trier of fact could conclude that Complainant’s conduct after the initial refusal—allowing acts of increasing intimacy, removing Complainant’s own clothing, pulling Accused’s naked body close, and expressing no unwillingness before the penetration occurred—support Accused’s belief that Complainant’s subsequent conduct overrode the prior lack of consent and that Complainant was now willing. Absent additional facts suggesting that the Accused knew that Complainant was not willing or was aware of and disregarded a substantial risk of unwillingness, the evidence is insufficient to prove the required mental state beyond a reasonable doubt. On these facts, Accused cannot be found guilty under Section 213.6.

3. Grading. Section 213.6 provides two alternative penalties for a violation. On proof beyond a reasonable doubt that the other person did not consent and that the defendant knew this or was aware of, yet consciously disregarded, a substantial, unjustifiable risk that the other person did not consent, the defendant is guilty of a felony of the fifth degree. The offense is graded more seriously, as a felony of the fourth degree, on additional proof beyond a reasonable doubt that: (1) the other person expressed unwillingness by words or actions, or the act of

1 penetration or oral sex was “so sudden or unexpected that the other person ha[d] no adequate
2 opportunity to express unwillingness before the act occur[red]”; and (2) the defendant was aware
3 of, yet consciously disregarded, a substantial, unjustifiable risk that one of these aggravating
4 elements was present.¹¹

5 **Illustrations:**

6 6. After seeing a movie, Accused and Complainant go to Complainant’s
7 apartment, sit on Complainant’s sofa and begin kissing. Accused escalates the level of
8 contact by caressing Complainant’s back and shoulders. Accused slides a hand inside the
9 waistband of Complainant’s pants and underclothing. After further mutual caressing,
10 Accused digitally penetrates Complainant. Complainant immediately says “Stop,” but
11 Accused persists in the act of penetration, saying, “Come on, this will feel good.”

12 On these facts, the trier of fact could find Accused guilty of Sexual Assault in the
13 Absence of Consent. The trier of fact could find that, after Complainant said “Stop,”
14 Accused knew the facts establishing the absence of consent but nonetheless persisted in
15 the act of penetration. If Accused is convicted on this basis, then because (1)
16 Complainant’s unwillingness was expressed and (2) Accused was aware that lack of
17 consent had been expressed, the offense would be graded under subsection (2) as a felony
18 of the fourth degree.

19 7. Accused and Complainant are neighbors in an apartment building. They are
20 casually acquainted and have never been physically intimate. Late one evening,
21 Complainant is locked out of Complainant’s apartment. Complainant knocks on
22 Accused’s door, explains the situation, and asks to sleep on Accused’s couch until a
23 locksmith can come the next day. Accused agrees. After a brief, polite conversation,
24 Accused says goodnight and retires to the bedroom, leaving Complainant to sleep on the
25 living-room couch. Hours later, Complainant is awakened by a sound and, though still
26 groggy, sees the Accused approaching. Accused pulls down Complainant’s clothes and

¹¹ Under 1962 Code Section 2.02(4), the required mental state applies to all material elements of the offense, and the aggravating elements specified in Section 213.6 are “material” elements. See 1962 Code Section 1.13(10). Because these facts increase the maximum permissible punishment, they must be proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

1 penetrates Complainant, who is shocked and does not resist. Accused does not make
2 express threats or wield a weapon.

3 Complainant testifies that at the time of penetration, Complainant was not willing.
4 Nothing in the circumstances indicates Complainant's willingness to participate in sexual
5 intimacy. But Accused testifies that because Complainant did not physically or verbally
6 resist before or during the sexual act, Accused believed Complainant to be willing.

7 Complainant's testimony as to Complainant's unwillingness, the lack of a prior
8 sexual relationship between Accused and Complainant, the nonsexual circumstances that
9 brought them together, and the suddenness of the act of penetration could support finding
10 beyond a reasonable doubt that Complainant was not willing, and that Accused knew this
11 or was aware of, yet consciously disregarded, a substantial, unjustifiable risk that
12 Complainant did not consent. On this basis, the trier of fact could find Accused guilty
13 under Section 213.6. Although Complainant did not express unwillingness, the offense
14 could be graded as a felony of the fourth degree if the trier of fact also found that
15 Complainant had no adequate opportunity to express unwillingness before the sudden,
16 unexpected act of penetration occurred, and that Accused knew as much or was aware of
17 and recklessly disregarded that risk.

18 8. Complainant, a 20-year-old, lives in a two-bedroom apartment with a
19 roommate when Accused, the roommate's 50-year-old parent, comes to visit. At dinner,
20 Complainant chats with Accused in a warm, friendly way. That evening, Complainant
21 goes to bed in Complainant's bedroom. Accused goes to bed in the roommate's bedroom,
22 and the roommate uses the living-room couch. Later, Accused comes into Complainant's
23 bedroom, wearing only a loosely fastened bathrobe. Complainant, surprised, says, "Is
24 something wrong?" Accused responds, "I need you," lies down beside Complainant, lifts
25 Complainant's nightshirt, and rubs Complainant's upper thighs. Complainant stiffens,
26 does not reciprocate and says nothing. Accused removes Complainant's underwear and
27 digitally penetrates Complainant.

28 At trial, Complainant testifies that Complainant was not willing for the sexual
29 penetration to occur. Complainant emphasizes the failure to reciprocate any of Accused's
30 physically intimate acts, the lack of any prior sexual relationship between them, and the
31 presence of Accused's child just outside Complainant's door. Accused testifies that

1 Accused thought Complainant had been flirting with Accused at dinner and was willing
2 to engage in the sexual act.

3 On this evidence, the trier of fact could find beyond a reasonable doubt that
4 Complainant was not willing for the act of sexual penetration to occur, that Accused was
5 aware of, yet consciously disregarded, the substantial, unjustifiable risk that Complainant
6 was unwilling, and therefore that Accused had violated Section 213.6. The offense would
7 be punished as a felony of the fifth degree because the penetration did not occur in
8 disregard of expressed unwillingness, and was not so sudden that Complainant had no
9 adequate opportunity to express unwillingness.

10 9. Accused and Complainant have had a sexually intimate relationship for several
11 years. They have a child together but now live separately. At times during their
12 relationship, Accused violently attacked Complainant. One day, Accused confronts
13 Complainant at home and accuses Complainant of having a sexual affair with another
14 person. Complainant repeatedly asks Accused to leave, sends their young child to a back
15 room, and picks up the phone to call the police. Accused grabs the phone and threatens to
16 teach Complainant a lesson. Complainant begs Accused to stop. Instead, Accused
17 responds, "I can't help it, I love you so much." When Accused removes Complainant's
18 clothing, Complainant does not fight back or verbally resist. Instead, Complainant asks
19 Accused to use a condom, continues to sob, and is physically passive while Accused
20 engages in an act of sexual penetration. Complainant testifies that at the time of
21 penetration, Complainant was not willing for that act to occur. Accused testifies that
22 because Complainant asked for condom to be used and did not physically or verbally
23 resist during the penetration, Accused believed Complainant to be willing.

24 The trier of fact could find Accused guilty under Section 213.6. The necessary
25 finding that Complainant was not willing and that Accused either knew this or was aware
26 of, yet consciously disregarded, a substantial, unjustifiable risk that Complainant did not
27 consent is supported by: Accused's history of violence toward Complainant, refusal to
28 heed Complainant's requests to leave, and seizure of the phone to keep Complainant from
29 summoning help; Accused's threat to teach Complainant a lesson; Complainant's
30 testimony that Complainant was not willing for penetration to occur and begged Accused
31 to leave; Accused's insisting on sex; and Complainant's failure to reciprocate Accused's

1 sexual acts leading up to and including penetration. Complainant's request that Accused
2 use a condom does not, by itself, undermine the evidence of lack of consent, as the
3 factfinder could conclude that the request was intended to minimize injury to
4 Complainant, rather than to signal willingness. If, in addition, the trier of fact found
5 beyond a reasonable doubt that Complainant had expressed unwillingness and that
6 Accused knew this or was aware of a substantial, unjustifiable risk that Complainant had
7 expressed that unwillingness, then the offense would be graded as a felony of the fourth
8 degree.

9 10. Complainant is camping on the beach with friends when Accused, a nearby
10 camper, approaches, offering an "energy healing" massage. After Accused explains that
11 the massage releases tension from the neck, back, and legs, Complainant says, "Let's see
12 if it works." Complainant, wearing a bathing suit, enters Accused's tent and lies face
13 down. Accused massages Complainant's body in different places and begins to massage
14 Complainant's upper thighs. Complainant becomes aware that Accused's hand is
15 touching Complainant's genitals. Complainant then feels Accused anally penetrate
16 Complainant. Shocked, Complainant sits up and leaves. Complainant testifies that at the
17 time of penetration, Complainant was not willing for that act to occur. Accused testifies
18 that because Complainant did not physically or verbally resist before the penetration,
19 Accused believed Complainant to be willing.

20 Complainant's testimony is legally sufficient to support finding beyond a
21 reasonable doubt that Complainant did not consent. The circumstances are also legally
22 sufficient to support a finding that Accused knew this or was aware of, yet consciously
23 disregarded, a substantial, unjustifiable risk that Complainant did not consent. Accused
24 did not offer a sexual massage, and nothing in Complainant's words or actions indicated
25 that sexual intimacy was expected or welcome. Although Complainant was not fully
26 clothed, partial nakedness alone did not signal willingness to engage in sexual contact.
27 The trier of fact therefore could find Accused guilty under Section 213.6. The offense
28 would be graded as a felony of the fifth degree, unless the trier of fact found additional
29 aggravating circumstances. Although Complainant did not express unwillingness before
30 the act, the offense could be graded as a felony of the fourth degree if the trier of fact
31 found beyond a reasonable doubt that the act of penetration was so sudden or unexpected

1 that Complainant had no adequate opportunity to express the lack of consent before it
2 occurred, and that Accused knew as much or was aware of and yet disregarded that
3 risk.¹²

4 An actor whose sexual acts are met with a clear verbal statement of refusal—such as
5 “No,” “Stop,” or “Don’t”—must take that rejection at face value, even if the actor hopes that it
6 does not reflect the other person’s actual desires. The actor must also heed the other person’s
7 revocation of a prior expression of consent by stopping any further sexual acts, notwithstanding
8 disappointment, frustration, anger, or confusion.¹³

9 **Illustration:**

10 11. Accused and Complainant have been sexually intimate in the past. After
11 having dinner at Accused’s apartment, they engage in gradually escalating and mutually
12 reciprocated sexual acts. As the level of physical intimacy increases, Accused tries to
13 remove some of Complainant’s clothing. Complainant pushes Accused’s hand away and
14 says, “I’m not ready for this.” At this point, Complainant has expressly refused consent to
15 greater sexual intimacy. If Accused nonetheless sexually penetrates Complainant,
16 Accused may be found guilty of Sexual Assault in the Absence of Consent. The offense
17 could be graded as a felony of the fourth degree because the factfinder could conclude
18 beyond a reasonable doubt that Accused knew that Complainant had expressed
19 unwillingness to engage in the sexual act.

¹² Because Accused did not claim professional qualifications or expect payment in return, Accused’s “energy healing” massage was not a “professional or commercial service[]”; therefore, absent additional facts, Accused could not be convicted under Section 213.3(2)(b)(iv) of Sexual Assault of a Vulnerable Person. That offense is also a fourth-degree felony, but because it applies in a professional or commercial context, it does not require (as does the fourth-degree felony offense under Section 231.6(2)(a)) proof that the act of penetration or oral sex was “so sudden or unexpected that the other person [had] no adequate opportunity to express unwillingness before the act occur[red].” Instead the fourth-degree felony offense under Section 213.3(2)(b)(iv) requires proof that the Complainant was “wholly or partly undressed, or in the process of undressing, for the purpose of receiving nonsexual professional or commercial services from the actor and [had] not given the actor explicit prior permission to engage in that act.”

¹³ See Section 213.0(2)(e)(v).

REPORTERS' NOTES

1 **1. Current Law.** A reader assessing Section 213.6 may wish to understand the extent to
2 which it reflects or departs from current law in punishing sexual penetration and oral sex solely
3 on the basis of the absence of consent. That seemingly straightforward question is challenging
4 because current law is complex, and often is inconsistent, even within a single jurisdiction. Any
5 attempt to determine how many jurisdictions follow a particular approach requires several
6 caveats.

7 This Note classifies jurisdictions not only on the basis of the written statutes, but also on
8 the basis of case law interpreting and enforcing them in practice. The Note indicates the source
9 of law on which the classification is based and separates jurisdictions punishing penetration
10 without consent as a felony from those punishing it as a misdemeanor. The Note classifies a
11 jurisdiction as treating penetration without consent as sufficient for punishment only when no
12 other sources of law in the jurisdiction require proof of additional circumstances (apart from
13 mens rea) as a prerequisite to conviction. Jurisdictions with no readily accessible definition of
14 consent are classified separately from jurisdictions requiring either contextual consent (as in
15 Section 213.0(2)(e)) or something more definite.

16 Using these criteria, a recent survey of the laws of the 53 most relevant U.S. jurisdictions
17 (including the District of Columbia Code, the United States Code, and the Uniform Code of
18 Military Justice), shows that 36 (68%) punish sexual penetration solely on the basis of the
19 absence of consent. Of these, 12 do not define consent¹⁴ and accordingly may punish more or
20 less conduct than would Section 213.6. The remaining 24 jurisdictions (67% of the 36 that
21 punish penetration without consent) define consent in a way that imposes criminal sanctions for
22 penetration in the absence of contextual consent or in the absence of a more specific form of
23 agreement or permission.¹⁵

¹⁴ Jurisdictions that have a nonconsent-based statute, but have no readily apparent definition of consent, include: Alabama, Arizona, Georgia, Idaho, Louisiana, Maryland, Massachusetts, Mississippi, North Dakota, Ohio, South Dakota, and Tennessee. Three additional jurisdictions punish penetration without consent as a felony, but they are not counted among those that punish in the absence of at least contextual consent, because their law appears to assume consent in the absence of at least verbal resistance. Those jurisdictions are Iowa, Nebraska, and Washington. See American Law Institute, “Current State of the Law -- Consent-Only Offenses” (July 2018), p. 1.

¹⁵ Fourteen jurisdictions punish the offense as a felony—11 on the basis of statutory language and three as a result of judicial decisions that the legislature has not overturned. FLA. STAT. ANN. § 794.011(5); HAW. REV. STAT. § 707-731; ME. REV. STAT. ANN. tit. 17-A, § 255-A; MO. ANN. STAT. § 566.031; N.H. REV. STAT. ANN. § 632-A:2(I)(i), (m); NEV. REV. STAT. ANN. § 200.366(2)(b); OKLA. STAT. ANN. tit. 21, §§ 113, 1123; OR. REV. STAT. ANN. § 163.425; 18 PA. CONS. STAT. ANN. § 3124.1; WIS. STAT. ANN. § 940.22; 10 U.S.C. § 920 [U.C.M.J. art. 120] (b). See also State in the Interest of M.T.S., 129 N.J. 422, 609 A.2d 1266 (1992) (interpreting N.J. STAT. ANN. § 2C:14-2); State v. Barela,

Some may reach different conclusions about the most appropriate way to classify and tally jurisdictions. An independent survey using more conservative assumptions concluded that as of 2016, 29 American jurisdictions (rather than the 36 identified in the more recent analysis summarized here) punished penetration without consent.¹⁶ That difference is largely immaterial for present purposes. By either measure, well over half of American jurisdictions currently treat penetration without consent as a crime, even in the absence of other aggravating circumstances. And in accord with this view, in 2012 the FBI amended the rape definition used for its national crime statistics to include any act of “penetration, no matter how slight, of the vagina or anus . . . , or oral penetration by a sex organ of another person, . . . without the consent of the victim.”¹⁷

This recognition that sexual penetration and oral sex without consent are serious criminal offenses, even in the absence of force or other coercion, is widespread and growing. Popular press reports on the FBI’s new definition of rape did not describe it as an outlier or in the vanguard in defining rape, but rather as in harmony with existing law.¹⁸ Several states have

349 P.3d 676 (Utah 2015) (interpreting UTAH CODE ANN. § 76-5-406); *State v. Hazelton*, 915 A.2d 224, 233 (Vt. 2006) (interpreting VT. STAT. ANN. tit. 13, § 3252).

Among these 14, nine—Florida, Hawaii, New Jersey, Oklahoma, Oregon, Pennsylvania, Vermont, Wisconsin, and the UCMJ—expressly require affirmative permission, positive agreement, or active cooperation. Five—Maine, Missouri, New Hampshire, Nevada, and Utah—state that consent may be inferred from, or assessed by, the totality of the circumstances.

Ten additional jurisdictions punish the offense as a misdemeanor—six by statute, see COLO. REV. STAT. ANN. § 18-3-404; D.C. CODE § 22-3006; KY. REV. STAT. ANN. § 510.130; MINN. STAT. ANN. § 609.3451; N.Y. PENAL LAW § 130.55; 18 U.S.C. § 2244, and four as a result of judicial interpretation, see *People v. Babaali*, 90 Cal. Rptr. 3d 278, 282, 287 (Cal. Ct. App. 2009) (applying CAL. PENAL CODE § 243.4 and affirming pattern instruction that reads “to consent, a person must act freely and voluntarily and know the nature of the act”); *Efstathiadis v. Holder*, 119 A.2d 522, 527-528 (Conn. 2015); *State v. Blount*, 770 P.2d 852 (Kan. Ct. App. 1989) (applying a precursor to current KAN. CRIM. CODE ANN. § 21-5505); *State v. Stevens*, 53 P.3d 356, 365 (Mont. 2002) (applying MONT. CODE ANN. § 45-5-502).

Of these 10, six jurisdictions—Colorado, D.C., Kansas, Minnesota, Montana, and the United States—define consent in terms of positive agreement. Four—California, Connecticut, Kentucky, and New York—state that consent may be inferred or assessed by the totality of the circumstances.

¹⁶ Yale Law School MPC Study Group, “State Definitions of Penetration,” Oct. 3, 2016.

¹⁷ U.S. Dep’t of Justice, Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division Uniform Crime Reporting (UCR) Program, Reporting Rape in 2013: Summary Reporting System (SRS) User Manual and Technical Specification (April 9, 2014), at 3, available at <https://ucr.fbi.gov/recent-program-updates/reporting-rape-in-2013-revised>. The prior definition followed the common-law standard: “carnal knowledge of a female forcibly and against her will.”

¹⁸ See, e.g., Charlie Savage, *U.S. to Expand Its Definition of Rape in Statistics*, N.Y. TIMES (Jan. 6, 2012) (“Many states have long since adopted a more expansive definition of rapes in their criminal laws, and officials said that local police departments had been breaking down their numbers and sending only a fraction of the reported rapes to the F.B.I. to comply with outdated federal standards.”); Kevin

recently updated their codes to make the absence of consent sufficient for conviction of a felony sexual offense.¹⁹

This is the prevalent trend, not only nationally but elsewhere around the world. In 1999 the Canadian Supreme Court eliminated force as a necessary element of the basic sexual-assault offenses. The court held instead that the essential element is nonconsent²⁰ and that a defense of consent requires that “the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused.”²¹ In cases involving sexual penetration, the offense is punishable, absent aggravating circumstances, by a maximum of 10 years’ imprisonment.²² Although Canadian scholars find that prosecutors and the lower courts have not yet fully assimilated the new affirmative-consent standard,²³ *Ewanchuk* apparently has made a significant difference,²⁴ for example permitting conviction where a complainant was

Johnson, *FBI changes definition of rape to include men as victims*, USA TODAY (Jan. 6, 2012) (reporting that “a survey of major city police chiefs found that 80% believed the old definition was ‘not adequate’”).

¹⁹ E.g., 2015 LA. SESS. LAW SERV. ACT 256 (S.B. 117) (West) (amending state’s third-degree rape law, which carries up to 25 years of imprisonment, to include a consent-based subsection, namely “(4) When the offender acts without the consent of the victim,” now codified as LA. STAT. ANN. § 14:43(A)(4)).

²⁰ *R. v. Ewanchuk* [1999] 1 SCR 330, 1999 CanLII 711 (SCC).

²¹ See *id.*, at ¶¶ *Id.* at 45, 47-49, 51 (quoting *R. v. Park*, 1995 CarswellAlta 221, and holding that “the *mens rea* of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying “no”, but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying “yes”. ... What matters is whether the accused believed that the complainant effectively said “yes” through her words and/or actions. ... [A] belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence.”)

²² R.S., 1985, c. C-46, s. 271(a).

²³ See Lucinda Vandervort, *Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory*, 23 COLUM. J. GENDER & LAW 395, 435-436, 439-441 (2012); Rakhi Ruparelia, *Does No Mean “No” Mean Reasonable Doubt? Assessing the Impact of Ewanchuk on Determinations of Consent*, 25 CAN. WOMAN STUD. 167 (2006); Melanie Randall, *Sexual Assault Law, Credibility, and “Ideal Victims”: Consent, Resistance, and Victim Blaming*, 22 CAN. J. WOMEN & L. 397, 423 (2010) (finding that “despite Canadian legal reform in sexual assault law with regard to consent, the onus of proof and credibility of consent in practice remains with the victim.”).

²⁴ Janine Benedet, *Sexual Assault Cases at the Alberta Court of Appeal: The Roots of Ewanchuk and the Unfinished Revolution*, 52 Alta. L. Rev. 127, 142 (2014) (discussing *R. v. Flaviano*, 2013 ABCA 219 (Alta. C.A.) and *R. v. Adepoju*, 2014 ABCA 100 (Alta. C.A.)); Lise Gotell, *The Discursive Disappearance of Sexualized Violence*, in DOROTHY E. CHUNN, SUSAN B. BOYD & HESTER LESSARD, eds., REACTION AND RESISTANCE: FEMINISM, LAW AND SOCIAL CHANGE 127, 146 (2007).

lapsing in and out of consciousness but was not “literally cognitively and physically incapable of consenting.”²⁵

In England, rape is now defined as sexual penetration without consent,²⁶ and the statute defines consent by stating that “a person consents if he *agrees by choice*, and has the freedom and capacity to make that choice.”²⁷ The offense is punishable by life imprisonment. Scotland has an essentially identical definition of the offense and defines consent as “free agreement.”²⁸ In Scotland too, the offense is punishable by life imprisonment.²⁹ The law is similar in Northern Ireland,³⁰ in the states of Australia,³¹ and in New Zealand.³²

European law likewise is moving to eliminate force as an essential requirement and to base the offense on the absence of consent. In 2003, the European Court of Human Rights observed that:³³

“[even where] the definition of rape [in European countries] contains references to the use of violence or threats of violence . . . , in case-law and legal theory lack of consent, not force, is seen as the constituent element of the offence. [T]he prosecution of non-consensual sexual acts [even in the absence of force] is sought in practice by means of interpretation of the relevant statutory terms . . . and through a context-sensitive

²⁵ Gotell, *supra* note 24 at 128, 146 (2007) (discussing *R. v. J.A.*, [2003] O.J. No. 2803 (C.J.) (QL), where complainant was lapsing in and out of consciousness but not so intoxicated to be “literally cognitively and physically incapable of consenting to the activity of sexual intercourse”; accused did not have a defense of mistake because (*id.*, at 128): “accused at the very least was reckless or wilfully blind about whether or not the complainant was really consenting to the intercourse. . . . [He] did not take reasonable steps before engaging in either of the two individual acts of sexual intercourse.”)).

²⁶ “A person (A) commits an offence [of Rape] if — (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (b) B does not consent to the penetration, and (c) A does not reasonably believe that B consents.” Sexual Offences Act (2003), pt. 1, § 1.

²⁷ Sexual Offences Act (2003), pt. 1, § 74 (emphasis added).

²⁸ *Id.*, Part 2, § 12.

²⁹ See *Her Majesty’s Advocate v. AB*, [2015] HJAC 106 at [7].

³⁰ Criminal Law (Rape) Act, 1981 (Act No. 10/1981), <http://www.irishstatutebook.ie/eli/1981/act/10/enacted/en/print>.

³¹ E.g., Crimes Act 1900 (New South Wales) (1981) §61 - HA (2) (“A person ‘consents’ to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse.”); Crimes Act (Victoria), as amended 2007, § 34(C) (2016) (defining “consent” as “free agreement”).

³² Crimes Act 1961, s 128.

³³ *M.C. v. Bulgaria*, [2003] ECHR 39272/98, ¶¶ 163-165.

1 assessment of the evidence. [There is] a universal trend towards regarding lack of consent
2 as the essential element of rape and sexual abuse”

3 In 2011, the Council of Europe adopted the Istanbul Convention, which requires member
4 states to criminalize all “non-consensual acts of sexual nature” and stipulates that “[c]onsent
5 must be given voluntarily as the result of the person’s free will assessed in the context of the
6 surrounding circumstances.”³⁴ The Istanbul Convention, signed by 45 of the Council’s 47
7 member nations, entered into force in 2014.³⁵ In its wake, many European states have revised
8 their domestic legislation, making sexual penetration and oral sex without consent punishable as
9 the equivalent of a serious felony, with consent in most cases requiring either affirmative
10 permission or other externally observable communication signaling voluntary participation.

11 Sweden, for example, amended its sexual-offense provisions in 2018 so that “the law is
12 now based upon the absence of consent instead of the occurrence of violence, threats or a
13 particularly vulnerable situation,”³⁶ and consent is defined primarily in terms of an affirmative

³⁴ See Council of Europe Treaty Series - No. 210, *Convention on Preventing and Combating Violence Against Women and Domestic Violence*, May 11, 2011, available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e>. Article 36 provides:

Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised: (a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object; (b) engaging in other non-consensual acts of a sexual nature with a person; Consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.

The Convention leaves each nation discretion to define “intent.” See *Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence*, May 11, 2011, ¶ 189, available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210> (noting that “[t]he interpretation of the word ‘intentionally’ is left to domestic law.”).

³⁵ Only Russia and Azerbaijan failed to sign. See Council of Europe, *Historical Background*, Council of Europe Portal (2018), <https://www.coe.int/en/web/istanbul-convention/historical-background>; Council of Europe, *Chart of signatures and ratifications of Treaty 210*, Council of Europe Portal: Treaty Office (July 8, 2018), <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures?desktop=true>.

³⁶ SWEDISH NATIONAL COUNCIL FOR CRIME PREVENTION (BRÅ), *THE NEW CONSENT LAW IN PRACTICE 1* (2020), available at www.bra.se/publikationer. In translation, the statutory text reads:

“A person who performs sexual intercourse ... with a person who is not participating voluntarily is guilty of *rape* and is sentenced to imprisonment for at least two and at most six years. If [the offense] is considered gross, the person is ... sentenced to imprisonment for at least five and at most ten years.”

BROTTSBALKEN [BRB][PENAL CODE] 6:1, at 44 (n.d.); official English translation available at

expression of willingness.³⁷ As a result, “a range of actions that were not previously punishable as rape have now become so. This has led to a number of prosecutions and convictions for new types of actions.”³⁸ The basic offense, absent aggravating circumstances, is punishable by up to six years’ imprisonment.³⁹

Similar reforms are under consideration in other European nations⁴⁰ and are now on the books in Denmark (with a maximum of eight years’ imprisonment), Iceland (16-year maximum),

<https://www.government.se/492a92/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf>.

The operative term—“voluntariness” rather than “consent”—was chosen to avoid confusion with the concept of “consent” as developed elsewhere in Swedish criminal law. See Moa Bladini & Wanna Svederg Andersson, *Swedish Rape Legislation from Use of Force to Voluntariness - Critical Reflections from an Everyday Life Perspective*, 8 BERGEN J. CRIM. L. & CRIM. JUSTICE 95, 115-116 (2020) (noting that “the main reason for this change was the risk of confusion in relation to the general [defense of] consent in [Swedish criminal law].”) Nonetheless, English-language commentary, including in Swedish sources, often describes the requirement as one of “consent.” See, e.g., text, *supra*, quoting SWEDISH NATIONAL COUNCIL, *supra*, at 1; Bladini & Anderson, *supra*, at 96 (noting that the new provision requires “*voluntariness* (corresponding to lack of consent in public debate) ...”); Christina Anderson, *Swedish Law Now Recognizes Sex Without Consent as Rape*, N.Y. TIMES, May 23, 2018; Meka Beresford, *Sweden Outlaws Sex Without Consent As Europe Pushed to Tighten Rape Laws*, REUTERS (May 23, 2018), <https://www.reuters.com/article/us-sweden-sexcrimes-rape/sweden-outlaws-sex-without-consent-as-europe-pushed-to-tighten-rape-laws-idUSKCN1IO2WD>.

Swedish scholars conclude that the difference in terminology has little or no substantive implications. See Claes Lernestedt, *Swedish (In)Voluntariness*, in TATJANA HÖRNLE, ed., *SEXUAL ASSAULT AND RAPE – WHAT CAN WE LEARN FROM AND FOR LAW REFORM?* (Oxford U. Press, forthcoming 2022).

³⁷ The statute stipulates that “When assessing whether participation is voluntary or not, particular consideration is given to whether voluntariness was expressed by word or deed or in some other way.” BRB 6:1, *supra* note 36, at 44. See Bladini & Anderson, *supra* note 36 at 97, 112-113 (noting that “The new legislation brings an important change by clarifying that a (female) body is not available until she says ‘stop’, but unavailable until she says ‘yes.’ ... This means that a crucial part of the legal assessment must include the question of what the victim has or has not expressed. ... [B]eing passive can also constitute voluntary participation.... [But the] point of departure must be that voluntariness to participate in a sexual activity will be expressed in some way and that the absence of such expressions normally should be interpreted as non-voluntariness. Tacit consent might, in exceptional cases, be enough to not constitute rape”; *id.* at 115 (noting that in the preparatory documents “the Government emphasised [sic] that it is the responsibility of the perpetrator to ensure that the sexual act is mutual. ... [T]he inner will of the victim is irrelevant[;] what matters is what the victim has communicated.”).

³⁸ SWEDISH NATIONAL COUNCIL, *supra* note 36, at 7.

³⁹ See note 36, *supra*.

⁴⁰ See, e.g., Daniela Alaattinoğlu, et al., *Rape in Finnish Criminal Law and Process – A Discussion on, and Beyond, Consent*, 8 BERGEN J. CRIM. L. & CRIM. JUSTICE 33, 44 (2020) (stating that in 2021 the government is likely to present to the Finnish Parliament a bill to define rape as “sexual

- 1 and Spain (10-year maximum).⁴¹ The 2016 German enactment (carrying a five-year maximum)
- 2 likewise replaces the force/coercion framework with a requirement of consent, but its concept of
- 3 consent is only partially tied to a requirement of affirmative permission.⁴²

intercourse with a person who does not participate voluntarily,” with a penalty of imprisonment for at least one year and at most six years. The draft statute stipulates that “[a] sentence for rape also follows, if a person ...[takes] advantage of the fact that another person is unable to form or express his or her will due to unconsciousness, decreased consciousness, intense intoxication, illness, disability, state of fear or because of the suddenness of the situation....”).

⁴¹ The new Danish provision, effective Jan. 1, 2021, eliminates the force-based framework of prior law and simply states: “Anyone who has sexual intercourse with a person who did not consent to the act shall be punished for rape by up to 8 years of imprisonment.” See Jørn Vestergaard, *The Rape Law Revision in Denmark: Consent Or Voluntariness As The Key Criterion?*, 8 BERGEN J. CRIM. L. & CRIM. JUSTICE 5, 29 (2020). The statute does not, however, provide a definition of “consent.” *Id.*

For Iceland, Penal Code §194(1), enacted in 2018, provides:

“Any person who has sexual intercourse or other sexual relations with a person without his or her consent shall be guilty of rape and shall be imprisoned for a minimum of 1 year and a maximum of 16 years. Consent is considered to have been given if it is freely stated. Consent is not considered to have been given if violence, threats, or other forms of unlawful coercion are employed.”

See Ragnheiður Bragadóttir, *Legislation on the Offence of Rape in Icelandic Criminal Law*, 8 BERGEN J. CRIM. L. & CRIM. JUSTICE 54, 72 (2020). In this formulation, consent must be expressly communicated. See *id.*, at 74 (noting that “[c]onsent ... must be given with words or other unmistakable expression. Complete omission will not be interpreted as willing participation.”); Paul Fontaine, *Iceland Unanimously Passes Landmark Law On Sexual Consent*, THE REYKJVIK GRAPEVINE, Mar, 23, 2018 (reporting that “[t]oday, Iceland’s Parliament [unanimously] passed a law putting the onus of consent on being told ‘yes’; rather than not being told ‘no’.”), <https://grapevine.is/news/2018/03/23/iceland-unanimously-passes-landmark-law-on-sexual-consent/>.

In Spain, a June 2019 Supreme Court decision, relying on the Istanbul Convention, endorsed the principle that “only yes means yes.” Subsequently, the government submitted to the Spanish legislature a bill to codify that decision. The bill defines as rape any penetration without consent and provides that the offense is punishable by four to 10 years in prison. See BBC News, *Spain plans “only yes means yes” rape law*, Mar. 3, 2020, <https://www.bbc.com/news/world-europe-51718397>.

⁴² See STRAFGESETZBUCH [STGB] [Penal Code] § 177 (2016) (deleting force requirement and providing that “[w]ho[ever], against the recognizable will of another person, performs sexual acts with this person ... will be punished with imprisonment between six months and five years.” See Tatjana Hörnle, *The New German Law on Sexual Assault and Sexual Harassment*, 18 GERMAN L.J. 1309 (2017) (providing this translation from the German).

By requiring proof of an act “against the recognizable will,” § 177 appears to reject “affirmative consent” in favor of a “no means no” standard. But the statutory sections that follow (StGB §§ 177 II Nr. 1-5) identify a wide range of situations where affirmative consent is required because a person’s ability to express refusal is considered impossible, unnecessary, or partially impaired (including sleeping and unconscious victims, surprise attacks, “climate of violence” cases, and temporary losses of cognitive capacities due to intoxicating substances). See Tatjana Hörnle, *The New German Law on Sexual Assault*, in HÖRNLE, *supra* note 36, (explaining that “for these cases an ‘only yes means yes’ model applies”).

To be sure, surveys of trends or the “majority view” do not dictate the approach that is best for a Model Code not intended simply to reflect existing law but instead to express considered judgments of how it could be improved. As always, precedents must be weighed, not just counted. The picture summarized above nonetheless captures the current state of the law, with its ambiguity, lack of harmonization, and the increasing coalescence around treating sexual penetration and oral sex in the absence of consent as serious criminal offenses.

2. Policy Considerations. Basing liability on lack of consent, as provided in Section 213.6, is consistent with the social recognition that the criminal law must protect individuals against violations of their sexual autonomy, not merely against sex obtained by physical force or coercion. The decision to share sexual intimacy with another, whether made spontaneously or with great deliberation, is a core feature of our humanity. The decision must always be a matter of individual choice.⁴³ A person who seeks sexual intimacy with another must heed the other person’s right to decide whether to engage in, refuse, or defer sexual acts, including penetration or oral sex.

Section 213.0(2)(e)(iii) states that “[n]either verbal nor physical resistance is required to establish that consent is lacking” American law and culture widely reject a requirement of physical resistance.⁴⁴ But this proposition has not yet won universal approval. The contrary

⁴³ See generally STEPHEN J. SCHULHOFER, UNWANTED SEX 93-105 (1998) (discussing authorities that document the emergence of autonomy as the principal interest to be protected by the law of sexual assault). See also M.C. v. Bulgaria, [2003] ECHR 39272/98, ¶ 106, ¶¶ 163-165 (canvassing legal systems worldwide and concluding that “[t]he basic principle which is truly common to [the reviewed] legal systems is that serious violations of sexual *autonomy* are to be penalized.” (internal quotation marks omitted)).

⁴⁴ Only eight states retain a formal resistance requirement. One of these, Louisiana, retains the historical requirement of resistance “to the utmost,” but only for a class of aggravated rape that had been subject to the death penalty. LA. REV. STAT. ANN. § 14:42(A)(1); see also *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (invalidating death penalty for rape of a child under this statute). Two states require “earnest resistance.” ALA. CODE § 13A-6-60(8) (LexisNexis 2019); W. VA. CODE ANN. § 61-8B-1(1)(A) (LexisNexis 2019). Three states require “reasonable” resistance. DEL. CODE ANN. tit. 11, § 761(J)(1) (2007 & Supp. 2010); MO. ANN. STAT. § 556.061(12)(A) (West 1999 & Supp. 2011); NEB. REV. STAT. § 28-318(8)(B)-(C), (9)(A) (2008 & Supp. 2010). In at least 17 jurisdictions, statutes explicitly provide that resistance is not required. ALASKA STAT. § 11.41.470(8) (2010); D.C. CODE § 22-3001 (2019); FLA. STAT. ANN. § 794.011 (West 2019); 720 ILL. COMP. STAT. ANN. 5/11-1.70 (West 2019); IOWA CODE ANN. § 709.5 (2019); KY. REV. STAT. ANN. § 510.010(2); ME. REV. STAT. ANN. tit. 17-A § 251 (2019); MICH. COMP. LAWS ANN. § 750.520I (West 2019); MINN. STAT. ANN. § 609.341 (West 2020); MONT. CODE ANN. § 45-5-511(5) (2020); N.J. STAT. ANN. § 2C:14-5(A) (West 2019); N.M. STAT. ANN. § 30-9-10 (West 2020); N.D. CENT. CODE § 12.1-20-04 (2019); OHIO REV. CODE ANN. § 2907.02 (West 2020); OR. REV. STAT. ANN. § 163.315(2) (West 2019); PA. CONS. STAT. ANN. 18 § 3107 (West 2020); VA. CODE ANN. § 18.2-67.6 (West 2020). In an additional jurisdiction, Kansas, the state supreme court has eliminated the resistance requirement by interpretation of an arguably ambiguous statute. See *State v. Borthwick*, 880 P.2d 1261 (Kan. 1994), interpreting Kan. Stat. Ann. § 21-5503 (West 2011), which requires that the victim be “overcome by force or fear,” but does not explicitly require proof of resistance.

view—that verbal protests are not always sufficient to establish the lack of consent, absent other indications of resistance—continues to find support in some contemporary statutes⁴⁵ and case law.⁴⁶ The scholarly literature also includes occasional arguments that, in contemporary social interactions, “no” does not invariably mean no.⁴⁷ On this view, the law risks injustice if it punishes a person who acts on the basis of the prior, more traditional convention that simply saying “no” does not in itself suffice to require that an actor stop a sexual advance.⁴⁸ But conversely, the law also risks injustice if it sets a standard that too readily permits sexual overreaching.

Under Section 213.6 and Section 213.0(2)(e)(v), a verbal refusal, without more, establishes a lack of consent for the purposes of the criminal law. This legal principle does not deny the obvious reality that ambiguity is inherent in many sexual interactions. Specific words—like “No,” “Stop,” or “Don’t”—can reflect a variety of subjective attitudes and desires.⁴⁹ But a

⁴⁵ E.g., N.Y. PENAL LAW § 130.05(2)(d) (2020) (defining lack of consent to require that “the victim clearly expressed that he or she did not consent . . . and a reasonable person in the actor’s situation would have understood such person’s words and acts as an expression of lack of consent to such act under all the circumstances.”) (emphasis added). Thus, the statutory language stipulates that (in addition to applicable mens rea requirements), the actus reus element of absence of consent is not established by the victim’s “clearly expressed” refusal alone; something more—presumably some sort of physical resistance—is needed to meet the requirement that a reasonable person would understand the person’s “clearly expressed” words and actions as an expression of lack of consent under all the circumstances. Although a “no” is not invariably sufficient, the New York courts have held that verbal refusal can suffice to establish the lack of consent under some circumstances. See, e.g., *People v. Powell*, 128 A.D.3d 1174, 9 N.Y.S.3d 452 (N.Y. App. Div. 3d Dept., May 4, 2015).

See also NEB. REV. STAT. 28-318(8) (2020) (stating that a sexual act is without consent when “the victim expressed a lack of consent through words,” but also stating that “[t]he victim need only resist, either verbally or physically, so as to make the victim’s refusal to consent genuine and real and so as to reasonably make known to the actor the victim’s refusal to consent”). In *State v. Gangahar*, 609 N.W.2d 690, 695 (Neb. Ct. App. 2000), the court held, reconciling this potentially contradictory language, that “the statute allows [defendant] to argue that . . . ‘no did not really mean no.’”).

⁴⁶ E.g., *Gangahar*, supra note 45 (holding that “while [the victim] said ‘no,’ . . . Gangahar [may] argue that, given all of her actions or inaction, ‘no did not really mean no.’”).

⁴⁷ E.g., George C. Thomas III & David Edelman, *Consent to Have Sex: Empirical Evidence About “No,”* 61 U. PITT. L. REV. 579 (2000).

⁴⁸ E.g., Douglas N. Husak & George C. Thomas III, *Date Rape, Social Conventions and Reasonable Mistakes*, 11 LAW & PHIL. 95, 125 (1992).

⁴⁹ There is conflicting empirical data about how frequently women say “no” when they mean “yes,” as well as about whether most men routinely hear “yes” when told “no.” See, e.g., Charlene L. Muelenhard & Carie S. Rodgers, *Token Resistance to Sex: New Perspectives on an Old Stereotype*, 22 PSYCHOLOGY OF WOMEN QUARTERLY 443 (1998) (reviewing studies about token resistance, noting complexity of interpreting findings, and reporting on study with richer qualitative findings).

rule permitting the sexually assertive party to assume that an express verbal refusal might *not* mean unwillingness requires the other person to resist more emphatically, and grants the more assertive party a license not to take literally even the clearest words of refusal. That approach can teach those who initiate sexual encounters to disregard the other person’s expressed wishes, with the concomitant danger of overreaching and unwanted sexual intrusion.⁵⁰ The law must encourage anyone seeking to have sex with another person to take that person’s refusals seriously and to clarify, rather than ignore, any potential ambiguity.

Section 213.0(2)(e) also makes clear that verbal resistance, though sufficient, is not necessary to prove absence of consent. Neither verbal nor physical resistance is required to establish that the complainant was not willing. Instead, the factfinder may conclude from the surrounding circumstances that consent was absent, notwithstanding the lack of overt resistance, verbal or otherwise. For example, a person may disrobe for a shower after a workout at the gym, with no expectation of sexually intimate touching, much less penetration or oral sex. If sexual acts and intimate penetration occur unexpectedly, passive behavior does not signal consent, as Illustration 7 shows.⁵¹ Sexual acts that take a person by surprise may elicit stunned silence rather than verbal or physical resistance, and penetration may occur before the person has an adequate opportunity to protest.⁵² The standard of contextual consent allows the factfinder to determine from the entire context whether the evidence proves beyond a reasonable doubt that the complainant did not consent and that the actor knew it or was aware of, yet recklessly disregarded, the risk that this was the case.

The contrary rule—requiring explicit refusal, protest, or resistance, even when the sexual act is unexpected—has led to absurd results, permitting an aggressor to escape liability for sexually penetrating another person suddenly and unexpectedly, in a situation previously devoid of sexual context, so long as the actor stops the penetration when the other person expressly

⁵⁰ See *Commonwealth v. Lefkowitz*, 481 N.E.2d 277, 232 (Mass. App. Ct. 1985) (“[W]hen a woman says ‘no’ to someone[,] any implication other than a manifestation of non-consent that might arise in that person’s [the defendant’s] psyche is legally irrelevant, and thus no defense. . . . I find no social utility in establishing a rule defining non-consensual intercourse on the basis of the subjective (and quite likely wishful) view of the more aggressive player in the sexual encounter.”).

⁵¹ See *State v. Cardell*, 970 P.2d 10 (Idaho 1998); *Wright v. State*, 294 P.3d 1201 (Kan. Ct. App. 2013); *State v. Taylor*, 231 P.3d 79 (Mont. 2010); *State v. Harrison*, 286 P.3d 1272 (Utah Ct. App. 2012).

⁵² See, e.g., *People v. Iniguez*, 872 P.2d 1183 (Cal. 1994) (en banc); *State v. Elias*, 2013 WL 3480737 (Idaho Ct. App. July 12, 2013), *aff’d*, 337 P.3d 670 (Idaho 2014) (sexual act occurred before victim had adequate opportunity to protest, since she was sleeping; court held evidence insufficient to show that defendant accomplished penetration by use of extrinsic force required by statute); *People v. Warren*, 446 N.E.2d 591, 594 (Ill. App. Ct. 1983); *State v. Bauer*, 324 N.W.2d 320 (Iowa 1982).

objects.⁵³ Courts frustrated by legal standards that assume consent in the absence of resistance sometimes seek to affirm convictions in these cases by widening the scope of other statutory provisions, for example, by broadly interpreting “force” or “physical helplessness.”⁵⁴ But when courts solve the problem in this fashion, their approach can lead to conviction at the highest felony level, placing the defendants in the same grading category as those who use physical violence or exploit unconscious victims. Proportionate grading suffers.

Another dimension of the problem arises when one or both parties are intoxicated. In those situations, assertions of lack of consent can be especially difficult to evaluate. Drugs or alcohol can become relevant in several ways. Some of those are addressed in Sections of Article 213 other than Section 213.6: Section 213.3(1) imposes felony liability on an actor who engages in sexual penetration or oral sex with another person who is unconscious (for example, as a result of intoxication) and on an actor who surreptitiously drugs another for the purpose of engaging in sexual penetration or oral sex. Section 213.3(2) imposes felony liability on an actor who engages in sexual penetration or oral sex with someone who is passing in and out of consciousness (for example, as a result of intoxication).

When these more serious provisions do not apply, Section 213.6 may yet impose liability for the lesser felony of Sexual Assault in the Absence of Consent. When, for example, a heavily intoxicated person is passive and unresponsive, as in Illustration 4, that behavior is readily attributable to intoxication alone, and cannot safely be assumed to reflect consent for a sexual act to occur. To permit an inference of consent from passivity in a situation of intense intoxication would expose vulnerable individuals to unnecessary dangers of unwanted sexual intrusion. Conversely, if the factfinder concludes that a heavily intoxicated complainant communicated apparent willingness at the time of the sexual intrusion, the actor would not (absent other facts) have the mental state necessary for liability under Section 213.6, even if the complainant actually had been unwilling at the time or later had a change in attitude about the encounter, as in Illustration 3.

3. *Mens Rea.* Under current law, mens rea requirements are clear (but divergent) in several states, while more commonly, governing law on the mens rea issue is ambiguous,

⁵³ See, e.g., *State v. Stevens*, 53 P.3d 356 (Mont. 2002) (overturning convictions of masseur who penetrated clients but stopped immediately on being told to do so).

⁵⁴ E.g., *Ritter v. State*, 97 P.3d 73, 76-78 (Alaska Ct. App. 2004) (affirming conviction for forcible rape in the case of massage therapist who digitally penetrated four adult clients in the course of treatment, on basis that because complainants “were alone with [defendant], they were undressed, and it was not feasible to run outside into the cold,” evidence sufficed to prove that the “women were coerced by an *implicit* threat of imminent physical injury or kidnapping.”). Compare *State v. Stevens*, 53 P.3d 356 (Mont. 2002) (affirming rape convictions involving massage-client victims who had been lulled to sleep, on basis that they were “physically helpless,” but reversing rape convictions involving massage-client victims who were only “deeply relaxed.”).

indeterminate, or contradictory.⁵⁵ In a number of states, the governing mens rea is either negligence or strict liability.⁵⁶

The 1962 Code treats recklessness as the “basic norm” for criminal liability and punishment.⁵⁷ Thus, a reckless mens rea is sufficient culpability for most of the major offenses, including aggravated assault, manslaughter, and robbery, all three felonies of the second degree;⁵⁸ and terroristic threats and causing a catastrophe, both felonies of the third degree.⁵⁹ The 1962 Code also imposed liability on the basis of recklessness for nearly all the sexual offenses.⁶⁰

⁵⁵ A few states require knowledge or “intent.” E.g., OHIO REV. CODE ANN. § 2907.03(A)(1) (“No person shall engage in sexual conduct with another, not the spouse of the offender, when ... [t]he offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution”). Others require recklessness. See, e.g., *State v. Bryant*, 756 S.W.2d 594 (Mo. Ct. App. 1988) (holding prosecution must prove at least recklessness); 18 PA. CONS. STAT. ANN. § 3121(a) (2018) (rape when a person engages in sexual intercourse by “forcible compulsion or . . . by threat of forcible compulsion”; because mens rea is not specified, default mens rea of recklessness applies, see 18 PA. CONS. STAT. ANN. § 302(c) (2018)).

⁵⁶ As in cases involving perceived threats of physical force, see Reporters’ Notes to Section 213.2, *supra*, governing law on the mens rea issue often sets a standard that is less demanding than recklessness. See, e.g., TENN. CODE ANN. § 39-13-503 (rape, a Class B felony (30 years maximum) when “sexual penetration is accomplished without the consent of the victim and the defendant knows *or has reason to know* at the time of the penetration that the victim did not consent”) (emphasis added); cf. *Com. v. Fischer*, 721 A.2d 1111 (Pa. Super. Ct. 1998) (holding that despite Pennsylvania statutes specifying a default mens rea of recklessness, the element of “forcible compulsion” is governed by a strict-liability standard).

⁵⁷ MODEL PENAL CODE AND COMMENTARIES, Comment to Section 2.02, at 239-241 (AM. L. INST. 1985).

⁵⁸ 1962 Code Sections 210.3, 211.1(2), 222.1. Aggravated assault requires a heightened form of recklessness; manslaughter and robbery do not. One element of robbery is theft, normally a felony of no more than the third degree, and theft requires proof of a purpose to deprive the owner permanently of possession. 1962 Code Sections 223.1(2), 223.2. But the distinctive element that raises theft to robbery, a felony of the second degree, is the infliction or threat to inflict serious bodily injury, and with respect to that aggravating factor, the required mens rea is recklessness. See 1962 Code Section 222.1.

⁵⁹ 1962 Code Sections 223.1(2), 223.2.

⁶⁰ See 1962 Code Section 213.1(2) (imposing liability on “[a] male who has sexual intercourse with a female not his wife [if] he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution.” The 1962 Code likewise treats recklessness as a sufficient mens rea for more serious sexual offenses, including those at the highest end of the grading spectrum. See, e.g., 1962 Code Section 213.1(1) (punishing as first-degree felony, with maximum of sentence of life imprisonment, actor who compels another person to submit by perceived threats of serious bodily injury, when victim was not a “voluntary social companion”; reckless mens rea is made sufficient by the default rule in 1962 Code Section 2.02(3)).

Section 213.4 carries forward this mens rea judgment. For reasons similar to those discussed in connection with threats of physical force,⁶¹ when an actor consciously disregards a substantial and unjustifiable risk that another person is unwilling to submit to or perform a sexual act, the actor’s awareness of wrongdoing is not in doubt. To be sure, sexual communication can be highly nuanced or perplexingly ambiguous. And this feature makes it imperative that criminal liability be based on proof of conscious misconduct. But the same uncertainties make a knowledge requirement unjustifiably restrictive, if not entirely unworkable.

A standard requiring proof beyond a reasonable doubt that the actor knew to a “practical certainty” that the other party was not willing⁶² often would be difficult or impossible to meet, and *inappropriately* so. A knowledge requirement would preclude conviction of any actor who was not 100 percent sure the other person was unwilling, even when the actor proceeded to penetrate the other person while realizing that the other party was *not* likely to be willing. A knowledge requirement would also preclude conviction when the actor probably *knew* the other party was unwilling, if there is a reasonable doubt about the actor’s level of knowledge.

These are intolerable consequences. As the 1962 Code recognized, and as Section 213 carries forward, there should be no need to prove knowledge when there is proof beyond a reasonable doubt that the actor was aware of, but recklessly disregarded, the risk that the other party was not willing for the sexual act to occur. Conscious disregard of that risk to the welfare of another person is in itself egregious and inexcusable. Accordingly, Section 213.6 provides that Sexual Assault in the Absence of Consent is committed when a person recklessly disregards these risks and causes another person to submit to or perform an act of sexual penetration or oral sex.⁶³

4. Grading – Current Law. Current law reflects a consensus that sexual penetration or oral sex without consent calls for significant criminal sanctions. But beyond that point of basic agreement, state judgments about the appropriate degree of punishment are far from uniform. Two-thirds of jurisdictions have offenses roughly analogous to Section 213.6, but their authorized punishments vary widely, with differences that cannot always be attributed to differences in how the key element—the absence of consent—is defined. For three jurisdictions that impose liability only in the stark situation where the lack of consent is proved by clearly expressed unwillingness, this especially serious offense carries a statutory maximum of 50 years

⁶¹ See Comment 5 and Reporters’ Note 2 to Section 213.2, *supra*.

⁶² See note 4, *supra*.

⁶³ Section 2.02(2)(c) of the 1962 Code specifies that a person is reckless when he or she “consciously disregards a substantial and unjustifiable risk that the material element exists or will result from the person’s conduct.” See also text at note 5, *supra*.

Section 213.6. Sexual Assault in the Absence of Consent

1 in one jurisdiction, 10 years in another, and five years in the third.⁶⁴ Among 12 jurisdictions that
2 treat absence of consent as sufficient but do not define consent, five impose felony sanctions—
3 three authorize a maximum penalty of at least 20 years,⁶⁵ one authorizes imprisonment for up to
4 five years, and one authorizes imprisonment for up to two years⁶⁶; the remainder, the seven other
5 jurisdictions that do not define consent, impose misdemeanor penalties of up to a year.⁶⁷ Finally,
6 of 24 jurisdictions that impose liability analogous to Section 213.6 and also define consent as
7 either affirmative consent or consent assessed in the context of all the circumstances, the
8 majority (67%) impose felony sanctions: five authorize maximum sentences ranging from 20
9 years to life,⁶⁸ six permit maximums of 10 to 15 years,⁶⁹ three permit maximums of five to seven
10 years,⁷⁰ and two permit maximums of 18 months to two years.⁷¹ The remaining eight states in
11 this group (those that define consent as either affirmative consent or consent assessed in the
12 context of all the circumstances) punish the offense as a misdemeanor, with penalties ranging
13 from 90 days to a year.⁷²

⁶⁴ IOWA CODE ANN. § 709.4 (2018) (10-year felony); NEB. REV. STAT. § 28-318(8) (2018); NEB. REV. STAT. § 28-319(1) (2018) (50-year felony); WASH. REV. CODE ANN. § 9A.44.060(1)(a) (2018) (five years).

⁶⁵ See, e.g., LA. REV. STAT. ANN. § 14:43 (2018) (third-degree rape “[w]hen the offender acts without the consent of the victim”; punishable by “not more than twenty-five years”); MISS. CODE ANN. § 97-3-95, § 97-3-101 (“sexual battery” for a person to engage in sexual penetration with another person “without his or her consent”; punishable by up to 40 years’ imprisonment); TENN. CODE ANN. § 39-13-503 (rape, a Class B felony (30-year maximum) when “sexual penetration is accomplished without the consent of the victim”). See generally “Current State of the Law -- Consent-Only Offenses,” *supra* note 14.

⁶⁶ ARIZ. REV. STAT. § 13-1404 (2018) (2 years); MASS. GEN. LAWS ch. 265, § 13H (2018) (5 years), see *Commonwealth v. Becker*, 879 N.E.2d 691, 697 (Mass. App. Ct. 2008).

⁶⁷ These jurisdictions are Georgia, Idaho, Maryland, Ohio, North Dakota, and South Dakota. See “Current State of the Law -- Consent-Only Offenses,” *supra* note 14.

⁶⁸ These jurisdictions are Nevada (life), New Hampshire (20 years), Utah (life), Vermont (life), and the UCMJ (30 years). *Id.*

⁶⁹ These states are Florida (15 years), Hawaii (10 years), Oklahoma (10 years), Pennsylvania (10 years), New Jersey (10 years), and Wisconsin (10 years). *Id.*

⁷⁰ These states are Maine (5 years), Missouri (7 years), and Oregon (5 years). *Id.*

⁷¹ These jurisdictions are Colorado (18 months) and the federal system (2 years). *Id.*

⁷² These states are California (6 months), Connecticut (1 year), D.C. (180 days), Kansas (1 year), Kentucky (90 days), Minnesota (1 year), Montana (6 months), and New York (3 months). *Id.*

In sum, of the 24 jurisdictions that treat penetration in the absence of consent as sufficient for criminal liability, while also defining the required consent in terms equivalent to or more specific than that of Section 213.0(2)(e), over half (14) punish that offense with at least five years of imprisonment. The jurisdictions that punish penetration without consent as a misdemeanor appear to do so in part because their statutes covering this conduct also apply to conduct considerably less aggravated than the behavior that Section 213.6 covers. These statutes may, for example, have a single offense applicable to sexual penetration, oral sex, and less serious forms of sexual contact; permit punishment on a strict liability or negligence basis; or impose liability even when several of these less aggravating circumstances are present.

5. Grading – Policy Considerations. Setting the proper penalty for the offense defined by Section 213.6 requires exceptional care. On the one hand, this offense must fit into an existing body of criminal law, and the penalty must be sensible relative to the penalties for nonsexual offenses graded at higher or lower levels. On the other hand, existing punishment levels for many violent and nonviolent offenses in the United States are rightly criticized as too harsh.⁷³ A penalty that appears proportionate to sanctions for other crimes may be unduly severe in absolute terms. And for sex offenses, many states authorize high maximum penalties that are difficult to justify in terms of the traditional penological goals of deterrence, incapacitation, rehabilitation, and retribution.⁷⁴

Mindful of these considerations, Section 213.6 grades the offense as a felony of either the fourth or the fifth degree.⁷⁵ That judgment reflects both the seriousness of the sexual acts within the scope of Section 213.6 and the availability of more stringent sanctions under other provisions of Article 213 when the penetration or oral sex occurs through force, threats, coercion, or exploitation of the other person’s vulnerability. An actor who deploys aggravated physical force or restraint, for example, is subject to the higher penalties authorized under Section 213.1.

But even in the absence of aggravating circumstances like these, an actor who engages in sexual penetration or oral sex while aware of, yet consciously disregarding, a substantial,

⁷³ See NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, *THE GROWTH OF INCARCERATION IN THE UNITED STATES* (2014); Justice Anthony Kennedy, *Speech at ABA Annual Meeting*, Aug. 9, 2003, available at https://archive.org/stream/325931-dcom5/325931-dcom5_djvu.txt.

⁷⁴ See *supra* notes 64, 68-69 (citing 14 jurisdictions that authorize imprisonment of 10 years or more for nonconsensual penetration, without requiring proof of aggravating factors).

⁷⁵ The revised sentencing provisions of the Model Penal Code provide in Section 6.06(6)(b) that felonies of the fourth and fifth degrees are subject to a term of incarceration that shall not exceed [5] years and [2] years respectively. Explaining these bracketed numbers, the Comment to this provision states: “The revised Code does not offer exact guidance on the maximum prison terms that should be attached to different grades of felony offenses. Instead, maximum authorized terms are stated in brackets in part because judgments about the sanctions appropriate to a felony of the second degree are fundamental policy questions that must be confronted by responsible officials within each state.” MODEL PENAL CODE: SENTENCING, (AM. L. INST., Proposed Final Draft, April 10, 2017), approved May 2017, Section 6.06(6)(b), Comment *k*, p. 157.

Section 213.6. Sexual Assault in the Absence of Consent

1 unjustifiable risk of the other person's unwillingness, culpably inflicts grievous personal injury.
2 That act warrants felony punishment; lesser sanctions would understate the seriousness of the
3 wrongdoing. Section 213.6 therefore classifies the offense as at least a felony of the fifth degree.
4 If the actor commits this act when the other person has clearly expressed unwillingness or when
5 the other person did not have an adequate opportunity to do so, the disregard for the other
6 person's bodily autonomy and emotional well-being is even more stark, and the act warrants an
7 even more substantial sanction. Section 213.6 accordingly classifies such cases as felonies of the
8 fourth degree.

**SECTION 213.7. OFFENSIVE SEXUAL CONTACT BY PHYSICAL FORCE OR RESTRAINT OR
SURREPTITIOUS INCAPACITATION; OFFENSIVE SEXUAL CONTACT**

(1) *Offensive Sexual Contact by Physical Force or Restraint or by Surreptitious Incapacitation.* An actor is guilty of Offensive Sexual Contact by Physical Force or Restraint or by Surreptitious Incapacitation when:

(a) the actor knowingly causes another person to submit to or perform an act of sexual contact with any person; and

(b) the act is without effective consent because:

(i) the actor uses or explicitly or implicitly threatens to use physical force or restraint against anyone, and that conduct causes the other person to submit to or perform the act of sexual contact; or

(ii) at the time of the act of sexual contact the other person lacks substantial capacity to appraise, control, or remember the person's own sexual conduct or that of anyone else because of a substance administered to that person, without that person's knowledge or consent; and the actor administered the incapacitating substance for the purpose of causing that incapacity or knows that it was surreptitiously administered by another for that purpose; and

(c) the actor is aware of, yet recklessly disregards, the risk that a circumstance described in paragraph (b) is present, and that the other person submitted to or performed the act of sexual contact because of a circumstance described in paragraph (b).

Offensive Sexual Contact by Physical Force or Restraint or by Surreptitious Incapacitation is a felony of the fifth degree [*three-year maximum*].

(2) *Offensive Sexual Contact.* An actor is guilty of Offensive Sexual Contact when:

(a) the actor knowingly causes another person to submit to or perform an act of sexual contact with anyone; and

(b) the other person did not consent to that act, and the actor is aware of, yet recklessly disregards, the risk that the other person did not consent to that act; or

(c) that act is without effective consent because:

(i) the other person is unaware that such act is occurring, or is physically unable to communicate lack of consent at the time of the act; and the actor is aware of, yet recklessly disregards, the risk that the other person is in that condition at the time of the act; or

(ii) the act would be an offense as defined by Section 213.3(2) or (3), involving vulnerable or legally restricted persons, had the act been one of sexual penetration or oral sex; or

(iii) the act would be an offense as defined by Section 213.4, involving extortion, had the act been one of sexual penetration or oral sex; or

(iv) the act would be an offense as defined by Section 213.5, involving prohibited deception, had the act been one of sexual penetration or oral sex.

Offensive Sexual Contact is a petty misdemeanor [six-month maximum].

(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the other person submitted to or performed the act of sexual contact under a circumstance described in subsections (1)(b) or (2)(c). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring under a circumstance described in those subsections. If applicable, an actor charged with a violation of subsections (1)(b)(i), (2)(b), or (2)(c)(iii) may raise an affirmative defense of **Explicit Prior Permission** under Section 213.10.

Comment:

Section 213.7 imposes a two-tiered liability scheme that punishes unwanted sexual contact either as a fifth-degree felony or a petty misdemeanor, depending on the circumstances. Sexual contact is defined in Section 213.0(2)(c) and involves forms of sexual touching that are less intimate and intrusive than sexual penetration or oral sex.

This liability is a floor. Cases of offensive sexual touching of a young person by an adult actor are typically considered more serious offenses, and separate provisions, specifically Section 213.8(4), (5) and (6), address liability in such cases. The following example demonstrates the different degrees of culpability that the same conduct may carry, depending on the age of the accused and the complainant.

Accused, jealous that Complainant is spending time with another person, grabs the groin of Complainant and says, "This belongs to me."

Section 213.7. Offensive Sexual Contact

- *Accused is 45 years old, and Complainant is 28 years old.*
- *Accused is 20 years old, and Complainant is 13 years old.*
- *Accused is 45 years old, and Complainant is 6 years old.*
- *Accused is 15 years old, and Complainant is 17 years old.*
- *Accused is 11 years old and Complainant is 9 years old.*

The first four of the above circumstances are governed by Section 213.7, but Section 213.8 addresses the possible need to adjust the penalty in the second and third scenarios. The last scenario, involving an Accused under 12 years old, is governed by Section 213.0(2)(g), which requires that an actor be “more than 12 years old” unless the charge alleges an act of sexual penetration or oral sex in violation of Section 213.1.

1. Offensive Sexual Contact by Physical Force or Surreptitious Incapacitation – Section 213.7(1). Section 213.7(1) outlines two circumstances in which punishment for sexual contact is enhanced to a felony of the fifth degree.

Section 213.7(1)(b)(i) punishes an actor who “knowingly uses or explicitly or implicitly threatens to use physical force or restraint against any person; and that conduct causes the other person to submit to or perform the act of sexual contact.” Physical force or restraint, as defined in Section 213.0(2)(f)(i) is “a physical act or physical restraint that inflicts more than negligible physical harm, pain, or discomfort or that significantly restricts a person’s ability to move freely.” Proof of a higher degree of force, such as that described as “aggravated physical force or restraint” in Section 213.0(2)(f)(ii), or that involves the use or threatened use of a deadly weapon (defined in Section 210.0(4)),¹ necessarily satisfies the lesser standard of “physical force or restraint.” Similarly, as a matter of logic, an actor who inflicts serious bodily injury has engaged in “a physical act ... that inflicts more than negligible physical harm.”

The use of aggravated physical force is a common statutory aggravator. But Section 213.7(1)(b)(i) also punishes acts of sexual contact that involve the knowing use of or threat to use a lesser degree of physical force or restraint—specifically, the degree of “physical force or restraint” defined in Section 213.0(2)(f)(i), which includes a “kick, punch, or slap on the face,”

¹ As Section 213.0(1) makes explicit, revised Article 213 incorporates the definitional sections of the 1962 Code, including Section 210.0(4), which defines “deadly weapon.” See 1962 Code Section 210.0(4) (“‘Deadly weapon’ means a firearm or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of causing serious bodily injury.”).

Section 213.7. Offensive Sexual Contact

1 even though it excludes negligible pain, harm, or discomfort, such as that from a pinch or pat on
2 the back.

3 Unwanted sexual contact that involves force or restraint too small to inflict “more than
4 negligible” harm or “significant restrict[ion]” of a person’s ability to move freely does not trigger
5 felony liability under Section 213.7. For example, an actor might slap another person’s arm,
6 causing minimal discomfort, or grab a piece of clothing as a temporary restraint. But when this
7 kind of slight force or restraint is used to cause the other person to experience the unwanted
8 sexual contact, prosecution and punishment should be for the lesser offense of Offensive Sexual
9 Contact under Section 213.7(2), a petty misdemeanor.

10 By contrast, when the force used causes more than negligible physical pain or harm,
11 Section 213.7(1)(b)(i) applies. The added danger to the victim and the added culpability of the
12 actor who, as required by Section 213.7(1)(c) must be proved to have been “aware of, yet
13 recklessly disregard[ed]” that the physical force or restraint was used and that it caused the other
14 person’s to submit to or engage in the sexual contact, justify treating the offense as a felony of
15 the fifth degree, even when the threat or injury does not rise to the level of serious bodily injury.

16 **Illustrations:**

17 1. Accused enters an elevator with Complainant, the only other passenger. When
18 the doors close, Accused jerks Complainant backward by the hair and reaches around to
19 grab Complainant’s breasts. Accused squeezes Complainant’s breasts and buttocks
20 roughly while making crude remarks. When the door opens, Accused pushes
21 Complainant out and onto the ground. Later, Complainant testifies that the hair-pulling
22 and jerk backward caused significant pain and that there were bruises on Complainant’s
23 breasts from Accused’s rough grasp. Under these facts, Accused may be found liable
24 under Section 213.7(1)(b)(i). Accused engaged in “sexual contact” as defined in Section
25 213.0(2)(c) by grabbing Complainant’s breasts and buttocks for a sexual purpose. In
26 addition, Accused knowingly used “physical force or restraint” to cause Complainant to
27 engage in the contact. Pulling Complainant’s hair significantly impeded Complainant’s
28 ability to move freely, and along with Accused’s grabs (which inflicted physical injury)
29 caused Complainant more than negligible physical pain.

30 2. Late one night, Complainant is waiting for the bus when Accused walks over,
31 makes crude comments, grabs Complainant’s hand, and rubs it into Accused’s groin.

Section 213.7. Offensive Sexual Contact

1 These facts do not support a finding of guilt under Section 213.7(1)(b). Although a
2 factfinder could determine that Accused's actions constitute "sexual contact," there is
3 insufficient evidence that this contact occurred under any of the circumstances in Section
4 213.7(1)(b). Accused did not use or threaten to use "physical force or restraint" or engage
5 in surreptitious drugging. Even though Accused used physical strength to move
6 Complainant's hand, barring proof beyond a reasonable doubt that moving the hand
7 caused more than negligible physical pain or physical injury, evidence of the required use
8 of "physical force or restraint" is absent. Accused also did not significantly restrict
9 Complainant's ability to move freely. However, Accused may be liable for Offensive
10 Sexual Contact under Section 213.7(2).

11 3. Same facts as Illustration 2, except that after Accused walks over to
12 Complainant, Accused whispers in Complainant's ear, "Give me a hand job or I'll break
13 your arm." Complainant complies. These facts support a finding that Accused engaged in
14 "sexual contact" as defined in Section 213.0(2)(c) by causing Complainant to touch
15 Accused's groin for a sexual purpose. These facts also support a finding of "physical
16 force" as defined by Section 213.0(2)(f)(i) and proscribed by Section 213.7(1)(b)(i).
17 Although Accused did not actually cause physical injury or significant pain, Accused
18 threatened more than negligible physical harm, pain, or discomfort. Upon proof of
19 Accused's mens rea and the causal connection between Accused's threat and
20 Complainant's submission, a factfinder could find Accused guilty under Section
21 213.7(1)(b)(i).

22 4.² Accused meets Complainant at a bar, where they chat. Complainant then
23 leaves to talk with another patron, and Accused becomes angry. When the other patron
24 leaves, Accused approaches Complainant and invites Complainant to Accused's hotel
25 room. Once in the room, Accused slaps Complainant roughly across the face. Accused
26 then orders Complainant to disrobe and stand against the wall. Using a steel-braided
27 whip, Accused whips Complainant on the buttocks, causing a deep open wound. When
28 Accused goes to another room, Complainant runs out and notifies police. Accused

² Facts loosely based on *State v. Guinn*, 105 Wash. App. 1030 (Wash. Ct. App. 2001) and *McCorquodale v. State*, 211 S.E.2d 577 (Ga. 1974).

1 testifies that Complainant and Accused chatted at the bar about their mutual interest in
2 BDSM, and that Complainant had given explicit prior permission for Accused’s use of
3 force. Accused also testifies that Accused had expected the whip to cause only negligible
4 pain, and no physical harm. Complainant testifies that the conversation at the bar was
5 flirtatious, but Complainant never discussed and did not give Accused permission to use
6 force.

7 This evidence could support a finding of guilt under Section 213.7(1)(b)(i).
8 Accused engaged in sexual contact within the meaning of Section 213.0(2)(c) by
9 touching the buttocks of Complainant for a sexual purpose. The factfinder could conclude
10 that Accused used physical force to engage in that sexual contact, which Section
11 213.0(2)(f)(i) defines as a “physical act . . . that inflicts more than negligible physical
12 harm, pain, or discomfort” and which expressly includes a “slap across the face.”
13 Whether or not the factfinder believes Accused’s testimony that Accused did not know
14 that the whip would cause more than negligible physical harm or pain, Accused
15 nonetheless admittedly used “physical force and restraint” by slapping Complainant
16 across the face, satisfying Section 213.7(1)(b)(i). The factfinder could also find, as an
17 alternative basis for satisfying Section 213.7(1)(b)(i), that even if Accused did not know
18 the whip would cause more than negligible physical harm or pain, Accused was aware of,
19 yet recklessly disregarded, the risk that using the whip would do so. Finally, the
20 factfinder could make the necessary finding under Section 213.7(1)(c) in one of two
21 ways. First, the factfinder could conclude that Accused, knowing that Complainant had
22 been slapped across the face, was aware of, yet recklessly disregarded, the risk that
23 Complainant submitted to the act of sexual contact because of that slap. Second, the
24 factfinder could conclude that Accused, when recklessly disregarding the risk that using
25 the whip would cause more than negligible physical harm or pain, was aware of, yet
26 recklessly disregarded, the risk that Complainant submitted to the act of sexual contact
27 because of that use of the whip.

28 Accused’s testimony raises the possibility of an affirmative defense of explicit
29 prior permission under Section 213.10. That defense is unavailable if the wound from the

Section 213.7. Offensive Sexual Contact

1 whip constitutes serious bodily injury,³ and the actor was at least aware of a substantial,
2 unjustifiable risk of serious bodily injury. Section 213.10(3)(c) precludes the defense
3 when the actor is recklessly aware of, but disregards, a substantial and unjustifiable risk
4 of serious bodily injury. But if the wound did not rise to this level, or if the actor was not
5 aware of a substantial, unjustifiable risk that the injury could be serious, then the defense
6 specified in Section 213.10, which requires explicit prior permission and a specified “safe
7 word,” among other requirements, may be available. A factfinder may convict Accused
8 only if the prosecution can disprove beyond a reasonable doubt at least one element of
9 Accused’s explicit-prior-permission defense.

10 The second aggravating factor is in Section 213.7(1)(b)(ii), which covers sexual contact
11 after surreptitious administration of intoxicants. It parallels the provision in Section
12 213.3(1)(b)(ii) that applies to acts of sexual penetration or oral sex under identical circumstances.
13 Secretly drugging another person for the purpose of engaging in unwanted sexual contact
14 aggravates punishment because the actor is not simply exploiting an existing vulnerability.
15 Instead, the actor creates the vulnerability for the purpose of exploiting it. That added culpability,
16 and added risk of injury to the victim, merit heightened punishment. Surreptitiously drugging
17 another person for the purpose of engaging in sexual contact with that person is like using force
18 for the same purpose. In both cases, the actor makes the other person vulnerable by removing or
19 reducing the other person’s ability to consent or refuse, remain or leave, and creates a risk of
20 bodily harm beyond the sexual assault.⁴ The vulnerability that the actor creates may also help the
21 acts go undetected, which further justifies enhanced punishment for the purpose of deterrence. In
22 a two-tier system, an actor who creates a vulnerability, rather than exploiting an existing
23 vulnerability, is thus subject to the higher punishment provided by Section 213(7)(1).

³ Section 213.10(3)(c) (foreclosing defense when the actor recklessly “engages in conduct that causes or risks serious bodily injury”) Whether a wound caused by a whip meets this standard would depend on a fact-driven inquiry into the nature and extent of the wound. As the Comment to Section 213.10 expressly notes, a person can explicitly consent to the infliction of injuries that fall short of serious bodily injury.

⁴ See Comment to Section 213.3(1)(b)(ii).

Illustrations:

5. Accused invites Complainant to Accused's home for dinner. When Accused greets Complainant at the door, Accused asks if Complainant would like a glass of wine and Complainant agrees. Unbeknownst to Complainant, Accused has spiked the drink with GHB, a psychoactive drug that depresses the central nervous system, because Accused wishes to impair Complainant's capacity to resist or remember the sexual advances of Accused. Complainant testifies that, after drinking, Complainant became disoriented and groggy and conveyed to Accused a need to sit down. Accused then led Complainant to a nearby couch, where Accused kissed Complainant and caressed Complainant's body, but did not touch or attempt to touch Complainant's intimate parts. These facts do not support conviction for an offense in Section 213.7, because, even though Accused surreptitiously drugged Complainant for the purpose of impairing Complainant's capacity to communicate unwillingness, the kisses and caresses are not "sexual contact" under Section 213.0(2)(c), which requires contact with an "intimate part."⁵

6. Same facts as Illustration 5, except that Accused fondles Complainant's breasts in addition to the kisses and other caresses. Accused may be found guilty under Section 213.7(1)(b)(ii). Accused's contact with Complainant's breasts, for the purpose of sexual gratification, is "sexual contact" as defined in Section 213.0(2)(c). In addition, a factfinder could conclude that Accused purposefully and surreptitiously administered a substance (GHB) to Complainant for the purpose of reducing Complainant's capacity to resist or remember the sexual conduct, and that Accused knew or was aware of a substantial, unjustifiable risk, that Complainant, as a result of the administration of that drug, lacked substantial capacity to appraise, control or remember the sexual conduct.

2. Offensive Sexual Contact. Section 213.7(2) provides liability for both the basic contact offense, outlined in Section 213.7(2)(b), and for contact offenses involving vulnerable

⁵ Accused may be liable for other offenses, including assault or surreptitious drugging offenses that require no sexual component. In addition, if the evidence showed that Accused had the purpose to drug Complainant so that Accused could engage in sexual penetration or oral sex, or a form of sexual contact covered by Section 213.0(2)(c), then attempt liability might also be appropriate.

victims, outlined in Section 213.7(2)(c)(i) through (iv). Each of these offenses is punishable as a petty misdemeanor.

a. Section 213.7(2)(b). Section 213.7(2)(b) defines the basic offense of Offensive Sexual Contact, which punishes sexual contact without consent. It parallels the core provision for sexual penetration or oral sex in the absence of consent, found in Section 213.6.

Illustrations:

7.⁶ Complainant is studying at a public library when Accused sits down in the next chair. Complainant does not notice that Accused has exposed his penis and begun to masturbate. At the moment of climax, Accused stands up, leans over Complainant, and ejaculates on Complainant's face. Based on these facts, the factfinder could find Accused guilty under Section 213.7(2)(b). The evidence supports the finding that Accused engaged in "sexual contact" as defined in Section 213.0(2)(c)(iii) because Accused knowingly touched Complainant with ejaculate for a sexual purpose. The factfinder could also conclude that, even though there was no force or express refusal preceding the contact, Accused knew or was aware of a substantial, unjustifiable risk that Complainant had not consented.

8. Accused and Complainant go out to dinner together. At the end of the evening, as they embrace to say goodbye, Accused begins to kiss Complainant on the lips, and Complainant responds by kissing and caressing Accused. Accused then caresses Complainant's buttocks. Complainant pushes Accused away, saying, "I think you have the wrong idea," and Accused stops. Complainant later testifies that Complainant found Accused too aggressive, and that Complainant did not consent to Accused's touch of the buttocks. Accused testifies to believing that the evening was the successful start of a budding romance, and that Complainant welcomed the sexual advances. These facts do not support a conviction under Section 213.7(2)(b). First, the kiss on the lips is not "sexual contact" under the statute. The caress of the buttocks is "sexual contact," because the buttocks are an intimate part, and Accused had a clear sexual purpose. However, the

⁶ Based on the facts of *Commonwealth v. Grace*, 84 Mass. App. Ct. 1131 (2014).

Section 213.7. Offensive Sexual Contact

1 evidence offered does not support a finding that Accused was aware of a substantial,
2 unjustifiable risk that the caress was unwanted.

3 As defined in Section 213.0(2)(e), “consent” refers to the complainant’s willingness to
4 engage in the sexual act, evidenced by words and actions in the context of all the circumstances.
5 An actor engaging in the type of consensual, gradually escalating sexual contact described in
6 Illustration 8 may reasonably believe that the other person consented and continues to consent to
7 the intimate acts, and, depending on the pattern of escalation, to progressively more intimate
8 acts, unless and until the other person revokes that consent by words or actions. Sexual intimacy
9 often naturally arises from incremental increases in sexual contact that are met by both parties’
10 willing participation and response, expressed through acts as much as words. However, an actor
11 is not entitled to privilege the actor’s desires over the desires of the other person. If the other
12 person revokes or withdraws previously given consent—whether to increased levels of intimacy
13 or even to continuing previously consented-to conduct, the actor must honor that revocation. An
14 actor aware of the other person’s expressed lack of consent is aware that the other person is not
15 willing to engage in further sexual contact.

16 **Illustrations:**

17 9. Same facts as Illustration 8, except that after Complainant pushes Accused
18 away and says, “I think you have the wrong idea.” Accused pulls Complainant closer and
19 continues kissing and caressing, including massaging Complainant’s breasts. Accused
20 testifies that, aside from making the statement and pushing Accused away, Complainant
21 did not again say “no,” or “stop.” Accused testifies to believing that Complainant was
22 “playing hard to get” but welcomed the contact. Complainant testifies that the contact
23 was unwanted. Based on these facts, a factfinder could find Accused guilty of violating
24 Section 213.7(2)(b). Although Complainant did not use the word “no,” Complainant’s
25 testimony that the act was unwanted is sufficient, if believed by the factfinder, to support
26 a finding beyond a reasonable doubt that Complainant was unwilling. And Complainant’s
27 acts of pushing away Accused and telling Accused of the misapprehension is enough
28 evidence to find beyond a reasonable doubt that when Accused disregarded
29 Complainant’s statement and continued Accused’s sexual contact, Accused knew or was
30 aware of a substantial, unjustifiable risk that Complainant did not consent to that contact.

Section 213.7. Offensive Sexual Contact

1 10.⁷ Accused passes Complainant walking in the other direction on the sidewalk.
2 Accused turns around and embraces Complainant from behind and cups Complainant's
3 breasts. Accused later claims that Complainant winked and gestured seductively to
4 Accused as Complainant walked by, leading Accused to hope that Complainant
5 welcomed sexual contact. Based on these facts, the factfinder could conclude that
6 Accused engaged in "sexual contact" with Complainant by knowingly touching
7 Complainant's breasts for a sexual purpose. Accused could be found guilty of violating
8 Section 213.7(2)(b). Even if the factfinder believed Accused's testimony that
9 Complainant winked and gestured, the factfinder could still find beyond a reasonable
10 doubt that Accused knew or was aware of, yet recklessly disregarded, the risk that
11 Complainant had not consented to any sexual contact, especially given its suddenness and
12 its occurrence in a public place in a nonsexual context. If, however, the factfinder
13 believed Accused's testimony that, in light of the wink and gesture, Accused genuinely
14 believed that Complainant welcomed the sexual contact and was not aware of a
15 substantial and unjustifiable risk that this was not the case, then the factfinder must find
16 Accused not guilty. The evidence might support a finding that Accused was negligent—
17 that a reasonable person should have been aware of a substantial and unjustifiable risk
18 that the contact was without consent—but liability requires proof of knowledge or
19 awareness of a substantial, unjustifiable risk that Complainant did not consent, not mere
20 negligence.

21 11. Same facts as Illustration 10, except that after Accused grabs Complainant's
22 breasts, Complainant yells, "Get off me!" Accused then reaches down and fondles
23 Complainant's groin. This evidence supports a finding that Accused violated Section
24 213.7(2)(b). Complainant's express statement of "get off me" establishes that
25 Complainant did not consent to sexual contact, and the factfinder could conclude that
26 Accused knew that Complainant did not consent to Accused's grabbing Complainant's
27 groin.

⁷ Based on the facts of *Chatham v. State*, 845 N.E.2d 203 (Ind. Ct. App. 2006) and *Smith v. State*, 678 N.E.2d 1152 (Ind. Ct. App. 1997). See also *State v. Matei*, 187 P.3d 608 (Kan. Ct. App. 2008).

Section 213.7. Offensive Sexual Contact

1 *b. Section 213.7(2)(c)(i).* In addition to penalizing an actor who engages in acts of sexual
2 contact while aware of a substantial, unjustifiable risk that consent is absent, subsection (2)(c)(i)
3 makes explicit that effective consent is lacking when an actor engages in sexual contact with a
4 person who is unaware that the contact is even taking place, or when the person is physically
5 unable to communicate lack of consent. A person who does not know that sexual contact is
6 occurring, or a person physically unable to communicate, cannot consent to that contact.⁸ This
7 provision simply restates that found in the 1962 Code, which punished sexual contact when “the
8 other person is unaware that a sexual act is being committed.”⁹

9 **Illustration:**

10 12. Complainant, a rider on a congested city bus, feels a wet substance against the
11 back of the thigh and reaches down to wipe it off, assuming that another passenger has
12 spilled a drink or food. A third person reports that Accused was fondling his penis behind
13 Complainant and ejaculated against Complainant’s leg. Accused testifies at trial that
14 Complainant and Accused chatted briefly while waiting for the bus, and that Accused
15 genuinely believed Complainant anticipated and welcomed sexual contact, although
16 Accused acknowledges that in hindsight, this belief was unreasonable. Complainant
17 testifies that Complainant was just being friendly, and in no way welcomed the sexual
18 contact. Accused is charged with violating Section 213.7(2)(c)(i). The touching of
19 ejaculate to Complainant’s leg for a sexual purpose constitutes “sexual contact.” If the
20 factfinder believes Complainant’s testimony and disbelieves Accused’s testimony, the
21 evidence supports a conviction under Section 213.7(2)(c)(i). The factfinder could find
22 that Accused knew or was aware of a substantial, unjustifiable risk that Complainant was
23 unaware the contact was occurring. If, however, the factfinder believes Accused’s
24 testimony, there is no liability under Section 213.7(2)(c)(i), because Accused’s admitted

⁸ Cf., e.g., *People v. Dancy*, 124 Cal. Rptr. 2d 898 (Cal. Ct. App. 2002) (“The inherent risk that a man may misinterpret a woman’s prior statements or conduct weighs strongly against recognizing ‘advance consent’ as a defense to rape of an unconscious person since the woman’s lack of consciousness absolutely precludes her from making her lack of consent known at the time of the act.”).

⁹ 1962 Code Section 213.4(3). That provision, however, required a mens rea on knowledge; revised Section 213.7(2)(c)(i) requires proof of recklessness with respect to the other person’s lack of consent.

1 negligence does not meet the required threshold of awareness of a substantial,
2 unjustifiable risk that Complainant did not consent.

3 *c. Section 213.7(2)(c)(ii).* Section 213.7(2)(c)(ii) punishes sexual contact in
4 circumstances in which a victim is vulnerable or legally restricted, as defined in Section 213.3(2)
5 and (3). Section 213.3(1) is covered by Section 213.7(1)(b)(ii) and (2)(c)(i). Specifically, Section
6 213.3(1)(b)(i) addresses victims who are “sleeping, unconscious, or physically unable to
7 communicate.” If an actor engages in an act of sexual contact under such circumstances, the act
8 is covered either by Section 213.7(2)(b) (lack of consent) or 213.7(2)(b)(i) (unaware or
9 physically unable to communicate). Section 213.3(1)(b)(ii) addresses victims who are
10 surreptitiously drugged. Sexual contact under those circumstances is covered by Section
11 213.7(1)(b)(ii), which imposes a heightened punishment for the reasons given in the commentary
12 to that subsection.

13 Accordingly, Section 213.3(2) (vulnerable persons) and Section 213.3(3) (legally
14 restricted persons) are covered by Section 213.7(2)(c)(ii). Section 213.3(2)(b)(i) addresses
15 persons with specified mental impairments; Section 213.3(2)(b)(ii) and (iii) addresses
16 substantially incapacitated persons; and Section 213.3(2)(b)(iv) addresses persons receiving
17 nonsexual services. Section 213.3(3)(b) addresses sexual activity in the context of a state-
18 imposed restriction on liberty. The application of each Section parallels its application in the
19 context of sexual penetration and oral sex. The reasons for each prohibition are given in the
20 Comments to those Sections.

21 **Illustrations:**

22 13. Complainant attends a party for aspiring pledges to a selective social club.
23 Complainant becomes heavily intoxicated and loses consciousness. While Complainant is
24 unconscious, Accused removes Complainant’s clothes and manipulates Complainant’s
25 intimate parts, taking photographs and posting them to social-media sites to humiliate
26 Complainant. Complainant presses charges. Based on these facts, a factfinder could find
27 Accused guilty of violating Section 213.7(2)(c)(i), a petty misdemeanor. Accused
28 engaged in “sexual contact” as defined in Section 213.0(2)(c) by touching Complainant’s
29 intimate parts for the purpose of sexual humiliation, and Accused did so while the
30 Complainant was unconscious and thus unaware the act was occurring.

Section 213.7. Offensive Sexual Contact

1 14. Same facts as Illustration 13, except that Complainant is passing in and out of
2 consciousness. Because the factfinder could conclude that Complainant's condition was
3 as described in Section 213.3(2)(b)(ii), and that Accused was reckless as to
4 Complainant's condition, Accused could be liable under Section 213.7(2)(c)(ii) for a
5 petty misdemeanor.

6 15. Same facts as Illustration 13, except that Accused spiked Complainant's drink
7 without Complainant's knowledge in order to disable Complainant and take humiliating
8 photos. Based on these facts, the factfinder could conclude that Accused violated Section
9 213.7(1)(b)(ii), which applies to cases of surreptitious intoxication and permits
10 punishment for a fifth-degree felony.

11 *d. Section 213.7(2)(c)(iii) and (iv).* Section 213.7(2)(c)(iii) and (iv) prohibits sexual
12 contact when certain conditions preclude effective consent. Subparagraphs (iii) and (iv) reflect
13 the judgment, explained further in the Comments to Sections 213.4 and 213.5, that even express
14 consent is invalid when it is obtained by specified extortionate threats or prohibited deceptions.

15 **Illustration:**

16 16.¹⁰ Accused works as an emergency medical technician. Accused and
17 Accused's partner, the ambulance driver, respond to a car accident. Accused rides to the
18 hospital in the back of the ambulance with Complainant, the accident victim.
19 Complainant testifies that Accused, after checking Complainant's vital signs and
20 addressing Complainant's urgent medical needs, said, "I need to check that all your parts
21 are working," and then began manipulating Complainant's penis. When Complainant
22 asked, "Are you sure this is necessary?," Accused replied, "Yes; it is part of our standard
23 10-point assessment." Complainant is troubled but says "okay." Later, Complainant
24 learns from the doctor that there is no "10-point assessment" and that Accused's act had
25 no medical justification. Accused may be convicted of violating Section 213.7(2)(c)(iv).
26 Even if the factfinder believes Accused's testimony that Accused thought that
27 Complainant consented to the sexual contact based on Complainant's "okay," the
28 factfinder could conclude that Accused knew that the consent resulted from Accused's

¹⁰ Based loosely on *People v. Kahl*, 54 Misc. 3d 138(A) (N.Y. App. Term 2017).

false representation that the contact was medically necessary, as proscribed by Section 213.5(1)(b)(i).

3. *Mens Rea.*

The provisions of Section 213.7 contain an identical conduct element—sexual contact—and various attendant circumstance elements (e.g., use of physical force, surreptitious intoxication, lack of consent, vulnerable status, etc.). The mens rea for the conduct element of sexual contact is knowledge in both subsections (1) and (2). The mens rea for the attendant circumstance elements is either knowledge or recklessness, according to the terms of the statute.

a. Conduct element. An actor who engages in “sexual contact” must be proved to have done so with at least knowledge of that conduct. In other words, a prosecutor must prove beyond a reasonable doubt that the actor was aware that the actor was engaging in or causing an act of sexual contact, as defined by Section 213.0(2)(c). An actor whose conduct alerts the actor to a substantial, unjustifiable risk of sexual contact, but who is not aware of such contact at the level of practical certainty, is not guilty of violating this provision.

The requirement that the prosecutor prove knowledge for the conduct element of sexual contact differs from the recklessness threshold set for most of the penetration and oral sex offenses. But knowledge in this case is appropriate. Acts of sexual penetration and oral sex require conduct that is unlikely to occur by accident or happenstance. For instance, oral sex is defined in Section 213.0(2)(b) as “a touching of the anus or genitalia of one person by the mouth or tongue of another person.” Sexual penetration similarly requires “an act involving penetration, however slight, of the anus or genitalia” under Section 213.0(2)(a). Proof of knowledge would require that the actor was practically certain of the act of penetration; thus an actor could credibly mount a defense if the actor intended to penetrate one orifice but in fact penetrated another,¹¹ or

¹¹ See, e.g., *Commonwealth v. Henderson*, 2014 WL 10752242, *26 (Pa. Super. Ct. 2014) (finding that the state’s “deviate sexual intercourse” statute “does not contain an intent component and the Defendant cannot impute one by now saying that the anal penetration was only accidental”); *Gonzales v. State*, 2018 WL 6520572 (Tex. App. 2018) (upholding verdict where defendant claimed the in fact the acts of digital and penile vaginal penetration occurred consensually, and that additional acts of digital and penile anal penetration were simply mistaken and accidental).

1 rubbed vigorously against the anus or vagina but claimed only reckless disregard for whether the
2 rubbing in fact penetrated the other person.¹²

3 In the case of acts of sexual penetration and oral sex, a reckless mens rea is appropriate
4 because it ensures that an actor can be convicted of a crime when—but only when—that actor
5 sexually penetrates another person or engages in oral sex while aware that the risk of such sexual
6 penetration or oral sex is substantial and unjustifiable, to such an extent that it grossly deviates
7 from the standard of care of a law-abiding person. The requirement of a reckless mens rea thus
8 forecloses conviction when the actor engages in an accidental or negligent penetration (a
9 reasonable person would have been aware of a risk of penetration), but permits liability even if
10 the prosecutor cannot prove that the actor was practically certain (i.e., knowing) of the
11 penetration.

12 In contrast to acts of sexual penetration and oral sex, which rarely occur by accident,
13 sexual contact can more readily happen inadvertently or under circumstances that make the
14 actor’s awareness of the circumstances cloudy. The transient nature of some forms of sexual
15 contact, which can be proved by a touch or a grab over the clothing, raise the concern that an
16 actor might be imputed to have acted with awareness of a risk even when that awareness was in
17 fact lacking. This concern is somewhat ameliorated by the requirement in the definition of
18 Section 213.0(2)(c) that “sexual contact” must have a purpose of “sexual arousal, sexual
19 gratification, sexual humiliation, or sexual degradation.” Nonetheless, that sexual purpose may
20 itself be contested, and thus a requirement that contact with an intimate part be knowing can help
21 offset concerns about overbreadth. For this reason the mens rea for acts of sexual contact is
22 knowledge—in other words, that the actor was aware with a practical certainty of touching an
23 intimate part with a sexual purpose. Significantly, an actor who *hopes* to make sexual contact,
24 and does in fact make such contact, satisfies the higher mens rea standard of purpose,¹³ even if
25 the prior probability of the contact materializing was low.

¹² It is not uncommon for defendants to assert that the inability to sustain an erection defeats proof of penetration. Because statutes recognize penetration “however slight,” such claims typically do not succeed. However, those discussions virtually never address the defendant’s *mens rea* as to the act of penetration, and most courts appear to assume strict liability. See, e.g., *Brown v. State*, 751 So.2d 1155 (Miss. Ct. App. 1999) (rejecting defendant’s claim that “because he was unable to sustain an erection, the requisite proof of penetration is absent,” but without any discussion of mens rea).

¹³ 1962 Code Section 2.02(2)(a) reads:

b. Attendant circumstance elements. Section 213.7(1) and (2) generally permit proof of recklessness for the attendant circumstance elements attached to each subsection, although portions of subsection (2)(c) require proof of knowledge. Specifically, subsection (2)(c)(ii) requires knowledge of the legally restricted status of the other person (in parallel to Section 213.3(3)), and subsection (2)(c)(iv) requires proof of knowledge of the prohibited deception and its causal effect (in parallel to Section 213.5). The reasons for specifying the particular mens rea for each of these sections is found in the commentary to the parallel offense for acts of sexual penetration and oral sex.¹⁴

4. Effective Consent – Section 213.7(3).

Sexual contact that occurs with the freely given consent of a competent adult usually is not a proper subject of legal concern. Yet persons who appear to consent to sexual acts do not do so freely when they agree only as a result of an actor's illegitimate use of force, coercion, or material deception. Similarly, a person may have a physical or mental impairment or be subject to a state-imposed restriction on liberty that makes the person incapable of giving effective consent. These circumstances preclude effective consent.

Section 213.7(3) makes this principle explicit in the context of offensive sexual contact that does not arise to the level of sexual penetration or oral sex. It provides that any seeming or apparent consent is ineffective if the prosecution proves beyond a reasonable doubt the elements of an offense under Section 213.7(1)(b)(i) (physical force or restraint), Section 213.7(1)(b)(ii) (surreptitious intoxication), Section 213.7(2)(c) (unaware, physically incapable, vulnerable or legally restricted persons, or instances of extortion or prohibited deception). However, an actor

A person acts purposely with respect to a material element of an offense when:

- (i) if the element involves the nature of the person's conduct or a result thereof, it is the person's conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, the person is aware of the existence of such circumstances or the person believes or hopes that they exist.

Thus, for instance, a subway groper who hopes that a bump in the track will permit the groper to grab the breast of a fellow passenger may not be *knowledgeable* that the grope will occur, because it is not practically certain, but may have *purpose* for it to occur, because it is the groper's *conscious object* to engage in the conduct and they *hope* it will happen. Proof of a higher mens rea satisfies a lower threshold. 1962 Code Section 2.02(5).

¹⁴ Although not explicitly cross-referenced, Section 213.7(1)(b)(i) finds its parallel in Section 213.2 (physical force or restraint); Section 213.7(1)(b)(ii) finds its parallel in Section 213.3(1)(b)(ii) (surreptitious intoxication); Section 213.7(2)(b) finds its parallel in Section 213.6 (lack of consent); and Section 213.7(c)(i) finds its parallel in Section 213.3(1)(b)(i) (unaware or physically incapable persons).

1 charged with an offense under subsection (1)(b)(i), involving the use of or threat to use physical
2 force or restraint, under subsection (2)(b), involving the absence of consent, or under subsection
3 (2)(c)(iii), involving extortion, may raise an affirmative defense of Explicit Prior Permission as
4 permitted under Section 213.10.

5 **Illustrations:**

6 17. Accused is charged with violating Section 213.7(1)(b)(i) and (2)(b) after a
7 neighbor reports seeing Accused in the backyard of Accused's house, roughly fondling
8 Complainant's breasts while holding a knife to Complainant's neck as Complainant
9 screams, "You're an animal! No! Stop!" Upon investigation of the neighbor's complaint,
10 police learn from Accused and Complainant that they both enjoy a "BDSM" relationship
11 and that prior to the incident they had expressly agreed to the use of force under terms
12 that satisfied Section 213.10. If police credit this information, prosecution under Section
13 213.7(1)(b)(i) or (2)(b) is not justified. Absent contrary evidence or information, the
14 prosecution cannot disprove beyond a reasonable doubt at least one element of Accused's
15 explicit-prior-permission defense, as required to obtain a conviction.

16 18. Accused is charged with a violation of Section 213.7(2)(c)(ii) when an
17 observer reports to police that Accused is fondling the penis of the Complainant, who
18 appeared to be passed out in an alley behind a bar. When police arrive, they find the
19 Accused with the Complainant, who is heavily intoxicated and passing in and out of
20 consciousness. Accused claims that the encounter was consensual and points to evidence
21 that Complainant removed his own pants. If the factfinder concludes beyond a reasonable
22 doubt that Complainant was passing in and out of consciousness and that Accused was at
23 least aware of a substantial, unjustifiable risk that this was the case, then Accused cannot
24 succeed on a claim that Complainant consented. Proof beyond a reasonable doubt of
25 Complainant's condition, and Accused's awareness of it, satisfies Section 213.7(2)(c)(ii)
26 and makes any defense of consent unavailable, because a Complainant in that condition
27 cannot effectively consent.

REPORTERS' NOTES

1 The decision to penalize some sexual contacts short of penetration or oral sex is
 2 noncontroversial. The 1962 Code outlined eight circumstances in which sexual contact
 3 constituted an offense: ¹⁵ 1) when the actor “knows that the contact is offensive to the other
 4 person;” 2) when the actor knows the complainant has a mental disease or defect; 3) when the
 5 actor knows the complainant is “unaware” of the contact; 4) when the complainant is under 10,
 6 regardless of the actor’s awareness;¹⁶ 5) when the actor surreptitiously administered intoxicants;
 7 6) in age-gap cases; 7) in guardian cases; and 8) in cases involving custodial detention. Today,
 8 nearly every jurisdiction prohibits unwanted sexual contact that falls short of penetration with
 9 laws that cover some, if not all, of these situations.

10 One challenge in drafting a sexual-contact statute is to ensure that the law does not stamp
 11 out spontaneous expressions of affection, but does protect individuals against unwanted intimacy
 12 that meaningfully intrudes on bodily autonomy. It is considerably difficult to draft terms that can
 13 properly distinguish between the fondling of another person’s intimate parts by a justifiably
 14 hopeful suitor and the same act done by a predatory abuser.

15 A second challenge arises from the need to treat offensive sexual touches of children
 16 more seriously than similar touches of adults. Section 213.8(4), (5) and (6), which applies to
 17 fondling and sexual contact with minors, addresses the need for additional sanctions in these
 18 situations.

19 A third challenge of defining the sexual-contact offenses is sweeping within one
 20 framework an array of behavior of varying severity. For instance, reasonable people might argue
 21 that an actor’s unwanted physical contact with another person’s anus or genitals, even if without
 22 penetration, merits greater punishment than forcible contact with the person’s buttocks or
 23 breasts, or that the actor’s unwanted physical contact using certain bodily fluids or the actor’s
 24 unclothed intimate parts merits greater punishment than forcible nonpenetrative contact with the
 25 complainant’s own intimate parts. Similarly, although generally the act of sexual contact with a
 26 person’s breasts or buttocks may be viewed as less offensive than contact with a person’s anus or
 27 genitals, the circumstances under which that contact occurs can change the perception of its
 28 severity. Fondling a person’s breasts or buttocks at gunpoint, or when done to a person paralyzed
 29 in a hospital bed, may strike many as more offensive than a grab of genitals at a party.

30 Although these arguments are reasonable, it is unwieldy to map out in statutory
 31 categories of seriousness the peculiar offensiveness of every form of sexual contact in every
 32 combination of circumstances, such as at gunpoint, during a ride on public transportation, on a
 33 crowded dance club floor, by stealth or unexpectedly, when unconscious, or after surreptitious

¹⁵ 1962 MPC Section 213.4. The subsections as listed mirror the numbering in the text.

¹⁶ Section 213.6(1) of the 1962 Code precludes a defense for even reasonable mistakes of age when the definition of an offense sets 10 years as the threshold. For offenses involving older ages, Section 213.7(1) permitted an affirmative defense of reasonable belief that the complainant was older.

1 drugging. Even seemingly simple efforts at line-drawing have proven largely unworkable, such
2 as varying the penalty for touching unclothed body parts versus touches over clothing. In such a
3 regime, the punishment of an actor who grabs the breasts of a stranger passing by could turn on a
4 factual finding of how low-cut the stranger's top was, or where exactly on the breast the grab
5 landed. Such distinctions are untenable as a matter of both practice and principle.

6 Instead, Section 213.7 reduces the permutations to two broad tiers of liability. Within
7 each tier, to the degree that any particular act in any particular circumstance is more or less
8 offensive—including based on the age of the actor,¹⁷ the age of the complainant, the nature of
9 the touch, and so on—a judge may take account of that when sentencing an offender within the
10 prescribed range.

11 Finally, it is important to distinguish sexual-contact offenses from statutes that penalize
12 incomplete efforts to commit a more serious offense, such as attempted rape or assault with
13 intent to commit a sexual offense.¹⁸ Those provisions require proof of an intent to engage in
14 sexual penetration or oral sex. In contrast, in sexual-contact offenses, the *actus reus* requires
15 proof of knowing sexual contact. There are also many other sex-related offenses found in
16 criminal codes but not covered in Article 213 because they do not involve physical intrusion on
17 the person. Examples include prohibitions on “sexting,”¹⁹ exhibitionism,²⁰ prostitution, and
18 voyeurism.²¹

19 With these principles in mind, Section 213.7 creates a unified scheme of liability for
20 offensive sexual contacts. This approach follows the 1962 Code, though it remains an exception
21 in much current state law.²² State codes often contain a patchwork of provisions for special
22 circumstances. It is not unusual to find independent statutes that define a general offense and set
23 out separate provisions that address bodily injury, recidivist offenders, or the touching of
24 children or other vulnerable populations (such as persons who have severe cognitive limits or
25 mental illness, or who are incarcerated).

¹⁷ For instance, the U.S. Supreme Court has recognized the unique characteristics of juveniles, who merit special consideration in sentencing. See, e.g., *Miller v. Alabama*, 567 U.S. 460 (2012) (forbidding sentences of life without parole for juveniles); see also Section 213.0(2)(f) (defining “actor” for most purposes as a person over the age of 12).

¹⁸ See, e.g., CAL. PENAL CODE § 220 (West 2014).

¹⁹ See, e.g., WEST’S FLA. STAT. ANN. § 847.0141 (West 2014) (punishing the knowing transmission of digital sexual images to minors, or possession of such harmful images).

²⁰ See, e.g., ARIZ. REV. STAT. ANN. § 13-1402 (2011) (penalizing exposure of genitals or anus by man or woman, and exposure of areola or nipples by woman, though exempting breast-feeding, and enhancing penalties for recidivists and those who expose to persons under age 15).

²¹ See, e.g., WEST’S REV. CODE WASH. ANN. § 9A.44.115 (West 2014) (punishing the knowing viewing, photographing, or filming, with sexual intent, of another person in a private area or that person’s intimate parts, without that person’s knowledge or consent, but outlining some exceptions).

²² But see, e.g., COLO. REV. STAT. ANN. § 18-3-404 and 18-3-405 (West 2012) (single scheme defining tiers of liability for unlawful sexual contact and sexual assault on a child); 18 U.S.C. § 2244.

The remainder of this Note addresses six aspects of the offenses defining criminal sexual contact: 1) the need for a sex-specific contact offense; 2) the absence of force as a required element for the basic contact offense; 3) the role of consent in the basic contact offense; 4) the decision to recognize certain special circumstances, including those that enhance the penalty to a fifth-degree felony; 5) the required mens rea; and 6) grading.

1. Sex-specific Contact Offenses.

Nearly every jurisdiction has a sex-specific general statutory provision that prohibits the unwanted sexual touching of a competent adult, although the standard applied varies widely. The great majority of statutes resemble battery laws, with an added sexual component.²³ Two jurisdictions follow an alternative pattern, derived from the common law, which prohibits unwanted sexual touches under a general proscription against “lewd and lascivious” behavior.²⁴ One state, Texas, uses a public-indecency provision to punish unwanted sexual contact.²⁵ Two

²³ ALA. CODE § 13A-6-66, 13A-6-67 (2017); ALASKA STAT. § 11.41.420, 11.41.425, 11.41.427 (2019); ARIZ. REV. STAT. ANN. § 13-1404 (2016); ARK. CODE ANN. § 5-14-125 (2016); CAL. PENAL CODE § 243.4 (2013); COLO. REV. STAT. ANN. § 18-3-404 (West 2020); CONN. GEN. STAT. ANN. § 53A-73A (West 2018); DEL. CODE ANN. tit. 11, § 767-769 (2018); D.C. CODE § 22-3004 to 22-3006 (2016); GA. CODE ANN. § 16-6-22.1 (2018); HAW. REV. STAT. § 707-733 (2012); 720 ILL. COMP. STAT. ANN. 5/11-1.50 (West 2017); IND. CODE ANN. § 35-42-2-1, 35-42-4-8 (West 2012); KAN. CRIM. CODE ANN. § 21-5505, 21-5512 (West 2018); KY. REV. STAT. ANN. § 510-110 to 510-130 (West 2014); LA. STAT. ANN. § 14:43.1-3 (West 2012); ME. REV. STAT. ANN. tit. 17-A, § 255-A, 260 (2012); MD. CODE ANN. CRIM. LAW § 3-307, 3-308 (West 2012); MASS. GEN. LAW. ANN. ch. 272 § 53, ch. 265 § 13H (West 2012); MICH. COMP. LAWS ANN. § 750.520e (West 2013); MINN. STAT. ANN. § 609.343, 344, 245, 3451 (West 2016); MO. ANN. STAT. § 566.100, 566.101, 566.145 (West 2012); MONT. CODE ANN. § 45-5-502 (West 2019); NEB. REV. STAT. § 28-320 (2018); N.H. REV. STAT. ANN. § 632-A:4 (2015); N.J. STAT. ANN. § 2C:14-3 (West 2011); N.M. STAT. ANN. § 30-9-12 (West 2014); N.Y. PENAL LAW § 130.52 and 130.55 (McKinney 2015); N.C. GEN. STAT. ANN. § 14-27.5A (West 2014); N.D. CENT. CODE § 12.1-20-04 and 12.1-20-07 (2012); OHIO REV. CODE ANN. § 2907.03, 2907.05, 2907.0, 2907.21 (West 2020); OKLA. STAT. ANN. tit. 21, § 1123(B)(1) (West 2018); OR. REV. STAT. ANN. §§ 163.415, 163.427 (West 2019); PA. STAT. AND CONST. STAT. ANN. § 3126 (West 2015); 11 R.I. GEN. LAWS § 11-37-4 (2012); S.C. CODE ANN. § 16-3-600(C) (2015); S.D. CODIFIED LAWS § 22-22-7.4 (2012); TENN. CODE ANN. § 39-13-504 to 39-13-505 (West 2018); UTAH CODE ANN. § 76-5-404 (West 2017); VA. CODE ANN. § 18.2-67.4 (West 2018); WASH. REV. CODE ANN. § 9A.44.100 (West 2010); W. VA. CODE ANN. § 61-8B-7 to 61-8B-9 (West 2018); WIS. STAT. ANN. § 940.225 (West 2012); WYO. STAT. ANN. § 6-2-304, 6-2-313, 6-2-402 (West 2015); 18 U.S.C. § 2244 and 2246(3).

In addition to the “indecent liberties” statute cited above, WASH. REV. CODE ANN. § 9A.44.100 (West 2010), which requires compulsion, Washington also has a sexual-motivation enhancement for non-sex offenses committed with a “sexual motivation.” WASH. REV. CODE ANN. § 9.94A.835 (West 2009). Similarly, although Indiana’s general sexual-contact statute requires force, the state’s highest court has recently affirmed the use of the battery statute for sexual contact where the element of force is missing. *McCarter v. State*, 961 N.E.2d 43 (Ind. 2012).

²⁴ NEV. REV. STAT. § 201.210 (West 2018) (open or gross lewdness); *Ranson v. State*, 99 Nev. 766 (1983) (upholding conviction against home invader who fondled occupant, reasoning that “open” simply means not furtively); VT. STAT. ANN. tit. 13, § 2601 (2018) (“Lewd or lascivious conduct”), 2602 (“Lewd and lascivious conduct with a child”); *State v. Benoit*, 609 A.2d 230 (Vt. 1992) (interpreting statute generously). Other jurisdictions have provisions with language of this kind, but they either also have more targeted contact statutes, apply them only to offenses involving children, or else appear from case law not to use these provisions for sexual-contact offenses.

²⁵ TEX. PENAL CODE ANN. § 21.07(a)(3) (West 2011) (defining offense of knowingly engaging in sexual contact in public place or, if private, in a place where “reckless about another being offended or alarmed” by the

states use all-purpose (not sex-specific) assault-and-battery statutes to punish offensive sexual contact.²⁶ And two states appear to have no express provision criminalizing offensive sexual touching of adult victims;²⁷ those states may instead use general assault-and-battery offenses to address such behavior, but that solution is not evident in their case law.

The near-universal embrace of a sex-specific contact offense reflects legislative agreement that general assault and battery statutes do not adequately address offensive contact that is sexual in nature. The traditional common-law formulations of assault and battery required no more than an attempted or actual offensive touching.²⁸ The 1962 Model Penal Code took a narrower approach to physical assault, holding liable one who “attempts to cause, or purposely, knowingly, or recklessly causes bodily injury to another.”²⁹ It then defined “bodily injury” as “physical pain, illness, or any impairment of physical condition.”³⁰ In a jurisdiction that followed this model, it is far from clear that most sexual-contact offenses would be a crime, because fondling intimate parts does not typically produce physical pain or impairment of condition.

Even if an ordinary assault-and-battery statute reached acts of sexual contact, sexual contact deserves separate treatment. As the Commentary to the 1962 Code acknowledged, “[t]he motives of the actor, the character of harm to the victim, and the nature of community norms at stake identify sexual assault as a distinct criminological problem” from ordinary assault.³¹ Groping another person’s intimate parts, or imposing one’s intimate parts or seminal fluids on an

sexual contact). Other states also have public-indecency statutes, but those states also have more direct regulations of sexual contact.

²⁶ FLA. STAT. ANN. § 784.03 (West 2015) (“Actually and intentionally touches . . . another person against the will of the other”); IOWA CODE ANN. § 708.1.2.b (West 2015) (“Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.”); see, e.g., *State v. Kraker*, 494 N.W.2d 687 (Iowa 1993) (upholding conviction for simple assault involving 63-year-old defendant for repeatedly taking 19-year-old complainant and “grabbing, holding, kissing, attempting to put his hands up her shirt and down her pants”); *Davenport v. State*, 429 So.2d 1352 (Fla. Dist. Ct. App. 1983) (affirming that simple battery is a lesser included offense of sexual battery by force (the penetration offense)). Florida also has a series of lewdness provisions, including an adult unnatural-and-lascivious act provision, but that does not appear to generally apply to contact offenses. WEST’S FLA. STAT. ANN. § 800.02 (“commits any unnatural and lascivious act with another person”).

²⁷ These states are Idaho and Mississippi. Both of these states have statutes punishing the sexual touching of vulnerable persons, typically children. See, e.g., WEST’S IDAHO CODE ANN. § 18-1505B (sexual abuse and exploitation of a vulnerable adult); § 18-1506 (sexual abuse of a child under the age of 16 years, with parallel structure); § 18-1507 (sexual exploitation of a child, includes “erotic fondling” of specific body parts and with intent); § 18-1508 (Lewd Conduct with minor child under age 16 that has both an intent clause and a nonexhaustive body list, and includes penetration); § 18-1508A (same for age 16 or 17 and older person); 18-6110 (sexual contact with prisoner).

²⁸ See, e.g., *United States v. Chestaro*, 197 F.3d 600 (2d Cir. 1999).

²⁹ 1962 Code Section 211.1(1)(a).

³⁰ 1962 Code Section 210.0(2).

³¹ 1962 Code, Commentary to Section 213.4 at 399.

unwilling person, is an intrusion that asserts dominance and power over that person, violating both privacy and autonomy. It may also carry an implicit uncertainty about whether the actor might escalate the sexual intrusion. Contact offenses can and do occur in public spaces or in front of other people (such as a grope on public transportation). That exposure can leave victims with a sense of powerlessness over their own body, shaking the sense of freedom to move about in the world with confidence that they will not be groped, fondled, or otherwise assaulted. That exposure may cause victims to take a longer path to work, stop frequenting a favorite place, or change their personal style, or it may even simply leave them fearful of engaging in everyday activities in order to avoid unwanted physical attention. Some of the conduct covered by the contact provision may even leave lasting emotional harm. Genital contact is among the most intimate of acts even without penetration, and to be subjected to it without consent is a distinct kind of harm.

For these reasons, sexual batteries should not be equated to simple assaults or batteries. There are many forms of slight contact that ought not to be punished as either simple assault or battery, but adding a sexual purpose changes the nature of the offense. Sexual intent can transform what might under other circumstances be harmless contact into a more sinister act. Brushing a person's back is not the same as brushing a woman's nipple or a man's penis. Nevertheless, the backdrop of ordinary assault-and-battery law does have a role to play; decisions about the scope of sexual-contact liability may be made more cautiously with awareness that the Code, like most jurisdictions, punishes some forms of offensive physical contact as a nonsexual offense.

2. Offensive Sexual Contact: The Absence of a Requirement of Force.

Although there is consensus in existing law that a general sexual-contact prohibition is needed, there is no similar consensus as to the specific elements of this offense. Of the 45 jurisdictions that have a general sexual-contact provision applicable to adults, at least 32 do not require any force.³² To be clear, states that do not require force for the generic sexual-contact offense typically have separate statutes that provide enhanced punishment for sexual contact accompanied by force.

³² See supra note 19 for relevant citations for: California, Colorado, Connecticut, Delaware, D.C., Georgia, Hawaii, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Washington, Wisconsin, Wyoming, and the federal system. Arguably, Virginia could be added to this list, as well as Iowa and Florida, because their ordinary battery statutes do not require force in many circumstances. See, e.g., VA. CODE ANN. § 18.2-67.4 (penalizing sexual contact without force if the actor assaults “within a two-year period, more than one complaining witness or one complaining witness on more than one occasion intentionally and without the consent of the complaining witness”); see also supra note 22. Two more states are ambiguous. Arizona penalizes sexual contact “without consent,” ARIZ. REV. STAT. ANN. § 13-1404 (2016), then defines that phrase to include force or coercion, id. § 1401(A)(7). But Arizona courts have read the “includes” language to mean that list is not exhaustive, and thus have construed “without consent” in the ordinary way. State v. Witwer, 856 P.2d 1183 (Ariz. Ct. App. 1993). South Carolina's statute requires that the touching “unlawfully injure[],” S.C. CODE ANN. § 16-3-600(D)(1)(b), but it is unclear what “injuries” qualify.

Section 213.7 follows the majority of jurisdictions, as did the 1962 Code, in rejecting a force requirement for the basic sexual-contact offense. A force-based standard is too narrow to reflect the intrinsic insult in unwanted sexual contact. For example, consider *Scott-Gordon v. State*.³³ In that case, the court addressed two separate incidents involving the defendant, each with a different complainant. In the first incident, the defendant approached the complainant from behind, groped the complainant's intimate parts, and told him that he (the defendant) had received a "free feel." The complainant jumped away and hit defendant with his fist, but the court reversed the defendant's conviction, finding insufficient evidence of force or threat of force. In the second incident, the defendant repeatedly grabbed a different complainant's hand and placed it on the defendant's penis. This time, the court upheld the conviction, finding that the grab constituted adequate evidence of force. Distinguishing between liability in these two cases seems to miss the point. In both instances, the defendant usurped the complainant's sexual autonomy by subjecting each complainant to an unwelcome act of sexual contact. The fact that in the second case the defendant used "force" and moved the complainant's hand, while in the first case the defendant groped the complainant without "force," provides little basis for distinguishing the defendant's culpability. To exculpate the defendant in the first case simply because he acted unilaterally and by stealth arbitrarily privileges a grope over a grab-and-grope—hardly a defensible distinction.

Scott-Gordon v. State also underscores the need for a targeted sexual-contact offense. Even assuming that the conduct was ordinary battery, treating it that way undermines critical goals. It devalues the sexual dimension of the contact, the aspect of the conduct that makes it offensive and threatening. This Section sides with the majority of jurisdictions, and with the 1962 Code, in criminalizing sexual contact even in the absence of force or coercion. At the same time, it punishes this offense as a petty misdemeanor—which is appropriate given the nature and extent of the harm.

3. Offensive Sexual Contact: Lack of Consent.

The 1962 Code provided for a misdemeanor penalty when the actor "knows that the contact is offensive to the other person."³⁴ This kind of provision is clear in covering situations in which the actor engages in unwanted sexual contact when the other person has no opportunity to refuse or indicate lack of consent. But the provision is problematic in allowing the argument

³³ 579 N.E.2d 602 (Ind. 1991). See also *Chatham v. State*, 845 N.E.2d 203, 207-208 (Ind. Ct. App. 2006) (reversing conviction where defendant, who did not know the complainant, "came up behind [her] and grabbed up with [his] hand in between [her] thighs and [her] crotch as far as [he] could," because even though her subsequent behavior indicated fear, she was not "compelled to submit" by force or threat of force).

³⁴ 1962 Code Section 213.4(1). The 1962 Code defined only three degrees of felonies, and two starkly different grades of misdemeanor. 1962 Code Section 6.06 (first-degree felonies carry a maximum of life imprisonment; second-degree, 10 years; and third-degree, 5 years); *id.* Section 6.07 (misdemeanors carry a maximum of one year, and petty misdemeanors carry a maximum of 30 days). In contrast, "relatively few states" today have such limited divisions. Model Penal Code: Sentencing, Proposed Final Draft, at 37 (AM. L. INST. 2017).

that the actor did not know the sexual contact was *offensive*, even if the actor knew the other person did not consent to the contact.

A small minority of jurisdictions follow the 1962 Code’s precise phrasing in statutes that explicitly incorporate an offensiveness standard. In practice that standard is used more widely because courts in other states routinely allow convictions for offensive sexual contact under all-purpose assault-and-battery statutes.³⁵

More commonly, jurisdictions define the basic sexual-contact offense by using concepts of consent.³⁶ Specifically, of the 32 jurisdictions whose baseline adult sexual-contact provisions penalize sexual contact without requiring proof of force or any other special conditions (such as a vulnerable victim), all but four employ consent as the pivotal element.³⁷ However, almost half do so without further defining “consent.”³⁸ Of those that do define consent, nine embrace an affirmative-consent conception,³⁹ four use “acquiesce” language,⁴⁰ and only two impose an expressed-unwillingness standard.⁴¹

³⁵ DEL. CODE ANN. tit. 11, § 767 (“the person knows that the contact is either offensive to the victim or occurs without the victim’s consent”); OHIO REV. CODE ANN. § 2907.06 (“knows that the sexual contact is offensive . . . or is reckless in that regard”), N.D. CENT. CODE § 12.1-20-07(1)(a) (“knows or has reasonable cause to believe that the contact is offensive”). Texas’s public-indecency provision could also be added here, because it uses language of this kind. See *supra* note 21. Again, many more jurisdictions might also be included here, because states make use of nonsexual battery laws where the terms of sexual-contact offenses are too restrictive. See, e.g., *supra* note 29 (discussing Indiana), and notes 22 & 28 (discussing Iowa, Florida, and Virginia).

³⁶ The majority of contact statutes have a consent provision. See, e.g., ALASKA STAT. § 11.41.420(1)(1) (West 2014) (“without consent of that person”); OR. REV. STAT. ANN. § 163.415 (West 2014) (“victim does not consent”); WIS. STAT. § § 940.225(3), (3m) (West 2014) (“without the consent of that person”).

³⁷ Three of those instead use an “offensiveness” formulation. DEL. CODE ANN. tit. 11, § 767 (“the person knows that the contact is either offensive to the victim or occurs without the victim’s consent”); OHIO REV. CODE ANN. § 2907.06 (“knows that the sexual contact is offensive . . . or is reckless in that regard”), N.D. CENT. CODE § 12.1-20-07(1)(a) (“knows or has reasonable cause to believe that the contact is offensive”). Washington simply uses sexual motivation as an enhancement to simple battery. See *supra* note 19 (discussing Washington provisions).

³⁸ CONN. GEN. STAT. ANN. § 53A-73A (“without the consent”); GA. CODE ANN. § 16-6-22.1(b) (same); WEST’S LA. STAT. ANN. § 14:43.1.1 (same); MD. CODE ANN. CRIM. LAW § 3-308 (same); MASS. GEN. LAW. ANN. 272 § 53, 265 § 13H (“intentional, unjustified touching” per case law); MO. ANN. STAT. § 556:061(5) (“consent or lack of consent may be expressed or implied”); OKLA. STAT. ANN. § 1123(B)(1) (“Without the consent of that person”); OR. REV. STAT. ANN. § 163.315 (“A lack of verbal or physical resistance does not, by itself, constitute consent but may be considered by the trier of fact”); PA. CONST. STAT. ANN. 18 § 3126 (“without the complainant’s consent”); S.D. CODIFIED LAWS § 22-22-7.4 (“has not consented”); TENN. CODE ANN. § 39-13-505 (“knows or has reason to know at the time of the contact that the victim did not consent”); UTAH CODE ANN. § 76-5-404 (“without the consent”); WYO. STAT. ANN. § 6-2-313 (“unlawfully subjects another to any sexual contact”); 18 U.S.C. § 2244 (“knowingly engages in sexual contact . . . without that person’s permission”).

³⁹ Four do so by statute. See COLO. REV. STAT. ANN. § 18-3-401(1.5) (“Cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act.”); D.C. CODE § 22-3001(4) (“words or overt actions indicating a freely given agreement to the sexual act or contact”); MINN. STAT. ANN. § 609.341, subd. 4 (“words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor”); WIS. STAT. ANN. § 940.225(4) (“words or overt actions by a person who is competent to give informed consent indicating a freely given agreement”). Illinois’s law, which is not counted here because it requires “force or threat of force,” nonetheless provides a defense if the victim consented, which it defines as “freely given agreement.” 720 ILL. COMP. STAT. ANN. 5/11-1. Five define consent as positive

Section 213.7. Offensive Sexual Contact

1 The different approaches reflect the central challenge of writing a statute specifying the
2 elements of unwanted sexual contact. The statute should not permit criminal liability for clumsy
3 initial efforts at intimacy, but the statute must also deter and punish culpable sexual intrusions.
4 Spontaneous sexual touches can be innocent or abusive: unwanted sexual contact may come
5 from an overeager date who misreads flirtatious signals or from a stranger on crowded public
6 transportation, but the two situations are not equivalent. The harm suffered by the person touched
7 unwillingly in a romantic situation is typically less serious than the harm of an unwanted sexual
8 contact in a nonsexual setting that may be experienced as a serious intrusion on privacy, an
9 attempt to dominate, and a threat that more and worse acts will follow.⁴²

10 The problem with limiting criminal liability to sexual touches in circumstances involving
11 force, threats, or clear expressions of unwillingness is that in many cases, the offensive sexual
12 touching may be the first instance of contact between the victim and actor, or it may occur even
13 as the victim first becomes aware of the actor's presence. A rule that required an explicit
14 expression of unwillingness would effectively immunize gropes by strangers or those that occur
15 unexpectedly, and it would grant every aggressive actor one "freebie" before a negative reaction
16 established nonconsent. Likely for these reasons, this approach finds little support in existing
17 law.⁴³ Thus, in keeping with the 1962 Code and the overwhelming majority of jurisdictions with
18 a dedicated adult sexual-contact offense, Section 213.7(2)(b) does not require any proof of force
19 or coercion, or an expression of unwillingness.

20 Instead, the central concept of "consent" in Section 213.0(2)(e), along with the required
21 mental state of either knowledge or conscious disregard of a substantial, unjustifiable risk of

agreement via case law. See *People v. Babaali*, 171 Cal. App. 4th 982 (2009) ("freely and voluntarily and know the nature of the act."); *State v. Adams*, 880 P.2d 226 (Haw. Ct. App. 1994) ("Consent signifies voluntary agreement or concurrence."); *State v. Blount*, 770 P.2d 852 (Kan. Ct. App. 1989) ("capable, deliberate, and voluntary agreement to or concurrence in some act or purpose"); *State v. Stevens*, 53 P.3d 356 (Mont. 2002) ("ordinary meaning"); *State ex rel. M.W.M.*, 2006 WL 217793 (N.J. Super. Ct. App. Div. Jan. 30, 2006) (applying affirmative-consent standard to contact offenses). Again, Iowa and Florida arguably fit here as well, since ordinary battery typically does not require a showing of unwillingness. See *supra* note 22.

⁴⁰ KY. REV. STAT. ANN. § 510-020(2)(C) ("not expressly or impliedly acquiesce in the actor's conduct"); ME. REV. STAT. ANN. tit. 17-A § 260(1)(A) (same); N.Y. PENAL LAW § 130.05(2)(C) (same); W. VA. CODE ANN. §§ 61-8B-7-9; 61-8b-2(b)(3) ("If the offense charged is sexual abuse, any circumstances in addition to the forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.").

⁴¹ NEB. REV. STAT. § 28-318(8)(a) ("the victim expressed a lack of consent through words, or (iii) the victim expressed a lack of consent through conduct."); N.H. REV. STAT. ANN. § 632-A:2(m) ("the victim indicates by speech or conduct that there is not freely given consent to performance of the sexual act.").

⁴² Precise figures are not available to establish the frequency with which a person's rejection of unwanted contact leads to violence, but anecdotal reports suggest the number is not trivial. One journalist has called for a database to track "rejection killings"—homicides by men rejected by women (whether strangers, friends, or intimate partners) they had sexually propositioned. Jessica Valenti, *'Rejection Killings' Need to be Tracked*, MEDIUM, Nov. 21, 2018, <https://gen.medium.com/revenge-killings-need-to-be-tracked-37e78a1cf6ce> (listing prominent recent cases).

⁴³ See Reporters' Note, *infra*.

1 nonconsent, properly distinguishes the different circumstances in which sexual contact may
2 occur. Sexual contact that occurs in a situation in which the actor has no reason to believe the
3 other person is willing—such as the stranger’s grope on public transportation—typically is
4 without consent, and the actor has no plausible claim to the contrary. In contrast, sexual contact
5 that arises in circumstances that might suggest receptiveness to further intimacy—even if that
6 hope proves erroneous—can be engaged in without the actor’s awareness of a substantial,
7 unjustifiable risk of lack of consent. The circumstances of the encounter will determine the
8 extent of that risk, and whether the contact is a criminal offense.

9 A consent-based approach is also consistent with the existing body of law surrounding
10 ordinary physical assault and battery, which typically does not presume that victims welcome the
11 assaultive contact unless they specifically expressed otherwise. Although the sexual nature of the
12 contact rightly distinguishes these sexual offenses from simple assault, it is inappropriate to
13 make conviction for offensive sexual contact substantially more difficult than for simple assault
14 by shifting the default assumption of whether the victim was willing. Indeed, an assault on
15 sexual integrity can be more serious than an ordinary physical assault. Victims of unwanted
16 sexual contact recently have forcefully expressed the degree to which such actions have led to
17 long struggles with anxiety, stress, and anger.⁴⁴ This has in turn led to greater recognition that
18 sexual autonomy requires protection against sexual aggression that stops short of sexual
19 penetration.

20 Accordingly, Section 213.7(2)(b) provides that sexual contact is a criminal offense, a
21 petty misdemeanor, when the actor is aware of a substantial, unjustifiable risk that the other
22 person did not consent to the contact.

23 ***4. Offensive Sexual Contact and Felonious Offensive Sexual Contact: Special*** 24 ***Circumstances.***

25 In addition to a general sexual-contact offense, every jurisdiction also has laws applicable
26 to particular situations, especially when the victim is a minor,⁴⁵ including, for example,

⁴⁴ See, e.g., Alix Langone, *#MeToo and Time’s Up Founders Explain the Difference Between the 2 Movements – and How They’re Alike*, TIME MAGAZINE, Mar. 22, 2018 (describing how “groundbreaking anti-sexual assault and women’s empowerment movements #MeToo and Time’s Up upended the public conversation about women’s issues around the world”); Jessica Valenti, *#YesAllWomen reveals the constant barrage of sexism that women face*, THE GUARDIAN (May 28, 2014) (“Women have had enough. The stares. The butt-grabs. The little comments . . . women across the world have come out en masse to share their stories of everyday sexism and misogyny—and to tell the world that enough is enough.”); Rebecca Traister, *Your Reckoning. And Mine*, N.Y. MAGAZINE (Nov. 12, 2017) (“Since the reports of Weinstein’s malevolence began to gush, I’ve received somewhere between five and 20 emails every day from women wanting to tell me their experiences: of being groped or leered at or rubbed up against in their workplaces. They tell me about all kinds of men—actors and publishers; judges and philanthropists; store managers and social-justice advocates; my own colleagues, past and present—who’ve hurt them or someone they know. It happened yesterday or two years ago or 20.”).

⁴⁵ The 1962 Code punished sexual contact with minors under age 10, sexual contact with minors under age 16 (where the actor was more than 4 years older), and sexual contact by a guardian with a ward under age 21. 1962 Code Section 213.4(4), (6), and (7). Although each of these was punished as a misdemeanor, existing law tends to punish contact with children and minors more severely.

Section 213.7. Offensive Sexual Contact

1 prohibitions against commanding a child to disrobe for sexual purposes.⁴⁶ Other common
2 aggravators (or specialized prohibitions) include: contact with vulnerable persons, like the
3 elderly or disabled,⁴⁷ contact between persons in certain status relationships,⁴⁸ contact that leads
4 to bodily injury or that is done with force,⁴⁹ and contact by persons previously convicted of a
5 similar offense.⁵⁰

6 In addition to prohibiting offensive touches and touches of children, the 1962 Code
7 penalized sexual contact in four special circumstances: 1) complainants with a mental disease or
8 defect; 2) unconscious or unaware complainants; 3) deliberate administration of intoxicants; and
9 4) custodial detention. The revised Code carries forward several of these prohibitions, clarifies
10 additional prohibited circumstances, and provides for an enhanced penalty in the most egregious
11 situations. In this respect, Section 213.7, like the 1962 Code, focuses on the vulnerability of the
12 complainant, the circumstances of any purported consent, and any aggravators in the
13 circumstances—rather than on the specific kind of sexual contact—to distinguish between grades
14 of offenses.

15 Section 213.7 heightens the penalty to a fifth-degree felony for Offensive Sexual Contact
16 by Physical Force or Surreptitious Incapacitation when the actor uses or threatens physical force
17 or restraint (subsection (1)(b)(i)) or surreptitiously drugs another for the purpose of engaging in
18 sexual contact (subsection (1)(b)(ii)).⁵¹ The petty misdemeanor penalty for Offensive Sexual
19 Contact in Section 213.7(2) applies to three of the circumstances covered in the 1962 Code: 1)
20 the other person is incapable of consent because unconscious or unaware of the contact
21 (subsection (2)(c)(i));⁵² 2) a mental impairment inhibits the other person's capacity to consent
22 (subsection (2)(c)(ii));⁵³ or (3) the other person is in the actor's custodial care (subsection
23 (2)(c)(ii)).⁵⁴ Section 213.7(2) adds three additional circumstances. The petty-misdemeanor

⁴⁶ See, e.g., IOWA CODE ANN. § 709.14 (West 2014); KAN. STAT. ANN. § 21-5510 (West 2014).

⁴⁷ See, e.g., NEV. REV. STAT. § 201.230.

⁴⁸ The most common category covers persons within the criminal-justice system, such as correctional officers and inmates, probation or parole officers and their wards, and police officers and persons in custody. See, e.g., ALASKA STAT. ANN. § 11.41.425(a)(2) (West 2014). Another popular category covers psychiatric and medical-care providers, see, e.g., ALASKA STAT. ANN. § 11.41.420(a)(4) (West 2014); N.D. Cent. Code Ann. § 12.1-20-06.1 (West 2013). Finally, some states have additional actor-specific provisions. See, e.g., MINN. STAT. ANN. § 609.345 (2014) (specifically naming clergy/parishioner, masseuse/client, among other categories); CONN. GEN. STAT. ANN. § 53a-73a (naming school or athletic instructors, among others).

⁴⁹ See, e.g., DEL. CODE ANN. tit. 11, § 769.

⁵⁰ See, e.g., N.Y. PENAL LAW § 130.53 (“persistent sexual abuse”) (McKinney’s).

⁵¹ Cf. 1962 Code Section 213.4(5) (punishing sexual contact after surreptitious intoxication as a misdemeanor).

⁵² Cf. 1962 Code Section 213.4(3).

⁵³ Cf. 1962 Code Section 213.4(2).

⁵⁴ Cf. 1962 Code Section 213.4(8).

Section 213.7. Offensive Sexual Contact

1 penalty applies when the actor is aware of a substantial, unjustifiable risk that: 1) the other
2 person is passing in and out of consciousness or substantially incapacitated (subsection (2)(c)(i));
3 2) the other person's apparent consent is the result of the actor's extortionate threats (subsection
4 (2)(c)(iii)); or 3) the other person's apparent consent is the result of the actor's prohibited
5 deceptions (subsection (2)(c)(iv)).

6 The justification for penalizing conduct in these categories is covered in the Commentary
7 to the penetration offenses defined in Sections 213.3, 213.4 and 213.5. The two-tier penalty
8 structure warrants elaboration. First, a smaller number of grading categories is appropriate for
9 the sexual-contact offenses than for the penetration and oral-sex offenses. In contrast to acts of
10 sexual penetration or oral sex, sexual contact poses less or no risk of injury, pregnancy, or
11 infection, and is a lesser affront to the other person's dignity, privacy, and sexual autonomy.
12 Because the penalties for sexual-penetration and oral-sex offenses are justifiably severe, a fine-
13 grained approach to grading is imperative. On the other hand, a statutory scheme with fewer
14 levels of penalty, and a much less severe maximum penalty, is appropriate for the sexual-contact
15 offenses.⁵⁵

16 The narrower range of penalties raises the question of how to allocate sexual-contact
17 offenses within that range. Section 213.7 reserves the most serious punishment for two
18 circumstances: (a) the use of or threat to use any impermissible physical force or restraint, which
19 includes the use of or threat to use a deadly weapon; and (b) surreptitious drugging. Those
20 circumstances both magnify the actor's culpability and inflict or threaten additional harm beyond
21 the unwanted sexual contact itself.

22 Elevating the penalty for surreptitiously drugging another person for the purpose of
23 facilitating sexual contact merits elaboration. Surreptitious drugging is punished as a third-degree
24 felony in Section 213.3(1)(b)(ii) when sexual penetration or oral sex occurs, and as a fifth-degree
25 felony in Section 213.7(1)(b)(ii) when the actus reus consists of sexual contact. The Comment to
26 Section 213.1(1)(b)(ii) provides the general justification for heightening the penalty for
27 surreptitious drugging in the context of acts of penetration or oral sex. Surreptitious drugging
28 also merits heightened punishment as a contact offense, as opposed to the lesser punishment
29 prescribed for other vulnerable victims and coercive circumstances defined in Sections 213.3,
30 213.4, and 213.5. These three Sections all involve victims who are incapacitated, vulnerable,
31 legally restricted, extorted, or deceived. But victims of surreptitious drugging as defined by
32 Section 213.3(1)(b)(ii) are in especially concerning physical jeopardy. The actor's surreptitious
33 administration of intoxicating substances both directly exposes the victim to an adverse reaction
34 to the substance and indirectly poses the risk that the victim may suffer injury from the
35 compromised state (for instance, from an allergic reaction, or by driving or swimming while
36 unaware of the intoxicant). In this respect, an actor who uses an intoxicant surreptitiously is more

⁵⁵ Cf. 1962 Code, Comment to Section 213.4, at 402 (observing that the “knows . . . offensive” standard “effects an abbreviated statement” of the provisions that punish intercourse by force or threat, and that “[m]ore elaborate statement was required there in order to accommodate a grading objective not involved in this section”).

like an actor who introduces a weapon or other form of force or threat to obtain sexual submission, rather than like an actor who exploits a preexisting condition. Moreover, an actor who violates Section 213.3(1)(b)(ii) diminishes the probability of the actor’s own apprehension, because the surreptitious nature of the administration may leave the victim unaware of the actor’s role, and amnesiac effects of common substances may leave the victim unable to recall the events. In a bifurcated scheme with only two tiers of punishment, surreptitious drugging fits better among the aggravated offenses.

All of the other circumstances described in Sections 213.3, 213.4, and 213.5—none of which involve the same kind of threat to physical welfare or exposure to risk of physical harm—are subsumed under the offenses described in Section 213.7(2)(c)(ii), (iii), and (iv). In a finely articulated grading scheme such as that applicable to unlawful sexual penetration and oral sex, the specific circumstances described in those offenses warrant varying degrees of severity in the punishment. But none of those offenses describe conduct or circumstances that pose the same added risk of physical harm as the offenses described in Section 213.7(1)(b)(i) and (ii). In a simple two-tier scheme with a lesser range of available punishments, it is appropriate to grade them together in a single offense.

5. *Mens Rea.*

Section 213.0(2)(c) defines “sexual contact” as touches of intimate parts done with a sexual purpose. But, of course, sexual contact alone is not an offense; Section 213.7 specifies the added elements that make sexual contact a criminal offense and generally requires for liability that the actor knowingly commit the act of sexual contact and either know or be aware of a substantial, unjustifiable risk of these additional circumstances.

The 1962 Code required knowledge for three circumstances that gave rise to liability: offensive sexual contact, sexual contact with persons with mental impairments, and sexual contact with persons unaware that the act is occurring.⁵⁶ Several other circumstances in the 1962 Code that are relevant to liability under Section 213.7—that the other person was surreptitiously drugged, that the actor is a guardian, and that the other person is in the actor’s custody—had no specified mental state, which means that the default requirement of recklessness applied.⁵⁷

In contemporary law, mens rea standards for contact offenses defy easy measurement. There are too many variables to assess, and even examination of a single factor yields wildly disparate results. For instance, states vary dramatically as to the mental state required regarding the element of consent or offensiveness in sexual-contact statutes. A significant number of states apply a negligence standard, requiring only that the actor have reason to know that the sexual contact was offensive or without consent.⁵⁸ Some jurisdictions impose a recklessness or

⁵⁶ 1962 Code Section 213.4(1)–(3).

⁵⁷ 1962 Code Section 2.02.

⁵⁸ See, e.g., *Efstathiadis v. Holder*, 119 A.3d 522 (Conn. 2015) (negligence); TENN. CODE ANN. § 39-13-505(a) (negligence – “knows or has reason to know”); *State v. Wier*, 317 P.3d 330 (Or. Ct. App. 2013) (negligence); N.D. CENT. CODE § 12.1-20-07.1.a (negligence: “knows or has reasonable cause to believe that the

knowledge standard.⁵⁹ And some jurisdictions, most recently the Ninth Circuit,⁶⁰ impose strict liability for intentional sexual contact that is nonconsensual.

The definitions of the conduct element in Section 213.7(1)(a) and (2)(a) both require that the act of sexual contact be committed knowingly.

With respect to attendant circumstances, such as the absence of consent, Section 213.7 imposes a mens rea standard that mirrors that found for the equivalent penetration offenses. Thus, generally speaking, the attendant circumstance elements of Section 213.7 require awareness of a substantial, unjustifiable risk that the attendant circumstances are present and, when applicable, that those circumstances caused the other person to submit to or perform the act of sexual contact. The exceptions to this general principle are found the portions of Section 213.7(2)(c) that parallel offenses for penetration and oral sex that impose knowledge as regards the attendant circumstance: specifically, Section 213.3(3) (custodial relationships) and 213.5 (prohibited deception).

The mens rea standard for the attendant circumstances should not be raised or lowered because the act is one involving sexual contact instead of penetration or oral sex. Imposing a knowledge standard, which requires proof of awareness associated with the idea of practical certainty, would set too high a hurdle for liability. Otherwise, an actor who knowingly engaged in a grope or grab, and who admitted that there was a substantial and unjustifiable risk that the sexual contact was without consent or with a vulnerable person, could avoid liability simply by convincing the factfinder that the actor did not know with certainty that the sexual contact was out of bounds. A knowledge standard too heavily privileges the sexual desires of the actor, at the expense of the persons with whom contact was known by the actor to be reckless and risky. Conversely, a less demanding mens rea, such as negligence, is likewise inappropriate. Subjective culpability is the presumed floor of the penal law's mens rea standards, particularly in the Model Penal Code.⁶¹ Moreover, even though the penalty is low, all sexual offenses impose a serious stigma that is unjustified absent proof of some degree of subjective culpability.

contact is offensive”); D.C. Code § 22-3006 (“Whoever engages in a sexual act or sexual contact with another person and who should have knowledge or reason to know that the act was committed without that other person's permission.”).

⁵⁹ See, e.g., OHIO REV. CODE ANN. § 2907.06 (recklessness- “knows that the sexual contact is offensive . . . or is reckless in that regard”); 18 U.S.C. § 2244 (knowing).

⁶⁰ In a recent decision, the Ninth Circuit interpreted a federal sexual-contact statute penalizing an actor who “knowingly engages in sexual contact with another person without that other person's permission.” *United States v. Price*, 921 F.3d 777 (9th Cir. 2019) (interpreting 18 U.S.C. § 2244(b)). In the case, a 46-year-old airline passenger moved seats to sit next to a 21-year-old woman during an evening flight. She alleged that he touched her repeatedly without her consent, while she was asleep; he claimed that she had invited the contact and that he did not realize his touches were without permission. The jury convicted, having been instructed that they need only find an intentional touch and the absence of consent—no proof of the defendant's mental state about that lack of consent was required. Upholding the conviction, the Ninth Circuit held that the “knowingly” mens rea applied only to the act of sexual contact, and not to the element of consent.

⁶¹ 1962 Code Section 2.02.

Given that the mens rea for the offenses in Section 213.7(2)(c) follows the pattern of the parallel provisions governing sexual penetration and oral sex, the comments to those Sections provide the rationale for imposing that standard in greater detail. However, it is important to note that although the recklessness standard may be identical, *application* of the standard in the sexual-contact context differs in important ways from its application to the penetration and oral-sex offenses. In sexual offenses, as in criminal law generally, recklessness is more readily found for greatly harmful or intrusive acts than for more innocuous ones. It is more evidently reckless to enter the neighbors' home without permission than to enter their yard, even assuming equivalent justification. Recklessness is judged in relation to both the probability and the severity of the potential harm. The actor's justification for the conduct also plays an important role. A neighbor who enters a home without permission is not reckless as to that lack of permission if the asserted justification was to save the occupant's beloved pet from a fire. Similarly, sexual contact undertaken without certain assent, but with good reason to hope for reciprocal desire—such as at the end of successful date—may be justified whereas the same risk is unjustified if unilaterally undertaken on public transportation by a stranger motivated by personal gratification alone. In sum, determining whether the actor took a substantial and unjustifiable risk varies according to the nature of the conduct—at the broadest level, sexual penetration versus contact, and more narrowly, contact of a certain kind versus another, along with the asserted justification for engaging in it.

6. Grading.

Contemporary law reflects a broad range of maximum penalties for violations of sexual-contact statutes, as it does for sexual-penetration statutes.⁶² However, there are several points of consensus. First, there is consensus that the baseline sexual-contact offense, which punishes contact with an adult that is offensive or without that person's consent, is in almost all cases graded as a low-level misdemeanor.⁶³ Second, forcible-touching offenses, and contact with vulnerable persons (such as the mentally impaired), are typically graded as felonies,⁶⁴ at times carrying quite severe penalties.⁶⁵

⁶² See Reporters' Note to Section 213.6.

⁶³ See, e.g., Cal. Penal Code § 243.4 (e)(i) (sexual contact against the will, punishable by 6 months); Conn. Gen. Stat. Ann. § 53a-73a (sexual contact without consent, punishable by one year); West's Haw. Rev. Stat. Ann. § 707-733 (sexual contact by compulsion, defined as absence of consent, punishable as a misdemeanor). But see, e.g., ARIZ. REV. STAT. ANN. § 13-1404 (2015) (punishing sexual contact without consent as a Class 5 felony); supra note 28 (describing evolution of Arizona law on the definition of "consent"); UTAH CODE ANN. § 76-5-404 (defining a high level felony for indecent touches); VT. STAT. ANN. tit. 13 § 2601 (permitting up to five years for lewd and lascivious conduct). Only six jurisdictions (D.C., Montana, North Dakota, Ohio, West Virginia, and the federal system) set the maximum penalty lower than 364 days or a year; in these jurisdictions the law prescribes 60- to 90-day maximum penalties for the applicable misdemeanors.

⁶⁴ See, e.g., R.I. GEN. LAWS § 11-37-4.

⁶⁵ See, e.g., UTAH CODE ANN. § 76-5-404 (allowing life for serious bodily injury, otherwise 15 years for forcible contact); WIS. STAT. ANN. § 940.22 (equating sexual contact and sexual intercourse, and allowing up to 40-year penalty); NEB. REV. STAT. § 28-320 (allowing 20 years for causing serious bodily injury); WYO. STAT. ANN.

Section 213.7. Offensive Sexual Contact

1 In keeping with existing law, Section 213.7 grades the basic sexual-contact offense as a
2 petty misdemeanor. Notwithstanding the denotation “petty,” the Model Penal Code Sentencing
3 provisions suggest six months’ incarceration as a rough point of reference for the maximum
4 punishment in the case of a petty misdemeanor.⁶⁶

5 Section 213.7 generally departs from existing law in two respects. Section 213.7(1)
6 grades the forcible-contact offenses as a fifth-degree felony (suggesting a three-year maximum
7 as a rough point of reference), as opposed to the prevalent state legislation applying more severe
8 penalties. And Section 213.7(2) grades sexual contact with certain vulnerable persons—such as
9 those unaware, unconscious, mentally impaired, or impermissibly coerced into contact—as a
10 petty misdemeanor rather than as a felony.

11 Several factors support the Draft’s decision to authorize a less severe penalty than found
12 in existing state law, even in aggravated circumstances or for sexual contact in situations
13 involving vulnerable or coerced victims. Sexual contact, even under aggravating circumstances,
14 typically causes less severe harm than that caused by the more intrusive acts of sexual
15 penetration and oral sex. Grading the basic contact offense with greater severity than the lowest-
16 level penetration offense would seem illogical. In addition, many situations of Offensive Sexual
17 Contact by Physical Force or Surreptitious Incapacitation are also likely to support additional
18 nonsexual charges—such as counts for assault or weapon possession. These added offenses
19 provide adequate flexibility in sentencing for situations that warrant punishment beyond the
20 statutory maximum authorized for a felony of the fifth degree. And to the extent that the sexual
21 contact occurred in a situation in which the defendant intended a more serious offense, the crime
22 of attempt can permit a more fitting penalty.

23 Similarly, instances of unwanted sexual contact without those aggravating conditions,
24 while worthy of punishment, should not be punished at the felony level. Again, the harm to the
25 victim from, and the culpability of the actor for, offensive sexual contact without aggravating
26 factors are generally less severe than the harm and culpability involved when the unwanted
27 sexual acts are sexual penetration or oral sex. To elevate this contact to a felony, authorizing a
28 term of incarceration akin to the term imposed on actors who penetrate others without consent,
29 would collapse important differences in culpability and open the door to unnecessarily harsh,
30 uneven, and potentially discriminatory exercises of charging and sentencing discretion.

§§ 6-2-304, 6-2-306 (allowing 15-year penalty for a variety of circumstances excluding serious bodily injury, and 20 years for serious bodily injury)

⁶⁶ Model Penal Code: Sentencing, Proposed Final Draft Section 6.11(7)(b) (AM. L. INST. 2017).

SECTION 213.8. SEXUAL OFFENSES INVOLVING MINORS

(1) *Sexual Assault of a Minor.* An actor is guilty of Sexual Assault of a Minor when:

(a) the actor engages in an act of sexual penetration or oral sex with another person or causes another person to submit to or perform an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act:

(i) the other person is younger than 16; and

(ii) the actor is more than five years older than the other person; and

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (a) and (b) exist.

Sexual Assault of a Minor is a felony of the fifth degree [*three-year maximum*] except that it is a felony of the fourth degree [*five-year maximum*] when at the time of the act the actor is 21 or older, and it is a felony of the third degree [*10-year maximum*] and a registrable offense when at the time of the act the actor is 21 or older, the other person is younger than 12, and the actor is aware of, yet recklessly disregards, the risk that the other person is younger than 12.

(2) *Incestuous Sexual Assault of a Minor.* An actor is guilty of Incestuous Sexual Assault of a Minor when:

(a) the actor engages in an act of sexual penetration or oral sex with another person or causes another person to submit to or perform an act of sexual penetration or oral sex; and

(b) at the time of the act, the actor is 18 or older and the other person is younger than 18; and

(c) the act is without effective consent because at the time of the act the actor is:

(i) a parent or grandparent of the other person, including a biological, step, adoptive, or foster parent or grandparent; or

(ii) the legal spouse, domestic partner, or sexual partner of a person described by subparagraph (i); or

(iii) a legal guardian or de facto parent of the other person, who resides intermittently or permanently in the same dwelling as the other person; and

(d) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (a) through (c) exist.

Incestuous Sexual Assault of a Minor is a felony of the third degree [*10-year maximum*]. It is a registrable offense when at the time of the act the other person is younger than 16.

(3) *Exploitative Sexual Assault of a Minor.* An actor is guilty of Exploitative Sexual Assault of a Minor when:

(a) the actor engages in an act of sexual penetration or oral sex with another person or causes another person to submit to or perform an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act:

(i) the other person is younger than 18; and

(ii) the actor is more than five years older than the other person; and

(iii) the actor holds a formal position of authority over the other person, such as a teacher, employer, religious leader, treatment provider, administrator, or coach; and

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (a) and (b) exist.

Exploitative Sexual Assault of a Minor is a felony of the fifth degree [*three-year maximum*]. It is a defense to a prosecution under Section 213.8(3) for the actor to prove by a preponderance of the evidence that the actor's position of authority over the other person did not impair the other person's ability to form an independent judgment about whether to consent to the act of sexual penetration or oral sex.

(4) *Fondling a Minor.* An actor is guilty of Fondling a Minor when:

(a) the actor knowingly fondles another person, or knowingly causes another person to submit to or perform an act of fondling with anyone; and

(b) the act is without effective consent because at the time of the act:

(i) the other person is younger than 12 and the actor is more than five years older than the other person; or

(ii) the other person is younger than 16 and the actor is more than seven years older than the other person; and

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraph (b)(i) or (ii) exist.

Grading. Fondling a Minor is a felony of the fifth degree [*three-year maximum*], except that it is a felony of the fourth degree [*five-year maximum*] when at the time of the act the actor is 21 or older, the other person is younger than 12, and the actor is aware of, yet recklessly disregards, the risk that the other person is younger than 12.

(5) Aggravated Offensive Sexual Contact with a Minor. An actor is guilty of Aggravated Offensive Sexual Contact with a Minor when:

(a) the actor knowingly engages in an act of sexual contact with another person or causes another person to submit to or perform an act of sexual contact; and

(b) the act is without effective consent because at the time of the act:

(i) the other person is younger than 18; and

(ii) the actor is more than five years older than the other person; and

(iii) the act, had it been an act of sexual penetration or oral sex, would be an offense as defined by Section 213.1, 213.2, 213.3, 213.4, 213.5, or 213.8(2) or (3); and

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraph (b)(i) and (ii) exist.

Aggravated Offensive Sexual Contact with a Minor is a felony of the fourth degree [*five-year maximum*].

(6) Offensive Sexual Contact with a Minor. An actor is guilty of Offensive Sexual Contact with a Minor when:

(a) the actor knowingly engages in, or causes another person to submit to or perform:

(i) an act of sexual contact; or

(ii) an act involving the touching of the tongue of anyone to any body part or object, when that act is for the purpose of anyone's sexual arousal, sexual gratification, sexual humiliation, or sexual degradation; and

(b) the act is without effective consent because at the time of the act:

(i) the other person is younger than 12, and the actor is more than five years older than the other person; or

(ii) the other person is younger than 16, and the actor is more than seven years older than the other person; and

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraph (b)(i) or (ii) exist.

Offensive Sexual Contact with a Minor is a misdemeanor [*one-year maximum*], except that it is a felony of the fifth degree [*three-year maximum*] when at the time of the act the actor is 21 or older, the other person is younger than 12, and the actor is aware of, yet recklessly disregards, the risk that the other person is younger than 12.

(7) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the circumstances described in any of the subsections (1) through (6) exist at the time of the act. Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring under the circumstances described in any of those subsections.

(8) *Calculation of ages.* The age of any person described in this Section is calculated according to the "days-and-month" approach, which determines age by the day, month, and year of that person's birth, measured in whole numbers.

[(9) *Affirmative defense of marriage.* It is an affirmative defense to a charge under subsections (1), (3), (4), and (6) of this Section, and to a charge under subsection (5)(d) based on an act that would be a violation of subsection (8)(3) had it been an act of sexual penetration or oral sex, that the actor was the legal spouse of the other person at the time of the act of sexual penetration, oral sex, fondling, or sexual contact.]

Comment:

Sections 213.1 through 213.7 apply without regard to the age of the complainant. An actor who engages in acts of sexual penetration, oral sex, or sexual contact without consent, or who engages in acts of sexual penetration, oral sex, or sexual contact when the other person is

vulnerable, or who uses force, coercion, or exploitation to obtain sexual submission, is punishable whether the other person is an adult or a minor.

But the particular vulnerability of minors, who are frequent targets of sexual abuse and exploitation,¹ requires additional protections. The classic framework of force and consent is poorly suited to regulating sexual activity with minors. Young minors may willingly submit to inappropriate sexual activity even in the absence of any threat or force, simply because the actor is an older adult.² Older minors may have the capacity to consent to sexual behavior with age-appropriate peers, but they are susceptible to manipulation or exploitation by family members or other authority figures.³ The universal acceptance of sexual offenses defined solely on the basis of the actor's and complainant's ages affirms that there is widespread agreement about the need to condemn and deter sexual acts when one party is too young, or the relationship between the parties too imbalanced, for a minor to give meaningful consent.

The 1962 Code and every U.S. jurisdiction currently penalize sexual activity with minors on the basis of chronological age alone, without further inquiry into the presence or absence of consent, force, coercion, or added vulnerability. The use of chronological age as a means of discerning different degrees of sophistication at times creates artificial and imperfect distinctions, but it is the universal approach for want of better alternatives. As the 1962 Code recognized, although “chronological age is only a rough estimate of the group of persons sought to be protected in this section, administrative considerations compel use of this crude index rather than a legal test which would call for expert, contradictory, and often inconclusive testimony on the

¹ Estimates of rates of abuse vary, with rates of around one in four to five for girls, and one in six to 20 for boys, before the age of 17. David Finkelhor et al., *The Lifetime Prevalence of Child Sexual Abuse and Sexual Assault Assessed in Late Adolescence*, 55 J. ADOLESCENT HEALTH 329, 329 (2014). When these data are parsed to focus only on sexual acts perpetrated by adults against youths and children, rather than peer-to-peer acts, the rate is reported as one in nine for girls and one in 53 for boys. Id. at 332. Such abuse often has lasting and serious consequences. See, e.g., Tamara Blakemore et al., *The Impacts of Institutional Child Sexual Abuse: A Rapid Review of the Evidence*, 74 CHILD ABUSE & NEGLECT 35, 35 (2017) (“[R]esearch consistently finds a ‘significant link between a history of child sexual abuse and a range of adverse impacts both in childhood and adulthood’ . . .”). See generally *infra* Reporters’ Notes.

² Megan E. Giroux et al., *Differences in Child Sexual Abuse Cases Involving Child Versus Adolescent Complainants*, 79 CHILD ABUSE & NEGLECT 224, 230-231 (2018) (comparing data about minors younger than 12 with data about minors between 12 and 17, and specifically acknowledging that the length and repetition, paired with the lesser intrusiveness and violence, of the abuse of younger children is indicative of “grooming”).

³ Id. at 230 (noting that older adolescents are more likely to be the victims of sexual abuse, particularly by older people outside but connected to the family, among other differences between categories of complainants).

issue of puberty.”⁴ An age-based approach also has longstanding pedigree, despite its shortcomings. As noted in the commentary to the 1962 Model Penal Code, “[a]n early English statute extended felony sanctions to intercourse with a female under the age of 10 with or without her consent.”⁵

Age-gap requirements. Many early codes, including those in place during the drafting of the 1962 Model Penal Code, referred only to the age of the complainant in setting liability, disregarding the age of the actor. But that approach gave rise to numerous objections. The 1962 Code particularly criticized an age-based approach with respect to older girls (the 1962 Code protected only female complainants against male actors), observing that it had the undesirable effect of penalizing young men for consensual “sexual experimentation between contemporaries.”⁶ Focusing on the age of the complainant alone also fails to account for the differing degree of culpability when the same conduct is engaged in by an immature versus a mature actor. In this respect, the age of the actor is an important consideration for social condemnation, even for complainants too young to consent. A misguided, curious adolescent who intrudes sexually on a young child may deserve punishment, but not at the same level as an adult who has specifically targeted minors for sexual gratification. And a young minor who engages in inappropriate sexual behaviors with peers may require intervention by the state, but not through the punitive and condemnatory processes of the criminal- or juvenile-justice systems.

Historical changes have also had the effect of widening the scope of liability for statutes based only on the complainant’s age. A statute that appears to punish without regard to the actor’s age may not have had that effect in an era in which minors were not eligible for criminal punishment. For instance, the 1962 Code punished a man who engaged in “sexual intercourse” with a girl under 10,⁷ and “deviate sexual intercourse” with a girl or boy under 10, as second-degree felonies,⁸ equivalent to forcible rape. That language on its face would seem to impose

⁴ MODEL PENAL CODE Section 213.1 Comment at 328-329 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980).

⁵ Id. at 276 (citing 18 Eliz. c. 7, § 4 (1576); 4 WILLIAM BLACKSTONE, COMMENTARIES *212).

⁶ MODEL PENAL CODE Section 213.1 Comment at 327 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980).

⁷ MODEL PENAL CODE Section 213.1(1)(d) (AM. L. INST., Proposed Official Draft 1962).

⁸ Id. Section 213.2(1)(d).

serious liability for an actor as young as 11 who engages in nominally consensual activity with a nine-year-old complainant. But the Comments to the 1962 Code explain that, in fact, other provisions constrained the availability of punishment for actors who are minors.⁹ Specifically, Section 4.10 of the Model Penal Code, in deference to the “widespread adoption of juvenile court[s]” at the time of the Code’s passage, barred criminal conviction for actors under 16, and presumed that actors as old as 16 or 17 would also be handled in juvenile proceedings absent explicit waiver.¹⁰ Thus, as practical matter, a criminal conviction required at least a six-year age gap between a complainant and an actor, even if a delinquency finding presumably could attach to an 11-year-old actor with a nine-year-old complainant.¹¹

Section 213.3 of the 1962 Code, titled “Corruption of Minors and Seduction,” expressly imposed an age gap in its provisions. It punished, as a felony in the third degree, “sexual intercourse” or “deviate sexual intercourse” between a male four or more years older than a female complainant who was under the age of 16.¹² Complainants 16 years of age or older attained the “age of consent,” and could engage in consensual sexual activity with any person. Conversely, 10- to 15-year-old complainants could lawfully consent to sexual activity with peers within four years of their age. A 14-year-old was thus liable for sexual activity with a complainant of 10, but not 11, 12, or 13. And a 19-year-old was liable for sexual activity with complainants aged 10 to 15.

Like the 1962 Code, existing law generally embraces the view that the age of the actor is important; only a minority of jurisdictions penalize sexual activity solely with reference to the complainant’s age, even for the class of very young complainants.¹³ Rather, most statutes take a tiered approach to liability that punishes sexual behavior on the basis of the ages of the

⁹ Many jurisdictions followed the common law approach that precluded liability for actors under the age of 14. MODEL PENAL CODE Section 213.1 Comment at 339 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980).

¹⁰ Id. at 340; see also *infra* Reporters’ Notes.

¹¹ MODEL PENAL CODE Section 213.1 Comment at 340-341 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980).

¹² MODEL PENAL CODE Section 213.3(1)(a) (AM. L. INST., Proposed Official Draft 1962). That Section also penalized an actor who was a “guardian or otherwise responsible for general supervision of [the complainant’s] welfare” if the complainant was under the age of 21. Id. Section 213.3(1)(b).

¹³ See Leslie Y. Garfield Tenzer, *#MeToo, Statutory Rape Laws, and the Persistence of Gender Stereotypes*, 2019 UTAH L. REV. 117, 121-122 (counting 34 states that impose age differentials, and 16 states that impose age thresholds without regard to the actor’s age); see also *infra* Reporters’ Notes.

complainant and of the actor,¹⁴ excluding liability in most cases of peer sexual activity, imposing moderate liability for adolescents who act sexually in an impermissible manner, and reserving the most severe penalties for adults who prey on very young minors.¹⁵ In contrast to the 1962 Code, however, a significant number of states set an older age of consent. Roughly eight states set the age at 17, and another 11 or so at 18.¹⁶ In fact, all five of the most populous states set a general age of consent at 17 or 18, although the specific terms of those statutes vary.¹⁷

In keeping with the dominant pattern, Section 213.8 permits liability for sexual activity with reference to the age of the complainant and of the actor, without requiring any additional evidence of lack of consent or ineffective consent due to force, vulnerability, or coercion. In effect, Section 213.8 declares certain complainants incapable of providing effective consent

¹⁴ See, e.g., CAL. PENAL CODE § 261.5(c) (Deering 2020) (“Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony . . .”); N.C. GEN. STAT. § 14-27.24(a) (2019) (“A person is guilty of first-degree statutory rape if the person engages in vaginal intercourse with a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim.”); TENN. CODE ANN. § 39-13-506(b)(1) (2019) (defining statutory rape, in part, as the “unlawful sexual penetration of a victim” who is “at least thirteen (13) but less than fifteen (15) years of age and the defendant is at least four (4) years but less than ten (10) years older than the victim”); see also *infra* Reporters’ Notes.

¹⁵ See Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 339 (2003) (“It is somewhat erroneous to think of states having defined one threshold age of consent, although certainly a few states have so declared. Rather, because of the increased complexity of the many statutory schemes, states often provide different ages for consent depending on the particular offense. . . . Indeed, in an attempt to distinguish the egregious felonious sexual activity from the non-egregious, many statutory schemes comprise complex, multi-layered age differential scenarios of victim and perpetrator.”); see also *infra* Reporters’ Notes.

¹⁶ See *Age of Consent Laws by State*, AGEOFCONSENT.NET, <https://www.ageofconsent.net/states> (last visited Aug. 11, 2020).

¹⁷ See, e.g., CAL. PENAL CODE § 261.5(a)-(c) (Deering 2020) (“(a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a ‘minor’ is a person under the age of 18 years and an ‘adult’ is a person who is at least 18 years of age. (b) Any person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor. (c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony . . .”); FLA. STAT. ANN. § 794.05 (LexisNexis 2019) (defining the second-degree felony of “unlawful sexual activity with certain minors” as when a “person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age”); 720 ILL. COMP. STAT. ANN. 5/11-1.50 (LexisNexis 2019) (defining criminal sexual abuse when a “person commits an act of sexual penetration or sexual conduct with a victim who is at least 13 years of age but under 17 years of age and the person is less than 5 years older than the victim” as a misdemeanor); N.Y. PENAL LAW §§ 70.00(2)(e), 130.25(2) (Consol. 2019) (defining rape in the third degree, when an actor “twenty-one years old or more . . . engages in sexual intercourse with another person less than seventeen years old,” as a class E felony, which carries a four-year maximum); TEX. PENAL CODE ANN. § 22.011(a)(2), (c)(1), (e)-(f) (LexisNexis 2019) (defining “child” as a person younger than 17, and penalizing acts of penetration with a child as a second-degree felony, but allowing an affirmative defense for actors within three years of age of complainants 14 or older).

solely as a result of their age and their age relative to the actor, or to the actor’s special authority over them.¹⁸ Consistent with the 1962 Code, Section 213.8 also sets a general age of consent of 16.

Mens rea – conduct of sexual penetration, oral sex, fondling, or sexual contact. The provisions of Section 213.8 address four different conduct elements: sexual penetration and oral sex (Section 213.8(1) through (3)), fondling (Section 213.8(4)), and sexual contact (Section 213.8(5) and (6)).

a. Sexual Penetration and Oral Sex. Sections 213.8(1) through (3) cover acts of sexual penetration or oral sex, and subsections (1)(c), (2)(d), and (3)(e) make explicit that each requires proof of at least the defendant’s awareness of a substantial, unjustifiable risk of sexual penetration or oral sex. As explained in the commentary reproducing the 1962 Code’s mens rea provision, Section 2.02, the Model Penal Code presumes that recklessness is the applicable mens rea unless otherwise specified.¹⁹

Existing law often omits explicit reference to any mens rea, much less the mens rea as to the act of sexual conduct (as opposed to the required mental state for the defendant’s awareness of attendant circumstance such as the victim’s age, the absence of consent, or the victim’s incapacity).²⁰ Defenses of accidental or inadvertent penile penetration are uncommon in case law involving adult complainants.²¹ Case law contains more examples of defenses of accidental or inadvertent penetration in the context of allegations of digital or object penetration.²² When such claims arise, and raise the question of the mental state required for the actor’s conduct in

¹⁸ Importantly, it is the age of the minor that is of consequence; sexual activity with emancipated minors who fall within the terms of Article 213 remains prohibited, unless a judicial emancipation order or other statute requires otherwise. RESTATEMENT OF THE LAW, CHILDREN & THE LAW § 4.10 & Comment *k* (AM. L. INST., Council Draft No. 4, 2019).

¹⁹ See Comment, Section 213.0(1) (reproducing the definition of recklessness, which requires *conscious disregard of a substantial and unjustifiable risk*, as well as the 1962 Code’s statutory interpretation provisions in Section 2.02(3), which expressly set recklessness as the presumptive mens rea).

²⁰ See, e.g., Reporters’ Notes to Article 213 referencing mens rea.

²¹ See, e.g., *State v. Fenney*, 2015 WL 1880185 (Minn. Ct. App. 2015) (finding sexual penetration, defined as “any intrusion however slight into the...anal opening,” to require proof of “general intent” and finding evidence sufficient where complainant could not remember assault, but “police found a toilet brush with five and one-half inches of L.H.’s blood and DNA on the handle at the crime scene” and “fecal matter just inside the threshold” where complainant recalled pain began and injuries consistent with forcible penetration of anus by handle, thereby rejecting defendant’s claim of reasonable doubt that complainant fell and injured self on toilet roller holder).

²² See, e.g., *Fenney*, 2015 WL 1880185.

engaging in penetration, courts tend either to permit strict liability or to impose a “general intent” standard that is readily met.²³

But as regards child offenses in particular, the question of the actor’s mental state as to the conduct is not gratuitous. Defenses of accident or mistake are not uncommon,²⁴ especially since the defense of consent is unavailable for most child offenses and physical evidence may preclude a convincing claim that the complainant is lying or mistaken about identity. For instance, in *Brown v. State*,²⁵ four witnesses observed through a window that the defendant was engaged in what appeared to be an act of sexual penetration of his three-year-old stepdaughter, who later exhibited signs of gonorrhea (for which the defendant had recently been treated).

²³ See, e.g., *State v. Aponte*, 800 A.2d 420 (R.I. 2002) (announcing, in case involving 15-month-old who required multiple surgeries to correct injuries from acts of digital penetration, that proof of mens rea “do[es] not apply to vaginal penetrations of such force and duration that could never be confused with the normal activities of parenting or child care, particularly in light of these horrific injuries”). See also *Commonwealth v. Henderson*, 2014 WL 10752242 (Pa. Super. Ct. 2014) (finding that the state’s “deviate sexual intercourse” statute “does not contain an intent component and the Defendant cannot impute one by now saying that the anal penetration was only accidental”); *State v. Duncan*, 128 Wash. App. 1030 (Wash. Ct. App. 2005) (upholding trial court’s refusal to allow chiropractor to assert that any penetration was accidental, because “[i]ntent or knowledge is not an element of second degree rape”). Cf. *Gonzales v. State*, 2018 WL 6520572 (Tex. App. 2018) (upholding verdict where defendant claimed the alleged acts of digital and penile vaginal penetration occurred consensually, while the alleged acts of digital and penile anal penetration were mistaken and accidental).

²⁴ See, e.g., *Commonwealth v. Widger*, 237 A.3d 1151 (Pa. Super. Ct. 2020) (finding sufficient evidence of “knowingly and recklessly digitally penetrat[ing] the child’s vaginal cavity without a good faith medical reason,” notwithstanding defense claim that penetration of infant occurred accidentally while changing toddler’s diaper, in part due to medical evidence establishing second-degree laceration requiring sedation and sutures); *State v. Wall*, 764 So.2d 1191 (La. Ct. App. 2000) (affirming sentence and rejecting defendant’s claim that “penetrations of A.S. were accidental” or to “teach S.S. how to masturbate because she was asking him about sex”); *State v. Otto*, 157 P.3d 8 (N.M. 2007) (admitting uncharged prior acts evidence to counter defendant’s claim that penetration was a mistake or accident).

A related issue can arise with respect to a defendant charged with sexually penetrating a specific orifice of another person. If the prosecution must prove beyond a doubt that the defendant was practically certain about the specific orifice, then defense counsel can more readily raise the defense that the defendant in fact intended to penetrate a different orifice. For instance, suppose an actor engaged in an act of nonconsensual anal penetration and is charged with doing so. At trial, the actor’s counsel can assert a mens rea defense by claiming that the actor’s intent was an act of nonconsensual vaginal penetration. Such a this defense more readily succeeds if the government must prove *knowing* penetration of the anus, as opposed to having to prove the actor’s awareness of a substantial and unjustified risk of anal penetration. See, e.g., *Commonwealth v. Henderson*, 2014 WL 10752242, *26 (Pa. Super. Ct. 2014) (finding that the state’s “deviate sexual intercourse” statute “does not contain an intent component and the Defendant cannot impute one by now saying that the anal penetration was only accidental”); *Gonzales v. State*, 2018 WL 6520572 (Tex. App. 2018) (upholding verdict where defendant claimed the in fact the acts of digital and penile vaginal penetration occurred consensually, and that additional acts of digital and penile anal penetration were simply mistaken and accidental).

²⁵ *Brown v. State*, 680 S.E.2d 909 (S.C. 2009). See also *Jones v. State*, 288 S.E.2d 788 (Ga. Ct. App. 1982) (error not to instruct jury on accident when defendant claimed his finger accidentally penetrated daughter’s vagina while cleaning her); *Metts v. State*, 435 S.E.2d 515 (Ga. Ct. App. 1993) (error not to instruct on accident when defendant claimed that any contact with complainant was accidental byproduct of sharing a bed to sleep).

1 When confronted, the defendant claimed that “he may have accidentally penetrated her” and that
 2 he “came ... into her a couple of times but not intentionally” while in the process of disciplining
 3 her. The statute under which the defendant was convicted punished “sexual battery with a victim
 4 who is less than eleven years of age” and defined sexual battery as “sexual intercourse, sexual
 5 intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of
 6 a person’s body or of any object into the genital or anal openings of another person’s body,
 7 except when such intrusion is accomplished for medically recognized treatment or diagnostic
 8 purposes.”²⁶ The defendant was permitted to argue mistake to the jury, but ultimately was
 9 convicted and that conviction was upheld.

10 In contrast, in *People v. Bell*,²⁷ the complainant was convicted of aggravated criminal
 11 sexual abuse of a five-year-old child. After the child exhibited pain while urinating and vaginal
 12 irritation, the child claimed that the defendant (her mother’s boyfriend) had touched her vagina.
 13 The defendant stated that he had wrestled with the child, and may have accidentally touched her
 14 vagina, but did not do so intentionally, and that the child’s claim was in retaliation for his
 15 planned job relocation. Reversing the conviction, the court held that the evidence failed to
 16 establish beyond a reasonable doubt that the defendant had engaged in an act of sexual
 17 penetration, defined as “any intrusion, however slight, of any part of the body of one person ...
 18 into the sex organ ... of another person.”

19 Case law includes several examples of this kind—typically by a young minor who lacks
 20 sexual sophistication, who testifies ambiguously about whether the defendant actually penetrated
 21 the minor or simply groped the minor’s exterior genitalia²⁸—and illustrates the manner in which
 22 a heightened mens rea standard can play a crucial, and unnecessarily problematic, role in cases
 23 alleging penetration of a child. Child complainants also at times have trouble stating with
 24 precision the exact nature and scope of the intrusion. Child complainants do not always have the
 25 sexual experience or bodily awareness to differentiate clearly between orifices. As one court
 26 observed, “we cannot expect the child victims of violent crimes to testify with the same clarity

²⁶ S.C. Stat. § 16-3-655 (criminal sexual conduct with a minor); S.C. Stat. § 16-3-651(h) (sexual battery).

²⁷ *People v. Bell*, 625 N.E.2d 188, 191 (Ill. App. Ct. 1993).

²⁸ See, e.g., *id.* at 190 (citing as precedent reversals in two similar cases in which the testimony was that defendant “‘poked’ her vagina with his finger” and a second in which the defendant had “‘touched’ her in her ‘naughty place’”)

1 and ability as is expected of mature and capable adults.”²⁹ Child complainants may use words
 2 like “pushing” or “rubbing” that not only make proof of the element of penetration challenging,
 3 but also do not unequivocally support a finding that the actor *knew* penetration would occur.³⁰
 4 This is true even when other evidence supports a finding that there was penetration. Also, in a

²⁹ Villalon v. State, 791 S.W.2d 130 (Tex. Crim. App. 1990) (en banc) (affirming conviction where complainant testified using dolls as illustrations, even though the complainant “never testified to language which would establish penetration of the vagina” but said:

he was on top of her doing bad things “with the one he pees” and that he was trying to “put it where I pee.” When asked by the prosecuting attorney if he “put it where (she does) number one,” she responded affirmatively....Her testimony concerning bleeding was that “three days it started bleeding from where I do number one.

791 S.W.2d at 134.

³⁰ See, e.g., J.A. v. State, 904 N.E.2d 250 (Ind. 2009) (“J.A. also claims that “common sense” undercuts the reliability of Je.A.’s statements because the State alleged that he penetrated Je.A.’s anus with his penis, whereas Je.A. testified that J.A.’s penis was “soft” when this occurred. As noted by the State, this argument ignores Je.A.’s testimony that he could feel J.A.’s penis inside him and that this hurt. The trial court found that a child of Je.A.’s age was “unlikely to understand the import” of what J.A.’s counsel meant when he questioned him about whether J.A.’s penis was “soft.””)

A typical example of testimony by a very young child is illustrated in State v. Stenberg, 404 P.3d 356 (Ct. App. Ks. 2017). As recounted by the trial court: “Stenberg correctly notes there was some evidence that could be consistent with a lack of penetration. At trial, K.P. testified Stenberg touched her “privates” with his “privates” by moving his hips while he was on top of her. She stated that his privates went “on top” of her privates and that Stenberg’s movements did not “make [her] skin move.” Undersheriff Sharp testified about Stenberg’s confession at trial. In his written statement, Stenberg admitted that he “rubbed [his] soft penis against [K.P.] when [he] awoke from sleeping with no clothes on” and that he “rubbed it against her vagina.”

K.P.’s statements in her interview with Special Agent Popejoy were inconsistent. She initially told Popejoy that Stenberg “put his pee-pee in my pee-pee” and “he put his pee-pee in mine,” using language that Popejoy established indicated that Stenberg put his penis in her vagina. When Popejoy asked K.P. what Stenberg did with his pee-pee, K.P. said that “he wiggled it.” However, when Popejoy asked her whether she could feel it “inside or only on her pee-pee,” K.P. said it was “only on my pee-pee.” And when Popejoy demonstrated Stenberg’s acts with a tissue box, K.P. indicated that Stenberg’s penis did not go inside of the line on the top of the box. K.P. role-played Stenberg’s acts both by acting out Stenberg’s movements on the floor using her own body and by using anatomically correct dolls provided by Popejoy. In both exercises, K.P. appeared to be demonstrating intercourse positions.”).

An example of testimony by an older child is illustrated by the 10-year-old complainant in People v. Campise, 2020 WL 1482624 (Cal. Ct. App. 2020) (“According to Jane, appellant repeatedly tried to put his penis inside her vagina. She testified “it wouldn’t go in all the way, though.” She would lie on the bed with her pants down, and he would try to push his penis inside her. Jane told the jury appellant’s penis would “push” on her, but it would not go inside because “my hole isn’t big enough.” She said it hurt when appellant tried to penetrate her with his penis. She denied appellant’s penis ever went inside her even a little bit. While he pushed against her, “goosey stuff” would come out.

Jane agreed that, when appellant was trying to push inside her vagina, the tip of his penis was touching her vagina, and his penis was lined up towards her vagina. According to Jane, appellant would ejaculate while he was pushing his penis “[i]n my crotch[,]” “on my crotch,” and “against” her crotch.

Jane testified appellant’s penis would initially be “like, soft, like kind of squishy and hard” before he pushed against her, and then it became harder. He told her it felt good. According to Jane, appellant would ejaculate in her crotch, and he would push the ejaculate inside her. She could feel a “warmness” from his “goosey stuff” as it went down inside her vagina. She estimated appellant tried to penetrate her vagina with his penis more than five times during their various encounters.”).

1 nontrivial number of cases, the defendant has alleged lack of practical certainty (i.e., knowledge)
2 of penetration because the child’s orifice was too small.³¹

3 In these situations, and many others, the difference is between, on the one hand, an
4 accidental or negligent penetration (a reasonable person would have been aware of a risk of
5 penetration), which is nonculpable, and culpable acts committed with awareness and yet
6 disregard of a *substantial* and *unjustifiable* risk. A reckless mens rea ensures that an actor can be
7 convicted of a crime when—but only when—that actor sexually penetrates another person or
8 engages in oral sex while aware that the risk of such sexual penetration or oral sex is substantial
9 and unjustifiable, to such an extent that it *grossly deviates from the standard of care of a law-*
10 *abiding person*. That is the criterion that properly marks the line between culpable and
11 nonculpable conduct, between actors who should be deterred and punished versus those who
12 should not be—not whether the actor was practically certain (i.e., knowing) of the penetration.

13 Although a recklessness standard exceeds that found in much of existing law, particularly
14 as regards offenses involving children, some commentators have expressed concern about the
15 application of a recklessness standard to accidental acts of penetration and about intentional acts
16 that appear to ill-fit the gravity of “sexual penetration” even though they satisfy its technical
17 definition. For instance, it has been argued that a Good Samaritan catching a falling child from a
18 climbing structure might commit the act of recklessly penetrating the child, and thus risk
19 liability. But that conclusion is incorrect—recklessness requires awareness of a risk of
20 penetration that is not just substantial but *also unjustifiable*—and so much so that it grossly
21 deviates from a law-abiding person’s standard of care. A bystander who catches a falling child,
22 even when aware of a substantial risk of penetration, is neither *unjustified* in doing so nor grossly
23 deviating from a law-abiding person’s standard of care, and thus is not reckless.

³¹ See, e.g., *People v. Bell*, 625 N.E.2d 188, 191 (Ill. App. Ct. 1993) (reversing conviction absent proof beyond a reasonable doubt that digital fondling led to penetration, citing precedent). Cf. *State v. Bomar*, 182 P.2d 47 (Mont. 2008) (addressing jury verdict in case involving child complainant and ambiguity as to whether defendant penetrated child); *Wiegat v. State*, 76 S.W.3d 49 (Tex. Ct. App. 2002) (rejecting defense argument of insufficient evidence of penetration, as opposed to contact in light of physical findings including mother’s observations and seven year old disabled child’s genital warts). This is a defense as old as the common law, although a mens rea offered no relief because such offenses were often strict liability or negligence offenses. See, e.g., *State v. LeBlanc*, 5 S.C.L. 339 (Const’l Ct. App. S.C. 1813) (“It is said that the act was not so completed as to constitute the offence, and that there could not have been a sufficient penetration. It is laid down by all writers on criminal law, that the least penetration is sufficient. The child herself has proved there was some penetration. The doctors all concur that some penetration may be effected on a subject as small as this, and if it might be, the lameness affords a presumption that sufficient force was used for that purpose.”).

A separate concern arises with regard to intentional acts of penetration that might technically satisfy a recklessness standard, such as a locker room “wedgie”³² that might expose ordinary pranksters to unjustifiable criminal liability. We do not doubt that inflicting a “wedgie” on an unsuspecting or otherwise nonconsenting person, even if just as a childhood or adolescent prank, violates the terms of one or more Article 213 offenses. But this result is not a consequence of requiring only a reckless mens rea, and it cannot be avoided by raising the required mens rea to knowledge. Forcibly pulling a person’s underpants upwards from the back is conduct deliberately intended to inflict discomfort or embarrassment by drawing that clothing into the anus or vagina. That conduct would fall within the terms of an Article 213 penetration offense even if a *purposeful* mens rea were required, just as many other forms of playground bullying readily meet the criminal law definition of an assault. The solution to the potential overbreadth of criminal liability in such cases, as in countless others of this kind, is the sound use of prosecutorial discretion, dismissal under the de minimis provision,³³ or if need be, juvenile-court intervention, rather than tinkering with mens rea requirements that fail even to solve the asserted problem.

b. Fondling and Sexual Contact. In contrast to the recklessness standard for the conduct elements of Section 213.8(1) through (3), which applies to acts of penetration or oral sex, Section 213.8(4), (5) and (6) imposes a mens rea of knowledge as regards the conduct elements of fondling or sexual contact. Both sexual contact and fondling also require the prosecution to prove the defendant’s sexual purpose, as required by Section 213.0(2)(c) and (d).

A knowledge standard such as that imposed in Section 213.8(4), (5) and (6) leaves room for defendants to argue for acquittal on the basis that they did not know with certainty that they were engaging in an act of fondling or sexual contact—even if they admit to conduct that involved a conscious disregard of a substantial and unjustifiable risk of those sexual acts. That is because knowledge requires the prosecution to prove beyond a reasonable doubt that the defendant is *aware* that the defendant is engaged in such conduct, at the level associated with

³² Wikipedia, an appropriate source for explaining slang of this kind, defines a wedgie as “the act of forcibly pulling a person’s underpants upwards from the back. The act is often performed as a school prank or a form of bullying.” <https://en.wikipedia.org/wiki/Wedgie> (accessed Mar. 30, 2021).

³³ 1962 Code Section 2.12.

1 *practical certainty*, whereas recklessness requires conscious disregard of a substantial and
2 unjustifiable risk.³⁴

3 Little attention is given in existing case law to the question of mens rea as regards the
4 conduct of contact, perhaps because such offenses often require proof of a specific sexual
5 purpose, as a matter of either statutory or case law.³⁵ Judicial efforts to read a mens rea into an
6 ambiguous statute have led to convoluted standards, as exemplified by a series of cases from the
7 Rhode Island Supreme Court.³⁶

8 But as explained in depth in the Comment to Section 213.7, acts of sexual contact more
9 plausibly occur in an incidental, accidental, or nonsexual manner, as compared to acts of sexual
10 penetration or oral sex. Even the safeguard of sexual purpose is inadequate, as that sexual
11 purpose may itself be contested. A requirement that the acts of contact with an intimate part be
12 knowing can help offset concerns about overbreadth.

13 The act of fondling the genitals presents a more challenging question. It more closely
14 resembles acts of penetration or oral sex, in that the act itself is more likely to indicate intention
15 than inadvertence. But it also somewhat resembles sexual contact, in the sense that the line
16 between mere touch and fondling is far from precise. For this latter reason, a mens rea of
17 knowing is more appropriate for the conduct element of fondling in 213.8(4). To the extent that
18 the evidence establishes knowing contact, but is equivocal about the more sustained or prolonged
19 form of contact defined as fondling, the actor will still be liable for that sexual contact under the
20 provisions of Section 213.7 and Section 213.8.

³⁴ See 1962 Code Section 2.02(2)(b), (c); Comment to Section 213.0(1).

³⁵ See, e.g., Reporters' Note to Section 213.0(2)(c).

³⁶ See, e.g., *State v. Tobin*, 602 A.2d 528 (R.I. 1992) (reading proof requirement that *defendant* had the purpose of sexual arousal, gratification, or assault into statute that punished intentional sexual contact that a *reasonable person* could construe as for sexual purposes); *State v. Griffith*, 660 A.2d 704 (R.I. 1995) (applying *Tobin* reasoning to hold that "first-degree child-molestation sexual assault...is not a strict liability offense" but instead incorporates an added proof requirement that the "defendant's act of [digital] penetration be for the purpose of sexual arousal or gratification"); *State v. Bryant*, 670 A.2d 776 (R.I. 1996) (holding that "purposeful penile penetration precludes a finding of innocent touching," and thus no additional requirement of sexual purpose need be proved); *State v. Aponte*, 800 A.2d 420 (R.I. 2002) (further limiting *Griffith* and holding that proof of mens rea "do[es] not apply to vaginal penetrations of such force and duration that could never be confused with the normal activities of parenting or child care, particularly in light of these horrific injuries").

1 ***Mens rea – attendant circumstances of age of actor and minor.*** Historically, statutory
 2 rape has been treated as a strict-liability offense as regards the ages of the victim and actor.³⁷
 3 Even as of the drafting of the 1962 Code, that rule “continue[d] today in a large number of
 4 states.”³⁸ Today, strict liability persists in a majority of jurisdictions.³⁹ As a result, a defendant
 5 proven to have engaged in prohibited sexual conduct with a person under the specified age could
 6 mount no defense of mistake as to the age, no matter how reasonable or justified.

7 Despite misgivings, the 1962 Code followed this practice in part, denying any defense of
 8 mistake as regards complainants under 10 years old, in part because “any proposed change on
 9 this point would encounter political resistance.”⁴⁰ But the Code recognized the imperative to
 10 allow a defense of mistake for older complainants, providing a defense of “reasonable belief” for
 11 offenses in which criminality depends on the child’s being below a statutory threshold older than
 12 10.⁴¹ This “compromise solution” proved “extremely influential” according to the commentaries
 13 published in the 1980s.⁴²

14 As explained further in the Reporters’ Note, current law primarily embraces a strict-
 15 liability standard, but there are three variables evident in alternative models. First, some
 16 jurisdictions embrace the “hybrid” model of the 1962 Code, and apply different standards of
 17 mens rea based on the age of the complainant. Second, among jurisdictions that embrace some
 18 form of mens rea, some require that the government prove a culpable mens rea, whereas others

³⁷ MODEL PENAL CODE Section 213.6 Comment at 413 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980); see also *infra* Reporters’ Notes, note 3(a).

³⁸ MODEL PENAL CODE Section 213.6 Comment at 413 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980).

³⁹ Roughly two-thirds of states impose strict liability for statutory rape, allowing no mistake-of-age defense. See *infra* note 266 and accompanying text; see also, e.g., *Pritchard v. State*, No. 280, 2003, 2004 Del. LEXIS 61, at *4 (Feb. 4, 2004) (explaining that Delaware’s statutory rape law “precludes a defense based on the defendant’s reasonable belief that the victim had reached the age of consent”).

⁴⁰ MODEL PENAL CODE Section 213.6 Comment at 416 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980).

⁴¹ *Id.* (“Section 213.6(1) provides, however, that it is no defense to liability for rape or deviate sexual intercourse that the actor reasonably believed the child to be older than 10. It was thought that strict liability would be acceptable for offenses based on such extreme youth and that in any event any proposed change on this point would encounter political resistance. Section 213.6(1) further provides, however, that the actor may defend in cases where the age is set higher than 10 by proving that he “reasonably believed” his sexual partner to be above the specified age. The phrase ‘reasonably believed’ is defined in Section 1.13(16) *supra* to establish a minimum culpability of negligence. The defendant must establish both the fact and reasonableness of his mistake by a preponderance of the evidence.”).

⁴² *Id.* at 416-417.

1 simply permit an affirmative defense of mistake.⁴³ Lastly, the law and courts in some
2 jurisdictions have not resolved every aspect of the issue, and thus no definitive statement about
3 mens rea can be made.

4 The imposition of strict liability has historically been justified on two grounds. First,
5 when the age of consent is set at an age as young as 10, as in the 1962 Code, “no credible error
6 of perception would be sufficient to recharacterize a child of such tender years as an appropriate
7 subject of sexual gratification.”⁴⁴ Second, the common law tended to view child sexual abuse as
8 a harm primarily perpetrated by sexually aggressive men upon young, sheltered females. It was
9 also considered a crime to have sexual intercourse of any kind outside of marriage.⁴⁵ In this
10 view, the simple act of a grown man being alone with or having a sexual encounter with a young
11 girl not his wife was either criminal or considered obviously wrongful. Thus the greater wrong of
12 engaging in sexual activity was justifiably punished without proof of further mens rea (including
13 mens rea as to the girl’s age), given the lesser wrong of a man enjoying a private encounter with
14 a girl—reasoning typified by the case of *Regina v. Prince*.⁴⁶ Finally, prosecutors have argued
15 that mens rea requirements place too high a burden in pursuing cases as serious as allegations of
16 child sexual abuse, even given a general preference to impose liability only upon actors proven
17 to have had a culpable mindset.

18 But none of those premises withstands scrutiny today. First, and most fundamentally,
19 criminality, particularly in the case of offenses involving moral turpitude, always ought to
20 depend on awareness of wrongdoing (a mens rea of at least recklessness) proved beyond a
21 reasonable doubt, and as much so in sexual offenses as in any others.⁴⁷ The Supreme Court has
22 increasingly underscored the importance of imposing a *mens rea* requirement as regards criminal

⁴³ See *infra* Reporters’ Notes, note 3(a).

⁴⁴ MODEL PENAL CODE Section 213.6 Comment at 414 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980).

⁴⁵ See, e.g., Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660, 1661 n.9 (collecting fornication and adultery statutes).

⁴⁶ See *R v. Prince* [1975] 2 C.C.R. 154 (Eng.) (denying a mistake defense on a lesser legal wrong/lesser moral wrong theory, as taking the complainant from her parents’ legal custody was itself a wrongful act).

⁴⁷ See *B (A Minor) v. Director of Public Prosecutions* [2000] 1 All E.R. 833 (repudiating *Prince* as “at variance with the common law presumption regarding mens rea” and thus “unsound”).

offenses, observing the “basic principle that wrongdoing must be conscious to be criminal.”⁴⁸ In *United States v. X-Citement Video*, the Supreme Court applied this principle directly to an offense involving the sexual exploitation of children.⁴⁹ In that case, the Court held that a defendant could not be convicted of possessing child pornography in the absence of evidence that the defendant knew that children were depicted in the images. If anything, the prevalence of sex-offender registration and other harsh collateral consequences distinctive to the sexual offenses makes proof of mens rea all the more important in these cases.⁵⁰

Beyond this issue of principle, the pragmatic concerns once thought to justify strict liability for sexual conduct with minors no longer hold sufficient force today. For one thing, contemporary law typically does not rest on a single absolute age of consent.⁵¹ Rather, the law sets forth tiers of liability that recognize that in modern society even very young children may engage in sexual activity with peers that, while perhaps undesirable, should not be criminalized. As such, the range of “credible error” is actually much greater. Although few nine-year-olds could be mistaken for 18, a 15-year-old might reasonably be perceived to be 16. A tiered liability structure, imposed without proof of mens rea, could therefore have the effect of criminalizing a young person who reasonably, but erroneously, believed a sexual partner to be a peer. A child of 11 who appears or claims to be 13 would not be a clearly inappropriate sexual partner to a minor of 16. Strict liability is thus a poor fit for a contemporary era in which sexual exploration is more common among minors, and for a system of liability attuned to the age of both the complainant and the actor.

Second, empirical evidence has shown that most perpetrators of child sexual abuse are persons known to the complainant, such as family members, teachers, or clergy.⁵² The danger of

⁴⁸ *Elonis v. United States*, 135 S. Ct. 2001, 2003 (2015) (internal quotations omitted).

⁴⁹ *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 65, 70 (1994). But cf. *United States v. Price*, 921 F.3d 777, 793 (9th Cir. 2019) (interpreting 18 U.S.C. § 2244(b) as a strict liability offense as regards the defendant’s awareness of the absence of consent).

⁵⁰ See *infra* Reporters’ Notes to Section 213.11.

⁵¹ See *infra* Reporters’ Notes, note 3.

⁵² See Rebecca L. Moles & John M. Leventhal, Editorial, *Sexual Abuse and Assault in Children and Teens: Time to Prioritize Prevention*, 55 J. ADOLESCENT HEALTH 312, 312 (2014) (“Strangers were the least commonly reported perpetrator; most commonly, the acts were by an acquaintance of the child.”). One study showed that 27 percent of sexual offenders of minors were family members of the victims; for victims under 12, a third to half were family members. The other half of offenders of minors younger than 12 were acquaintances; less than five percent of offenders of complainants younger than 12 were strangers. Even for complainants aged 12 to 17, only 9.8 percent of

1 a stranger seducing a young girl and luring her from her home may endure, but the vast majority
2 of those who perpetrate sexual offenses against minors are close associates or family members.

3 The consequence of this is twofold. First, in cases involving young complainants, which
4 overwhelmingly comprise offenses committed by persons known to the complainant, proof of
5 *mens rea* is less likely to present a meaningful hurdle for prosecutors. Actors who are personally
6 known to the complainant—whether a neighbor, parent, stepparent, coach, teacher, or other
7 associate—are more readily proved to have known the complainant’s age. A rule that requires
8 such evidence is unlikely to leave minors unprotected. Moreover, for cases involving authority
9 figures expressly covered by Section 213.8—namely Section 213.8(2), involving actors who are
10 parental figures, and Section 213.8(3), involving actors in trust roles of other kinds—the age
11 threshold is set high enough that *mens rea* is unlikely to play any significant role. Prosecutors are
12 unlikely to have trouble proving that a coach, teacher, or youth pastor was unaware of a
13 substantial risk that the complainant was under 18.

14 Second, for stranger cases, which statistically appear more likely to occur when older
15 minors are involved, there is no longer the sense that sexual misconduct inexorably requires an
16 initial wrongful act that enables the actor to gain proximity to the complainant. In contemporary
17 society, minors may come into regular, lawful contact with adults. As a result, an adult actor may
18 encounter a minor in places in which the actor has little reason to suspect the minor is not age-
19 appropriate. A 15-year-old who looks mature and uses a fake identification to enter a 21-and-
20 above club, for instance, may actively misrepresent his or her age to a 21-year-old patron. If the
21 patron engages in what the patron believes to be consensual sexual activity, and a factfinder
22 believes that the patron was not aware of a risk that the complainant was underage, then it would
23 be unjust to impose liability on the patron. Even the contemporary analog to the common law
24 concern—for instance, an adult stranger who engages in an internet relationship with a teen and
25 arranges to meet for a sexual encounter—may blur the lines of wrongfulness, as consenting

offenders were strangers; two-thirds were acquaintances and one quarter were family members. Overall, only seven percent of offenders against minors younger than 18 were strangers—ranging from 3.1 percent for complainants under six to 9.8 percent for complainants 12 to 17. HOWARD N. SNYDER, U.S. BUREAU OF JUSTICE STATISTICS, NCJ 182990, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 & tbl.6 (2000). In one study, 74 percent of adolescents (aged 12 to 17) surveyed who stated they had been sexually assaulted reported that the assailant was someone they knew. Over two-thirds of assaults occurred within the complainant’s home (30.5 percent) or neighborhood (23.8 percent) or school (15.4 percent). DEAN G. KILPATRICK ET AL., NAT’L INST. OF JUSTICE, NCJ 194972, YOUTH VICTIMIZATION: PREVALENCE AND IMPLICATIONS 5 (2003), <https://www.ncjrs.gov/pdffiles1/nij/194972.pdf>.

adults regularly do meet and develop relationships online. It is better left to a factfinder to judge whether an actor credibly believed the complainant to be of age.

In this respect, imposing a mens rea requirement does not eliminate liability so much as ensure that it is appropriately calibrated. And importantly, an actor who plausibly claims not to have known that the minor was below one age threshold, but nevertheless engages in behavior that would be culpable at the threshold that the actor believed, is still punishable.⁵³ For instance, an adult defendant who claims to have believed that a very young complainant was in fact slightly older—for example that an 11-year-old was actually 13—will still be punishable. That is because the actor will in essence be admitting the mens rea necessary to prove to one crime (attempted sexual assault of a minor who is 12 to 15) as a defense to another (sexual assault of a minor under 12).⁵⁴

There is one situation in which the inability to prove a culpable mens rea may exculpate an actor whose culpability sits closer to the line, inasmuch as the actor is able to raise a credible doubt, notwithstanding generally unsavory behavior. That situation involves older actors who engage in nominally consensual activity with minors close to the age of consent. For instance, imagine a 15¾-year-old who willingly becomes sexually involved with a middle-aged actor who deliberately seeks out and preys upon young persons. Under the 1962 Code, which provided a defense of reasonable mistake, as well as under Section 213.8, which requires proof of a culpable mens rea, the actor may escape liability by claiming a reasonable belief that the complainant was 16 and therefore at the age of consent. Assuming no qualifying additional relationship (either parental, as required by Section 213.8(2), or a position of authority, as in Section 213.8(3)), the actor would thus face no criminal liability, because the prosecution cannot prove the necessary mens rea for the completed offense, and the attempted act is not a crime.

But although relationships between older minors and adults may be generally viewed as unacceptable, in the absence of other coercive elements they should not be criminally penalized. In the words of the Commentary to the 1962 Code:

⁵³ See *infra* Illustration 10.

⁵⁴ The 1962 Code expressly states that “Although ignorance or mistake would otherwise afford a defense to the offense charge, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.” 1962 Code Section 2.04(2).

1 The penal law does not try to enforce all aspects of community morality, and any
2 thoroughgoing attempt to do so would extend the prospect of criminal sanctions far into
3 the sphere of individual liberty and create a regime too demanding for all save the best
4 among us.⁵⁵

5 And while the lack of liability in certain cases may be unsatisfying, imposing a mens rea
6 requirement has the further effect of mitigating the age cutoffs that serve as the necessary
7 scaffold for the tiers of liability. The complainant who is 15¾ years old is more plausibly 16
8 than, say, a 12-year-old, and yet a strict-liability approach to age thresholds would treat actors in
9 both situations equivalently, even if the actor had good reason to believe the former capable of
10 lawful consent. Mens rea helps to soften the impact of age cutoffs by recognizing that, although
11 chronological age is the defining element of liability, it is not the only element.

12 Another added, but underappreciated, dimension of imposing a mens rea requirement
13 arises with regard to actors with cognitive disabilities.⁵⁶ These disabilities may make the actors
14 less sophisticated judges of age, as well as more likely to perceive as a peer a person who in fact
15 is significantly younger. If a cognitively typical 15-year-old becomes willingly sexually involved
16 with a 22-year-old with cognitive disabilities—disabilities that make the 22-year-old a *de facto*
17 intellectual, emotional, or social peer of the 15-year-old, whom the actor believed to be age-
18 appropriate—then it seems arbitrary to punish the 22-year-old. A recklessness standard requires
19 the government to prove that the actor had at least subjective awareness of a substantial,
20 unjustifiable risk of the other person’s age, and of an age gap. Mens rea also ensures that aiders
21 and abettors are held responsible only for assisting in acts that the aider and abettor intended to
22 be unlawful.⁵⁷

⁵⁵ MODEL PENAL CODE Section 213.6 Comment at 415 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980).

⁵⁶ Elizabeth Nevins-Saunders, *Incomprehensible Crimes: Defendants with Mental Retardation Charged with Statutory Rape*, 85 N.Y.U. L. REV. 1067, 1129 (2010); see Carpenter, *supra* note 15, at 344 (describing the case of Raymond Garnett, a 20-year-old cognitively disabled man convicted of statutory rape of a 13-year-old girl, who was precluded from arguing that he reasonably believed her to be 16).

⁵⁷ See *United States v. Encarnación-Ruiz*, 787 F.3d 581, 596 (1st Cir. 2015) (applying *Rosemond v. United States*, 572 U.S. 65 (2014), to hold that the government must prove that a defendant charged with aiding and abetting child pornography for filming his friend knew the minor’s age at the time of filming).

Indeed, the judicial decisions that uphold strict liability rest on rationales that no longer pass muster today. For instance, in *Owens v. State*,⁵⁸ the Maryland Supreme Court upheld strict liability on the grounds that there was no constitutional right to engage in extramarital sexual activity, and that jurisdictions have laws against bigamy and fornication.⁵⁹ But *Lawrence v. Texas* has since affirmed a constitutional right to some private consensual sexual activity outside of marriage,⁶⁰ and most jurisdictions either have removed adultery and fornication statutes from their books or do not enforce them in part because they are unconstitutional.⁶¹ Moreover, the fundamental holding of *Lawrence* that affirms a constitutional right to consensual sexual activity between adults underscores the error of punishing a person who is unaware that a sexual partner is not an adult.⁶²

For these reasons, Section 213.8 requires proof beyond a reasonable doubt of a culpable mental state for all statutory offenses. It also reaches beyond existing law and the 1962 Code to impose this requirement as an element of the offense, requiring proof beyond a reasonable doubt by the prosecution, rather than as an affirmative defense. This shift is justified by the same concerns that animate the imposition of a mens rea standard more generally: namely, the strength of social science and other evidence that affirms that most sexual assaults against young minors are perpetrated by actors known to them (and thus proof of mens rea is unlikely to pose a challenge), and a contemporary reality in which older minors increasingly are sexually active and engaged with older persons who might legitimately have no reason to suspect that the minor is under the age of consent. Thus, the offenses defined in Section 213.8 all require proof of at least the actor's recklessness—that the actor was aware of, yet recklessly disregarded, a substantial

⁵⁸ 724 A.2d 43 (Md. 1999).

⁵⁹ *Id.* at 53.

⁶⁰ See *Lawrence v. Texas*, 539 U.S. 558, 585 (2003); cf. Arnold H. Loewy, *Statutory Rape in a Post Lawrence v. Texas World*, 58 SMU L. REV. 77, 77 (2005) (“[*Lawrence*] should provide a constitutional defense for an individual who engages in sexual intercourse with a person that he non-negligently believes is an adult.”).

⁶¹ See, e.g., Alyssa Miller, *Punishing Passion: A Comparative Analysis of Adultery Laws in the United States of America and Taiwan and their Effects on Women*, 41 FORDHAM INT’L L.J. 425, 428, 434 (2018) (noting that adultery was penalized as a capital offense in puritan New England, but now only 20 states have adultery laws on the books, and they are rarely enforced).

⁶² See, e.g., Carpenter, *supra* note 15 (arguing that *Lawrence* affirms that public welfare model for statutory rape no longer fits to justify imposition of strict liability).

1 and unjustifiable risk that the complainant was the requisite age for culpability, and that any
2 pertinent age gap existed.

3 **Grading – general considerations.** The breadth of interests protected by statutory-rape
4 laws is reflected in the range of punishments imposed for their violation. At one extreme, an
5 adult who sexually abuses a young child merits the most serious of punishments. Such offenses
6 are difficult to detect, the harm caused to the victim is often lasting and severe, and the
7 community opprobrium is high. At the other extreme, an adult who engages in a nominally
8 consensual, if exploitative, sexual relationship with an older minor violates community norms
9 and is a worthy target of deterrence, but is a less appropriate subject for extreme penalties. The
10 range of scenarios covered by statutory-rape laws complicates the imposition of punishment just
11 as it complicates the line-drawing exercise for substantive liability.

12 Grading of the offenses described in Section 213.8 is guided by several key principles.
13 First, at their core, statutory-offense laws are ineffective-consent laws. That is, a sexual act with
14 a minor that involves force, coercion, exploitation, a victim vulnerable for reasons other than
15 age, or the absence of consent remains subject to the serious penalties prescribed for those
16 offenses in other Sections of Article 213. Section 213.8 applies when those added circumstances
17 are absent.

18 But, of course, the absence of these aggravators carries different meaning in different
19 contexts. Grown adults who sexually abuse young minors may have no need to use force or
20 coercion to obtain sexual submission. But inquiring into that child's consent to the sexual act—
21 or requiring proof of nonconsent—is absurd. A young minor cannot be construed as even
22 nominally consenting to the sexual demands of a parent or another adult. Moreover, the state's
23 interest is at its apex when it comes to protecting young minors from inappropriate sexual
24 interest on the part of adults. It is therefore apt to analogize sexual acts between adults and young
25 minors as akin to sexual acts done by force or coercion; the age differential stands in place of
26 overt physical or psychological domination.

27 The same logic extends to sexual acts between parents and those in a parental role and
28 minors in their care. In such situations, consent is inapposite, even as regards an older minor. A
29 minor cannot reasonably be said to consent to sexual activity when that activity is with a parental
30 figure or guardian. The state's interest in protecting the minor from exploitation within the
31 family structure and in maintaining the integrity and security of the family as a place of

1 development and maturation justifies imposition of high penalties for those who exploit their
2 special access to a vulnerable minor.

3 In contrast, sexual activity engaged in willingly by older minors of considerable maturity
4 does not warrant as draconian a response. Unlike younger minors, who may not even possess the
5 autonomy and maturity to understand their capacity to consent or to withhold consent from any
6 sexual overtures, older minors have more developed understandings of their sexuality. Acts with
7 older minors that lack consent as defined by Section 213.0(2)(e) are more appropriately
8 punishable under Section 213.6 or other Sections of Article 213. In relation to older minors,
9 therefore, Section 213.8 makes a distinctive difference in situations in which the minor engaged
10 with apparent willingness (excepting the provisions of Section 213.8(2) and (3)). Although the
11 state maintains an interest in discouraging and deterring such acts, as discussed in the Sections
12 regarding the imposition of substantive liability, the necessary degree of deterrence and harm
13 prevention for such nominally consensual encounters merits a much less serious penalty.

14 Lastly, as with defining the scope of substantive liability, assessing the proper penalty
15 requires attentiveness not just to the age of the complainant, but also the age of the actor. Many
16 states now formally recognize that peers may engage in sexual exploration, even at tender years,
17 and thus decline to punish such activity when committed by minors against others of the same
18 approximate age.⁶³ A minor who engages in inappropriate sexual activity with a much younger
19 minor may cause as serious a harm to that minor as would an adult actor, but the state's interest
20 in punishment in the two cases differs. While the need to protect young minors from the sexual
21 advances of older minors justifies proscribing such behavior, the associated penalty should aim
22 less for retribution and more for deterrence and rehabilitation, given the mental plasticity and
23 sexual immaturity of an actor who is an older minor.⁶⁴

24 Current law recognizes these considerations in affixing penalties, even as there exists
25 very little consensus as to the appropriate penalties for any particular offense. At the broadest
26 level, as one scholar observed, often “the classification of the crime as a misdemeanor or felony

⁶³ Carpenter, *supra* note 15, at 340-341.

⁶⁴ See Chelsea Leach et al., *Testing the Sexually Abused-Sexual Abuser Hypothesis: A Prospective Longitudinal Birth Cohort Study*, 51 CHILD ABUSE & NEGLECT 144, 144, 150-151 (2016) (reporting lack of correlation between sexual-abuse history and later sexually abusive behavior in a prospective study, but noting that studies of sexual offenders show rates of history of abuse at around 70 percent—suggesting that most maltreated children do not become abusive, but that most abusive adults were maltreated); see also *infra* Reporters' Notes.

will depend on the relative age of the victim and perpetrator.”⁶⁵ For instance, “some states ... have applied less serious punishment when committed by a perpetrator whose age differential is less than three or four years from the victim or when both perpetrator and victim are below the recognized age of consent. The resulting classifications affect the grading of the offense and punishment of the perpetrator.”⁶⁶ Jurisdictions draw both substantive and grading distinctions, foreclosing liability altogether for actors within peer range, and grading actors just outside that range with lesser severity than actors much older.⁶⁷ Section 213.8 follows this pattern and imposes tiers of liability based on the age of the complainant, the age of the perpetrator, and the difference in ages between them. It reserves the most severe penalties for adults who sexually engage young minors and for parental figures who abuse their roles. But it departs from current law in prescribing significantly less severe penalties for adults who engage in nominally consensual activity with older minors, as well as for older minors who engage in sexual behavior with age-inappropriate younger minors.

In sum, Section 213.8(1) addresses complainants under the age of 16 and imposes three tiers of liability based on the complainant’s age, the actor’s age, and the age gap between them. Section 213.8(2) penalizes sexual acts committed by parents and grandparents, with a broad definition of those roles that is meant to encompass all those who functionally or formally assume a parental role. Section 213.8(3) prohibits sexual activity when the actor is in a role of authority, even where the complainant is otherwise beyond the age of consent. Section 213.8(4) imposes heightened punishment for sexual contact that is especially intrusive—such as masturbating a minor’s genitals. Section 213.8(5) and (6) imposes heightened punishment for forms of sexual contact with minors that are otherwise punished less severely under Section 213.7, and for sexual contact based solely on the age of the persons involved.

1. Sexual Assault of a Minor – Section 213.8(1)

The judgment that all sexual penetration with a young child should be treated as rape, even in the presence of nominal consent, was first given statutory expression during the reign of Elizabeth I.⁶⁸ The offense has been known colloquially as “statutory” rape ever since.

⁶⁵ Carpenter, *supra* note 15, at 339.

⁶⁶ *Id.* at 341; see also *infra* Reporters’ Notes, note 4.

⁶⁷ See *infra* Reporters’ Notes, note 4.

⁶⁸ 18 Eliz. c. 7, § 4 (1576).

Originally, the law equated this form of sexual penetration with forcible rape only when the child was younger than 10 years old⁶⁹ and female.⁷⁰ Intercourse with an older child was not considered a crime unless the strict requirements of force and resistance had been met. Sexual abuse of young boys by men was covered by general laws prohibiting “sodomy” or “deviate sexual intercourse”; however, “seduction of young boys and male adolescents by older females” was considered “neither to be the serious problem of the other forms of sexual conduct, absent force, nor likely to have the same adverse effects on the victim,”⁷¹ and thus was not regulated.

By the mid-20th century, all American jurisdictions had raised the age of consent from 10, though in many instances only by one or two years.⁷² At the other end of the spectrum, some states raised the age of consent to 17 or even 18.⁷³ Jurisdictions also began to draft statutes that applied to actors without regard to gender,⁷⁴ that addressed a broader range of sexual acts than simply vaginal intercourse, and that punished without regard to the gender of the complainant.

All states now punish intercourse with young minors, but in the case of intercourse with older minors (e.g., those above the age of puberty) few jurisdictions treat such conduct as equivalent in seriousness to intercourse with a young child. Instead, most states follow one of three intermediate approaches—either treating intercourse with an older minor as a crime only when the perpetrator is significantly older; treating all intercourse with an older minor as a prohibited but less serious offense; or combining the first two approaches by grading the seriousness of intercourse with an older minor on the basis of the age of both the victim and the perpetrator.⁷⁵

⁶⁹ BLACKSTONE, *supra* note 5, at *212.

⁷⁰ MODEL PENAL CODE Section 213.1 Comment at 334 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980) (“Traditionally, the law of rape punished only male aggression against females.”).

⁷¹ *Id.* at 338-339.

⁷² *Id.* at 324-325.

⁷³ See, e.g., CAL. PENAL CODE § 261.5(a) (Deering 2020) (setting the age of consent at 18); N.Y. PENAL LAW § 130.05(3)(a) (Consol. 2019) (setting the age of consent at 17).

⁷⁴ MODEL PENAL CODE Section 213.1 Comment at 334-339 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980). This change occurred even though the Supreme Court upheld the gender-specific focus of statutory rape statutes in *Michael M. v. Superior Court*, 450 U.S. 464, 475-476 (1981). As of the 2000s, every state in the country now has gender-neutral statutory rape laws. Tenzer, *supra* note 13, at 136.

⁷⁵ See, e.g., CAL. PENAL CODE § 261.5(b)-(c) (Deering 2020) (categorizing the offense as a misdemeanor when the victim is less than three years younger than the perpetrator, but setting four-year maximum sentence when the age difference is greater than three years); N.Y. PENAL LAW §§ 70.00(2)(e), 70.15(1), 130.20-.35 (Consol. 2019) (treating the offense as first-degree rape (with a 25-year maximum prison sentence) when the victim is under 11, or

1 These gradations reflect contemporary views that distinguish between sex with minors
2 who are too young to consent at all, and sex with minors who may lawfully consent to sex with
3 peers. It also reflects the current sensibility that distinguishes between what might popularly be
4 called “child sexual abuse” and “statutory rape.” Many jurisdictions treat the former as among
5 the most serious offenses in the penal code, because any suggestion of consent is untenable. In
6 contrast, the latter is viewed with greater leniency, as the minor has reached sufficient maturity
7 to consent in some circumstances, even if not to a partner of much greater years.

8 The difficulty lies in the need of the law to draw a precise line between these two
9 situations. Determining where to draw that line requires attention to the age of both the
10 complainant and the actor, as well as the rationales that animate the distinction. Generally
11 speaking, contemporary age-based restrictions on sexual activity find justification in three related
12 objectives: the prevention of pregnancy; the desire to protect minors from a potentially intense
13 emotional involvement for which they are not yet prepared; and the protection of minors from
14 intimidation, sexual exploitation, or unwanted intimacy. But the degree to which these purposes
15 are implicated varies considerably on the basis of the ages of complainants and perpetrators.
16 Young minors generally lack the maturity and independence to give effective consent to sexual
17 intercourse, and society, with good reason, considers sexual interest in them on the part of older
18 minors and adults as unacceptable and dangerous. Older minors may have the capacity to
19 consent to peers, yet require protection from predatory adults. The oldest minors may have the
20 legal right to consent to almost any person of their choosing—even if such a decision is viewed
21 as unwise—and yet still merit protection from adult actors who exploit special relationships,
22 such as a sexually abusive parent or an authority figure.

23 The choice of specific age cutoffs for each of these thresholds—the age below which
24 sexual behavior is presumptively unacceptable, the age at which peer exploration is to be
25 tolerated even if not desired, and a final “age of consent” at which a person gains nearly full
26 legal authority to consent to sexual partners—is inherently arbitrary in two respects. It is
27 arbitrary because persons of the same age may nonetheless possess widely disparate degrees of
28 maturity and sexual sophistication. It is also arbitrary because picking any single age involves an

when the victim is under 13 and the actor is 18 or older; second-degree rape (seven-year maximum) when the victim is under 15 and the perpetrator is at least four years older; third-degree rape (four-year maximum) when the victim is under 17 and the perpetrator is at least 21; and a misdemeanor (one-year maximum) in all other instances involving a victim under the age of 17).

intuitive judgment about the right age at which the characteristics necessary to support culpability are shared to the right degree to hold the entire group responsible.

a. Minors Younger Than 12 Years Old

The 1962 Code proceeded on the premise that, in 1962, the age of 12 represented the median age for onset of puberty, but nonetheless rejected that age as the dividing line between childhood and adolescence because, by definition, half of the younger children *would* have reached puberty. The Institute therefore chose instead to set the dividing line at the age of 10, explaining that “it would be illogical to set the age limit so high [i.e., at 12] that half the individuals in the class defined would fall outside the rationale for its definition.”⁷⁶ Sexual intercourse with a 10- or 11-year-old child was therefore treated as a criminal offense only at a lesser level of severity than sexual intercourse with a child younger than 10, and even then only when the actor was at least 16 years old.⁷⁷

It now seems clear that this judgment—treating sexual intercourse with a child as the most serious form of rape only when the victim was under 10—gives inadequate weight to the gravity and frequency of sexual abuse of very young minors by adults. To be sure, the medical evidence suggests that the median age for onset of puberty is now lower than it was at the time of the 1962 Code.⁷⁸ As a result, it seems safe to conclude that today many minors aged 10 and 11 will have reached puberty. Nonetheless, the number of 10- and 11-year-olds who remain pre-pubescent is undoubtedly substantial.⁷⁹ Moreover, while puberty may be viewed as an important

⁷⁶ MODEL PENAL CODE Section 213.1 Comment at 329 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980). In cases involving children under 10, the actor would nonetheless have to be at least 16 to be held criminally responsible. See MODEL PENAL CODE Section 4.10(1) (AM. L. INST., Proposed Official Draft 1962) (setting the age of criminal responsibility at 16); see also MODEL PENAL CODE Section 213.1 Comment at 341 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980) (“Section 213.1 [sets] the age of consent at 10 in Subsection (1)(d), which in combination with Section 4.10 effectively precludes conviction of rape without at least a 6-year age differential between the actor and the victim.”).

⁷⁷ See MODEL PENAL CODE Section 213.3(1)(a) (AM. L. INST., Proposed Official Draft 1962).

⁷⁸ See Marcia E. Herman-Giddens et al., *Secondary Sexual Characteristics and Menses in Young Girls Seen in Office Practice: A Study from the Pediatric Research in Office Settings Network*, 99 PEDIATRICS 505, 508-509 (1997) [hereinafter *Young Girls*] (reporting the mean age of onset of breast development as 8.87 for African American girls and 9.96 for White girls, and of menses as 12.16 and 12.88 in African American and White girls, respectively); Peter A. Lee et al., *Age of Puberty: Data from the United States of America*, 109 APMIS 81, 83 tbl.1 (2001); see also Elizabeth Weil, *Puberty Before Age 10: A New “Normal”?* (N.Y. TIMES), Mar. 30, 2012, <https://www.nytimes.com/2012/04/01/magazine/puberty-before-age-10-a-new-normal.html>. The age of puberty has also decreased for boys, and is 9 to 10 for genital development and 10 to 11 for pubic hair. Marcia E. Herman-Giddens et al., *Secondary Sexual Characteristics in Boys: Data from the Pediatric Research in Office Settings Network*, 130 PEDIATRICS e1058, e1058 (2012).

⁷⁹ Herman-Giddens et al., *Young Girls*, supra note 78, at 505.

milestone for judging the propriety of criminalizing sexual activities among peers, it has little bearing on the propriety of adult sexual interest in young minors. A post-pubescent 11-year-old is no more an appropriate sexual partner for an actor 20 years older than a pre-pubescent 11-year-old. Indeed, less than one percent of girls and two percent of boys aged 11 years or younger report having had sex; only five percent of girls and 10 percent of boys 14 years and younger have had sex.⁸⁰ Moreover, 62 percent of girls who had sex by their 10th birthday describe the sex as nonconsensual, as compared with 50 percent of those who had sex by 11 and 23 percent of those who had sex by 12.⁸¹ The extraordinary gravity of exposing young minors to sexual experience must weigh heavily in any judgment about the age below which sexual penetration by a person outside the complainant's peer group should be treated as presumptively unacceptable and dangerous.

But just as there is greater appreciation of the dangers of sexual abuse of young minors by adults, there is also greater awareness and tolerance of sexual behavior among peers. Minors of all ages are increasingly exposed to sexual content from an early age, through social media, games, access to the internet, or popular entertainment.⁸² As a result, even very young minors may engage in exploratory sexual behaviors with peers.⁸³ Such developmentally ordinary acts are not the proper subject of the criminal law.

The goal, therefore, is to prevent sexual exploitation of minors without imposing unjustifiably harsh punishments upon minors engaged in sexual exploration, whether age-appropriate or not. Although hard lines can create abrupt breaks in liability, they are necessary to mitigate the potential for arbitrary selective enforcement. For instance, if two same-aged minor participants engage in nominally consensual activity, then in the absence of a statutory scheme

⁸⁰ Lawrence B. Finer & Jesse M. Philbin, *Sexual Initiation, Contraceptive Use, and Pregnancy Among Young Adolescents*, 131 PEDIATRICS 886, 888 tbl.1 (2013).

⁸¹ Id. at 888 tbl.1.

⁸² Research indicates that children and youth have increasing exposure to sexual content through games, media, and the internet, and that exposure to sexual content in media affects youths' beliefs and actions about sex. See Rebecca L. Collins et al., *Sexual Media and Childhood Well-being and Health*, 140 PEDIATRICS S162, S164 (2017) (reporting that 42 percent of 10- to 17-year-olds have seen pornography online, although only 27 percent report intentionally viewing it, as compared to 54 percent of 15- to 18-year-old boys and 17 percent of 15- to 18-year-old girls).

⁸³ Nancy Kellogg, *The Evaluation of Sexual Abuse in Children*, 116 PEDIATRICS 506, 507 (2005) (“[W]hen young children at the same developmental stage are looking at or touching each other's genitalia because of mutual interest, without coercion or intrusion of the body, this is considered normal (ie, nonabusive) behavior.”); see also Section 213.0(2)(g), Comment – actor over 12.

that requires age gaps, a prosecutor could choose to treat one as a “victim” and one as a “perpetrator.” Where the alleged conduct involves force, coercion, or other indicia of lack of consent, such distinctions are defensible. But when age peers both fall within the protected class, and both are engaging in the sexual behavior willingly, any designation of “victim” and “accused” is unprincipled.⁸⁴ Similarly, without differentiating on the basis of age gaps, a minor who engages in sexually inappropriate behavior would be equated to a mature adult.

For these reasons, Section 213.8(1) rejects the 1962 Code’s choice of age 10 as the critical demarcation and instead, in accord with the approach currently common in American law,⁸⁵ sets 12 as the first pertinent threshold. In order to provide a safe harbor for peer-to-peer, nominally consensual activity, Section 213.8(1) makes explicit that the actor must be more than five years older than the minor. This element works in tandem with Section 213.0(2)(g), which makes clear that an actor must be a person more than 12 years of age.

In operation, this five-year age-gap requirement imposes liability for any actor 17 years old or older who engages in an act of sexual penetration or oral sex with a minor 12 or younger. For actors younger than 17 but older than 12, liability will turn on whether the five-year age gap is proved. For example, a 12½-year-old actor may be held responsible for sexual acts with a complainant younger than 7½ years of age, but not if the 12½-year-old engages in nominally consensual sexual activity with a 10-year-old. It is also important to note that, applying Section 4.10, cases involving actors under the age of 16—if adjudicated formally at all—are expected to be handled by juvenile courts rather than by an adult criminal conviction.

b. Minors at Least 12 Years Old but Younger Than 16 Years Old

The 1962 Code imposed liability for a third-degree felony for actors who engaged in “sexual intercourse” or “deviate sexual intercourse” with a person under the age of 16, if the actor was four or more years older.⁸⁶ The 1962 Code set the general age of consent at 16; thus

⁸⁴ See, e.g., *In re D.B.*, 950 N.E.2d 528, 533 (Ohio 2011) (“But when two children under the age of 13 engage in sexual conduct with each other, each child is both an offender and a victim, and the distinction between those two terms breaks down.”). But see *United States v. JDT*, 762 F.3d 984, 996-999 (9th Cir. 2014) (rejecting the defendant’s argument that a statute that allows for prosecution of a 10-year-old while identifying a child under 12 as a “protected party” is inherently unconstitutionally vague).

⁸⁵ See *infra* Reporters’ Notes, note 1; see also U.S. DEP’T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, NCJ 178238, STATE LEGISLATORS’ HANDBOOK FOR STATUTORY RAPE ISSUES 2 (2000) (surveying state statutory rape laws to determine the trends of “[r]aising the age of the minor who is subject to protection by the law” and “impos[ing] age gaps”).

⁸⁶ MODEL PENAL CODE Section 213.3(1)(a), (2) (AM. L. INST., Proposed Official Draft 1962).

persons 16 or more years old had the capacity to give valid consent, regardless of the age of their partner, unless the actor was a guardian or “otherwise responsible for [the Complainant’s] welfare.”⁸⁷

Section 213.8(1) carries over the judgment that 16 is the appropriate age of consent, in the absence of incest or an abuse of power. It also largely mirrors the substantive provisions of the 1962 Code by requiring an age gap before the imposition of liability, although it sets the minimum gap as more than five years, rather than four. The decision to increase the gap from four to five years is consistent with, although not dominant in, existing law.⁸⁸ It also mirrors typical structures of American socialization, such as the educational system: An age-gap threshold at only four years would expose an 18-year-and-two-month-old to criminal liability for engaging in consensual sexual activity with a 14-year-and-one-month-old— even though the two are respectively a senior and a freshman in high school.

In the era when the 1962 Code was drafted, sexual activity by adolescents under 18 was widely disapproved, both in principle and in light of the undeniable risk of pregnancy entailed in such encounters. The Institute nonetheless was persuaded that sexual experimentation among adolescents was so widespread that it could not be viewed as *per se* aberrational, victimizing, or exceptionally dangerous to an extent warranting deterrence through criminal sanctions:

[T]he spectre of imposition of felony sanctions on a boy of 17 who engages in sexual intercourse with a willing and socially mature girl of like age . . . reflects an extravagant use of the penal law to bolster community norms about consensual behavior, and it

⁸⁷ Id. Section 213.3(1)(b). That offense was graded as a misdemeanor. Id. Section 213.3(2).

⁸⁸ See, e.g., HAW. REV. STAT. § 707-732(1)(c)(i), (2) (2019) (penalizing sexual penetration of a person 14 to 16 years of age by a person five or more years older as a class C felony); KY. REV. STAT. ANN. § 510.090(1)(a)-(b) (LexisNexis 2019) (penalizing oral and anal penetration by an actor 21 or older with a person less than 16, or by an actor at least 10 years older than a person 16 or 17); ME. REV. STAT. ANN. tit. 17-A, § 254(1)(A) (LexisNexis 2019) (penalizing sexual acts as a class D crime when with a person 14 or 15 years old where the actor is at least five years older); cf. CAL. PENAL CODE §§ 286(b), (c)(1), 287(b), (c)(1) (Deering 2020) (punishing anal penetration and oral sex of any person under 18 as a misdemeanor, but elevating the offense to a low-level felony where the complainant is under 16 and the actor is over 21, and as a three-to-eight-year offense where the complainant is under 14 and the actor is more than 10 years older); MASS. ANN. LAWS ch. 265, § 23A (LexisNexis 2020) (punishing sexual penetration of a child under 16, either with a five-year gap for complainants under 12, or a 10-year gap for complainants aged 12 through 15).

ignores social reality in assuming that sex among teenagers is necessarily a deviation from prevailing standards of conduct.⁸⁹

On the basis of this assessment, the Institute concluded that the principal concern with respect to adolescents was not to condemn sexual experimentation as such but only to protect them from exploitation and victimization at the hands of significantly older individuals.

The social facts underlying this 1962 assessment certainly are no less applicable today, and jurisdictions have widely followed the Code’s recommendation to criminalize adolescent sexual activity only when there is a substantial age difference between the parties.⁹⁰ Minors at least 12 years old typically have attained sufficient maturity that the law deems them capable of consent in certain situations—specifically, with age-appropriate peers. But the law also deems it worthwhile to protect such minors from potentially predatory relationships, even if those relationships are nominally consensual.

Illustration:

1. Complainant, who is 14, enjoys multi-player online video games that include chats amongst the players. Complainant meets another player, Accused, online and begins a friendship. Complainant tells Accused that Complainant is 14, and Accused admits to being 58. One day, Complainant confesses in the chat to having developed a “crush” on Accused, and Accused expresses reciprocal feelings. Complainant and Accused agree to meet at a nearby hotel for a sexual encounter involving sexual penetration and oral sex. The encounter occurs as planned, but afterwards Complainant’s parents learn of the event and report it to the police. These facts, if proven beyond a reasonable doubt, permit a finding that Accused violated Section 213.8(1). Accused knows that Complainant is 14, that Accused is 58, and that there are more than five years between them. Complainant’s consent to the encounter is irrelevant. Because Accused is older than 21, the offense would be graded as a fourth-degree felony.

⁸⁹ MODEL PENAL CODE Section 213.1 Comment at 326 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980).

⁹⁰ See *id.* at 341 & n.181; see also Carpenter, *supra* note 15, at 334-357 (collecting and analyzing contemporary state laws governing statutory rape). But see Colin Campbell, Annotation, *Mistake or Lack of Information as to Victim’s Age as Defense to Statutory Rape*, 46 A.L.R. 5th 499, 510-513 (1997) (listing the 28 states that impose strict liability for statutory rape regardless of the age of the actor).

Notably, Section 213.8(1) may also apply in cases in which a minor’s response to the unwanted sexual overtures of an older person is ambiguous—such as frozen immobility, tacit compliance, or other ambiguous conduct on the part of the minor. While such responses may, in the context of all the circumstances, satisfy the requirement of the element of lack of consent under Section 213.6, it is also possible that such proof could fail to satisfy the factfinder beyond a reasonable doubt. In addition, even if the factfinder viewed the evidence as establishing the minor’s lack of consent, it might still fail to meet the requirements of Section 213.6 if the actor raises a reasonable doubt about the actor’s awareness of a substantial risk that the minor was not consenting (even if a reasonable person would have known). Section 213.8(1) renders the absence of consent irrelevant to the actor’s liability, based on a legislative judgment that the age difference precludes the minor from having the capacity to give effective consent.

Illustration:

2. Complainant, who is 15, is spending the night at an uncle’s home during a family holiday. Complainant is asleep in the guest room when Uncle, who is 46, enters and slips quietly into the bed. Complainant wakes and says, “What are you doing in here?” Uncle puts a finger over his lips and says, “Shhh.” Uncle then removes Complainant’s pajamas and engages in an act of sexual penetration as Complainant lies passively. The next day, Complainant reports the incident. Uncle contends that Complainant, to whom he is related by marriage, had been flirting with him throughout the holiday and had invited him to Complainant’s bedroom that night. Complainant denies Uncle’s evidence. Complainant agrees that Complainant never protested the sexual act, but states that the act was wholly uninvited.

If the factfinder believes Complainant, Uncle may be found guilty of a violation of Section 213.6, which prohibits sex without consent. Even though Complainant did not protest or resist the act in any way, Section 213.0(2)(e)(iii) stipulates that resistance is not required to find lack of consent. The circumstances of the act—including Complainant’s young age, the age gap between Complainant and Uncle, the fact that Uncle and Complainant are related, and Uncle’s furtive and secretive approach, may permit the factfinder to conclude both that the act was without consent and that Uncle was aware of a substantial risk of that lack of consent.

But even if the factfinder determines that the evidence does not meet the requirement of proof beyond a reasonable doubt of lack of consent, Section 213.8(1) permits Uncle to be held guilty on the basis of Complainant’s age and Uncle’s age. Complainant is 15 years of age, and Uncle is more than five years older. Because Uncle is older than 21, the offense would be punishable as a fourth-degree felony.

c. Grading – Section 213.8(1)

Section 213.8(1) defines three tiers of punishment based on the age of the actor, the age of the complainant, and the age gap between them. In this respect, Section 213.8(1) departs from the 1962 Code.⁹¹ The 1962 Code punished all violations of its applicable provisions without regard to the actor’s age in absolute terms: as a first-degree felony for acts of sexual penetration with a female younger than 10,⁹² as a second-degree felony for acts of “deviate sexual intercourse” with a female younger than 10,⁹³ and as a third-degree felony for either kind of

⁹¹ Grading liability based on both the age of the actor and the age of the complainant is common in existing law. For instance, similar to Section 213.8, Nebraska defines “sexual assault of a child in the first degree,” a Class IB felony, as sexual penetration by an actor at least 19 with a child under 12, creating an eight-year gap, or by an actor 25 years or older with a complainant aged 12 to 16, creating a 13-year gap. NEB. REV. STAT. ANN. § 28-319.01(1)-(2) (LexisNexis 2019). Nebraska then defines second- or third-degree sexual assault of a child, a Class II or Class IIIA felony respectively, as sexual contact where an actor is at least 19 and the complainant is under 14. *Id.* § 28-320.01(1)-(3). Similarly, Georgia defines statutory rape as sex with a person younger than 16, and punishes actors 18 or younger and within four years of a 14-to-16-year-old complainant as a misdemeanor; actors 21 or older with 10 to 20 years’ imprisonment; and all other actors with one to 20 years. GA. CODE ANN. § 16-6-3 (2020); see also *id.* § 16-6-4(b) (punishing child molestation with five to 20 years’ imprisonment, except that an actor 18 or younger and within four years of a complainant aged 14 to 16 is guilty only of a misdemeanor). In current law, however, gaps of four or fewer years are most common, especially for children under 12. See, e.g., ME. REV. STAT. ANN. tit. 17-A, § 255-A(1)(E-1) (LexisNexis 2019) (“A person is guilty of unlawful sexual contact if . . . [t]he other person . . . is in fact less than 12 years of age and the actor is at least 3 years older.”); MD. CODE ANN., CRIM. LAW § 3-308(b)(2) (LexisNexis 2019) (prohibiting “sexual act[s] with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 4 years older than the victim”). See generally AEQUITAS, RAPE AND SEXUAL ASSAULT ANALYSES AND LAWS, at 110-20 (2014) (surveying state law based on perpetrator-victim age difference). Ten-year gaps more commonly found in statutes that apply to older youths. See, e.g., DEL. CODE ANN. tit. 11, §§ 770(a)(1)-(2), 771(a)(1), 772(a)(2)(g) (2019) (imposing liability for rape in the fourth degree when the actor is over 30 years old and the complainant is between 16 to 18; and for rape in the third degree when the complainant is 14 to 16 and the actor is 10 years older, or the complainant is under 14 and the actor is over 19; and for rape in the second degree for a complainant under 12 and a defendant 18 or older).

Finally, existing law not only grades liability on the basis of age gaps, but also distinguishes criminal and noncriminal behavior that way. See, e.g., COLO. REV. STAT. § 18-3-402(1)(d)-(e) (2018) (punishing sexual penetration when the complainant is less than 15 years of age and the actor is four or more years older, or when the complainant is at least 15 but under 17 and the actor is 10 years older, but not punishing the same acts when the actor is within 10 years of the victim’s age).

⁹² MODEL PENAL CODE Section 213.1(1)(d) (AM. L. INST., Proposed Official Draft 1962).

⁹³ *Id.* Section 213.2(1)(d).

1 sexual act with a female younger than 16, when the male actor was at least four years older.⁹⁴
2 Under the 1962 Code, therefore, an 18-year-old high school student who had a consensual sexual
3 relationship with a 13-year-old was exposed to the same degree of liability as a 56-year-old adult
4 in the same sexual relationship.

5 Section 213.8(1), in contrast, punishes sexual activity differently on the basis of the age
6 of the actor and of the complainant. It starts from the premise that adults who sexually abuse
7 minors younger than 12 deserve the most serious punishments, at a level akin to actors who
8 obtain sexual submission by use of force. Section 213.8(1) reflects this judgment by punishing
9 acts by actors 21 years old or older with complainants younger than 12 as a third-degree felony
10 and a registrable offense, and acts by actors more than 21 years old with complainants between
11 12 and 16 years old as a fourth-degree felony. The combined effect of these provisions is to
12 reserve the harshest penalties for adult actors who engage in sexual activity with minors
13 significantly younger, including young minors.

14 The third avenue of liability gives special consideration to actors between 12 and 21
15 years old. At one end of the continuum, some sexual activity by actors within this age range is
16 not punishable at all by Section 213.8(1). Peer sexual activity with minors within five years of
17 age is unpunished in Section 213.8(1). At the other end of the continuum, a young actor who
18 engages in sexual activity with very young complainants is liable, as is an actor nearing 21 who
19 engages in sexual activity with minors nearing the age of consent. Under Section 213.8(1), both
20 sets of actors are punishable with a felony in the fifth degree. Thus, for example, a 12½-year-old
21 actor who engages in sexual activity with a child aged seven or younger is eligible for a fifth-
22 degree felony (rather than the more serious third-degree penalty that would have applied if the
23 actor were 21 or older), as is a 20-year-old actor who engages in sexual activity with a minor 12
24 to 15 years old (rather than the more serious fourth-degree penalty that would apply were the
25 actor over 21). The grading scheme ensures a diminished punishment for the two least culpable
26 categories of actors: actors within close range of complainants nearing the age of consent, and
27 actors who are themselves minors, but who act out sexually and abuse young minors.

28 There are several reasons to single out actors younger than 21 for distinctive treatment.
29 Actors younger than 21 who engage in sexual activity with minors nearing the age of consent
30 may be making questionable choices, or exploiting the immaturity of the other person for the

⁹⁴ Id. Section 213.3(1)(a), (2).

actor's sexual benefit. But the minor complainant retains far greater agency and autonomy when dealing with a slightly older person as compared to a much older adult. A 20-year-old who engages in a sexual relationship with a 14-year-old deserves punishment, but not to the same degree as a 40-year-old undertaking the same activity. Reducing the applicable punishment from a fourth-degree felony to a fifth-degree felony when the actor is younger than 21 acknowledges both the relative sexual maturity of older minors, who are thus more likely to have engaged in the activity with nominal willingness, and the diminished culpability of an actor who engages in an encounter that at least carries the patina of consent. It also pays heed to the inherent arbitrariness of age-based statutes, which by necessity create abrupt breaks in liability. Under the terms of Section 213.8, for instance, a 20³/₄-year-old who has consensual sex with a 15¹/₂-year-old is liable for a fifth-degree felony, while a 50-year-old who has consensual sex with a 16-year-old is not liable for any offense. Although the actor bears responsibility for seeking an inappropriately young sexual partner, and thus is an appropriate target for deterrence and condemnation, the justifiability of punishment diminishes as the complainant approaches the age of consent.

Similarly, actors younger than 21 who engage in prohibited sexual acts with minors younger than 12, while proper subjects of deterrence and punishment, should also be treated much less harshly than fully mature adults who engage in the same abuse. Minors who engage in inappropriate sexual conduct may be engaging in misguided but nonmalicious sexual exploration or mimicking their own prior experiences of abuse.⁹⁵ Actors who are themselves within the range of puberty may be juggling their own understandings of the proper bounds of sexual activity and may have both less experience and less capacity controlling sexual impulses. They are also still within the period of maturation and sexual development, and therefore have a greater capacity for rehabilitation.⁹⁶ The minor's motivations may derive from a constellation of factors ranging from purely exploitative sexual abuse to sexual curiosity to a misguided romance. Although such behavior deserves both deterrence and condemnation, it is not equivalent to the same acts of misconduct committed by a sexually mature adult against a young child. A fifth-degree felony is an appropriate punishment for an actor younger than 21 who engages in sexual activity with another minor more than five years younger, even if that person is very young.

⁹⁵ See *infra* notes 209-210 and accompanying text.

⁹⁶ See *infra* Reporters' Notes.

1 Finally, actors younger than 12 who engage in intimate sexual activity with other minors
2 may be worthy subjects of state interest, such as if the other minor is significantly younger. But
3 Section 213.8(1), along with Section 213.0(2)(g), reflects the judgment that, absent allegations of
4 conduct involving aggravated physical force or restraint,⁹⁷ the state’s interests are adequately
5 served through the family-law system (such as abuse and neglect or child-in-need-of-supervision
6 petitions) or mental-health and community-based programs, not through juvenile-justice or
7 criminal-justice courts.⁹⁸

8 **Illustrations:**

9 3. Complainant, who is nine years and 10 months old, lives next door to Accused,
10 who is 32 years old. Accused knows that Complainant is under 12 years old, and that
11 Accused is more than five years older. Complainant’s parent is friendly with Accused,
12 and on occasion relies on Accused to provide child care. One day, Accused and
13 Complainant are sitting on Accused’s couch playing video games when Accused says,
14 “Let me show you something that feels really good.” Accused removes Complainant’s
15 shorts and performs oral sex on Complainant. Based on these facts, Accused could be
16 found guilty of a violation of Section 213.8(1). Because Complainant is younger than 12
17 and Accused is over 21, the offense is punishable as a third-degree felony.

18 4. Same facts as in Illustration 3, except that Accused is 15 years old. Accused
19 knows that Complainant is under 12, and Accused is more than five years older. Because
20 Accused is younger than 21, the offense is punishable as a fifth-degree felony. Under
21 Section 4.10, the offense is intended for adjudication in juvenile court.

22 5. Same facts as in Illustration 3, except that Accused is 13 years and six days old.
23 The act is not punishable under Section 213.8(1), because the nine-year-old complainant
24 is within five years of the age of the actor, and there must be more than a five-year age
25 gap. Such incidents are left to the social-welfare system and other nonpunitive responses.

⁹⁷ Section 213.0(2)(g) expressly exempts charges under Section 213.1 from the requirement that an actor be more than 12 years of age.

⁹⁸ See NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES 323 (Jeremy Travis et al. eds., 2014) (“Principles for the restrained use of punishment—similar to the values of crime control and offender accountability—have deep roots in normative theories of jurisprudence and social policy.”). See generally JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007) (critiquing the resort to penal sanctions in the United States to address all social ills).

Section 213.8. Sexual Offenses Involving Minors

1 6. Same facts as in Illustration 3, except that Complainant is 14 years old.
2 Accused knows that Complainant is 14, and that Accused is 32. The offense is punishable
3 as a felony of the fourth degree, because Accused is over 21 and more than five years
4 older than Complainant, and Complainant is older than 12 but younger than 16.

5 7. Complainant, a 15½-year-old sophomore in high school, attends a party at the
6 college fraternity of Complainant's brother. Complainant gets into a long conversation
7 with Accused, a college student who is 20 years and eight months old, during which
8 Complainant confesses to being 15. Accused invites Complainant up to Accused's room,
9 where the two engage in mutually desired sexual activity, including sexual penetration.
10 When Complainant returns home at the end of the weekend, Accused and Complainant
11 begin an email correspondence. Complainant's parents find the correspondence and
12 report the relationship to the local authorities. Based on these facts, Accused could be
13 found guilty of a violation of Section 213.8(1). Complainant is between 12 and 16 years
14 of age, and Accused is more than five years older; Complainant's nominal consent is
15 irrelevant. Because Accused is younger than 21 years old, the act is punished as fifth-
16 degree felony. In the absence of additional facts, this evidence does not support liability
17 under any other provision of Article 213, as the acts of sexual penetration were
18 consensual.

19 8. Same facts as in Illustration 7, except that Accused is a 43-year-old professor.
20 Accused may be found guilty of a violation of Section 213.8(1). Because Accused is
21 older than 21, and the Complainant is younger than 16 but older than 12, the offense is
22 punishable as a fourth-degree felony.

23 Section 213.8(1)(c) requires that the actor know or recklessly disregard a risk that the
24 complainant was younger than 16 and that the actor is more than five years older. An actor must
25 also be proven reckless as to more specific age thresholds in order to enhance the punishment.
26 Therefore, an actor who was not aware of a risk that the complainant was under 12 is relieved of
27 liability under the enhanced provision, even though the actor may be liable for an offense under a
28 different subsection. Of course, an actor may assert a belief that a complainant was 12 years or
29 older, but the factfinder can reject that assertion if the factfinder thinks that the evidence proves
30 beyond a reasonable doubt that the actor was aware of a substantial and unjustifiable risk that the
31 complainant was in fact under 12.

Illustrations:

9. Accused, a 17-year-old student, is attending a middle-school sporting event when Accused encounters Complainant, who is 11 years and 10 months old. Complainant, who is tall and looks much older than 11, tells Accused that Complainant is 13 and a student at the school, and Accused believes Complainant. Accused and Complainant go to a secluded area under the stadium to talk and engage in sexual activity, but they are interrupted by Complainant's sibling, who finds them and yells at Accused, "[Complainant] is only 11! What are you doing!?" Complainant's sibling reports the incident to the police. If the factfinder finds these facts, the factfinder could not find Accused guilty under Section 213.8(1). Although Accused is more than five years older than Complainant, and Complainant is under 12, Accused was not aware of a substantial, unjustifiable risk that Complainant is under 12, given Complainant's statement, appearance, and the location where they met, as well as the absence of evidence that would have alerted Accused to a risk to the contrary. Under the facts as Accused believed them, Complainant was 13 (thus over 12 years old), and at most four years younger than Accused. Section 213.8(1) does not penalize sexual activity between minors within five years of one another's ages.

10. Same facts as in Illustration 9, except that Accused is 36. Accused may be found guilty of a violation of Section 213.8(1). Even if Accused believed Complainant to be 13, Accused knows that Complainant is younger than 16 years old and more than five years younger than Accused. However, Accused cannot be found guilty of the third-degree felony offense. Accused is older than 21, and Complainant is younger than 12, but in the absence of additional facts, it cannot be found beyond a reasonable doubt that Accused recklessly disregarded the risk that Complainant was under 12. Accused can be found guilty of a fourth-degree felony, because Accused is more than 21 years old.

It is important to underscore that the liability provided in Section 213.8 does not relieve liability under Sections 213.1 through 213.6 for actors who engage in nonconsensual sexual activity with minors. In such cases, the prosecution may elect to pursue more serious punishment if any of the aggravating factors of force, coercion, vulnerability, extortion, exploitation, or lack of consent are present.

Illustrations:

11. Accused is the 16-year-old friend of Complainant's sibling. Accused knows that Complainant is 10 years old. Late one night when Accused is spending the night at Complainant's family home, Complainant wakes up and finds Accused in Complainant's room, standing over Complainant's bed. Complainant, startled, says, "What are you doing here?" Accused silently climbs on top of Complainant and begins to remove Complainant's pajamas. Complainant struggles to get free and cries out, saying, "Stop! What are you doing?!", but Accused presses down against Complainant to prevent Complainant's escape, and puts a hand over Complainant's mouth to stifle Complainant's protests. Accused sexually penetrates Complainant, who later reports the incident. Based on these facts, Accused may be found guilty of a violation of Section 213.8(1), and punishable for a fifth-degree felony, because Accused is under 21 years old, but more than five years older than Complainant, whom Accused knows to be only 10 years old. But a factfinder may also find Accused guilty of a violation of Section 213.2, since Accused knowingly used physical force or restraint to cause Complainant to submit to an act of sexual penetration, or of Section 213.6, since Accused knowingly engaged in an act of sexual penetration without Complainant's consent.

12. Same facts as in Illustration 11, except that Accused is 13 and Complainant is 13. There is no basis for liability under Section 213.8(1), because even though Complainant is younger than 16, Accused and Complainant are the same age. But a factfinder may properly find that Accused committed a violation of Section 213.2 (physical force or restraint) or Section 213.6 (without consent). Accused is over the age of 12, as required by Section 213.0(2)(g), and the act of holding Complainant down, covering Complainant's mouth, and ignoring Complainant's protests and efforts to break free provide a basis upon which the factfinder could find force and lack of consent.

13. Same facts as in Illustration 11, except that Accused is 11 years old and Complainant is five years old. These facts do not support a finding of any criminal offense. Under Section 213.0(2)(g), an accused must be over 12 to be held criminally liable for any offense other than specified violations of Section 213.1. Rather, this troubling conduct is more appropriately and productively managed outside of the adult-criminal-law or juvenile-law systems.

2. Incestuous Sexual Assault of a Minor – Section 213.8(2)

Sexual abuse of minors is a pervasive problem in our society,⁹⁹ and in a significant number of cases the abuser is a close relative or associate of the victim.¹⁰⁰ In cases involving family members, sexual penetration may be part of a pattern of abuse that began when a child was younger, but even if the victim is on the cusp of adulthood, the state maintains a proper role in protecting minors from exploitation by caregivers responsible for their well-being. The inherently exploitative nature of a sexually intimate relationship between a minor and a person closely connected to the minor’s care, whether by blood or association, leads every jurisdiction to adopt statutes prohibiting incestuous child molestation and abuse.

The 1962 Code recognized the problem of incestuous sexual abuse in several ways. Section 230.2 defined the crime of incest, a felony of the third degree, as:

Section 230.2. Incest. A person is guilty of incest, a felony of the third degree, if he knowingly marries or cohabits or has sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood [or an uncle, aunt, nephew or niece of the whole blood]. “Cohabit” means to live together under the representation or appearance of being married. The relationships referred to herein include blood relationships without regard to legitimacy, and relationship of parent and child by adoption.¹⁰¹

Notably, this provision is deliberately limited to blood relationships, except for the inclusion of adoptive parents. The comment further explains that the use of brackets for select first-degree relatives “reflect[ed] uncertainty as to whether they should be added.”¹⁰² The purpose of the provision was given as “protection of the integrity of the family unit,” a

⁹⁹ See supra nn. 1-3; SNYDER, supra note 52, at 12 (“[C]rimes against juvenile victims are the large majority (67 percent) of sexual assaults handled by law enforcement agencies.”). The majority of victims are female, but child victims tend to include slightly more males than in the adult context. Specifically, in one study—which defined sexual assault to include rape, sodomy, assault with an object, and forcible fondling—the proportion of female victims is: 69 percent of victims under six; 73 percent of victims under 12, and 82 percent of victims under 18. Id. at 4.

¹⁰⁰ In one study, roughly 27 percent of offenders were family members of young victims, with that percentage increasing as the victim’s age gets younger. Another 60 percent of offenders were known, although not related, to the victim. Only 14 percent of offenders were strangers to the victim; for victims under six, just three percent of offenders were strangers, and for victims six to 12, just five percent were strangers. Id. at 10 tbl.6. “Nearly all offenders in sexual assaults . . . were male,” and 23 percent of offenders were under the age of 18. Id. at 8 & tbl.5.

¹⁰¹ MODEL PENAL CODE Section 230.2 (AM. L. INST., Proposed Official Draft 1962).

¹⁰² MODEL PENAL CODE Section 230 Comment at 369 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 2, 1980).

justification that stands today.¹⁰³ However, Section 230.2 is both over- and underinclusive in light of that goal. It is overinclusive because it punishes first-degree relatives outside the nuclear familial unit, regardless of the age of those individuals or the closeness of their emotional connection to one another. It is underinclusive because Section 230.2 excluded sexual acts with a stepchild or stepsiblings, on the ground that “it was thought inappropriate to enforce a permanent bar on marriage between steprelations.”¹⁰⁴ It also covers only acts of vaginal penetration. But the modern family unit is defined far more by cohabitation and acts of caregiving than by biology, and acts of oral sex or anal penetration surely disrupt family harmony as significantly as do acts of vaginal penetration.

In this respect, the critical function of the incest provision in the 1962 Code was less to prohibit sexual abuse of minors within a family unit than to prevent the formation of consanguineous marital or reproductive units.¹⁰⁵ Although that may be a laudable goal, it is excessive to proscribe as a third-degree felony any sexual conduct among consenting adults simply on the basis of a familial association. It likewise is unacceptable not to heighten the punishment for actors who prey upon minors in their care, simply because the actor lacks an actual blood relation.

Instead, the primary regulatory provision for sexual abuse of minors within the family structure in the 1962 Code was its provisions governing sexual acts with minors under 10 or minors under 16, both of which apply to a broader range of sexual acts, and without any added proof of familial or other relationship.¹⁰⁶ The only relationship-based provision of Article 213, punished as “Corruption of Minors” in Section 213.3(1)(b), applies to acts of sexual penetration

¹⁰³ Id.

¹⁰⁴ MODEL PENAL CODE Section 213.3 Comment at 387 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980).

¹⁰⁵ See, e.g., *Raines v. Commonwealth*, 379 S.W.3d 152, 154-155 (Ky. Ct. App. 2012) (“[The incest statute] is designed to generally protect the family unit, and to specifically protect society from genetic mutations that may occur in issue of incestuous relationships.” (quoting *Jones v. Commonwealth*, No. 2004-CA-002639-MR, 2007 WL 288280, at *6 (Ky. Ct. App. Feb. 2, 2007)); *Commonwealth v. White*, 491 A.2d 252, 255 (Pa. Super. Ct. 1985) (“The incest statute protects children from parental or familial sexual abuse and lessens the chance of genetic defects while promoting the solidarity of the family unit.”).

¹⁰⁶ MODEL PENAL CODE Section 213.1(1)(d) (AM. L. INST., Proposed Official Draft 1962) (labelling sexual intercourse with females under 10 a second-degree felony); id. Section 213.2(1)(d) (labeling deviate sexual intercourse with any person under 10 a second-degree felony); id. Section 213.3(1)(a) (labeling sexual intercourse or deviate sexual intercourse with a person under 16 years of age, by one four years older or more, a third-degree felony).

with a person under the age of 21, where the actor was a “guardian or otherwise responsible for the general supervision of [the complainant’s] welfare.”¹⁰⁷ The Comment to that Section explained that “the principal function of Section 213.3(1)(b) is to repress [sexual relationships between a father and stepdaughter] where the child is less than 21 years old and where the stepfather has been appointed guardian or stands in *loco parentis*.”¹⁰⁸ The provision also applied to others, such as “probation officers, camp supervisors, and the like.”¹⁰⁹ Significantly, however, the 1962 Code did not view these acts as serious violations. Section 213.3(1)(b) was graded as a misdemeanor, and an accused could defend the charge by proving by a preponderance of the evidence that “the victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others.”¹¹⁰

In the time since the drafting of the 1962 Code, the abuse of minors—of all ages—by those charged with their care has emerged as a pressing social issue.¹¹¹ Sexual abuse of minors is now viewed as a serious crime worthy of particular attention when the perpetrators are those most closely connected to the minor. Accordingly, Section 213.8(2) penalizes as a third-degree felony acts of sexual penetration of and oral sex with minors younger than 18 years old, when the actor is a parent, grandparent, or one who acts in a parental role to the child. This Section is meant to supersede the flawed liability described in Section 230.2.

Section 213.8(2) has several critical components. First, Section 213.8(2) expands the category of minors protected under Section 213.8 all the way to legal adulthood (the age of 18) in cases in which the actor serves a parental role in the minor’s life. Second, Section 213.8(2) permits liability to attach without regard to any inquiry into force, consent, or willingness; consent is deemed irrelevant because the special relationship between a parental figure and minor prevents the minor from offering any form of authentic consent. Of course, a parent who acts with force, while a minor is asleep or unconscious, or in any of the other circumstances proscribed by Sections 213.1 through 213.6, may also be held liable under those provisions.

¹⁰⁷ Id. Section 213.3(1)(b).

¹⁰⁸ MODEL PENAL CODE Section 213.3 Comment at 387 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980).

¹⁰⁹ Id.

¹¹⁰ MODEL PENAL CODE Sections 213.3(2), 213.6(3) (AM. L. INST., Proposed Official Draft 1962).

¹¹¹ See *infra* Reporters’ Notes, note 1.

1 Third, Section 213.8(2) authorizes a serious penalty—a third-degree felony—even when the
 2 complainant is an older minor (aged 16 to 18) otherwise capable of freely consenting to sexual
 3 activity. For parental figures who sexually intrude upon a child under 12 years of age, the
 4 sanction is thus equivalent to those available under Section 213.8(1). But for parental figures
 5 who engage in sexual acts with complainants 12 through 15 years of age, the punishment is
 6 raised from a fourth-degree felony to a third-degree felony. And exploitative parental figures
 7 become eligible for serious criminal sanction, a third-degree felony, as opposed to no liability
 8 when the minor is aged 16 to 18. Fourth, Section 213.8(2)(d) requires proof that the actor be
 9 recklessly aware of both the minor’s age and the actor’s relationship to the minor. Although a
 10 *mens rea* requirement may seem absurd, given that the vast majority of actors will obviously
 11 easily be proved to know both the minor’s age and their relationship to the minor, it is necessary
 12 given the possibility of unknown biological connections.¹¹²

13 The terms of Section 213.8(2) and the severity of the authorized punishment reflect the
 14 judgment that a guardian or parental figure engaging in sexual activity with a minor in the
 15 guardian’s or parental figure’s care constitutes an extreme breach of trust, inflicts an especially
 16 egregious form of harm, and causes a particularly profound and lasting detrimental impact.¹¹³
 17 The punishment further underscores that sexual intimacy between parental figures and minors in
 18 their care, regardless of age, is uniformly forbidden. Such acts are treated as akin to sexual
 19 intimacy with very young minors or to sex by force. The core of the violation proscribed by
 20 Section 213.8(2) is thus not as much animated by concerns of age or consanguinity as it is based
 21 on the breach of a singular relationship of trust and dependence.¹¹⁴

¹¹² See, e.g., Tabitha Freeman et al., *Sperm Donors Limited: Psychosocial Aspects of Genetic Connections and the Regulation of Offspring Numbers*, in REGULATING REPRODUCTIVE DONATION 165, 166-172 (Susan Golombok et al. eds., 2016) (describing the current and historical policy and practice of controlling “offspring numbers”); see also id. at 175 (reporting that two of 30 families reported accidental meetings of mothers using same donor, and noting that “[t]he unexpectedly high frequency of accidental meetings between same donor families encountered in our research raises questions about what has previously been viewed as the ‘remote’ possibility of same donor offspring unwittingly meeting and forming relationships”).

¹¹³ See *infra* Reporters’ Notes. The special obligation of the caregiver to the minor is also why the statute does not apply in the reverse, to penalize sexual abuses committed by children against their parents, or by wards against their guardians. Sexual penetration under such circumstances may violate other provisions of Article 213, but do not on their face offend Section 213.8(2).

¹¹⁴ For instance, in *Commonwealth v. Rahim*, 805 N.E.2d 13, 17 (Mass. 2004), the Supreme Judicial Court of Massachusetts was forced to dismiss six incest charges against a defendant who had raped his 15-year-old stepdaughter, due to the plain language of the statute ignoring nonblood relationships, regardless of the emotional or psychological connection between stepparent and child. See id. at 23 (“This is no doubt a difficult case in the sense that construing the statute in accord with the plain meaning of its words will result in the dismissal of six

Of course, the challenge lies in defining the precise relationships that should be covered by a provision authorizing a high penalty for any acts of sexual penetration or oral sex on the basis of that relationship alone. Other subsections of Section 213.8 help ensure that many actors who engage in incestuous behavior will be punished; all adults who engage in acts of sexual penetration or oral sex with minors under 12 are eligible for a third-degree felony. The purpose of a special provision for incest is: 1) to define liability for actors who engage in sexual acts with minors 16 or older, who otherwise may freely consent to sexual activity; 2) to heighten the punishment for sexual activity with complainants older than 12; and 3) to condemn sexual relationships in certain familial configurations. With respect to the last point, it is therefore necessary to define the category of covered relationships in a manner that conforms most narrowly to the situations in which abuse of that relationship is most egregious and cannot adequately be addressed by other parts of the Code. Although there will always be outlier cases, the goal should be to impose liability tailored to the relationships most likely to raise special concern, whether as a result of the type of connection alone between the actor and complainant, or as a result of the special vulnerability of the complainant in light of the actor's status.

Accordingly, Section 213.8(2) imposes liability for parental and grandparental figures, the sexual partners of those persons, and any other legal guardian or de facto parent. In defining these categories, Section 213.8(2) takes a broad view of the scope of figures characterized by a parental or grandparental role, in three ways. First, Section 213.8(2)(c) includes persons related by biology, marriage, adoption, or legal status as a foster parent.¹¹⁵ Second, it includes persons who may not directly parent, but whose relationship to the parent justifies equivalent treatment. And third, it includes persons who, although not a formal parent, serve in a parental role to the child.

A parental figure who makes sexual advances on a minor sends conflicting signals about the role and function of the parent in the minor's life. Apart from continued strong social taboos

indictments alleging that the defendant committed incest by having sexual intercourse with his stepdaughter when she was fifteen and sixteen years old.”). But see *Howard v. Commonwealth*, 484 S.W.3d 295, 298-299 (Ky. 2016) (holding that the incest statute at issue, which did not specify blood relationships in its text, applied to a stepparent and stepchild relationship).

¹¹⁵ In contrast to the 1962 Code, nearly all jurisdictions use terminology that encompasses full blood, half-blood, step, and adoptive relationships. See, e.g., TEX. PENAL CODE ANN. § 25.02(a), (c) (LexisNexis 2019) (defining knowing acts of sexual intercourse with full blood, half-blood, step, or adoptive relations as a third-degree felony, unless the other person is an “ancestor or descendant by blood or adoption,” in which case it is a second-degree felony).

1 against sex between minors and their caregivers, the parent or guardian role is shaped by the
2 adult's provision of shelter, food, educational opportunity, social and emotional development,
3 and other basic needs of the minor. For young minors, the addition of a requirement that the
4 minor gratify the adult sexually confounds these other roles and presents a confusing and
5 intolerable conflict between the minor's interest and that of the adult. Even older minors more
6 capable of expressing independent judgment must nonetheless confront the impossible choice
7 between breaking the familial bond, asserting true independence, and acceding to the adult's
8 sexual desires. Sexual abuse by a parental figure corrupts the minor's natural evolution toward
9 maturity and independence, including the gradual development of intimate social and sexual
10 relationships with age-appropriate partners.

11 The same is true for grandparents, many of whom have the same kind of special access to
12 the child typified by the parental relationship. One study found that "11% of grandparents live in
13 the same household as their grandchild," and of those, "5% are primary caregivers."¹¹⁶ Another
14 study found that, of children who are not living with a parent, over half (1.7 million) live with
15 their grandparents, far outstripping any other group.¹¹⁷ But even grandparents who do not live
16 with their grandchildren have special bonds that differentiate them as a group from other family
17 members and caregivers. Grandparents commonly host grandchildren overnight in their homes,
18 go out to eat with grandchildren, attend family celebrations, and engage in recreation and travel
19 together.¹¹⁸ Although some grandparents may not have as close a bond as others, as a category,
20 grandparents are commonly beloved figures, often second only to parents, in many children's
21 lives. Like parents who impose upon children sexually, grandparents who impose upon their
22 grandchildren sexually place the grandchildren in a particularly vulnerable and untenable
23 position. In this case, the grandchild is thrust in between a parent and the parent's parent, forced
24 to choose to hurt one or the other by disclosing or reporting an inappropriate advance.

25 The inclusion of a person who, at the time of the act, "is the legal spouse, domestic
26 partner, or sexual partner" at the time of the act of a parent or grandparent to the child is meant to

¹¹⁶ AARP, 2018 GRANDPARENTS TODAY NATIONAL SURVEY: GENERAL POPULATION REPORT at 12 (2019), <https://doi.org/10.26419/res.00289.001>. That survey also reports that over half of grandparents view themselves as providing a "moral compass" to their grandchildren. *Id.* at 3.

¹¹⁷ *Family Structure and Children's Living Arrangements*, CHILDSTATS.GOV, <https://www.childstats.gov/americaschildren/family1.asp> (last visited Aug. 18, 2020).

¹¹⁸ See AARP, *supra* note 116, at 24 (surveying how often grandparents engage in specific "in-person opportunities to connect with their grandchildren").

Section 213.8. Sexual Offenses Involving Minors

1 extend coverage to persons who are engaged in intimate personal relationships with the parents
2 or grandparents of the child, even if they do not directly parent the child themselves. This
3 provision addresses a common scenario for abuse: when sexual overtures are made by the sexual
4 or live-in partner of the minor's parent; the partner may not directly serve a parenting function
5 but nonetheless stands in a special relationship to the child as a result of the relationship to the
6 parent.¹¹⁹ In the case of younger minors, the actor is likely old enough that the serious
7 punishments under Section 213.8(1) apply. But for minors aged 12 through 15, the available
8 punishment is much diminished, since many such encounters are nominally consensual. And for
9 a minor aged 16 through 17, there would be no liability at all for a parent's sexual partner, in the
10 absence of special provision.

11 The critical relationship captured by the "sexual partner" language of the subsection
12 depends less upon the actor and the parent or grandparent having recently engaged in sexual
13 intimacy with each other than upon the relationship being one in which such sexual intimacy is
14 presumed to occur. Indeed, an actor may claim to have turned to the minor for sexual
15 gratification precisely because the partner is no longer satisfying the actor sexually, but so long
16 as the actor remains in a relationship of a sexual character to the parental or grandparental figure,
17 the provision is met. One state's code provides that "[t]he following factors may be considered in
18 determining whether a relationship is currently or was previously a sexual or romantic
19 relationship" for purposes of a similar provision, and lists the type and length of relationship, the
20 "frequency of the interaction between the two persons," and the length of time since the
21 relationship has terminated as factors.¹²⁰ Section 213.8(2) applies only to ongoing relationships;
22 if the relationship has terminated, then the protections of 213.8(1) or other provisions of Article
23 213 apply. Otherwise, the factors listed provide helpful guidance in determining the existence of
24 a sexual partnership. In colloquial terms, this subsection is meant to cover individuals who would

¹¹⁹ One study found that children with a single parent who has a live-in partner are 20 times more likely to be sexually abused than children within a two-parent family, and that although only one-third of children live in single and stepparent families, they are two-thirds of children sexually abused. Sedlak, A.J., Mettenburg, J., Basena, M., Petta, I., McPherson, K., Greene, A., and Li, S., Fourth National Incidence Study of Child Abuse and Neglect (NIS-4): Report to Congress. Washington, DC: U.S. Department of Health and Human Services, Administration for Children and Families, at 5-22 (2010). Analogously, although sexual abuse by grandparents is far less common than abuse by parents, research shows that stepgrandchildren are at greater risk. Leslie Margolin, *Sexual Abuse by Grandparents*, 16 CHILD ABUSE & NEGLECT 735, 739 (1992) (reporting that about one-third of grandparent abuse cases involved stepgrandchildren, and the abuse tended to be "more severe").

¹²⁰ ARIZ. REV. STAT. ANN. § 13-1401(B) (LexisNexis 2020).

1 be identified as a common-law spouse or a boyfriend or girlfriend; it excludes best friends or
2 roommates who do not hold themselves out as in a relationship with the characteristics of an
3 intimate sexual partnership.

4 The aggravation of the punishment for adults who engage with minors aged 12 through
5 15, and extension of liability to actors who engage with minors aged 16 through 17, reflect the
6 special gravity of this kind of misconduct and the need to condemn and deter sexual overtures by
7 figures in a parental role. Even minors otherwise past the age of consent, when presented with
8 sexual demands by a parent’s sexual partner, face emotional turmoil akin to that stirred up when
9 the behavior is undertaken by a parent. The minor may accede as a result of fear of rupturing
10 cherished relationships, losing critical support or shelter, confusing familial roles, or causing
11 pain to loved ones. A parent’s romantic partner also benefits from special access to the minor;
12 because such persons may frequently spend the night or be given opportunities to be alone with
13 the minor, there is an enhanced ability of such persons to engage in inappropriate sexual activity
14 undetected. And coverage is especially important for older minors, past the age of puberty, who
15 may be especially vulnerable to sexual advances, or mistakenly confound filial affection with
16 sexual submission. These concerns are not diminished simply because the adult figure does not
17 directly parent the child. The limitation on relationships existing at the “the time of the act”
18 ensures that, should the actor cease to function in such a parental role, a consensual sexual
19 relationship with a minor 16 or older would be lawful.

20 The inclusion of “legal and de facto guardians” in Section 213.8(2)(c)(iii) likewise
21 permits liability for a person who, while not a formal parent of the child, serve in a parental role.
22 In family law, the terms “legal guardian” and “de facto parent” are well-defined concepts that
23 govern to determine when persons otherwise not formally “parents” of a child may nonetheless
24 assert parental rights.¹²¹ Typically, the test for a de facto parent requires proof of the exercise of
25 continuous parental authority over a child, for instance, that the person live with the minor for a
26 significant period, assume the obligations of parenthood without expectation of compensation,

¹²¹ See RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 1.82 Comment *a*, at 64 (AM. L. INST., Tentative Draft No. 2, 2019) (noting that “a majority of states now recognize the rights of de facto parents to seek contact and responsibility for a child”); see also UNIF. NONPARENT CUSTODY & VISITATION ACT § 4 (UNIF. LAW COMM’N 2018) (outlining the circumstances under which a court “may order custody or visitation to a nonparent”); UNIF. PARENTAGE ACT § 609(d) (UNIF. LAW COMM’N 2017) (specifying the procedures under which a de facto parent may be adjudicated to be a parent).

develop a parental bond with the minor, and have done so with the parent’s encouragement or consent.¹²²

The term “de facto guardian” is not intended to include temporary guardians or those who have exercised care over a child intermittently or for compensation, such as a nanny, a parent hosting a sleepover, a teacher, a religious figure, or a coach. Although those persons may share equal authority over the minor as a parent in such situations, the bond is of an entirely different character. A minor in such a situation at least in theory retains a safe space to retreat from such encounters, or to report the threat, in contrast to a minor who is experiencing sexual attacks within his or her own home or family. Extricating the victim from a situation of abuse involving a more transient figure typically poses less longstanding emotional, financial, and psychological harm. It is generally much easier never to see a coach or teacher again than it is to accuse and renounce a member of one’s own family.¹²³ The risks of abuse in those situations may warrant prohibition but at a lower level of punishment, as provided in Section 213.8(3).

For the same reasons, Section 213.8(2) is restricted to parents, grandparents, their romantic partners, or those legally or functionally in a parental role. It does not apply to other relatives, such as aunts, uncles, cousins, or siblings, unless they share a household and play a significant parental role such that they are de facto parents.¹²⁴ These individuals could incur liability when the minor is under 16, pursuant to Section 213.8(1), but not automatically when the minor is older. Although the taboo on incest typically includes these categories, the specific reasons to elevate the punishment for the crime when a parental figure is involved are absent. Aunts, uncles, siblings, cousins, and nieces and nephews typically do not have the same power or emotional influence over a minor as do family members who reside with and provide for a minor, or who belong to a generation that may derive authority from its more senior status. While some of these persons may be of an age or in a position akin to that of a parental figure, generally speaking they are more akin to peers. Moreover, inclusion of more distant relatives

¹²² RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 1.82(a) (AM. L. INST., Tentative Draft No. 2, 2019).

¹²³ See *supra*, Comment to Section 213.8(3), for more discussion of authority figures.

¹²⁴ Most jurisdictions extend the prohibition on incest to guardians, grandparents, aunts and uncles, and many also include siblings, nieces and nephews. E.g., ARK. CODE ANN. § 5-14-103(a)(4)(A) (2019); N.Y. PENAL LAW §§ 255.25-.27 (Consol. 2019). Other states simply forbid acts of sexual intercourse among persons “within the degrees of consanguinity within which marriages are declared by law to be incestuous and void”—CAL. PENAL CODE § 285 (Deering 2020)—or by “such person’s guardian or [a person] otherwise responsible for the general supervision of such person’s welfare.” CONN. GEN. STAT. ANN. § 53a-71(a)(4) (LexisNexis 2019).

1 raises difficult problems of line-drawing; in many families, some aunts and uncles are younger
2 than their nieces or nephews.

3 Relationships that do not involve the direct guardianship role do not consistently raise the
4 same degree of tension between the complainant's status within the family, need for protection,
5 and vulnerable proximity versus the actor's sexual demands. For this reason, the revised Code
6 also rejects the liability suggested in Section 230.2 ("Incest").¹²⁵ Instead, sexual overtures by
7 persons previously covered in 230.2 of the 1962 Code, but no longer covered in 213.8(2), are
8 governed by Section 213.8(1). Only when such persons satisfy the criteria set out in subsection
9 (2) does that provision apply. Adoption of Article 213 therefore repeals Section 230.2.

10 Section 213.8(2) also departs from the 1962 Code in setting the upper age threshold at 18,
11 rather than 21. The 1962 Code explained:

12 [T]he higher age reflects the realistic assumption that a much older child may be subject
13 to imposition and domination by one who occupies a position of authority and control.
14 Moreover, the guardian or person similarly situated bears a special responsibility for
15 guidance of his ward. Betrayal of that obligation by sexual intimacy is decidedly
16 wrongful even if the child is old enough to take care of himself in most situations.¹²⁶

17 Although that rationale still holds true, the age of 18 is widely recognized as the age of legal
18 emancipation. In contemporary society, roughly half of those aged 18 to 24 live outside their
19 childhood homes.¹²⁷ Approximately 40 percent of 18- to 24-year-olds are enrolled in some form
20 of higher education,¹²⁸ and roughly 72 percent of those aged 16 to 24 who are not in school are
21 in the workforce.¹²⁹ As a minor reaches adulthood, the rationales justifying greater protection
22 fade. And although the restrictions of Section 213.8(1) may leave a gap in protection for minors

¹²⁵ See supra text accompanying notes 97-102.

¹²⁶ MODEL PENAL CODE Section 213.3 Comment at 388 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980).

¹²⁷ See *America's Families and Living Arrangements: 2017*, U.S. CENSUS BUREAU tbls.A3 & AVG1, <https://www.census.gov/data/tables/2017/demo/families/cps-2017.html> (last updated Mar. 22, 2019) (finding that the total number of coresident parents with children 18 to 24 is 12,310, and the total number of householders 18 to 24 is 6,239, with a note that the average number of people over 18 in these households is about two).

¹²⁸ *College Participation Rates: Percent of 18 to 24 Year Olds Enrolled in College*, NAT'L INFO. CTR. FOR HIGHER EDUC. POLICYMAKING & ANALYSIS, <http://www.higheredinfo.org/dbrowser/index.php?measure=104> (last visited Aug. 18, 2020) (demonstrating that the percentage of college enrollment by state tends to be between 31 percent and 42 percent, with the most of the more populous states trending toward 40 percent).

¹²⁹ *Youth Employment*, CHILD TRENDS (May 27, 2019), <https://www.childtrends.org/indicators/youth-employment>.

over 18 with respect to some familial actors when the actor imposes sexually but not in a way that invokes the protections of Sections 213.1 through 213.6, such a gap is preferable to the risk of overbreadth. Including persons above the age of 18 runs the risk of criminalizing relationships that, although distasteful and against community sentiment, nonetheless cannot be described as categorically nonconsensual. Moreover, in cases in which the complainant is still vulnerable, and the sexual activity is unwanted, the provisions of Section 213.6 fill the gap so long as the factfinder concludes that the actor was aware of a substantial risk that the other person did not consent.

Illustrations:

14. Complainant, who is 16, lives with Complainant's parent. Complainant's parent's partner, Accused, occasionally spends the night at Complainant's home. Accused also has an occasional sexual relationship with Complainant's parent, and at the time of the incident called the parent Accused's "boo." Witnesses testify that, based on their observations of the relationship and statements by Accused and Complainant's parent, they believed Accused and Complainant's parent to be dating. One day, Accused enters Complainant's room late in the evening and climbs into bed with Complainant. Accused tells Complainant that Accused is going to show Complainant "about being grown-up" and removes Complainant's pants. Complainant nervously says, "Okay..." and then Accused engages in an act of anal penetration. Accused admits the incident, but claims that Complainant had been flirting with Complainant for the past year and that Accused has not engaged in sexual activity with Complainant's parent for at least six months. Accused argues that Complainant is 16, which is past the age of consent. Based on this evidence, a factfinder could find Accused guilty of violating Section 213.8(2). Accused knew that Complainant is under 18, and the factfinder could conclude that Accused was knowingly the sexual partner of Complainant's parent. Section 213.8(2) does not require that the sexual relationship be exclusive, or that the sexual partner formally cohabitate with the parent. Section 213.8(2) also requires that the actor be a sexual partner of a parental or grandparental figure, but that requirement speaks to the quality and nature of the relationship, not the recency of sexual activity between the parental figure and actor. The offense is punishable as a third-degree felony. Section 213.8(2) makes any question of Complainant's willingness irrelevant.

1 15. Same facts as in Illustration 14, except that Accused, a sibling of
2 Complainant's parent, lives in the same home as Complainant and regularly acts as a
3 guardian, such as by cooking meals for Complainant, taking Complainant to school or
4 athletic events, and enforcing Complainant's curfew. Based on these facts, Accused could
5 be found guilty of a violation of Section 213.8(2). The factfinder could conclude beyond
6 a reasonable doubt that Complainant is under the age of 18 and Accused resides with
7 Complainant as a de facto parent.

8 16. Accused is the 46 year-old sibling of Complainant's parent. Complainant, who
9 is 16, sees Accused a couple of times a year on holidays, and on such occasions Accused
10 spends the night in Complainant's home. On one such holiday, Accused enters
11 Complainant's room at night and engages in an act of sexual penetration. Based on these
12 facts, Accused is not liable under Section 213.8(2), because Accused is not in a parental
13 or guardianship role towards the Complainant, nor in a sexual relationship with
14 Complainant's parents or grandparents. Accused is also not liable under Section 213.8(1),
15 because Complainant is not younger than 16 years old. Thus, Accused is liable only if the
16 evidence proves guilt beyond a reasonable doubt under another provision of Article 213,
17 such as Section 213.6, which prohibits sexual penetration without consent. However, if
18 the factfinder believes that Accused did not know or recklessly disregard that
19 Complainant did not consent—for instance, if the factfinder concludes that Accused
20 believed that Complainant assented—then Accused cannot be found guilty.

21 17. Complainant, who is 25 years old, was adopted at a young age. After several
22 years tracking down Complainant's biological parents, Complainant locates one of
23 Complainant's biological parents, Accused. The two become close, and then begin a
24 consensual sexual relationship. Based on these facts, there is no violation of Section
25 213.8(2). Section 213.8(2) prohibits sexual intercourse between a minor and a parent, but
26 because the Complainant is older than 18, the statute does not apply.

27 ***3. Exploitative Sexual Assault of a Minor – Section 213.8(3)***

28 One circumstance that warrants special consideration is that of authority figures who
29 engage in sexual activity with older minors. Most authority figures involved with a minor
30 younger than 16 will be punishable under Section 213.8(1), without regard to the actor's status as
31 an authority figure; if the complainant is younger than 12, the offense will be a felony of the

third degree, and if the complainant is 12 through 15 years old, the offense will be a felony of the fourth degree. But the question remains whether the law should also punish authority figures who sexually engage with 16- and 17-year-olds who nominally consent to the acts, and thus the actor is not eligible for punishment under any of the other provisions of Sections 213.1 through 213.6.

The 1962 Code punished such acts by authority figures in Section 213.3(1)(b) as a misdemeanor, as discussed in the Comment to Section 213.8(3). In existing law, statutes prescribing special penalties for actors in positions of authority to a child are common.¹³⁰ Typical statutes target minors aged 15 or 16 to 18,¹³¹ but some statutes apply to persons as old as 21.¹³² It is not uncommon for a statutory scheme to contain a patchwork of laws covering each situation separately.¹³³

Arguments might be made against penalizing such behavior. Sixteen-year-old adolescents in contemporary society are—as a general matter—sufficiently mature and sufficiently aware of the implications of sexual penetration to be able to exercise autonomous, if not always wise,

¹³⁰ See, e.g., COLO. REV. STAT. §18-3-405.3, .5 (2018) (specifically proscribing sexual contact and penetration on a person between 15 and 18 “by one in a position of trust”); N.J. STAT. ANN. § 2C:14-2(a)(2)(b) (LexisNexis 2019) (“An actor is guilty of aggravated sexual assault if . . . [t]he actor has supervisory or disciplinary power over the victim by virtue of the actor’s legal, professional, or occupational status”); UTAH CODE ANN. § 76-5-404.1(1)(c) (LexisNexis 2019) (defining “position of special trust” to include several specific roles of authority—for example, “athletic manager who is an adult,” along with babysitter, coach, religious leader, and scout leader—and a catch-all that covers “any individual in a position of authority . . . which enables the individual to exercise undue influence over the child”); ARIZ. REV. STAT. ANN. § 13-1405 (position of trust); MICH. COMP. LAWS ANN. §§ 750.520d and 750.520e (teachers, administrators, and other school employees); MINN. STAT. ANN. §§ 609.344 and 609.345 (therapists, clergy, corrections officials, and police officers); OHIO REV. CODE ANN. § 2907.03 (someone in authority—teacher, coach, cleric, doctor, scout leader); 18 PA. STAT. AND CONS. STAT. ANN. § 3124.2 and 18 PA. STAT. AND CONS. STAT. ANN. § 3124.3 (abuses of authority by school employees, coaches, nonprofit workers and volunteers, police officers, detention officials, and youth-facility officials). Only some of these provisions provide a defense for an actor close in age.

¹³¹ See, e.g., ARIZ. REV. STAT. ANN. § 13-1404 (prohibits anyone in a position of trust from sexual contact with a victim who is 15, 16, or 17); ARIZ. REV. STAT. ANN. § 13-1405 (increases the penalty for sexual intercourse or oral or anal sex with a 15-, 16-, or 17-year-old victim if the offender is in a position of trust). Arizona also has provisions targeted to with abuses of authority by probation or juvenile court authorities (§ 13-1409), police officers (§ 13-1412), therapists (§ 13-1418), and those in correctional facilities (§ 13-1419).

¹³² See, e.g., ARK. CODE ANN. § 5-14-124 and -125 (covering abuses of authority with minors involving corrections officials, school employees, and mandated reporters and others in positions of trust or authority, as well as provisions covering any principal, teacher, coach, or counselor engaging in sexual activity with a student under 21).

¹³³ See, e.g., 18 PA. STAT. AND CONS. STAT. ANN. § 3124.2 (covering corrections employees, school and child-care workers and police); 18 PA. STAT. AND CONS. STAT. ANN. § 3124.3 (covering coaches, nonprofit volunteers and employees).

1 judgment. But because research underscores both the extent to which older actors exploit their
2 positions of trust for sexual gratification, and the lasting individual and social impact caused by
3 those actions, continued protection remains appropriate.¹³⁴ Moreover, awareness of the
4 frequency of and harm caused by sexual abuse of young people by authority figures such as
5 clergy, staff at group or foster-care homes, or athletic coaches has led to increased efforts to deter
6 and penalize such conduct.

7 Section 213.8(3) defines liability for such actors. It is not limited on its face to
8 complainants between the ages of 16 and 18, because the critical fact for the prosecution to prove
9 is that the complainant was younger than 18, rather than any particular age. A prosecutor might
10 elect to pursue charges under this provision for cases involving younger complainants, but the
11 availability of more severe penalties in Section 213.8(1) based solely on proof of age for
12 complainants younger than 16 make allegations involving 16 and 17 year old minors the
13 intended beneficiaries of the protections in Section 213.8(3). Section 213.8(3) is graded as a
14 felony in the fifth degree,¹³⁵ because the proscribed behavior is akin to Section 213.6 (sex
15 without consent) or Section 213.3(3) (custodial status), inasmuch as the actor's position of
16 authority precludes the meaningful exercise of consent. In addition, more severe sanctions are
17 available if the actor employs force, extortionate threats, or acts in the face of expressed
18 nonconsent.

19 Paragraph (b)(iii) requires that the actor “hold[] a formal position of authority over the
20 minor” and gives the specific example of a “teacher, employer, religious leader, treatment
21 provider, administrator, or coach.” These positions share in common the characteristic of formal,
22 authoritative power over a minor. Each of the listed individuals is a person to whom a
23 complainant entrusts the complainant's own care and development, and in turn those positions
24 offer to the complainant something critical in exchange (education, money, salvation or spiritual
25 guidance, medical care, athletic development, etc.). It is this feature, more so than the
26 corresponding features of emotional closeness or physical proximity, that “authority or
27 supervision” is meant to cover.

¹³⁴ See generally Blakemore et al., *supra* note 1 (noting the dearth of concrete evidence about prevalence, but collating rates related to abuse within religious institutions and assessing the abuse rates and impacts).

¹³⁵ Existing law provides a wide array of penalty ranges, but generally speaking authorizes lengthier terms of incarceration. Compare, e.g., MINN. STAT. ANN. §§ 609.344 (Criminal sexual conduct in the third degree, 15 years) and 609.345 (Criminal sexual conduct in the fourth degree, 10 years).

1 These requirements therefore are expressly intended to exclude consensual relationships
2 between figures of lesser authority or power, or ones in which the minor is able to give authentic
3 consent, notwithstanding the position of authority. A 16- or 17-year-old may willingly choose a
4 sexual encounter with a teaching assistant, or the scheduler at the restaurant where the teen
5 works, or the employer for whom the teen babysits or mows the lawn. Even though some such
6 relationships may be generally viewed as undesirable, they should not be criminalized.

7 For this reason, Section 213.8(3) expressly provides a defense that “the actor’s position
8 of authority over the other person did not impair the other person’s ability to form an
9 independent judgment about whether to consent to the act of sexual penetration or oral sex.”
10 This provision is intended to provide the defendant with the opportunity to show that the power
11 was not wielded in a predatory fashion, and that the sexual conduct was in fact truly consensual.

12 **Illustrations:**

13 18. Complainant, who is 16, plays on a soccer team coached by Accused, who is
14 32. At the end of the season, Accused hosts a party to celebrate the team’s victories. After
15 the party, Complainant stays behind to help Accused clean up. Accused grabs
16 Complainant from behind, saying, “You’re my favorite player.” Complainant tries to
17 wriggle from Accused’s grasp, saying, “That’s not true,” in a playful voice, but Accused
18 says, “You know it’s true. And aren’t I your favorite coach?” Again, Complainant laughs
19 nervously, saying, “You know you are!” while trying to return to cleaning. Instead,
20 Accused says, “Show me,” and begins to kiss Complainant. Complainant, stunned, does
21 not speak or resist. Complainant then follows Accused to the bedroom, where at
22 Accused’s urging Complainant engages in an act of oral sex. Accused later testifies that
23 Accused believed Complainant had a “crush” and that the sexual act was consensual;
24 Complainant testifies that Complainant was unwilling. Based on these facts, Accused
25 could be found guilty of a violation of Section 213.8(3), even if Accused was not aware
26 of the risk that Complainant had not consented, as would be required to convict Accused
27 of Sexual Assault Without Consent under Section 213.6. Accused knew that Complainant
28 is under 18 years of age, that Accused is more than five years older than Complainant,
29 and that Accused is Complainant’s coach. The offense is punishable as a fifth-degree
30 felony under Section 213.8(3). Accused cannot be found guilty of violating the more

1 serious offense under Section 213.8(1), because Complainant is not younger than 16
2 years old.

3 19. Same facts as in Illustration 18, except that Complainant is 15 years old.
4 Accused may be found guilty of a violation of Section 213.8(3), which is a fifth-degree
5 felony. But Accused is also guilty of violating Section 213.8(1), if the prosecution can
6 prove that Accused knew or was aware of a risk that Complainant is between 12 and 16.
7 Because Accused is older than 21, the offense is graded as a fourth-degree felony under
8 Section 213.8(1). According to the principles of Section 1.07,¹³⁶ however, the Accused
9 may not be convicted of both offenses.

10 20. Same facts as in Illustration 18, except that Complainant is 16 and Accused is
11 20 years old. Accused cannot be found guilty under Section 213.8(1), because, even
12 though Complainant is 16, Accused is not more than five years older than Complainant.
13 Nor can Accused be found guilty under Section 213.8(3), even though Complainant is 16
14 and Accused is Complainant's coach, because Accused is not more than five years older.

15 21. Complainant is 17, and works at a nearby water park in the summer. Accused
16 is Complainant's supervisor at the water park, and is 28. Complainant and Accused
17 engage in a consensual sexually intimate relationship during the summer. When
18 Complainant's parents find out, they order Complainant to quit the job and stop seeing
19 the supervisor, who they judge an inappropriate partner for Complainant. However,
20 Complainant continues to see Accused in secret. When Complainant's parents learn that
21 the relationship has continued, they call the police and convince the prosecutor to charge
22 Accused with a violation of Section 213.8(3).

23 Based on these facts, a jury could find that Accused violated the terms of Section
24 213.8(3), as Complainant is younger than 17, Accused is more than five years older, and
25 Accused (as Complainant's supervisor at work) holds a formal position of authority over
26 Complainant. However, Accused could offer evidence of the consensual nature of the

¹³⁶ 1962 Code Section 1.07. That Section states: "When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if: (a) one offense is included in the other..." Included offenses in turn are defined as "established by proof of the same or less than all the facts required to establish the commission of the offense charged." Proof of a violation of Section 213.8(1) requires proof of less than the facts required to prove Section 213.8(3): namely, Section 213.8(1) requires proof only of the Complainant's age, the five-year age gap, and the pertinent mens rea. Section 213.8(3) adds an element, the actor's position. Thus the prosecutor could pursue one or the other charge, but not both.

relationship and its enduring quality even after Complainant terminated the employment as evidence that Complainant formed an independent judgment in consenting to the sexual activity, and was not impaired by Accused's authority role. If a jury finds that a preponderance of the evidence supports Accused's position, Accused must be found not guilty.

Finally, the 1962 Code extended liability in these situations to cover complainants until age 21, but that approach now seems unduly broad. As noted above, even though persons aged 18 to 21 are susceptible to abuse or intimidation, the probable independence and autonomy of such persons in most aspects of their lives counsels against criminalizing consensual sexual encounters.¹³⁷ To the extent that such encounters are coercive or nonconsensual, Sections 213.4 and 213.6 serve as adequate protection against an actor's excessive influence.

4. Fondling the Genitals of a Minor – Section 213.8(4)

Section 213.8 departs from the 1962 Code, but is consistent with existing law in expanding the scope of covered behavior with minors that is eligible for heightened punishment. The 1962 Code reserved its most serious penalties for vaginal or anal penetration and oral sex, as does most existing law. Section 213.0(2)(a) and (b) and Sections 213.1 through 213.6 follow that pattern, by imposing penalties for acts of penetration or oral sex involving force, coercion, or other conditions indicating lack of consent without regard to the age of the complainant. The 1962 Code also punished acts of offensive sexual contact, which covers acts as transient as a quick grope or as prolonged as extended fondling.

Section 213.0(2)(c) and Section 213.7 likewise punish acts of sexual contact that fall short of sexual penetration or oral sex. Although some gropes of female genitalia may technically meet the definition of "sexual penetration," which is satisfied if there is any penetration "however slight" of the vulva,¹³⁸ most gropes of female genitalia are likely to be defined as sexual contact.¹³⁹ Yet even a prolonged masturbation of male genitalia may only ever

¹³⁷ See *supra* Section 213.8, Comment 2.

¹³⁸ See Section 213.0(2)(a), (b) & Comment. The nonconsensual fondling of female genitalia may in some cases technically satisfy the definition of vaginal penetration, because it follows the universal pattern of existing law in permitting liability for penetration "however slight." As a practical matter, experience teaches that prosecutors often pursue cases involving genitalia "grabs" (or superficial fondling), whether male or female, as contact offenses rather than penetration offenses.

¹³⁹ See, e.g., *People v. Bell*, 625 N.E.2d 188, 191 (Ill. App. Ct. 1993) (reversing conviction absent proof beyond a reasonable doubt that digital fondling led to penetration, citing precedent). Cf. *State v. Bomar*, 182 P.3d 47

constitute “sexual contact,” because no penetration occurs. In contrast, prolonged masturbation of female genitalia could readily satisfy the requirement of penetration in most cases,¹⁴⁰ because, as the Comment to Section 213.0(2)(a) explains, universal and longstanding practice has shown that the only workable penetration standard is one that defines the necessary amount of penetration as “however slight.”¹⁴¹ And this standard is essential in order to adequately penalize common, serious forms of sexual abuse, including acts of object and digital penetration.

The exclusion of fondling male genitalia from the category of sexual-penetration offenses is justified when compared to the conduct covered by Sections 213.1 through 213.6, which primarily target adult complainants.¹⁴² Brief fondling of the genitals of adults, although serious, is a less serious intrusion than an act involving penetration. A “grab” of genitalia—whether male or female—is an incursion on autonomy akin to other unwanted touches of intimate parts, rather than to an act involving penetration.

But whereas unwanted masturbation of the genitalia of adult males is adequately deterred and condemned by proscriptions governing unwanted sexual contact, the unwanted fondling of the genitalia of male minors by adults¹⁴³ is considerably more serious, as the minor is likely still in the process of sexual development and less likely to have engaged in any form of intimate touching.¹⁴⁴ An adult who masturbates a boy or young man, like an adult who masturbates a

(Mont. 2008) (addressing jury verdict in case involving child complainant and ambiguity as to whether defendant penetrated child).

¹⁴⁰ See Section 213.0(2)(c) & Comment.

¹⁴¹ See Section 213.0(2)(a) Comment & Reporters’ Note.

¹⁴² Older persons who show sexual interest in children need not always resort to displays of weapons, violence, threats, or other explicit coercion in order to obtain sexual submission.

¹⁴³ One study found that the majority of all victims of sexual assaults involving sexual penetration or forcible fondling were minors; specifically, 14 percent of victims were aged 0 to 5, 20.1 percent were 6 to 11, and 32.8 percent were 12 to 17. SNYDER, *supra* note 52, at 2 tbl.1. The most common charge across penetration and fondling categories was forcible fondling—it was the most serious charge in 45 percent of all sexual-assault cases reported to law enforcement between 1991 and 1996. *Id.* at 2.

¹⁴⁴ Rebecca L. Moles & John M. Leventhal, Editorial, *Sexual Abuse and Assault in Children and Teens: Time to Prioritize Prevention*, 55 J. ADOLESCENT HEALTH 312, 312 (2014) (“[M]ost of the sexual abuse or assault reported through the age of 17 did not include penetration. Many state statutes include more stringent penalties for penetration versus genital touching, which may contribute to the perception that penetration is somehow more “wrong” than other sexual contact or touching. One longitudinal study of outcomes of sexual abuse found an increased rate of psychopathology in survivors of any type of sexual abuse or assault, with a tendency toward even higher rates in those who had experienced penetration as part of the abuse. It is important to recognize that all forms of child abuse and neglect have been linked to poor medical and psychiatric health outcomes; the biologic and epigenetic bases of the outcomes are being uncovered and are beginning to be applied to public policy development.

Section 213.8. Sexual Offenses Involving Minors

1 young girl or woman, takes advantage of the minor's youth and inexperience, and causes
2 potential damage to the minor's emotional and sexual development.

3 Similarly, although fondling and masturbation of a minor's female genitalia may possibly
4 meet the criterion of "sexual penetration," such liability may be difficult to establish, given that
5 young minors often lack sophisticated understandings of their genitalia and thus may have
6 trouble explaining the nature and extent of the touch to the factfinder. In addition, the severe
7 penalties for acts of penetration may be excessive when the allegations involve groping over the
8 clothing. But punishing such acts at the low level of ordinary contact offenses may also be
9 insufficient. In sum, there are several reasons to elevate the punishment for acts of fondling or
10 masturbation of the genitalia of minors above the punishment for the same behavior in the
11 sexual-contact offense defined by Section 213.7.

12 Accordingly, Section 213.0(2)(d) defines the act of "fondling," and Section 213.8(4)
13 defines an offense of knowingly fondling a person younger than 16, if the actor is more than
14 seven years older, or younger than 12 if the actor is more than five years older. "Fondling" is
15 defined in Section 213.0(2)(d) as:

16 prolonged contact with or manipulation of the genitals, when the actor's purpose is the
17 sexual arousal, sexual gratification, sexual humiliation, or sexual degradation of any
18 person. Fondling requires more than a transient grope or grab....

19 By defining liability an intermediate degree of contact—more intrusive than transient sexual
20 touches but less intrusive than an act of penetration or oral sex—Section 213.0(2)(d) and Section
21 213.8(4) targets a type of conduct particularly common in cases involving the sexual abuse of
22 minors.

23 **Illustrations:**

24 22. Complainant, who is 10 years old, is in the bathroom of the public library
25 when Accused, who is 42, approaches and tells Complainant, whom Accused knows to
26 be younger than 12, to enter one of the stalls. Complainant initially refuses, but then
27 Accused says, "Trust me—I have a great surprise for you!" Complainant agrees and
28 enters the stall. Accused puts a hand inside of Complainant's pants and masturbates

Penetration should not be viewed as the sole marker of severity of abuse or predictor of long-term outcomes for the survivors.").

Section 213.8. Sexual Offenses Involving Minors

1 Complainant for several minutes. After Accused leaves, Complainant tells the library
2 staff what happened. Based on these facts, the factfinder could find Accused guilty of
3 violating Section 213.8(4), punishable for a fourth-degree felony, because the minor is
4 younger than 12 and the Accused is more than five years older, and is older than 21.

5 23. Same as in Illustration 22, except that the Complainant is 13 years old. Based
6 on these facts, the factfinder could find Accused guilty of Section 213.8(4) and
7 punishable for a fifth-degree felony. The minor is older than 12, and the Accused is more
8 than seven years older.

9 For the reasons given in the Comments to Section 213.8(1), this provision follows the
10 pattern of imposing liability separately for minors younger than 12 and those ages 12 through 15.
11 It also follows the pattern of providing for an age gap, and in heightening punishments for actors
12 21 years old or older. In the case of minors younger than 12, the gap is five years; for minors 12
13 through 15, it is seven years. Slightly more generous gaps are warranted given the nature of the
14 conduct, which is more akin to sexual contact than penetration in that same-aged minors are
15 more likely to engage in fondling in a consensual exploratory encounter that should not be
16 penalized criminally.

17 **Illustration:**

18 24. Complainant, who is 11½, is at a birthday party with Accused, who has just
19 turned 13. Complainant and Accused are playing a game in which each person draws a
20 name from a hat, and then spends seven minutes in a closet in the dark with that person.
21 Complainant draws Accused's name, they both enter the closet, and nervously laugh as
22 the door is closed. After a few moments, Complainant begins to kiss Accused, who
23 reciprocates. Accused reaches down and begins to masturbate Complainant over
24 Complainant's clothes and Complainant fondles Accused's breasts. Complainant's
25 parents suddenly open the door and observe the behavior, and report the incident to
26 police. Based on these facts, Accused cannot be found guilty of any offense. Although
27 Complainant is younger than 12 years of age, Accused is within five years of age of
28 Complainant.

1 The penalties that attach to a violation of Section 213.8(4) reflect the seriousness of the
2 offense on a continuum with acts of sexual penetration or oral sex at one extreme and acts of
3 sexual contact at the other. Specifically, Section 213.8(4) provides that the offense is a felony of
4 the fourth degree if the complainant is under 12 years of age and the actor is 21 years or older,
5 and a felony of the fifth degree if the actor is younger than 21, or if the complainant is aged 12
6 through 15.

7 ***5. Aggravated Offensive Sexual Contact with a Minor – Section 213.8(5)***

8 Section 213.8(5) addresses sexual contact with minors that occurs in aggravated
9 circumstances, such as when the actor uses physical force, exploits a vulnerability, engages in
10 extortion or deception, or is in a parental or authority figure relationship with the minor. Those
11 aggravating circumstances are defined in Section 213.8(5)(b)(iii) by reference to the comparable
12 provisions for sexual penetration and oral sex. Section 213.8(6) sets out separate provisions for
13 contact offenses involving minors based solely on the age of the actor and complainant, in the
14 absence of any other factors.

15 As with the penetration offenses, the general provisions of Article 213 governing sexual
16 contact, defined in Section 213.7, apply equally to sexual contact with minors. Section 213.7(1)
17 defines as a felony of the fifth degree the actor's use of physical force or surreptitious
18 impairment to engage in unwanted sexual contact. Section 213.7(2) punishes as a petty
19 misdemeanor sexual contact that occurs under circumstances akin to Sections 213.3 through
20 213.6.

21 Although these punishments are serious, enhanced penalties are appropriate for actors
22 who use force, extortion, exploitation, or a special vulnerability to engage in acts of sexual
23 contact with a minor. Enhanced penalties are also warranted for sexual contact that occurs in the
24 context of certain close familial relationships, as defined by 213.8(2), or special relationships of
25 authority as defined by Section 213.8(3).

26 Section 213.8(5) provides for enhanced punishment for actors who use physical force,
27 restraint, or coercion, or who exploit a status of trust, to engage in sexual contact with minors
28 younger than 18. This provision responds to two concerns. First, although abusive sexual contact
29 with minors often takes place without any added element of force or coercion, suggesting that
30 such enhancements may be unnecessary, there remains strong evidence that some adults use
31 coercive means, including acts or threats of physical violence, to engage in acts of sexual contact

Section 213.8. Sexual Offenses Involving Minors

1 short of penetration or oral sex with minors of all ages.¹⁴⁵ Another all-too-common scenario
2 involves acts of sexual contact with minors perpetrated by persons in charge of their care and
3 custody or religious or educational formation.¹⁴⁶ Yet without a special provision addressed to
4 those circumstances, such behavior would be punished as equivalent to a single act of sexual
5 contact undertaken without that context, because Section 213.7 does not address situations
6 involving incest or other exploitations of minors. For the same reason, there would also be no
7 heightened punishment for complainants over 16 but younger than 18. But the harm of the
8 exploitative behavior merits both additional punishment and deterrence.

9 Second, Section 213.8(6), like Section 213.8(1) and unlike Section 213.8(5), outlines the
10 penalties for sexual contact with minors in terms of graded judgments of age. It outlines penalties
11 for sexual contact with minors under 12 and with minors aged 12 to 15, and does not provide
12 liability for sexual contact with minors aged 16 to 17, instead leaving those acts to coverage
13 under the general provisions of Section 213.7. That distinction is justified for the same reason it
14 is justified in Section 213.8(1): an ordinary consent framework is functional as regards older
15 minors, who have both the capacity and sexual sophistication to make independent, if not always
16 wise, judgments about their sexual activity. But when an actor uses a special status (such as a
17 religious figure, coach, or parental figure), or uses or threatens physical force or restraint, or
18 exploits a vulnerability of a minor, greater protection is warranted. Although older minors may
19 be capable of a degree of sexual autonomy, they nonetheless are a vulnerable class still
20 dependent in essential ways on the protection and shelter of adults. Thus, the heightened
21 punishment of a fourth-degree felony, as described in Section 213.8(5), is appropriate for an
22 actor who uses impermissible means to engage in the act of sexual contact, even when the minor
23 is otherwise at an age where consent to such contact would be legally cognizable.

¹⁴⁵ See SNYDER, *supra* note 52, at 2-3 (reporting high rates of forcible sexual offenses against minors, as distinguished from statutory offenses); Giroux et al., *supra* note 2, at 227-228 (finding that 56.7% of child sexual abuse complainants and 74% of adolescent complainants reported violence). But see WORLD HEALTH ORGANIZATION [WHO], GUIDELINES FOR MEDICO-LEGAL CARE FOR VICTIMS OF SEXUAL VIOLENCE 76 (2003), https://www.who.int/violence_injury_prevention/publications/violence/med_leg_guidelines/en (describing “[f]eatures that characterize child sexual abuse” as including “[p]hysical force/violence is very rarely used; rather the perpetrator tries to manipulate the child’s trust and hide the abuse”).

¹⁴⁶ See, e.g., Blakemore et al., *supra* note 1, at 36 (studying the impact of “child sexual abuse perpetrated in schools, foster care and out-of-home care, residential schools and care facilities, sporting organizations, hospitals and religious institutions”).

Illustrations:

25.¹⁴⁷ When Complainant was 13 years old, Accused, the 43-year-old sexual partner of Complainant's parent, moved into their home. From the beginning, Accused showered Complainant with affection and attention, but over time the behavior became more physical. Accused started to stroke Complainant's hair, kiss Complainant on the lips at night, and occasionally interrupt Complainant when Complainant was bathing or getting dressed. Based on these facts alone, the factfinder could not find Accused guilty under Section 213.8(5) or (6). Although Complainant is 13 and Accused is more than seven years older, Accused's acts are not clearly covered by either subparagraph (i) or subparagraph (ii) of Section 213.8(6)(a). Although the prosecution might claim that the kisses involve touches to the mouth, which is a body part under Section 213.8(6)(a)(ii), there is insufficient evidence to establish beyond a reasonable doubt that the kiss involved a touch to the tongue of any person, or that the purpose of the kiss was sexual and not innocent affection. Stroking a child's hair and interrupting the child in the bathroom or while dressing, without more, are not acts of "sexual contact" under Section 213.0(2)(c).

26. Same facts as in Illustration 25, except that eventually, Accused starts entering Complainant's room in the middle of the night, rousing Complainant, and groping Complainant's breasts and buttocks. There is sufficient evidence for the factfinder to find a violation of Section 213.8(5). The gropes constitute "sexual contact" under Section 213.0(2)(c), because they involve touches to intimate areas for a sexual purpose. Moreover, such touches appear to have no purpose other than sexual gratification. The contact would also have violated Section 213.8(2) if it were an act of sexual penetration or oral sex, because Accused is older than 18, Complainant is younger than 18, and Accused is the sexual partner of Complainant's parent. Since Accused is more than five years older than Complainant and can be proved to be aware of each element, Accused may be found guilty of Aggravated Offensive Sexual Contact with a Minor, a fourth-degree felony.

¹⁴⁷ Facts loosely drawn from CINDY L. MILLER-PERRIN ET AL., VIOLENCE AND MALTREATMENT IN INTIMATE RELATIONSHIPS 82 (2018), https://us.sagepub.com/sites/default/files/upm-binaries/86300_Chapter_4_%281%29.pdf.

27. Same facts as Illustration 25, except that Complainant is 16. Accused is not liable under Section 213.8(6), because Complainant is not younger than 16 years old. Accused might be liable under Section 213.7(2)(b), if the factfinder concludes that Complainant did not consent to the act and that Accused was reckless with regard to lack of consent. But Accused is liable under Section 213.8(5) without inquiry into consent. Accused engaged in sexual contact with a minor, aware that the minor was under 18 and Accused was more than five years older, and the sexual contact would have violated Section 213.8(2) for the reasons given in Illustration 26. Accused is thus liable for a fourth-degree felony.

6. Offensive Sexual Contact with a Minor – Section 213.8(6)

Section 213.7(2) punishes sexual contact as a petty misdemeanor when it occurs without the consent of the other person and in specified circumstances that mirror those found in the provisions governing penetration and oral sex. This subsection arguably could apply to many instances of sexual contact between an adult and a minor. Under the definition of consent provided in Section 213.0(2)(e), a factfinder may infer lack of consent from the context of all the circumstances; resistance is not required. For cases with very young minors, such as those under eight years of age, the simple fact of the child’s age might thus provide evidence of lack of consent.

At the same time, however, an inquiry into consent is misplaced when it comes to minors engaging in sexual activity with those much older. Very young minors lack the independence and autonomy necessary to effectively consent, particularly as regards an adult. A six-year-old cannot “consent” to the sexual demands of a person much older, and a factfinding process that invites such inquiries brings disrepute to the law. And while older minors may have the capacity to consent to peers, questions of consent are likewise misguided when the actor is deemed too old to be an appropriate partner. A minor, whether as young as eight or as old as 15, may explicitly welcome the sexual demands of an adored adult out of genuine loyalty or affection, but penal law rightly ensures that an adults who make such demands are subject to criminal liability.

For these reasons, sexual contact with minors, even in the absence of the special circumstances outlined in Section 213.8(5), is commonly aggravated above an adult-oriented contact offense. At the same time, wide variation exists in the age required to trigger a particular punishment, in the tiers and thresholds for different degrees of punishments, and in the absolute

1 punishments imposed. The cutoffs for jurisdictions with age distinctions for liability tend to
 2 hover around the ages of 12 and 15; less than a dozen jurisdictions have provisions that cover 16-
 3 and 17-year-olds.¹⁴⁸ A small handful of jurisdictions have a single unitary scheme. Jurisdictions
 4 also vary markedly in the punishments authorized.¹⁴⁹

5 Section 213.8(6) imposes liability for sexual contact with minors, based solely on the age
 6 of the actor and the complainant rather than the presence or absence of nominal consent. The act
 7 is without effective consent because of the age of the minor and the age difference between the
 8 actor and the minor. Statutory liability for specified contact with minors achieves three
 9 objectives. First, as with the other offenses defined in Section 213.8(1) through (4), it protects
 10 minors from sexual exploitation without requiring additional proof of force, coercion, the
 11 absence of consent, or a particular vulnerability on the part of the complainant. Second, Section
 12 213.8(6) widens the definition of prohibited behavior to include touches of the tongue with a
 13 sexual purpose. Although such conduct was deliberately omitted from the definition of sexual
 14 contact applicable to the general contact offenses, primarily out of concern for overbreadth,¹⁵⁰ it
 15 is appropriately included in a provision aimed at protecting minors. Third, the penalties found in
 16 Section 213.7 are at the lowest end of the spectrum, in keeping with the behavior addressed,
 17 which involves unwanted sexual contact. But the same behavior, when engaged in by an adult
 18 with a minor, deserves a more serious penalty. Each of these objectives is addressed in turn
 19 below.

20 ***Age-based liability.*** It is beyond question that the acts of sexual penetration and oral sex
 21 covered by Section 213.8(1) through 213.8(3) rank among the most emotionally powerful and
 22 intimate behaviors in which human beings can engage. But it is equally true that even lesser
 23 forms of intimacy, like those defined as “sexual contact,” can hold deep significance even if they
 24 also carry considerably less emotional and physiological risks. Protecting minors against
 25 corruption of these rites of passage by exploitative older actors is a critical intention of this
 26 subsection.

¹⁴⁸ See *infra* Reporters’ Note.

¹⁴⁹ Nearly every jurisdiction punishes contact with a minor under the age of 12 as a felony; many of those also have age-gap requirements. However, those range from the most serious felonies to much lower degrees of felony. The penalty prescribed for impermissible sexual contact with minors 12 to 15 tends to split more evenly between misdemeanors and low-level felonies, although some statutes permit more stringent punishments. See *infra* Reporters’ Notes.

¹⁵⁰ See Comment to Section 213.7(2)(c).

1 At the same time, the central challenge in setting out age-based thresholds of liability is
2 even more acute in the context of sexual-contact offenses than for the more intimate sexual acts
3 covered by the preceding subsections. Sexual penetration and oral sex are behaviors
4 appropriately engaged in, at the earliest, only by those nearing adulthood. But the kinds of sexual
5 contact covered by Section 213.8(6) can appropriately occur at younger ages, even in a context
6 involving sexual overtones. Engaging with mutual consent in the kinds of sexual contact covered
7 by Section 213.8(6) is considered a rite of passage during youth and puberty, and it is an
8 expected feature of sexual exploration as one matures. Even very young minors, motivated by
9 sexual curiosity, may voluntarily undertake behavior that meets the definition of sexual contact.
10 It may not be ideal that very young minors “play doctor,” but as long as such activity is engaged
11 in willingly with age-appropriate partners, it is not a proper subject for penal law.

12 One manner of preventing overbreadth in the application of sexual-contact statutes,
13 therefore, is found in Section 213.0(2)(g). That provision applies to these Sections, and thus an
14 actor must be over 12 years of age in order to be chargeable with any sexual-contact offenses.
15 Those under 12 are generally not competent to make responsible choices, and to the extent their
16 actions cause harm, the state’s interest is in preventing, identifying, and remediating that harm—
17 with regard to both the actor and any complainant—rather than in holding a young minor
18 criminally responsible. Even blameworthy behavior by actors under 12, such as a playground
19 bully who forcibly punches and then grabs another child, or touches the child intimately, should
20 be handled outside of the penal law, either privately or within the educational or abuse-and-
21 neglect system, as appropriate.

22 Yet the penal law can and should address an older, more sexually sophisticated actor who
23 abuses young minors, or seeks to exploit the sexual curiosity of a young minor. Young minors
24 are likely to be trusting of older persons, and less assertive in enforcing physical boundaries.
25 Exploitation of these vulnerabilities by an older, sexually sophisticated actor for purposes of
26 sexual gratification can sometimes warrant criminal-law or juvenile-justice intervention. The
27 difficulty is in striking the right balance between leaving ordinary sexual exploration among age
28 peers undisturbed, while proscribing sexually exploitative and predatory behavior by older
29 actors.

30 Section 213.8(6)(b) thus sets out provisions of liability for sexual contact that roughly
31 mirror those of Section 213.8(1) and (4) in that they distinguish between minors younger than 12

Section 213.8. Sexual Offenses Involving Minors

1 and those aged 12 to 15, and between actors younger and older than 21. Both provisions require
2 that the actor be aware of, yet recklessly disregard, the risk that the minor is under the specified
3 age, as stated in Section 213.8(6)(c). Acts of sexual contact with minors that involve aggravating
4 elements, such as physical force, coercion, or exploitation, are punishable by Section 213.8(5).
5 Section 213.8(6) is addressed to sexual contact or touches of the tongue with minors based only
6 on the age of the minor and the age differential with the actor.

7 Consistent with the dominant trends in existing law, Section 213.8(6) prohibits sexual
8 contact with minors under 12 when the actor is five or more years older. As with Section
9 213.8(1), this provision must be read consonant with both Section 213.0(2)(g), which defines an
10 “actor” as a person more than 12 years of age, and with Section 4.10 of the 1962 Code, which
11 precludes a person under 16 years of age from prosecution in criminal court, and presumes that
12 those aged 16 and 17 will be handled in juvenile courts. Criminal liability under Section 213.8(6)
13 thus, at the lowest threshold, attaches to a child 12 years and one day old who engages in
14 proscribed sexual contact with a child aged seven or younger.

15 Section 213.8(6) also prohibits sexual contact with minors aged 12 through 15 years old,
16 when the actor is seven or more years older than the minor. The wider age gap is important to
17 protect against overbreadth in a demographic that may engage in behavior that, while arguably
18 ill-advised, ultimately should not be subject to penal sanction. To be clear: gropes, grabs, and
19 other *nonconsensual* sexual contact remain covered by the provisions of Section 213.7(2),
20 regardless of the age of the complainant. Section 213.8(6) thus applies when the conduct is
21 nominally consensual, but occurs between persons within defined age categories. Because the
22 complainant must be younger than 16, and the actor more than seven years older, all sexual
23 touches of minors aged 12 to 15 by actors starting at ages 19 to 22, respectively, are penalized,
24 although only those touches by actors 21 and older are eligible to be treated as a felony. To
25 criminalize nominally consensual acts involving sexual contact by peers is unwarranted, given
26 the far less intrusive nature of the sexual behavior at issue.

27 Illustrations:

28 28. Complainant, who is 15 years old, is shopping at the local mall when
29 Accused, who is 17 and knows Complainant from school, sees Complainant enter an
30 elevator alone. Accused follows. Once inside, Accused turns and grabs Complainant.
31 Accused pulls Complainant closer, pressing Accused’s lips against Complainant’s and

1 moving Accused's hands to Complainant's buttocks. Complainant struggles and finally
2 pushes Accused away, fleeing once the doors to the elevator open. Based on these facts,
3 the factfinder cannot find Accused guilty of an offense under Section 213.8(6). Although
4 Complainant is younger than 16 years of age, Complainant is not more than seven years
5 older than Accused. Accused may, however, be found liable for a violation of Section
6 213.7(2)(b). Accused grabbed the buttocks of Complainant, which meets the definition of
7 "sexual contact," and the factfinder may determine that Accused knew or recklessly
8 disregarded the risk that Complainant did not consent.

9 29. Same facts as in Illustration 28, except that Complainant, who is in a
10 relationship with Accused, reciprocates with enthusiasm. Based on these facts, Accused
11 is not liable for any offense. Accused is not liable under Section 213.8(6) for the reason
12 given in Illustration 28. Nor is Accused liable under Section 213.7, because
13 Complainant's actions indicate consent.

14 ***Prohibited behaviors.*** Section 213.8 expands the scope of prohibited conduct beyond that
15 of Section 213.7. Section 213.7 applies only to "sexual contact," which is defined by Section
16 213.0(2)(c) as limited to contact with intimate parts such as the genitalia, anus, groin, buttocks,
17 inner thigh, or breast. It does not include touches to the mouth, lips, or tongue, for reasons
18 explained in the Comment to Section 213.0(2)(c).

19 Section 213.8(6)(a)(ii), however, includes not just "sexual contact" but also "act[s]
20 involving the touching of the tongue of any person, to any body part or object, for the purpose of
21 sexual arousal, sexual gratification, sexual humiliation, or sexual degradation of any person."
22 The inclusion of the tongue is necessary to ensure that this lesser, but still egregious, form of
23 child exploitation does not go unpunished. Research suggests that more serious forms of child
24 sexual abuse are often preceded by a "grooming" period in which a potential actor secures the
25 trust of and continued access to a child. There is considerable debate in the literature about the
26 precise contours of "grooming" behavior, the frequency with which actors employ it, and the
27 ability of outsiders to distinguish between grooming and innocent acts of affection.¹⁵¹ But there
28 is a general consensus that actors often "gradually increase physical contact in order to

¹⁵¹ See generally Georgia M. Winters & Elizabeth L. Jeglic, *Stages of Sexual Grooming: Recognizing Potentially Predatory Behaviors of Child Molesters*, 38 DEVIANT BEHAV. 724 (2017) (describing and analyzing the stages of sexual grooming).

desensitize the child to touch” or engage the child in “educational” acts intended to remove the child’s fear of greater intimacy.¹⁵² Of course, adults may kiss a child or teen for innocuous reasons. Thus, the provision applies only to knowingly touching the tongue, which is far less likely to be innocent, and also requires that the contact be for a sexual purpose.

Illustrations:

30.¹⁵³ Complainant is nine years old and Teacher is a 28-year-old teacher in Complainant’s class. Complainant often stays after school in Teacher’s class, because Complainant’s guardian frequently gets caught at work and Teacher had offered to watch Complainant until the guardian is able to arrive. Over time, Teacher gradually began raising sexually explicit topics with Complainant, and then started showing Complainant images and videos of acts of oral sex. One day, Teacher says, “You should try it out— doesn’t it look fun?” and tells Complainant to open Complainant’s mouth. Teacher inserts several fingers into Complainant’s mouth, and instructs Complainant to treat it “like a popsicle.” Complainant complies and sucks on Teacher’s fingers, but later alerts the principal. Based on this evidence, the factfinder could find a violation of Section 213.8(6), and find it punishable as a fifth-degree felony. Complainant is under 12, as Teacher knows, and Teacher is more than five years older and over 21. The factfinder could conclude that the touch between Teacher’s fingers and Complainant’s tongue was for a sexual purpose, as required by Section 213.8(6)(a)(ii). Teacher is not guilty under Section 213.8(5), however, because even though Teacher holds a position of authority over Complainant, touches to the tongue are not included in the definition of “sexual contact,” but rather are covered only under Section 213.8(6)(a)(ii).

31. Same facts as in Illustration 30, except that Complainant is 17. These facts do not support liability under Section 213.8 or any other provision of Article 213. Complainant is not under 16 and thus does not fall within the class protected by Section 213.8(6). Similarly, Section 213.8(3), which applies to exploitative acts by those in authority, only addresses acts of sexual penetration or oral sex. As the act of inserting fingers into another person’s mouth does not meet the definition of “sexual contact”

¹⁵² Id. at 726.

¹⁵³ Facts loosely drawn from *McGregor v. State*, No. 02-13-00043-CR, 2014 WL 1999305 (Tex. App. 2014).

described in Section 213.0(2)(c); thus there can be no liability under Section 213.7 or Section 213.8(5). If the act was not consensual, Complainant may be subject to prosecution under ordinary assault-and-battery law.

Grading. Section 213.8(6) allows consensual contact among peers, but prohibits sexual contact when an actor is significantly older than a complainant. Given that the behavior proscribed includes the most superficial form of sexual contact, the most important component of Section 213.8(6) is to define when such contact is and is not legally tolerable. The associated penalty—a misdemeanor or fifth-degree felony based on the ages of the complainant and the actor—reflects the lesser degree of harm inflicted by sexual contact as compared to fondling of genitals, sexual penetration, or oral sex. It also captures the sense that older complainants may have perceived the encounter as consensual, even if legally impermissible, whereas younger complainants lack any such capacity to even nominally consent.

Misdemeanor penalties for contact offenses with minors are evident in existing law, although in a minority of jurisdictions and chiefly for contact with an adolescent complainant.¹⁵⁴ At the same time, the majority of provisions punish sexual contact with adolescents as a low-level felony,¹⁵⁵ and there is also support for far more extreme sanctions.¹⁵⁶ A precise sense of the

¹⁵⁴ See, e.g., IOWA CODE ANN. § 709.12 (LexisNexis 2019) (defining sexual contact by actors 18 or older with a child as a misdemeanor offense, as well as providing juvenile courts jurisdiction for cases where the actor is 16 or 17 and the contact occurs with a child at least five years younger); MICH. COMP. LAWS SERV. §§ 750.520c(1)(a), (2)(a), .520e(1)(a), (2) (LexisNexis 2019) (defining sexual contact as a felony punishable by 15 years' imprisonment where the complainant is under 13, and as a misdemeanor where the complainant is 13 to 16 and the actor is five or more years older); N.H. REV. STAT. ANN. §§ 632-A:3(III)(a)(1), :4(I)(b) (LexisNexis 2019) (defining sexual contact as a class B felony where the complainant is under 13, and as a misdemeanor where the complainant is 13 to 16 and the actor is five or more years older); N.Y. PENAL LAW §§ 130.55-.65 (Consol. 2019) (defining contact with a person 14 to 17 where the actor is five years older and with a person younger than 14 years of age as misdemeanors, and defining contact with a complainant younger than 11 or younger than 13 when the actor is 21 or older as a seven-year felony); OHIO REV. CODE ANN. § 2907.06(A)(4), (C) (LexisNexis 2020) (defining sexual contact by an actor 18 or older with a complainant aged 13 to 16, where the actor is four or more years older, as a misdemeanor); S.D. CODIFIED LAWS §§ 22-22-7, -7.3 (2019) (defining the offense of sexual contact with a child under 16 as a Class 3 felony where the victim is under 16 and the actor 16 or older, but as a misdemeanor where the actor is under 16 or where the victim is at least 13 and the actor is less than five years older); UTAH CODE ANN. § 76-5-401.1 (LexisNexis 2019) (defining sexual abuse with a person aged 14 to 16 by actor four or more years older as a misdemeanor); VA. CODE ANN. § 18.2-67.4:2 (2019) (punishing sexual abuse by an adult with a child aged 13 to 15 as a misdemeanor).

¹⁵⁵ GA. CODE ANN. § 16-6-22.1(d) (2020) (punishing sexual battery of a minor younger than 16 as a five-year felony); HAW. REV. STAT. § 707-732(1)(b)-(c), (2) (2019) (defining the act of knowing sexual contact with a person younger than 14, or with a person 14 to 16 when the actor is five or more years older, as a class C felony); NEB. REV. STAT. ANN. § 28-320.01(3) (LexisNexis 2019) (defining sexual contact with a complainant 14 or younger by an actor 19 or older as a Class IIIA felony if the actor does not cause serious injury); N.C. GEN. STAT. § 14-202.1 (2019) (defining “taking indecent liberties” with a minor younger than 16, where the actor is at least 16 and five

Section 213.8. Sexual Offenses Involving Minors

1 actual degree of liability is at times difficult to discern because some of those provisions cover
2 acts of both penetration and contact.¹⁵⁷ Existing law exhibits both the practice of setting a single
3 penalty applicable to several age-based thresholds¹⁵⁸ and the practice of providing for harsher
4 penalties based on the age of the actor in relation to the age of the complainant.¹⁵⁹ Also, many
5 jurisdictions have multiple options for different degrees of liability for essentially identical
6 conduct,¹⁶⁰ which leads to uncertainty in how actual sentencing practices likely unfold.

years older as a Class F felony); 18 PA. CONS. STAT. §§ 1104(1)-(2), 3126(a)(7)-(8), (b) (2019) (defining a five-year contact offense for actors with a complainant younger than 13, or a two-year offense for an actor four or more years older than a complainant aged 13 to 16).

¹⁵⁶ See, e.g., LA. STAT. ANN. § 14:81(A)(1), (H)(1)-(2) (2018) (punishing any lewd and lascivious act with a child under the age of 17, where the actor is more than two years older, with a seven-year maximum, unless the child is younger than 13 and the actor is 17 or older, in which case the maximum is 25 years); MD. CODE ANN., CRIM. LAW § 3-307(a)(3), (b) (LexisNexis 2019) (punishing sexual contact with a complainant under 14 where the actor is four years older with maximum imprisonment of 10 years); VA. CODE ANN. § 18.2-67.3(A)(1), (B) (2019) (punishing sexual abuse with a person younger than 13 with up to 20 years' imprisonment); WASH. REV. CODE ANN. §§ 9A.44.083, .086, .089 (LexisNexis 2020) (defining contact with a complainant under 12 where the actor is three or more years older as a class A felony, contact with a complainant aged 12 to 14 where the actor is three or more years older as a class B felony, and contact with a complainant aged 14 to 16 where the actor four or more years older as a class C felony).

¹⁵⁷ See, e.g., 720 ILL. COMP. STAT. ANN. 5/11-1.60(d) (LexisNexis 2019) (punishing sexual penetration and contact in a single scheme as applied to acts with a complainant 13 to 17 by an actor at least five years older); WIS. STAT. ANN. §§ 948.02(1)(e), (2), 948.093 (LexisNexis 2019) (defining “sexual contact or sexual intercourse” as a Class B felony when the complainant is younger than 13, and as a Class C felony when the complainant is younger than 16, unless the actor is not yet 19 and the complainant is 15 or older and the act is intercourse, or 15 when the act is contact, in which case the offense is a misdemeanor).

¹⁵⁸ See, e.g., 720 ILL. COMP. STAT. ANN. 5/11-1.60(c)-(e) (LexisNexis 2019) (punishing sexual conduct as a Class 2 felony in a single scheme in the following circumstances: contact with a complainant under 13 by an actor 17 or older; contact by an actor younger than 17 with a complainant younger than nine; contact or penetration with a complainant 13 to 17 by an actor more than five years older); 18 PA. CONS. STAT. § 3126 (2019) (defining indecent assault with complainant less than 13 as a misdemeanor or felony contact offense or as a misdemeanor of the second degree where the actor is four or more years older than a complainant aged 13 to 16).

¹⁵⁹ See, e.g., KY. REV. STAT. ANN. §§ 510.110-20 (LexisNexis 2019) (defining sexual contact with a complainant under 12 or with a complainant under 16 where the actor is 21 or older as a felony, and defining sexual contact by an actor aged 18 to 21 where the complainant is younger than 16 as a misdemeanor, though allowing a defense for actors less than five years older than a complainant 14 or older); W. VA. CODE ANN. §§ 61-8B-7, -9 (2019) (categorizing sexual contact with a complainant younger than 12 by an actor who is 14 or older as a felony with a maximum imprisonment of five years, but extending that maximum to 25 years when the actor is 18 or older, and categorizing sexual contact with a complainant younger than 16 by actor four or more years older as a misdemeanor offense).

¹⁶⁰ Compare D.C. CODE § 22-3010.01(a) (2019) (authorizing a six-month penalty for “sexually suggestive contact with [a] child or minor” by a person 18 or older, when the actor is more than four years older or “in a significant relationship with a minor”), with *id.* § 22-3009 (authorizing a 10-year penalty for any person who “engages in sexual contact with [a] child” where the actor is at least four years older). Each jurisdiction also has a misdemeanor contact offense, see Reporters’ Note to Section 213.7, which also could be used in cases involving minor complainants.

1 The penalties applicable to Section 213.8(6) reflect the judgment that sexual contact with
2 minors of any age by actors significantly older merits serious punishment. However, Section
3 213.8(6) distinguishes between the degree of punishment appropriate as both a deterrent and a
4 retributive matter in two circumstances: when the minor is older as opposed to a minor too
5 young to comprehend or nominally consent to even the most superficial sexual acts, and when
6 the actor is a sexually mature adult as opposed to an adolescent or young adult who is still in the
7 throes of development. The punishment also reflects the structure of Section 213.8, which
8 departs from the dominant approach in existing law by separating out the most intimate form of
9 sexual contact, fondling of genitals, for enhanced punishment. Accordingly, actors of any age
10 who engage in illicit sexual contact with minors 12 through 15 years old are punishable by up to
11 one year's incarceration, as are actors under 21 who engage in sexual contact with a minor
12 outside the peer group. Actors aged 21 years old or older who engage in sexual contact with
13 minors younger than 12 years old are punishable with up to three years' imprisonment. Both
14 punishments exceed the petty misdemeanor applicable to offensive sexual contact, as proscribed
15 by Section 213.7(2).

16 ***7. Absence of Effective Consent – Section 213.8(7)***

17 Section 213.8(7), like the parallel provisions found in Sections 213.1(3), 213.2(3),
18 213.3(4), 213.4(3), 213.5(3), and 213.7(3), underscores that effective consent is absent when the
19 circumstances of the subsection are proved. Any nominal consent or willingness on the part of
20 the complainant is irrelevant to the actor's liability.

21 ***8. Calculation of Ages – Section 213.8(8)***

22 Given that liability under many states' statutory-rape laws hinges not just on the age of
23 the victim, but on the difference in age between the victim and the perpetrator, the question of
24 how to calculate age has arisen repeatedly. In the absence of clear statutory direction, at least
25 four approaches have emerged in case law for calculating a statutory age gap.

26 The first approach, probably closest to our colloquial sense but widely rejected by the
27 courts, would treat age "in whole integers of years."¹⁶¹ Under this whole-years approach,
28 sometimes called the "Birthday Rule," persons are considered only as old as they were on their
29 last birthday: that is, individuals are deemed 19 years old until they turn 20. In other words, a
30 complainant aged 15 years, two months, and eight days would be considered 15, just as a

¹⁶¹ State v. Faulk, 683 S.E.2d 265, 267 (N.C. Ct. App. 2009).

defendant aged 19 years, seven months, and five days would be considered only 19, making the statutory difference between their ages exactly four years (and hence not *more* than the four years often required by statute).

A still more extreme version of a whole-integers approach involves a “calendar year” calculation, according to which the age gap is measured by the number of whole calendar years separating the defendant’s and victim’s years of birth.¹⁶² On this approach, “a defendant born on January 2, 1990,” would be considered only four years older than a victim “born on December 30, 1995,” despite being nearly six years older in fact, “because there are only four calendar years between their births (1991, 1992, 1993, 1994).”¹⁶³ As with the whole-years approach, the only courts that have considered this “calendar year” interpretation have rejected its results as “absurd.”¹⁶⁴

At the other extreme is an approach measuring the difference in age down to the exact hour of birth.¹⁶⁵ So far it appears that only one court has accepted this hourly interpretation, and then only under the rule of lenity, to resolve the ambiguity created by the “unique” circumstances of that case.¹⁶⁶ That court also did not confront the conflict between its approach and the longstanding common-law rule “that fractions of a day are not considered when computing time.”¹⁶⁷

¹⁶² See *People v. Costner*, 870 N.W.2d 582, 587-588 (Mich. Ct. App. 2015) (rejecting the defendant’s argument that “years” should be interpreted as “calendar years,” which is defined as 12 “calendar months beginning January 1 and ending December 31”); accord *State v. Jason B.*, 729 A.2d 760, 769 (Conn. 1999) (rejecting the defendant’s argument that the statutory reference to “years” should be interpreted as full “calendar years”).

¹⁶³ *Costner*, 870 N.W.2d at 588 n.3.

¹⁶⁴ *Id.* at 588; *Jason B.*, 729 A.2d at 769.

¹⁶⁵ See *Commonwealth v. Price*, 189 A.3d 423, 431-432 (Pa. Super. Ct. 2018) (setting aside twin brothers’ convictions under Pennsylvania’s statutory rape law, requiring at least a four-year age gap between the actor and complainant, because both were some three years, 364 days, and 10 hours older than their alleged victim, and thus arguably not the full four years required by the statute).

¹⁶⁶ *Id.* at 432; cf. *United States v. Brown*, 740 F.3d 145, 150 n.10 (3d Cir. 2014) (declining to address this very situation under the federal Sex Offender Registration and Notification Act (“SORNA”) because it seemed “highly unlikely that a prosecution will ever be brought on the basis that someone who is exactly 4 years older than another by birth-date will be prosecuted under SORNA on the theory that, by hours or minutes, the offender was ‘more than 4 years older’”).

¹⁶⁷ *State v. Yarger*, 908 N.E.2d 462, 464 (Ohio Ct. App. 2009) (citing *Greulich v. Monnin*, 50 N.E.2d 310, 312 (Ohio 1943)); accord *Mason v. Bd. of Educ.*, 826 A.2d 433, 436 (Md. 2003) (“Although the fiction that a day has no fractions has been contested on several occasions, no majority opinion has chosen to do away with the assumption for the purpose of calculating a person’s age.”); *Commonwealth v. Iafrate*, 594 A.2d 293, 295 (Pa. 1991) (noting that “[s]ince as early as 1908 courts of [the] Commonwealth [of Pennsylvania] have adhered to” the same

Nearly all courts to consider the issue reject these three approaches and instead adopt a method nicknamed the “days-and-months approach.”¹⁶⁸ According to this approach, what matters is “a calculation of *time*, not of *age*.”¹⁶⁹ And “common sense dictates that in comparing the relative ages of individuals, the difference in their ages is determined by reference to their respective *birth dates*,” measured, that is, to the day.¹⁷⁰

The “days-and-months” approach is the most widely adopted, and most logical. Subsection 213.8(8) prescribes this method. Thus, for example, where Section 213.8 requires a difference of more than five years between perpetrator and victim, as in subsections (1)(b)(ii) and (3)(b)(ii), the age difference must be at least five years and one day. An actor aged 20 years, seven months, and 10 days who engages in sexual activity with a minor aged 15 years, five months, and five days, is five years, two months, and five days older than the minor, and therefore would be considered *more than* five years older, satisfying the age-gap requirement of subsections (1)(b)(ii) and (3)(b)(ii).

9. Affirmative Defense of Marriage – Section 213.8(9)

Section 213.8(9) permits a defendant to raise an affirmative defense of legal marriage when charged with a violation of Section 213.8 that is based solely on the age of the complainant. This defense is unavailable for any other charges, such as those requiring proof of additional factors indicating that the sexual act was unwanted.

Ample policy reasons counsel against permitting minors to marry, even with parental consent. Studies show that roughly 80 percent of marriages entered into by teenagers end in

computational rule of disregarding fractions of a day, though also holding the rule inapplicable for “determining juvenile court jurisdiction”).

¹⁶⁸ United States v. Doult, 926 F.3d 244, 247 (6th Cir. 2019).

¹⁶⁹ State v. Faulk, 683 S.E.2d 265, 267 (N.C. Ct. App. 2009).

¹⁷⁰ State v. Marcel, 67 So. 3d 1223, 1225 (Fla. Dist. Ct. App. 2011) (emphasis added) (quoting State v. Jason B., 729 A.2d 760, 767 (Conn. 1999)); accord People v. Costner, 870 N.W.2d 582, 588 (Mich. Ct. App. 2015) (rejecting the calendar-year approach as “fl[y]ing in the face of common sense,” and adopting the alternative approach for Michigan’s sex-offender registry); State v. Parmley, 785 N.W.2d 655, 662 (Wis. Ct. App. 2010) (adopting “[the days and months] commonsense approach of calculating who is ‘not more than 4 years older’ than the victim” for Wisconsin’s registry); see also Doult, 926 F.3d at 247 (citing Commonwealth v. Price, 189 A.3d 423, 431-432 (Pa. Super. Ct. 2018)) (adopting the same “straightforward days-and-months approach” to interpret 18 U.S.C. § 2243(a), a federal sexual-abuse statute, while not ruling out the hourly approach in Price); United States v. Black, 773 F.3d 1113 (10th Cir. 2014) (“This court concludes the Third Circuit’s analysis [applying the days-and-months approach to SORNA] is entirely convincing and hereby adopts it as our own.”); Brown, 740 F.3d at 150 & n.10 (applying the days-and-months approach to SORNA while declining to reach the hourly interpretation, as “an extreme hypothetical”).

divorce, and adolescent marriage is associated with severe negative educational, economic, physical, and psychological effects for both the adolescent and any children of the marriage.¹⁷¹ However, in most jurisdictions, persons aged 12 to 15 may in fact be lawfully married;¹⁷² thus, marriage exceptions are commonly found in statutes that define liability solely with reference to the age of the parties.¹⁷³

Section 213.8(9) includes optional language providing an affirmative defense of legal marriage because, in a state that permits a minor to marry, it would be anomalous for the criminal law to penalize sexual intimacy between spouses.¹⁷⁴ The inclusion of this optional language is not meant to signal The American Law Institute’s approval of this practice. Rather, it simply represents an acknowledgement that the threshold age for marriage is a policy judgment that lies outside the boundaries of this Article 213 revision.

REPORTERS’ NOTES

1. *Sexual victimization of minors*

Robust data regarding the sexual victimization of minors has only recently been collected, analyzed, and published.¹⁷⁵ As with studies of adult sexual offenses, studies of

¹⁷¹ See, e.g., Pamela E. Beatse, *Marital Rights for Teens: Judicial Intervention That Properly Balances Privacy and Protection*, 2009 UTAH L. REV. 625, 627 & n.8 (2009) (citing studies that show early marriages are less stable); Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. REV. 1817, 1844-1850 (2012) (surveying adverse effects of early marriage, and noting that 80 percent of marriages entered into by those in their mid-teens end in divorce); Child marriage, UNITED NATIONS CHILDREN’S FUND (Sept. 2020), <https://www.unicef.org/protection/child-marriage> (“Child marriage robs girls of their childhood and threatens their lives and health. Girls who marry before 18 are more likely to experience domestic violence and less likely to remain in school.”).

¹⁷² See Beatse, *supra* note 171, at 628-629 (noting that 18 is the minimum age of consent for marriage in most states, but a majority of states also allow minors younger than 18 to marry with judicial consent in addition to parental permission).

¹⁷³ See, e.g., COLO. REV. STAT. § 18-3-402(1)(d)-(e) (2018) (defining sexual penetration as sexual assault where the actor “is not the spouse of the victim” only where the victim is less than 15 and the actor is at least four years older or where the victim is 15 to 17 and the actor is at least 10 years older); ME. REV. STAT. ANN. tit. 17-A, § 253(1)(B) (LexisNexis 2019) (defining gross sexual assault as a Class A crime where the victim is younger than 14 and is “not the actor’s spouse”).

¹⁷⁴ One court has held, however, that the license to engage in sexual activity with a minor otherwise protected under statutory-rape law extends only to the spouse; if the minor divorces or engages in consensual extramarital sexual activity, the non-spousal actor may still be punished. See *State v. Huntsman*, 204 P.2d 448, 451 (Utah 1949) (affirming conviction of an adult man for consensual intercourse with a 17-year-old legally married to another man, stating that “[t]he fact that a female under that age is capable of consenting to marriage does not indicate that she can consent to illicit sexual intercourse, nor does the fact that by marriage she is capable of consenting to intercourse with her husband indicate that she is capable of consenting to illicit intercourse with another person”).

¹⁷⁵ See DAVID FINKELHOR & ANNE SHATTUCK, *CRIMES AGAINST CHILDREN RESEARCH CTR., CHARACTERISTICS OF CRIMES AGAINST JUVENILES 1* (2012) (“Statistics on crimes against children have not been

offenses against minors often are subject to various criticisms, including how offenses are defined and categorized, and the enduring problem of underreporting. Nonetheless, some general conclusions may be drawn from the existing data.

First, persons under 18 are common targets of sexual abuse. One review of incident reporting data showed that juveniles comprise 66 percent of all sex-crime victims.¹⁷⁶ Another study confirms that “crimes against juvenile victims are the large majority (67%) of sexual assaults handled by law enforcement agencies.”¹⁷⁷ According to one review, among victims of completed rape, roughly a third to one-half were first victimized while under the age of 18.¹⁷⁸ For female victims of sexual violence, 42.2 percent experienced a completed rape by age 18—29.9 percent between 11 and 17 and 12.3 percent at or before age 10.¹⁷⁹ For male victims, 27.8 percent experienced a completed rape at or before age 10.¹⁸⁰

The pattern of sexual victimization varies for minors by age and gender. Among victims of child sexual assault, the majority are female, but a greater fraction are male than among adult victims of sexual offenses.¹⁸¹ Studies indicate that minors also make up significant proportions of victims of other sexual offenses. Minors are 73 percent of female victims of forcible fondling, 63 percent of female victims of sexual assault with an object, 62 percent of victims of forcible sodomy, 46 percent of victims of forcible rape, and 63 percent of all female victims of sex offenses. Minors are 86 percent of male victims of forcible fondling, 76 percent of male victims of sexual assault with an object, 78 percent of male victims of forcible sodomy, 75 percent of male victims of forcible rape, and 84 percent of all male victims of sex offenses.¹⁸²

One survey also found that, although most juvenile sex-offense victims are 12 or over, there are significant rates of victimization for those younger than 12.¹⁸³ Another study concluded that 46 percent of all juvenile victims of forcible sexual offenses are under 12;¹⁸⁴ roughly a quarter of forcible fondling, sexual assault with an object, and sodomy victims were under six,

readily available until recently, because The Uniform Crime Reporting (UCR) system . . . has never collected information or reported crimes by age of victim, with the exception of homicides.”).

¹⁷⁶ Id. at 2. By comparison, juveniles make up two to 16 percent of victims for typical non-sex offenses. Id.

¹⁷⁷ SNYDER, *supra* note 52, 12.

¹⁷⁸ See MICHELE C. BLACK ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 25 (2011).

¹⁷⁹ Id.

¹⁸⁰ Id.

¹⁸¹ Specifically, the proportion of female victims is: 69 percent of victims under six; 73 percent of victims under 12, and 82 percent of victims under 18. This study defined sexual assault to include rape, sodomy, assault with an object, and forcible fondling. SNYDER, *supra* note 52, at 4.

¹⁸² Id.

¹⁸³ See, e.g., SNYDER, *supra* note 52, at 2 & tbl.1 (reporting that 14 percent of child sexual-assault victims were aged 0 to 5, 20.1 percent were 6 to 11, and 32.8 percent were 12 to 17, and that forcible fondling is the most common charge—45 percent of all sexual assaults reported to law enforcement in between 1991 and 1996).

¹⁸⁴ FINKELHOR & SHATTUCK, *supra* note 175, at 1.

and another quarter to a third in each category were six to 11 years old.¹⁸⁵ Nearly two-thirds of victims of incest are under 12.¹⁸⁶

In addition, the vast majority of perpetrators of sexual crimes against juveniles are persons known to the juvenile.¹⁸⁷ Roughly 33 percent are family members, and another 58 percent are acquaintances. Only four percent are identified as strangers.¹⁸⁸ Another study found that 14 percent of offenders were strangers to the victim; for victims under six, just three percent of offenders were strangers, and for victims six to 12, just five percent were strangers.¹⁸⁹

The majority of perpetrators of sexual offenses against juveniles are adults (roughly 64 percent), but a significant minority are themselves juveniles (36 percent).¹⁹⁰ Another study found that almost all offenders were male, and roughly 35 percent of offenders were under the age of 18.¹⁹¹ The vast majority of incidents involved no weapon; a firearm was involved in only two percent of sexual-assault victimization of minors.¹⁹² Sexual offenses against minors are more likely to result in arrest than those against adults, but rates are comparable.¹⁹³

¹⁸⁵ Id. at 5 fig.8.

¹⁸⁶ Id.

¹⁸⁷ In one study, 74 percent of adolescents (aged 12 to 17) surveyed who stated they had been sexually assaulted reported that the assailant was someone they knew. Over two-thirds of assaults occurred within the complainant's home (30.5 percent) or neighborhood (23.8 percent) or school (15.4 percent). KILPATRICK ET AL., *supra* note 52, at 5; see also Finkelhor et al., *supra* note 1, at 331 tbl.1 (finding that the lifetime rate of sexual abuse by family and acquaintances is three to five times the rate by strangers, depending on gender and age of the victim).

¹⁸⁸ FINKELHOR & SHATTUCK, *supra* note 175, at 5 fig.9. The figures reported for "sex offenses" included data for forcible offenses as well as statutory rape and incest, and further noted that the relationship between the victim and offender was unknown in five percent of cases. Id. Across all offense types, victims under six are most likely to be victimized by family members. As the minor ages, acquaintances are more likely to be the perpetrators, and make up 70 percent of perpetrators for victims over 12. Id. at 6 fig.11.

¹⁸⁹ SNYDER, *supra* note 52, at 10 tbl.7.

¹⁹⁰ FINKELHOR & SHATTUCK, *supra* note 175, at 6 fig.10.

¹⁹¹ NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 46 (Melissa Sickmund & Charles Puzzanchera eds., 2014), www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf; DAVID FINKELHOR ET AL., JUVENILES WHO COMMIT SEXUAL OFFENSES AGAINST MINORS 2 (Office of Juvenile Justice & Delinquency Prevention, Juvenile Justice Bulletin, Dec. 2009); cf. *Sexual Assault Offender Age Profiles by Victim Age*, OFF. JUV. JUST. & DELINQ. PREVENTION: STAT. BRIEFING BOOK (Oct. 22, 2018), www.ojjdp.gov/ojstatbb/victims/qa02401.asp?qaDate=2016 ("Forty percent of sexual assault victims under age 12 were victimized by a juvenile (under 18) offender, and 33 percent of juvenile victims ages 12 to 17 were sexually assaulted by a juvenile offender.").

¹⁹² SNYDER, *supra* note 52, at 6. This study also indicated that there was "information on the most serious weapon used" in 93 percent of sexual-assault victimizations, and in 77 percent of these cases, no weapons other than "hands, feet, or fists" were used. Id. Violence and threats are more likely to be present with regard to older adolescent victims. Giroux, *supra* note 2, at 228 tbl.1.

¹⁹³ See SNYDER, *supra* note 52, at 11 (finding that 29 percent of juvenile-victim cases resulted in an arrest, whereas 22 percent of adult-reported cases did). These numbers vary according to age; only 19 percent of cases involving victims under six led to arrest, whereas roughly a third of those with victims aged six to 17 did. Id.

The deleterious effects of sexual victimization on the growth and well-being of a minor are self-apparent, but studies confirm significant increases in mental-health issues,¹⁹⁴ likelihood of developing substance-abuse problems,¹⁹⁵ and delinquent acts.¹⁹⁶ Studies suggest that victims of child sexual abuse are more likely to undertake sex work, which may carry inherent risks, to have difficulty forming interpersonal relationships, engage in compulsive behaviors, and have various immediate and chronic health problems.¹⁹⁷ In sum, “victimization by sexual assault is clearly associated with dramatic increases in the rates of each negative outcome among both boys and girls.”¹⁹⁸

2. Minors who commit sexual offenses

Section 213.0(2)(g) defines “actor” as a person more than 12 years of age. Section 4.10 of the 1962 Model Penal Code set the age of criminal responsibility at 16, and assumed that most minors—even those as old as 17—would have allegations of their misconduct adjudicated by juvenile courts.¹⁹⁹ Existing law shows far greater tolerance for treating minors more like adults. The 1990s ushered in a period of harsh treatment of all persons alleged to have engaged in criminal activity, including juveniles.²⁰⁰ This trend had two prongs. First, courts and legislators increasingly allowed young persons accused of misbehavior to be transferred for disposition in criminal court, rather than adjudicated in a juvenile-court proceeding. Second, courts and legislators increasingly exposed even very young minors to legal responsibility for their actions, whether in juvenile or adult court.

In the case of sexual offenses, the consequence of these trends is particularly important. Because statutory-rape liability is predicated only upon a showing of age, and does not involve any proof of nonconsent or force, expanded nets of liability made it possible for a young person to engage in unlawful behavior, even if both parties were peers who considered the activity consensual sexual conduct. Courts thus had to decide whether to permit a prosecutor to pursue charges against only one of two parties to a *consensual* encounter, even when both were within the age range of the protected class. Courts also had to determine whether prosecutors could

¹⁹⁴ KILPATRICK ET AL., supra note 52, at 9 (reporting “a four- to fivefold increase in the prevalence rate of PTSD” among juvenile victims of sexual offenses).

¹⁹⁵ Id. at 10 (reporting a roughly fourfold increase of the rate of “substance abuse or dependence” among male juvenile victims of sexual assault and a roughly fivefold increase in that rate among female victims).

¹⁹⁶ Id. at 10 (reporting a roughly threefold increase of the rate of “delinquent acts” among male juvenile victims of sexual assault and a fivefold increase in that rate among female victims).

¹⁹⁷ See Nor Shafirin Ahmad & Rohany Nasir, *Emotional Reactions and Behavior of Incest Victims*, 5 *PROCEDIA SOC. & BEHAV. SCI.* 1023, 1026 (2010) (citing studies on incest and other child sexual-abuse victims).

¹⁹⁸ KILPATRICK ET AL., supra note 52, at 10.

¹⁹⁹ MODEL PENAL CODE Section 213.1 Comment at 340 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980). Of course, even an actor over 12 years old must also be found to meet a threshold standard of adjudicative competence. See *infra* text accompanying note 217.

²⁰⁰ ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 88-99 (2008) (discussing “the collapse of the rehabilitative model” that began in the 1960s and intensified in the 1990s).

charge even very young minors who engaged in clearly nonconsensual activity (for instance, a nine-year-old who digitally penetrated a four-year-old), given that these “perpetrators” are so young that the law deems them incapable of consenting to sex themselves (and thus they are arguably a “victim” of their own crime).

Many courts have met the first challenge—involving nominally consensual sex between two underage participants—by refusing to apply statutory-rape laws to actors within the protected age class.²⁰¹ But some courts have signaled greater willingness to apply statutory-rape laws to situations in which the allegations involve nonconsensual sex, even if both parties are within the protected class.²⁰² In order to determine the proper treatment of sexual offenses committed by minors against other minors, it is helpful to identify distinctions between adult and juvenile actors.²⁰³

Importantly, “[v]ery few juveniles of any age commit sex offenses.”²⁰⁴ And an even smaller number of juveniles younger than age 12 commit sexual offenses—roughly one in eight of all juvenile offenders (who themselves are only one-fourth of all perpetrators of sexual offenses).²⁰⁵ The offending rate “rises sharply around age 12 and plateaus after age 14”;

²⁰¹ See, e.g., *Commonwealth v. Wilbur W.*, 95 N.E.3d 259, 270-271 (Mass. 2018) (collecting cases in which “peer-aged minors” were not prosecuted for consensual sexual encounters); *In re B.A.M.*, 806 A.2d 893, 898 (Pa. Super. Ct. 2002) (setting aside adjudications because both boys were “willing participant[s]”); *State ex rel. Z.C.*, 165 P.3d 1206, 1207, 1213 (Utah 2007) (setting aside the delinquency adjudication of a 13-year-old girl who had a nominally consensual sexual encounter with a 12-year-old boy, finding it “absurd” when both were “victims” as much as perpetrators of the offense); *In re G.T.*, 758 A.2d 301, 309 (Vt. 2000) (reading the state’s statutory-rape law to be “inapplicable in cases where the alleged perpetrator is also a victim under the age of consent”).

²⁰² *State v. Colton M.*, 875 N.W.2d 642, 649 (Wis. Ct. App. 2015) (finding that the prosecution “provided a rational and proper basis for its decision to charge” the actor in a nonconsensual sexual encounter but not the victim when both were underage); *State v. R.R.S.*, 597 S.W.3d 835, 842 (Tex. 2020) (upholding liability for 13-year-old adjudicated delinquent based on sexual acts with 5-year-old brothers, stating that “whether a child’s legal inability to consent to sex renders the child incapable of committing a particular offense depends on whether the *accused*’s consent is an element of the offense, not whether the victim’s consent may provide a defense.”).

²⁰³ In general:

Juveniles are more likely to offend in groups (24 percent with one or more co-offenders versus 14 percent for adults). They are somewhat more likely to offend against acquaintances (63 percent versus 55 percent). Their most serious offense is less likely to be rape (24 percent versus 31 percent) and more likely to be sodomy (13 percent versus 7 percent) or fondling (49 percent versus 42 percent). They are more likely to have a male victim (25 percent versus 13 percent).

....

Juvenile sex offenders are also much more likely than adult sex offenders to target young children as their victims. . . . [Thus,] children younger than age 12 have about an equal likelihood of being victimized by juvenile and adult sex offenders, but adult offenders predominate among those who victimize teens.

FINKELHOR ET AL., *supra* note 191, at 4-5.

²⁰⁴ *Id.* at 8.

²⁰⁵ *Id.* at 2-3. One scholar reports that, “in 2012, forty children under ten-years-old and 461 children between the ages of eleven and sixteen were adjudicated guilty of statutory rape.” Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, 205 (2017).

1 according to this study, 38 percent of juvenile sex offenders are 12 to 14, and 46 percent are 15
2 to 17.²⁰⁶ Notably, “teenage sex offenders are predominantly male (more than 90 percent),
3 whereas a [more] significant number of preteen offenders are female.”²⁰⁷ Juvenile sex offenders
4 are also much “more likely than adult offenders to commit illegal sexual behavior in groups.”²⁰⁸

5 There is no single profile of the juvenile sexual offender. Rather, these juveniles exhibit a
6 range of backgrounds, motivations, and social functioning. As one review of the literature
7 explained,

8 Some juvenile sex offenders appear primarily motivated by sexual curiosity. Others have
9 longstanding patterns of violating the rights of others. Some offenses occur in
10 conjunction with serious mental health problems. Some of the offending behavior is
11 compulsive, but it more often appears impulsive or reflects poor judgment.²⁰⁹

12 However, “[a]mong preteen children with sexual behavior problems, a history of sexual abuse is
13 particularly prevalent.”²¹⁰ In other words, a significant number of minors, and especially younger
14 minors, who perpetrate sex crimes are themselves victims of sex crimes.

15 That said, the vast majority of abused children do not grow up to abuse others.²¹¹
16 Moreover, although popular imagination holds that juvenile sexual offenders are likely to
17 continue to commit sexual offenses into adulthood, the research does not bear that out. “Multiple
18 short- and long-term clinical followup studies of juvenile sex offenders consistently demonstrate
19 that a large majority (about 85-95 percent) of sex-offending youth have no arrests or reports for
20 future sex crimes.”²¹² In the words of one scholar,

²⁰⁶ FINKELHOR ET AL., *supra* note 191, at 4.

²⁰⁷ *Id.* at 2 (estimating that females are seven percent of all juvenile sex offenders).

²⁰⁸ *Id.* at 9.

²⁰⁹ *Id.* at 3.

²¹⁰ *Id.*; see Leach et al., *supra* note 64, at 145 (citing studies that indicate a link between “child maltreatment and later offending”). See also Ashley F. Jespersen, Martin L. Lalumiere & Michael C. Seto, Sexual Abuse History Among Adult Sex Offenders and Non-Sex Offenders: A Meta-Analysis, 33(3) Child Abuse & Neglect 179 (2009).

²¹¹ See Leach et al., *supra* note 64, at 150 (finding that “proportionally few sexually abused boys—just three percent—were found to have committed any sexual offense”). The effect is measurable both ways: how many persons sexually abused as minors go on to abuse minors when they are adults, and how many persons who sexually abuse minors have a history of having been abused themselves as minors. One overview of the literature found studies that reported that as few as 27 percent and as many as 70 percent of persons who sexual abused minors had themselves also been abused as minors. Jespersen, Lalumiere & Seto, *supra* note 210, at 185 tbl.2 (citing studies with percentages as low as 4%, but those studies asked only about sexual abuse by parents). Importantly, that study reiterated that “[t]he large majority of sexually abused children do not go on to offend....” *Id.* at 190 (highlighting, for instance, that a significant number of sexually abused children are female, and yet the large majority of sexual offenders are male).

²¹² FINKELHOR ET AL., *supra* note 191, at 3. Those that are rearrested tend to be arrested for other, nonsexual crimes. *Id.*

[C]urrent clinical typologies and models emphasize that this retrospective logic has obscured important motivational, behavioral, and prognostic differences between juvenile sex offenders and adult sex offenders and has overestimated the role of deviant sexual preferences in juvenile sex crimes. More recent models emphasize the diversity of juvenile sex offenders, their favorable prognosis suggested by low sex-offense-recidivism rates, and the commonalities between juvenile sex offending and other juvenile delinquency ²¹³

Empirical studies also suggest a high degree of variation in prevalence and reporting rates, suggesting that there is “real variation in community approaches to juvenile sex offending.” That is, “[i]n some communities, officials handle juvenile sex offense cases more within the child protection system than within the criminal justice system,” whereas others “have clearly made this problem a law enforcement priority.”²¹⁴

Both statutory and case law support the intuition that juvenile sex offenders should be distinguished from adult sex offenders. Many jurisdictions have statutes that, like Section 4.10 of the Model Penal Code, foreclose criminal liability under a certain age.²¹⁵ And, in many jurisdictions, courts have found the application of a statutory-rape provision unconstitutional when used to prosecute an actor who is himself or herself younger than the age threshold.²¹⁶ Similarly, the Restatement on Children and the Law describes the standard for adjudicative competency in juvenile justice proceedings;²¹⁷ another section sets 10 as the minimum age for delinquency, as a “juvenile under the age of 10 is unlikely to be sufficiently competent to participate in a delinquency proceeding.”²¹⁸ Indeed, research has shown that significant numbers of minors under 16 “performed as poorly on standard competence measures as adults found incompetent to stand trial.”²¹⁹

²¹³ Id. at 2-3.

²¹⁴ Id. at 10.

²¹⁵ See MODEL PENAL CODE Section 4.10 (AM. L. INST., Proposed Official Draft 1962) (setting age for criminal liability at 16); see also Comment to Section 213.0(2)(g).

²¹⁶ See, e.g., *In re D.B.*, 950 N.E.2d 528, 533 (Ohio 2011) (“[W]hen two children under the age of 13 engage in sexual conduct with each other, each child is both an offender and a victim, and the distinction between those two terms breaks down.”). But see *United States v. JDT*, 762 F.3d 984, 996-999 (9th Cir. 2014) (rejecting a vagueness challenge to the delinquency adjudication of a then-10-year-old boy alleged to have abused younger children, even though the statute applied to all children under 12).

²¹⁷ RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 15.30 & Comments *a-c*, at 219-223 (AM. L. INST., Tentative Draft No. 2, 2019); see id. § 15.30 Comment *a*, at 220-221 (“[S]tate courts and legislatures that have considered the issue have almost uniformly concluded that . . . a youth facing delinquency adjudication must be capable of understanding the proceeding and assisting counsel.”); see also id. § 15.30 Comment *c*, at 225 (recognizing that such understanding might vary according to the complexity of the case).

²¹⁸ Id. § 15.30 Comment *b*, at 222.

²¹⁹ Id. (citing a study that shows that 35 percent of 11- to 13-year-olds and 20 percent of 14- and 15-year-olds fail competence standards); see also id. § 15.30 Reporters’ Note Comment *b*, at 240-241 (reviewing studies on adolescent development that link “age and maturity” to competence). See generally Thomas Grisso et al., *Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants*, 27 L. &

1 The particular context of sexual offenses, and the relationship between sexual acts and
2 the adolescent maturation process, counsels in favor of setting a slightly higher age threshold for
3 criminal accountability for all but the most serious sexual offenses.²²⁰ It also supports structuring
4 penal liability to account for the steep increases in cognitive capacity, sexual sophistication,
5 impulse control, and personal restraint that occur during adolescence, as well as for the capacity
6 for reform and correction of maladapted behaviors that manifest before a person has reached
7 mature adulthood.

8 Finally, it is important to observe that, when a statutory offense applies to sexual activity
9 that the parties understood to be consensual, concerns about bias in enforcement may arise. Both
10 scholars and litigants have observed that prosecutorial discretion in labeling “victims” and
11 “offenders” in a consensual sexual encounter between peers often seems guided primarily by
12 intuition rather than principled distinction. Some of those biases are even formally inscribed in
13 law. For example, Texas provides an affirmative defense for sexual contact with a minor under
14 17 for actors who are not more than three years older, but only if the actor is the opposite sex.²²¹

15 In a comprehensive article, one scholar notes that an overbroad statutory-rape provision
16 invites exercises of discretion and “imposes mainstream morals on a small group of offenders
17 selected for illegitimate reasons.”²²² This discretion starts with the way in which these
18 complaints enter the system: “Parents tend to report most often, and, concomitantly, prosecutions
19 proceed most often, against minors who do not conform to gender and sexuality or other
20 norms.”²²³ Specifically, minors are disproportionately prosecuted for same-sex consensual
21 sexual activity; the designation of offender and victim “reinforces aggressive male and passive
22 female gender roles”;²²⁴ experimentation that is not “typical” is more likely to be punished;²²⁵
23 and young men of color are more likely to be targeted for prosecution in interracial
24 relationships.²²⁶ In one prominent case, a 17-year-old young Black adolescent was convicted and

HUM. BEHAV. 333 (2003). Section 15.10 of the Restatement on Children and the Law sets 10 as the minimum age for delinquency jurisdiction. RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 15.30 Comment *b*, at 222 (AM. L. INST., Tentative Draft No. 2, 2019) (citing § 15.10, Minimum Age of Delinquency Jurisdiction).

²²⁰ See Comment to Section 213.0(2)(g).

²²¹ TEX. PENAL CODE ANN. § 21.11(b)(1) (LexisNexis 2019) (“It is an affirmative defense to prosecution under this section that the actor: (1) was not more than three years older than the victim and of the opposite sex . . .”). See generally Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195, 227 (2008) (discussing the lack of defense under laws such as that in Texas for consensual sexual encounters between queer teens).

²²² Godsoe, *supra* note 205, at 183.

²²³ *Id.* at 217.

²²⁴ *Id.* at 218.

²²⁵ *Id.* at 230-231.

²²⁶ See *id.* at 226-227 (citing data that show that Black and Latino youths are disproportionately represented in prosecutions for statutory rape).

1 sentenced to 10 years in prison for engaging in consensual oral sex with a 15-year-old white
2 adolescent; after public backlash, he was released early.²²⁷

3 Litigants have also presented courts with similar challenges. For instance, in
4 *Commonwealth v. Bernardo B.*, the Supreme Judicial Court granted a discovery request, having
5 found that the minor met the threshold showing for a selective-prosecution claim.²²⁸ The minor
6 was a 14-year-old entering ninth grade; two complainants were 12 and a third was about to turn
7 12, all entering sixth grade. The record supported a finding that the sexual activity was
8 consensual—“all of the children mutually agreed to it, and [] all were under the age of
9 consent.”²²⁹ The activity came to light when the boy’s father found suggestive messages on his
10 son’s cell phone, and alerted one girl’s mother. The mother of the girl then notified the police,
11 which led to the charges. The boy’s counsel sought discovery to prove that when underage
12 participants engaged in consensual sexual activity, the state chose to prosecute boys and treat
13 girls as victims. The court granted the request.

14 In sum, even if a statutory-rape provision can technically withstand a constitutional-
15 vagueness or selective-enforcement challenge, it should be drafted with specificity in order to
16 minimize the probability of arbitrary or biased application.

17 **3. *State of the law – sexual offenses involving minors***

18 A comprehensive review of all existing law governing sexual offenses committed by and
19 against minors, as well as of secondary sources compiling and analyzing this material, reveals a
20 body of law that defies logic. Jurisdictions exhibit marked variation in the structure of their
21 schemes, the ages for liability, the use of defenses versus elements in defining applicable age
22 thresholds and age gaps, the penalties imposed, the use of specialized statutes (such as
23 “continuous sexual abuse”) and the manner in which prohibited behavior is defined. One
24 difficulty of this examination is that many statutory regimes reproduce or separately define
25 offenses against minor complainants that parallel force, coercion, or other nonconsent provisions.
26 Thus, in assessing the state of the law for the purposes of Section 213.8, it is imperative to
27 separate out the provisions of liability that apply on the basis of age alone, or age in combination
28 with other factors.

29 This Note attempts to provide only a rough sketch, using illustrative examples, of the
30 range of existing regimes. Generally speaking, nearly all statutory schemes for penetration
31 offenses distinguish between sexual acts with pre-pubescent complainants and post-pubescent
32 complainants. The most common pre-pubescent threshold age is 12, although some jurisdictions
33 set the age at 13 and at least one sets the age at 11. The post-pubescent range is typically 12 to
34 16, although some jurisdictions narrow the range to 11 to 15, 13 to 17, 14 to 17, or even 16 to 18.

²²⁷ Id. at 226-227 (discussing the case of Genarlow Wilson); see also Michele Goodwin, *Law’s Limits: Regulating Statutory Rape Law*, 2013 WIS. L. REV. 481, 495-498 (describing the racialized history and enduring racial taint of statutory rape).

²²⁸ *Commonwealth v. Bernardo B.*, 900 N.E.2d 834, 843-844 (Mass. 2009).

²²⁹ Id. at 838.

A handful of states impose liability for all sexual acts under a certain age, even as high as 17 or 18, although they may diminish the punishment or provide an affirmative defense for actors who are peers with an age difference of no more than a few years.²³⁰ The penalty ranges for penetration offenses vary markedly. Generally, the most severe penalties apply to older actors who commit offenses against young complainants,²³¹ whereas misdemeanor liability may apply when complainants are older.²³²

As regards contact offenses, jurisdictions vary widely. Just under half of states distinguish between pre- and post-pubescent complainants. Many states set age differentials of varying lengths, ranging from three to 10 years. Many states have minimum age requirements for the actor, regardless of any age gap. And penalty clauses vary even more dramatically. Selected portions of state schemes are offered as illustrations below.

Colorado has a general sexual-assault provision that punishes sexual penetration of a person younger than 15 where the actor is at least four years older, or 15 to 17 where the actor is at least 10 years older.²³³ The under-15 offense is a felony punishable by up to six years in prison; the 15-to-17 offense is a misdemeanor.²³⁴ The state punishes sexual contact with a minor under 15, where the actor is four or more years older, with up to six years in prison.²³⁵ Colorado courts have upheld strict liability for age-based offenses.²³⁶

Pennsylvania punishes sexual penetration with a complainant younger than 13 as a 40-year felony.²³⁷ It punishes intercourse with a complainant younger than 16, where the actor is 11 or more years older, as a 20-year felony, and where the actor is four to 11 years older as a 10-year felony.²³⁸ Sexual contact with a complainant under 13 is punishable as a first-degree

²³⁰ See, e.g., TEX. PENAL CODE ANN. § 22.011(a)(2), (c)(1), (e) (LexisNexis 2019) (defining the offense of knowing penetration of a child, which is defined as a person younger than 17, and providing an affirmative defense where the actor is not more than three years older than the victim at the time of the offense, and the victim is a child 14 or older).

²³¹ See, e.g., MONT. CODE ANN. § 45-5-503(4)(a)(i) (imposing a 100-year felony for sexual penetration of a complainant under 12 by an actor 18 or older).

²³² See, e.g., 720 ILL. COMP. STAT. ANN. 5/11-1.50(c) (LexisNexis 2019) (defining criminal sexual abuse when a “person commits an act of sexual penetration or sexual conduct with a victim who is at least 13 years of age but under 17 years of age and the person is less than 5 years older than the victim” as a misdemeanor).

²³³ COLO. REV. STAT. § 18-3-402(1)(d)-(e) (2018).

²³⁴ Id. § 18-3-402(2)-(3); see id. § 18-1.3-401(1)(a)(V)(A.1) (setting the maximum penalty for a class 4 felony at six years’ imprisonment).

²³⁵ Id. § 18-3-405(1)-(2); see id. § 18-1.3-401(1)(a)(V)(A.1).

²³⁶ *People v. Salazar*, 920 P.2d 893, 895-896 (Colo. App. 1996).

²³⁷ 18 PA. CONS. STAT. § 3121(c), (e)(1), 3123(b), (d)(1) (2019) (determining that rape and “involuntary deviate sexual intercourse” of a person “less than 13 years of age” carries a maximum sentence of 40 years’ imprisonment).

²³⁸ Id. §§ 1103, 3122.1, 3125(a)(7), (a)(8), (c) (2019) (defining “statutory sexual assault” as a felony of the first degree where the actor is more than 11 years older and a felony of the second degree where the actor is four to 11 years older, and defining “aggravated indecent assault” against a child as a felony of the second degree, where

1 misdemeanor, and contact with a complainant younger than 16 by an actor more than four years
2 older is punishable as a second-degree misdemeanor.²³⁹

3 Montana provides that persons younger than 16 are generally incapable of consent.²⁴⁰ It
4 then penalizes sexual intercourse with a person younger than 16.²⁴¹ If the actor is 18 or older,
5 and the complainant 12 or younger, the offense is a 100-year felony.²⁴² If the complainant is at
6 least 14 and the actor is 18 or younger, then the offense is a five-year felony.²⁴³ The statutory
7 scheme also penalizes sexual contact with a person younger than 14 by an actor three or more
8 years older as a six-month misdemeanor.²⁴⁴ The scheme also punishes incest, which includes
9 siblings of the whole or half-blood, ancestors, descendants, and stepchildren, as well as adoptive
10 relationships, with life imprisonment or 100 years.²⁴⁵ Consent is a defense to incest but only for
11 sexual relationships with stepchildren; it is ineffective if the child is younger than 18 and the
12 stepparent is four or more years older.²⁴⁶ Montana permits a defense of reasonable mistake for
13 statutory cases that depend on the victim being younger than 16, but forecloses it if the
14 complainant is younger than 14.²⁴⁷

15 Delaware provides that generally children under 16 cannot consent to sex with a person
16 more than four years older, and that children under 12 cannot consent at all.²⁴⁸ Generally there is
17 no mistake-of-age defense, but an actor no more than four years older than a complainant aged
18 12 to 16 may offer a defense of the complainant's consent.²⁴⁹ The most serious statutory offense
19 permits a life maximum for intercourse with a complainant under 12 by an actor 18 or older

felonies of the first degree carry a maximum imprisonment of 20 years and imprisonment of 10 years for felonies of the second degree).

²³⁹ Id. § 3126(a)(7)-(8), (b) (2019). A first-degree misdemeanor carries a five-year maximum penalty, and a second-degree misdemeanor carries a two-year maximum penalty. Id. § 1104(1)-(2) (2019). Statutory provisions commonly overlap inasmuch as the language of the statute provides, for instance, that “the complainant is less than 13 years of age” in one provision and “the complainant is less than 16 years of age and the person is four or more years older than the complainant” in a separate provision. Id. § 3126(a)(7), (8). The penalty clauses then may authorize different degrees of punishment, and the prosecutor may exercise discretion as to which offense to charge.

²⁴⁰ MONT. CODE ANN. § 45-5-501(b)(iv) (2019).

²⁴¹ Id. § 45-5-503(1). The base offense is punishable “by life imprisonment or by imprisonment in the state prison for a term of not more than 20 years.” Id. § 45-5-503(2).

²⁴² Id. § 45-5-503(4)(a)(i).

²⁴³ Id. § 45-5-503(5).

²⁴⁴ Id. § 45-5-502(2)(a), (5)(a)(ii).

²⁴⁵ Id. § 45-5-507(1), (3).

²⁴⁶ Id. § 45-5-507(2)(a). There is also a defense for actors under 18 where the other person is four or more years older than the actor, in which case the younger actor is also considered a victim. Id. § 45-5-507(2)(b).

²⁴⁷ Id. § 45-5-511(1).

²⁴⁸ DEL. CODE ANN. tit. 11, § 761(l) (2019).

²⁴⁹ Id. § 762(a), (d). Notwithstanding this general rule, any sexual offense against complainants under 14 also permits a mistake of age defense that the actor thought the complainant was older than 16. Id. § 777(a).

under specific aggravating circumstances.²⁵⁰ Next is a 25-year felony for sexual penetration of a complainant under 12 by an actor 18 or older,²⁵¹ as well as for intercourse between a complainant not yet 16 with an actor 10 years older, or a complainant not yet 14 with an actor 19 or older;²⁵² then a 15-year felony for intercourse or penetration of a complainant under 16, or intercourse with a complainant not yet 18 and an actor 30 or older.²⁵³ Two contact offenses apply to either persons under 13 (an eight-year felony), or persons under 18 (a three-year felony).²⁵⁴ Incest is a misdemeanor, handled in family court.²⁵⁵

Finally, Utah has a complex and dense scheme, which includes a specific provision titled “Unlawful adolescent sexual activity.”²⁵⁶ That provision is a catch-all that appears to effectively govern sexual activity between nominally consenting persons aged 12 to 18.²⁵⁷ It then has an eight-part penalty scheme, ranging from punishment of an adolescent 17 years of age who engages sexually with a 12- or 13-year-old with a five-year felony, to punishment of an adolescent 14 years of age with a 13-year-old with a 90-day misdemeanor.²⁵⁸

Generally speaking, state schemes also contain a wide array of specialty offenses, such as continuous abuse provisions,²⁵⁹ provisions for recidivist sex offenders, and an array of exploitation, enticing, and indecency provisions. Many states have provisions specifically tailored to situations in which the actor is in a position of trust.²⁶⁰ Statutory language may broadly cover any person in a position of authority,²⁶¹ or give a specific list addressed to

²⁵⁰ Id. § 773(a)(5), (c).

²⁵¹ This felony specifically, rape in the second degree, also carries a minimum sentence of 10 years. Id. § 772(a)(2)(g), (c); see id. § 4205(b)(2) (setting the “term of incarceration” for a class B felony at 2 to 25 years).

²⁵² Id. § 771(a)(1).

²⁵³ Id. § 770; see id. § 4205(b)(3) (setting the maximum sentence for a class C felony at 15 years).

²⁵⁴ Id. §§ 768-769; see id. § 4205(b)(2) (setting the maximum sentence for class D and F felonies at 8 and 3 years, respectively).

²⁵⁵ Id. § 766.

²⁵⁶ UTAH CODE ANN. § 76-5-401.3 (LexisNexis 2019).

²⁵⁷ See id. § 76-5-401.3(1)(b) (applying the provision to “sexual activity between adolescents under circumstances not amounting to” several specific offenses in the Utah Criminal Code, including rape, sodomy, sexual abuse, and other similar offenses).

²⁵⁸ Id. § 76-5-401.3(2); see id. §§ 76-3-203(3), -204(3) (penalizing third-degree felonies with five years’ imprisonment, and class C misdemeanors with 90 days’ imprisonment).

²⁵⁹ See, e.g., TEX. PENAL CODE § 21-02 (defining offenses of “continuous sexual abuse of young child or children”). States also commonly have civil commitment laws for sexually violent predators. See, e.g., TEX. HEALTH & SAFETY CODE § 841.001 et seq.

²⁶⁰ See, e.g., ARK. CODE ANN. § 5-14-124 (2019) (defining certain specific situations in which the actor “is in a position of trust or authority over the victim” as sexual assault in the first degree); COLO. REV. STAT. § 18-3-405.3 (2018); 720 ILL. COMP. STAT. ANN. 5/11-1.20(a)(4) (LexisNexis 2019).

²⁶¹ See, e.g., ALASKA STAT. ANN. § 11.41.434(a)(3)(B) (“occupies a position of authority in relation to the victim”); ARIZ. REV. STAT. § 13-1405(B) (“position of trust”).

particular roles.²⁶² States also have varying approaches to defining persons—such as a “mother’s boyfriend”—with special, familial, or quasi-familial status toward the victim.²⁶³

Every state has also has at least one statute specifically addressing sexual contact with a minor. Many states have multiple overlapping provisions. A handful of states single out fondling for special treatment, although others fold it into general contact offenses,²⁶⁴ and one specifically includes it in the definition of penetration.²⁶⁵

a. Mens rea

Roughly two-thirds of states do not require proof of mens rea for statutory rape.²⁶⁶ However, roughly 16 states allow for a mistake-of-age defense to at least a charge of statutory

²⁶² See, e.g., D.C. STAT. § 22-3009.03 (“Any teacher, counselor, principal, coach, or other person of authority in a secondary level school....”)

²⁶³ See, e.g., ALASKA STAT. § 11.41.434(a)(3)(A) (“the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim”); N.J. STAT. ANN. 2C:14-2(2) (“(a) The actor is related to the victim by blood or affinity to the third degree; or (b) The actor has supervisory or disciplinary power over the victim by virtue of the actor’s legal, professional, or occupational status; or (c) The actor is a resource family parent, a guardian, or stands in loco parentis within the household.”); id. § 2C:14-2(3) (“supervisory or disciplinary power of any nature or in any capacity over the victim”); 13 VT. STAT. ANN. § 3252(e) (“(1) the victim is entrusted to the actor’s care by authority of law or is the actor’s child, grandchild, foster child, adopted child, or stepchild; or (2) the actor is at least 18 years of age, resides in the victim’s household, and serves in a parental role with respect to the victim.”).

²⁶⁴ See, e.g., GA. CODE ANN. § 16-6-4(a)(1) (2020) (defining child molestation as “any immoral or indecent act to or in the presence of or with any child under the age of 16 years” when done with sexual intent); IND. CODE ANN. § 35-42-4-3(b) (LexisNexis 2019) (“A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching . . . with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Level 4 felony.”); IOWA CODE ANN. § 709.8(1)(a)-(b), (2)(a) (LexisNexis 2019) (defining “lascivious acts with a child” as a class C felony where actors 16 or older who perform certain acts with a child, including “fondl[ing] or touch[ing] the pubes or genitals of a child” or having the child fondle the actor’s genitals); KAN. STAT. ANN. § 21-5506(b)(3), (c)(2)-(3) (2018) (defining “aggravated indecent liberties with a child” under 14 as “[a]ny lewd fondling or touching of the person of either the child or the offender” done with sexual purpose, and is a level 3 felony, or an “off-grid person felony” where the actor is 18 or older); MISS. CODE ANN. § 97-5-23(1) (2019) (providing that “handl[ing], touch[ing] or rub[bing] with hands or any part of his or her body or any member thereof, or with any object” any child under 16 with sexual purpose is punishable by two to 15 years’ imprisonment).

²⁶⁵ See ARIZ. REV. STAT. ANN. § 13-1401(3)(a), (4) (LexisNexis 2020) (defining “sexual contact” to include “fondling or manipulating of any part of the genitals, anus or female breast,” and “sexual intercourse” to include “masturbatory contact with the penis or vulva”); cf. OHIO REV. CODE ANN. § 2907.05(B) (LexisNexis 2020) (specifically proscribing touches of a child’s genitalia).

²⁶⁶ See ALA. CODE § 13A-6-62 cmt. (LexisNexis 2020) (explaining that “the defendant’s mistaken belief as to the victim’s age or mental deficiency is no defense” under Alabama law); D.C. CODE § 22-3011(a) (2019) (“Neither mistake of age nor consent is a defense to a prosecution under [the D.C. statutory rape provisions.]”); KAN. STAT. ANN. § 21-5204(b) (2018) (providing that for Kansas’s statutory rape law, “[p]roof of a culpable mental state does not require proof . . . that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which the accused is charged.”); N.J. STAT. ANN. § 2C:14-5(c) (LexisNexis 2019) (providing, for purposes of New Jersey’s statutory rape provisions, that “[i]t shall be no defense to a prosecution for [such] a crime . . . that the actor believed the victim to be above the age stated for the offense, even if such a mistaken belief was reasonable”); TENN. CODE ANN. § 39-11-506, -522 (2019) (defining various degrees of impermissible sexual contact with children based on the age of the child); UTAH CODE ANN. 1953 § 76-2-304.5 (LexisNexis 2019) (providing that it is no defense to any of Utah’s provisions addressing the sexual abuse of minors “that the actor mistakenly believed” the minor to be of age or was otherwise “unaware of the victim’s true age”);

State v. Blake, 777 A.2d 709, 713 (Conn. App. Ct. 2001) (“All a person need do to violate [Connecticut’s statutory rape law] is to (1) engage in sexual intercourse (2) with a person between the ages of thirteen and fifteen, and (3) be at least two years older than such person.”); Pritchard v. State, No. 280, 2003, 2004 Del. LEXIS 61, at *4 (Feb. 4, 2004) (explaining that Delaware’s statutory rape law “precludes a defense based on the defendant’s reasonable belief that the victim had reached the age of consent”); Hodge v. State, 866 So. 2d 1270, 1273 (Fla. Dist. Ct. App. 2004) (noting the “earlier caselaw” in Florida “finding that crimes against underage persons fall ‘within the category of crimes in which, on grounds of public policy, certain acts are made punishable without proof that the defendant understands the facts that give character to his act . . . and proof of an intent is not indispensable to conviction’” (quoting Simmons v. State, 10 So. 2d 436, 438 (Fla. 1942))); Haywood v. State, 642 S.E.2d 203, 204 (Ga. Ct. App. 2007) (“With regard to statutory rape . . . , the defendant’s knowledge of the age of the female is not an essential element of the crime [under Georgia law] . . . and therefore it is no defense that the accused reasonably believed that the prosecutrix was of the age of consent.” (quoting Tant v. State, 281 S.E.2d 357, 358 (Ga. Ct. App. 1981))); State v. Buch, 926 P.2d 599, 607 (Haw. 1996) (holding, based on legislative history, that “a defendant is strictly liable with respect to the attendant circumstance of the victim’s age in a sexual assault” under Hawaii law); State v. Stiffler, 788 P.2d 220, 221 (Idaho 1990) (concluding that “mistake of age is not a defense to a charge of statutory rape” under Idaho’s statutory rape statute); State v. Tague, 310 N.W.2d 209, 212 (Iowa 1981) (holding that “[m]istake of fact is not a defense” to a charge of statutory rape); State v. Sims, 195 So. 3d 441, 444 (La. 2016) (“Although strict liability criminal offenses are generally disfavored, this Court has recognized a legislature’s authority to exclude the element of knowledge or intent in defining a criminal offense . . . [including in Louisiana’s] “law prohibiting carnal knowledge of a juvenile”); Walker v. State, 768 A.2d 631, 633, 635 (Md. 2001) (concluding that, as with Maryland’s statute dealing “with victims age thirteen and younger,” “the availability of a defense of reasonable mistake of age cannot be read into carnal knowledge between a fourteen or fifteen year old victim and a defendant who is age twenty-one or older”); Commonwealth v. Montalvo, 735 N.E.2d 391, 393 (Mass. App. Ct. 2000) (“It is immaterial [for the crime of statutory rape in Massachusetts] that the defendant reasonably thought the victim was sixteen or older. . . . The same is true of the related crime of indecent assault and battery on a child under the age of fourteen”); People v. Cash, 351 N.W.2d 822, 826 (Mich. 1984) (“The vast majority of states, as well as the federal courts . . . do not recognize the defense of a reasonable mistake of age to a statutory rape charge. For the reasons discussed below, [Michigan] agree[s] with the majority’s position.”); Collins v. State, 691 So. 2d 918, 923 (Miss. 1997) (“There is simply no indication by our legislature or by this Court that the defendant’s knowledge the child’s age is a factor to be considered [under Mississippi’s statutory rape statute]. Rather, the knowledge or ignorance of the age of the child is irrelevant.”); State v. Navarrete, 376 N.W.2d 8, 11 (Neb. 1985) (“[M]istake or lack of information as to the victim’s chastity is no defense to the crime of statutory rape [under Nebraska law].” (quoting State v. Vicars, 183 N.W.2d 241, 243 (Neb. 1971))); Elder v. State, No. 55111, 2010 Nev. LEXIS 2409, at *X (Sept. 9, 2010) (declining to overrule the Nevada Supreme Court’s decision in Jenkins v. State, 877 P.2d 1063 (Nev. 1994) “that a reasonable mistake regarding the age of a victim is [not] a defense to the crime of statutory sexual seduction”); State v. Holmes, 920 A.2d 632, 636 (N.H. 2007) (declining to overrule the New Hampshire Supreme Court’s earlier decision in Goodrow v. Perrin, 403 A.2d 864, 866 (N.H. 1979) upholding the state’s law “making statutory rape a strict liability crime”); People v. Dozier, 72 A.D.2d 478, 486 (N.Y. App. Div. 1980), aff’d, 417 N.E.2d 1008 (N.Y. 1980) (“*Mens rea* is simply not an element of New York’s statutory rape statute.”); State v. Anthony, 516 S.E.2d 195, 199 (N.C. Ct. App. 1999) (“Just as consent is not a defense [to a charge of statutory rape], for the same reasons, mistake of age is not a defense [under North Carolina law].”); Starkey v. Okla. Dep’t of Corr., 305 P.3d 1004, 1026-1027 (Okla. 2013) (explaining that “[s]tatutory rape does not require scienter [under Oklahoma law] because it is not a defense that a defendant did not know the victim was under the age of consent”); State v. Yanez, 716 A.2d 759, 766 (R.I. 1998) (declining to “interfere [with Rhode Island’s child sexual assault statutes] by engrafting a *mens rea* requirement where one was not intended”); Toomer v. State, 529 S.E.2d 719, 720-721 (S.C. 2000) (explaining that, under South Carolina law, “[w]here the female is under the age of fourteen and unmarried, the only other element necessary to be proven in order to establish the crime of Rape is the fact that the defendant had sexual intercourse with her” (quoting State v. Whitener, 89 S.E.2d 701, 716 (S.C. 1955))); State v. Jones, 804 N.W.2d 409, 416-417 (S.D. 2011) (explaining that under South Dakota case law, “[i]n a prosecution for alleged statutory rape a defendant’s knowledge of the age of the girl involved is immaterial and his reasonable belief that she is over the age of eighteen years is no defense” (quoting State v. Fulks, 160 N.W.2d 418, 420 (S.D. 1968))); Fleming v. State, 455 S.W.3d 577, 583 (Tex. Crim. App. 2014) (upholding Texas’s statutory rape provision, over a Due Process challenge, despite the law’s failure to “require the State to prove that the defendant had a culpable mental state regarding the victim’s age” or “to recognize an affirmative defense based on the defendant’s belief that the victim was 17 years of age or older”); State v. Searles, 621 A.2d

- 1 rape involving an older complainant;²⁶⁷ and three states permit the defense of reasonable mistake
- 2 of age for any sexual offense involving a minor.²⁶⁸ At least one state appears to require proof of

1281, 1283 (Vt. 1993) (declining “to imply knowledge of age as an element of, or reasonable mistake of age as a defense to, sexual assault of a minor” under Vermont’s statutory rape law); *Rainey v. Commonwealth*, 193 S.E. 501, 501-502 (Va. 1937) (holding under Virginia law “that if the sexual act had taken place, without actual force, a conviction of statutory rape would have been warranted because the girl was between the ages of fourteen and sixteen years and her consent to the act could not operate to prevent it from being a crime”); *State v. Jadowski*, 680 N.W.2d 810, 815-816 (Wis. 2004) (“An actor’s ability to raise mistake regarding his belief about the age of a minor as a defense is explicitly negated” by WIS. STAT. ANN. § 939.43(2) (1999-2000)).

²⁶⁷ See ARIZ. REV. STAT. ANN. § 13-1407(A) (LexisNexis 2020) (“It is a defense to a prosecution pursuant to [Arizona’s sexual offense provisions] in which the victim’s lack of consent is based on incapacity to consent because the victim was fifteen, sixteen or seventeen years of age if at the time the defendant engaged in the conduct constituting the offense the defendant did not know and could not reasonably have known the age of the victim.”); ARK. CODE ANN. § 5-14-102(c)-(d) (2019) (providing, for certain sexual offenses under Arkansas law where the “criminality of the conduct depends on a child’s being below a critical age,” that “the actor may be guilty of the lesser offense defined by the age that the actor reasonably believed the child to be”); COLO. REV. STAT. § 18-1-503.5(1) (2018) (providing that, where “the criminality of conduct depends on a child being younger than eighteen years of age and the child was in fact at least fifteen years of age, it shall be an affirmative defense that the defendant reasonably believed the child to be eighteen years of age or older”); 720 ILL. COMP. STAT. ANN. 5/11-1.70(b) (LexisNexis 2019) (“It shall be a defense under [Illinois’ criminal sexual abuse provisions] that the accused reasonably believed the person to be 17 years of age or over.”); ME. REV. STAT. ANN. tit. 17-A, § 254 (LexisNexis 2019) (providing “a defense to a prosecution under” certain conduct that constitutes sexual abuse of minors “that the actor reasonably believed the other person is at least 16 years of age”); MINN. STAT. § 609.344(1)(b) (2019) (providing that, where “the complainant is at least 13 but less than 16 years of age and . . . the actor is no more than 120 months older than the complainant, it shall be an affirmative defense, which must be proved by a preponderance of the evidence, that the actor reasonably believes the complainant to be 16 years of age or older”); MO. ANN. STAT. § 566.020(2) (LexisNexis 2019) (“Whenever in this chapter [dealing with sexual offenses] the criminality of conduct depends upon a child being less than seventeen years of age, it is an affirmative defense that the defendant reasonably believed that the child was seventeen years of age or older.”); MONT. CODE ANN. § 45-5-511(1) (2019) (“When criminality [under Montana’s sexual offense chapter] depends on the victim being less than 16 years old, it is a defense for the offender to prove that the offender reasonably believed the child to be above that age. The belief may not be considered reasonable if the child is less than 14 years old.”); N.D. CENT. CODE § 12.1-20-01(1)-(2) (2019) (providing that “[w]hen the criminality of conduct depends on a child’s being below the age of fifteen, it is no defense that the actor did not know the child’s age, or reasonably believed the child to be older than fourteen,” but when “criminality depends on the victim being a minor, it is an affirmative defense that the actor reasonably believed the victim to be an adult”); OR. REV. STAT. ANN. § 163.325(2) (LexisNexis 2019) (“When criminality depends on the child’s being under a specified age other than 16, it is an affirmative defense for the defendant to prove that the defendant reasonably believed the child to be above the specified age at the time of the alleged offense.”); 18 PA. CONS. STAT. § 3102 (2019) (providing, when “the criminality of conduct depends on a child being below the age of 14 years,” that “it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older,” but when the “critical age [is] older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age”); WASH. REV. CODE ANN. § 9A.44.030(2) (LexisNexis 2020) (providing that, for certain statutorily defined ages, “it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be the [prescribed] age . . . based upon declarations as to age by the alleged victim”); W. VA. CODE ANN. § 61-8B-12(a) (LexisNexis 2019) (“In any prosecution under this article in which the victim’s lack of consent is based solely on the incapacity to consent because such victim was below a critical age . . . it is an affirmative defense that the defendant, at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.”); WYO. STAT. ANN. § 6-2-308 (2019) (providing, when “criminality of conduct [for certain sexual offenses] in this article depends on a victim being under sixteen (16) years of age,” that “it is an affirmative defense that the actor reasonably believed that the victim was sixteen (16) years of age or older,” but when the victim is under 12 or 14 years, “it is no

a culpable mens rea for cases involving older complainants.²⁶⁹ In two jurisdictions, courts have even imposed strict liability notwithstanding statutory language that suggests a mens rea is required.²⁷⁰

The traditional justifications for strict liability involve protecting children from exploitation and the inherent wrongfulness of sexual conduct with young persons. Until recently, the drive to protect children from exploitation was expressly framed as the need to protect the

defense that the actor did not know the victim's age, or that he reasonably believed that the victim was twelve (12) years or fourteen (14) years of age or older, as applicable"); *Perez v. State*, 803 P.2d 249, 251 (N.M. 1990) (explaining that, "[w]hile a child under the age of thirteen requires the protection of strict liability" under N.M. STAT. ANN. § 30-9-11 (1990), "the same is not true of victims thirteen to sixteen years of age," because actors in that case may assert a "defense of mistake of fact"); see also *People v. Soto*, 245 P.3d 410, 422 n.11 (Cal. 2011) (explaining that, pursuant to *People v. Hernandez*, 393 P.2d 673, 677 (Cal. 1964), the court "recognize[s] a defense to statutory rape when the accused had a good faith, reasonable belief that the victim was 18 or older" despite there being none in statute).

²⁶⁸ See ALASKA STAT. ANN. § 11.41.445(b) (2019) (providing an "affirmative defense" to all statutory-rape charges "that, at the time of the alleged offense, the defendant (1) reasonably believed the victim to be that age or older; and (2) undertook reasonable measures to verify that the victim was that age or older"); KY. REV. STAT. ANN. § 510.030 (LexisNexis 2019) (providing for sexual offenses that "the defendant may prove in exculpation that at the time of the conduct constituting the offense he or she did not know of the facts or conditions responsible for such incapacity to consent," including the victim's age); *Lechner v. State*, 715 N.E.2d 1285, 1288 (Ind. Ct. App. 1999) (declining "to limit the availability of the statutory mistake of fact defense" provided by IND. CODE ANN. § 35-42-4-3(c) (West 1978) "to those defendants whose reasonable belief was that the victim was at least 16 years old," and instead "hold[ing] that the defense is available to any defendant who reasonably believes the victim to be of such an age that the activity engaged in was not criminally prohibited").

²⁶⁹ See, e.g., OHIO REV. CODE ANN. § 2907.04(A) (LexisNexis 2020) ("No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, *when the offender knows* the other person is thirteen years of age or older but less than sixteen years of age, or the offender *is reckless in that regard*." (emphasis added)); *Phipps v. State*, 107 N.E.3d 754, 759 (Ohio Ct. App. 2018) (observing that OHIO REV. CODE ANN. § 2907.04(A) (2017) "requires a mens rea of knowing or reckless as to the age of the victim for a conviction," and therefore "does not impose strict liability"). But see OHIO REV. CODE ANN. § 2907.02(A)(1)(b) (LexisNexis 2020) (forbidding any person from "engag[ing] in sexual conduct with another who is . . . less than thirteen years of age, whether or not the offender knows the age of the other person," unless the minor is a spouse living with the offender).

²⁷⁰ See COLO. REV. STAT. § 18-3-405(1) (2018) ("Any actor who *knowingly* subjects another not his or her spouse to any sexual contact commits sexual assault on a child if the victim is less than fifteen years of age and the actor is at least four years older than the victim." (emphasis added)). Yet despite that wording, the Colorado courts have read the provision as "a strict liability offense," holding proof of mens rea unnecessary as to the victim's age. *People v. Salazar*, 920 P.2d 893, 895-896 (Colo. App. 1996). As the *Salazar* court explained, that was at least partly because the legislature "specifically considered and rejected a[nother] provision that would have allowed the defense of 'reasonable mistake of age'." *Id.* at 895. On the same basis, the Tenth Circuit has also read Colorado's general sexual assault law as "a strict liability statute" with respect to victims who are "at least fifteen years of age but less than seventeen years of age." *United States v. Wray*, 776 F.3d 1182, 1190-1191 (10th Cir. 2015) (quoting COLO. REV. STAT. § 18-3-402(1)(e) (2014)). The same is true of Arizona's statutory-rape law as well. Compare ARIZ. REV. STAT. ANN. § 13-1405(A) (LexisNexis 2020) ("A person commits sexual conduct with a minor by *intentionally or knowingly* engaging in sexual intercourse . . . with any person who is under eighteen years of age." (emphasis added)), with *State v. Gamez*, 258 P.3d 263, 268 (Ariz. Ct. App. 2011) (finding that "nothing in the plain language of the statute . . . requires proof that the perpetrator engaged in the sexual act while also knowing that the person was under 18," and that "[h]ad the legislature intended to require the state in this context to prove that a defendant knew the victim was under 18, it would have said so" explicitly).

1 chastity of young girls prior to marriage.²⁷¹ That purpose manifests most evidently in the
 2 traditional availability of a “promiscuity defense.” Namely, the complainant’s “unchaste”
 3 character was recognized as a complete defense to statutory rape.²⁷² Viewed this way, statutory
 4 rape was considered as almost regulatory in nature, and thus strict liability could be justified as
 5 consistent with social-welfare purposes.²⁷³

6 The more contemporary view of statutory rape rejects a chastity defense, and focuses on
 7 the protection of all children from sexual exploitation. As the Texas Court of Criminal Appeals
 8 recently explained in upholding that state’s statutory-rape law, “[t]he statutory prohibition of an
 9 adult having sex with a person who is under the age of consent” is no longer about protecting
 10 only girls, let alone girls’ chastity, but instead “serves to protect young people from being
 11 coerced by the power of an older, more mature person.”²⁷⁴

12 Similarly, statutory-rape laws were once predicated on the idea that sexual activity with
 13 obviously underage persons is inherently wrongful. In the traditional formulation, the mere
 14 ability to access a minor supported an inference of wrongfulness—there was simply no
 15 legitimate circumstance in which a man should take a young woman away from her family over

²⁷¹ See Russell L. Christopher & Kathryn H. Christopher, *The Paradox of Statutory Rape*, 87 IND. L.J. 505, 509 (2012) (relating this history of chastity framing). “Because their chastity was considered particularly precious,” as Justice Brennan recounted, “young women were felt to be uniquely in need of the State’s protection.” Michael M. v. Superior Court, 450 U.S. 464, 494-495 (1981) (Brennan, J. dissenting). California’s statutory-rape law was at one time expressly upheld on the belief that it served the “obvious purpose . . . [of] protecting from violation the virtue of young and unsophisticated girls.” Id. at 495 n.10 (quoting *People v. Verdegren*, 39 P. 607, 608-609 (Cal. 1895)); accord *State v. Vicars*, 183 N.W.2d 241, 243 (Neb. 1971) (“The act which constitutes the crime of statutory rape is depriving a female within the age limits of her virginal chastity.”); Goodwin, *supra* note 227, at 494 (“[P]rotecting the chastity and virtue of white women and girls also served the function of protecting white male reputation and property as the sexuality of women and girls could not be separated from the latter’s overall legal status as property.”).

²⁷² Christopher & Christopher, *supra* note 271, at 521; see, e.g., *Vicars*, 183 N.W.2d at 423 (“The previous chaste character of the prosecutrix is a material element of the offense [of statutory rape] to be alleged and proved.”).

²⁷³ See CAROLYN E. COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES* 11 (2004) (discussing the history of statutory rape laws and the defense “that the victim was sexually experienced”); Carpenter, *supra* note 15, at 317 (describing the so-called “public-welfare offense” model of statutory rape).

²⁷⁴ *Fleming v. State*, 455 S.W.3d 577, 582 (Tex. Crim. App. 2014). The Texas Court of Criminal Appeals “place[d] the burden on the adult”—as presumably able to know better—“to ascertain the age of a potential sexual partner and to avoid sexual encounters with those who are determined to be too young to consent to such encounters.” Id. And so it places the risk on the adult, again as a presumably responsible party, “that he or she may be held liable for the conduct if it turns out that the sexual partner is under age” if he or she “chooses not to ascertain the age of a sexual partner.” Id.; see also id. at 581 (“While it is indeed widely known that ‘16 will get you 20,’ and precocious young girls have commonly been referred to as ‘jail bait,’ such colloquialisms address only the understanding that even consensual sex with someone underage is a violation.”). But see Goodwin, *supra* note 227, at 499 (arguing that statutory rape in the mid-20th century remained motivated by racial and class concerns, citing data that 75 percent of statutory-rape complaints in California in 1963 were against black men, often raised by welfare case workers); id. at 505 (citing instances in which the laws are applied to peers, undermining the claim that statutory-rape laws target pedophiles).

1 the family’s objection.²⁷⁵ Similarly, in an era with strong prohibitions on sexual relations outside
 2 of marriage, the act itself was illegal; the age was only an aggravating factor.²⁷⁶ In the
 3 contemporary version, the concept applies only to the act of engaging sexually with a partner
 4 obviously too young to consent. To quote one legislative body, it is fair to “designate[] as rape
 5 sexual conduct with a pre-puberty victim . . . regardless of whether the offender has actual
 6 knowledge of the victim’s age,” because “the physical immaturity of a pre-puberty victim is not
 7 easily mistaken, and engaging in sexual conduct with such a person indicates vicious behavior on
 8 the part of the offender.”²⁷⁷

9 But neither rationale for strict liability withstands scrutiny in a modern statutory scheme,
 10 for two reasons. First, many statutory-rape schemes apply to complainants much older than the
 11 obviously pre-pubescent victims envisioned in the original rationale. A minor who is 16 may
 12 indeed be readily and fairly mistaken for a person of legal age. Second, many statutory-rape
 13 schemes do not specify the age of the actor.²⁷⁸ Thus, it is hardly the case that the only
 14 perpetrators of the offense will be those clearly “preying” on a person much younger.

15 In *United States v. Murphy*, the Second Circuit rejected strict liability for a federal statute
 16 that imposed liability for transporting a minor for the purpose of engaging in a sexual act that
 17 was unlawful because the minor was between 12 and 16 and the actor was four or more years
 18 older.²⁷⁹ The defendant was 25, and the complainant was 14; they met on a dating website where
 19 the defendant claimed to be 19 and the complainant’s profile listed her age as 19, but she later
 20 claimed to be 16. The court’s reasoning was based primarily upon a textual analysis of the
 21 statutes and their interoperability. But the court also noted that reading out any requirement of

²⁷⁵ See *Garnett v. State*, 632 A.2d 797, 812 (Md. 1993) (Bell, J., dissenting) (citing *R v. Prince* [1975] 2 C.C.R. 154 (Eng.)) (noting that *Prince* idea of “lesser legal wrong” is founded in the notion that taking a “daughter, even one over 16, from her father’s household” is a wrong—which no longer holds true today); see also Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660, 1661 n.9 (1991) (collecting fornication and adultery statutes).

²⁷⁶ Cf. *Collins v. State*, 691 So. 2d 918, 923 (Miss. 1997) (citing *United States v. Ransom*, 942 F.2d 775, 777 (10th Cir. 1991)) (“[T]he defendant’s intent to commit statutory rape can be derived from his intent to commit the morally or legally wrongful act of fornication.”).

²⁷⁷ OHIO REV. CODE ANN. § 2907.02 cmt. (LexisNexis 2020). The House Report accompanying the federal sexual abuse statute, 18 U.S.C. § 2241(c) (1986), likewise explains that the statutory-rape provision there was included because there is simply “no credible error of perception [that] would be sufficient to recharacterize a child of such tender years as an appropriate object of sexual gratification.” *Ransom*, 942 F.2d at 777 (quoting H.R. REP. NO. 99-594, at 15-16 (1986), as reprinted in 1986 U.S.C.C.A.N. 6186, 6195-6196).

²⁷⁸ Courts at times have confronted cases in which the accused falls within the statutorily protected age group. See, e.g., *In re B.A.M.*, 806 A.2d 893, 894, 898 (Pa. Super. Ct. 2002) (explaining, in vacating the delinquency adjudication of an 11-year-old boy for statutory rape, that “both boys [in the encounter] were willingly participants and [the other boy] was not victimized by the experience,” while adding that “[t]he law was not intended to render criminal *per se* the experimentation carried on by young children, even where the acts may evoke disapprobation or censure”); *State ex rel. Z.C.*, 165 P.3d 1206, 1207, 1213 (Utah 2007) (vacating the delinquency adjudication of a 13-year-old girl who had “consensual” sex with a 12-year-old boy because “no true victim or perpetrator [could] be identified”).

²⁷⁹ *United States v. Murphy*, 942 F.3d 73, 79-82 (2d Cir. 2019) (interpreting 18 U.S.C. § 2243(a)-(b) (2018)).

mens rea led to “absurdity,” citing an example of a 15-year-old convincingly posing as a 21-year-old.²⁸⁰

4. Grading

The grading scheme of Section 213.8 proceeds from several basic premises, which are supported by existing law and social scientific research, but not always embodied in state codes punishing statutory offenses.

First, the grading scheme sharply distinguishes between the punishment authorized for actors who victimize young minors (those under 12), and actors who victimize older minors, aged 12 through 15. This distinction is well supported in existing law, which views actors who victimize very young minors as worthy of serious punishment. It also reflects the intuition that, for teenage complainants, the existence of offenses punishing sexual activity by means of force, coercion, exploitation, deception, or lack of consent serves as a backstop of liability that ensures the availability of severe punishments for actors who use those illicit means to obtain the minor’s sexual submission. As a result, the punishments prescribed for older complainants reflect the judgment that the encounter between the complainant and actor is more akin to sex by exploitation than to forcible sex. When a complainant did not consent to the encounter, whether expressly or circumstantially, other provisions of Article 213 apply.

And while technically Sections 213.1 through 213.7 apply equally to complainants under 12 as to older complainants, experience teaches that an actor may not have to resort to force or coercion in order to cause a younger complainant to submit to unwanted sexual activity.²⁸¹ The younger the complainant, the greater the probability that even nominal consent fades. And eventually, the prospect of nominal consent altogether disappears; whereas a misguided 11-year-old may believe himself or herself to be “consenting” to the demands of a flattering adult, a five-year-old lacks even the capacity for that nominal degree of autonomy. The same is true for instances of incest, where the familial bond makes any notion of meaningful consent or willingness moot. As a result, sexual encounters with young children are more properly punished at a level akin to offenses involving force or coercion, rather than just nonconsent.

Second, the grading scheme distinguishes between actors who, like the complainants, are themselves young minors; actors who are older minors and young adults engaging in inappropriate behavior with nominally consenting partners who are relatively close in age; and adult actors who exploit minors. These distinctions receive less support in existing law, although there are clear traces. More commonly, statutes either preclude liability for peer-range actors, either on their face or by providing for an affirmative defense, or dramatically reduce the punishment when the actor is also a minor. Relatively few statutes draw finer distinctions, such

²⁸⁰ Id. at 80.

²⁸¹ That said, although the use of actual physical violence is uncommon as regards very young complainants, data suggests that actors more commonly use threats or other coercive measures that could satisfy the elements of other Sections of Article 213. Michele Elliott et al., *Child Sexual Abuse Prevention: What Offenders Tell Us*, 19 CHILD ABUSE & NEGLECT 579, 582 tbl.1 (1995) (reporting data from interviews with child sex offenders, 44 percent of whom use “coercion and persuasion,” and 19 percent of whom used physical force).

as by diminishing punishment for actors within a certain age range of the complainant.²⁸² Instead, schemes tend to either permit or preclude liability, not base liability on the size of the age gap between the actor and the complainant.

Section 213.8 rejects this approach, choosing instead to calibrate punishment more finely according to the degree of wrongfulness suggested by the behavior. Although a 12-year-old minor who sexually abuses a six-year-old child, or a 16-year-old who abuses a 10-year-old, may be a worthy subject of state interest via the juvenile-justice system, the authorized punishment for those offenses should not treat the minor actor’s culpability as equivalent to that of an adult actor three times older. An adult who has reached full maturity is distinguishable from a preteen or teenager in cognitive, social, and especially sexual development. An adult is also likely less amenable to reintegrative rehabilitation. Lastly, a far greater degree of wrongfulness is suggested by an adult’s interest in, and willingness to impose upon, a minor with little to no sexual experience than by the same actions done by a minor close in age and with similar relative inexperience.

This distinction is supported by social science research into juvenile development, as well as by recent case law embracing that research. In a series of recent cases, the Supreme Court has recognized that the maximum sentences for juveniles who commit crimes—even older juveniles—should take into account the cognitive and emotional immaturity of the minds of juveniles as compared to adults who engage in the same antisocial behaviors.²⁸³ A significant body of research shows that minors do not suddenly acquire adult cognitive capacities at the age of 18, but rather that an adolescent’s impulse control, decisionmaking ability, and reasoning are still in development until the early 20s, when clear physiological shifts occur.²⁸⁴ In other words, “[t]here is now incontrovertible evidence that adolescence is a period of significant changes in brain structure and function.”²⁸⁵ And in particular, changes during puberty and early adolescence

²⁸² See, e.g., GA. CODE ANN. § 16-6-2(d) (2020) (punishing oral or anal sex between a person at least 13 but less than 16 as a misdemeanor when the actor is 18 or younger and no more than four years older).

²⁸³ See, e.g., *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (finding that prior cases “drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption” in deciding appropriate penalties); *Miller v. Alabama*, 567 U.S. 460, 480 (2012) (requiring sentencers to “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison”); *Graham v. Florida*, 560 U.S. 48, 92 (2010) (finding that the defendant’s “youth and immaturity . . . suggest that he was markedly less culpable than a typical adult who commits the same offenses”); *Roper v. Simmons*, 543 U.S. 551, 578-579 (2005) (holding death penalties for offenders who were under the age of 18 at the time of the crime to be unconstitutional).

²⁸⁴ See, e.g., Alexandra O. Cohen et al., *When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 PSYCHOL. SCI. 549, 550 (2016) (citing studies showing that “structural and functional development of limbic and prefrontal circuitry are implicated in motivated behavior and its control, respectively, and may lead to a propensity toward risky and impulsive actions”).

²⁸⁵ Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 28 ISSUES SCI. & TECH. 67, 67 (2012) (adding that “important changes in brain anatomy and activity take place far longer into development than had been previously thought,” such as into the early 20s); see also LAURENCE STEINBERG, *ADOLESCENCE* 56-65 (10th ed. 2013) (“Experts in cognitive development explain that intellectual capacities such as working memory, logical reasoning, general knowledge, and information processing do not mature until mid-adolescence.”).

involve “the density and distribution of dopamine receptors,” which in turn “plays a critical role in how humans experience pleasure” and “have important implications for sensation-seeking”—specifically including sexual pleasure.²⁸⁶ In fact, a distinct body of research has explored the relationship between risky sexual behavior—such as unprotected sex—and adolescents’ neural and cognitive capacities.²⁸⁷

The grading structure of Section 213.8 takes both the legal and scientific developments in our understanding of juvenile misconduct into account in setting maximum punishments. For this reason, actors below the age of 21 are treated with substantially more leniency than are actors older than 21 who engage in identical behavior. Section 213.8 also treats young adults—actors under the age of 21, with considerable more leniency when the offense involves sexual behavior with a complainant 12 or older.

Lastly, in affixing penalties, even for the most egregious offenses defined by Section 213.8 such as abuse of young children by adults, and the abuse of minors by parental figures, the scheme embraces the principles and the overall grading objectives of Articles 6 and 7. In so doing, Section 213.8 does not intend to minimize or dismiss the serious harms caused by child sexual abuse. The provisions of Section 213.8 governing adult sexual imposition on minors, especially those very young or in a child-caregiver relationship with the actor, authorize lengthy periods of incarceration. Therefore, the grading of offenses in Section 213.8 harmonizes with the penalties for offenses of analogous severity in other provisions of the Article and throughout the Code.

The resulting scheme therefore authorizes punishments equivalent to forcible rape for adult actors who engage in sex with minors under 12 or parental figures who abuse their children and wards, and the next most serious level of punishment for adult actors who engage sexually with minors aged 12 to 16. The scheme penalizes, but at much reduced levels, young adults and minors who engage in sexual activity with inappropriately young partners—punishing teenagers who sexually abuse young children as felons, but at a lower level, and young adults who engage with teenagers as misdemeanants.

With regard to the specific sentences authorized for each grade of an Article 213 offense, the harsh penal approaches of recent decades—characterized by casual dismissals of a sentence of a year imprisoned as inconsequential—have more recently given way to deeper understanding of the many costs imposed by imprisonment on the actor, the actor’s family and community, and

²⁸⁶ Steinberg, *supra* note 285, at 67; see also *id.* at 71 (noting that the general band of full maturity runs from 15 at the low end to 22 at the high end).

²⁸⁷ See, e.g., Sarah W. Feldstein Ewing, *Developmental Cognitive Neuroscience of Adolescent Sexual Risk and Alcohol Use*, 20 AIDS & BEHAV. S97, S98 (2016) (“An inherent challenge in this work is that the cognitive processes involved in adolescent sexual decision-making are highly complex; involving everything from navigating emergent basic biological drives to procreate, the high potential natural rewards of the behavior, higher-order cognitive processes requisite within weighing costs/benefits, and charting new emotional, social, and affective waters”).

Section 213.8. Sexual Offenses Involving Minors

- 1 all of society.²⁸⁸ Such considerations must count heavily in all judgments assigning specific
- 2 authorized sentence ranges to the relative grading categories specified for the offenses defined by
- 3 Section 213.8.

²⁸⁸ See generally MARC MAUER & ASHLEY NELLIS, *THE MEANING OF LIFE: THE CASE FOR ABOLISHING LIFE SENTENCES* (2018) (noting use of life sentences for sex crimes, including statutory prohibition on early release for persons committed for sex offenses, in the course of arguing against the American exceptionalism that favors the use of long term, harsh sentences like life in prison); NAT'L RESEARCH COUNCIL, *supra* note 98, at 4-7 (detailing increasing harshness of penal sanctions and the costs to communities and society, specifically noting that the "incremental deterrent effect of increases in lengthy prison sentences is modest at best" and that "[i]ncarceration is strongly correlated with negative social and economic outcomes for former prisoners and their families").

1 **SECTION 213.9. SEX TRAFFICKING**

2 **(1) *Sex Trafficking.*** An actor is guilty of Sex Trafficking if the actor knowingly
3 recruits, entices, transports, transfers, harbors, provides, isolates, or maintains a person by
4 any means, with the purpose of facilitating a commercial sex act involving that person
5 when:

6 **(a)** coercion is being, or will be, used to cause the person to submit to or
7 perform a commercial sex act, which therefore will be without effective consent; and
8 the actor knows that coercion is being or will be used to cause the person to submit
9 to or perform that commercial sex act; or

10 **(b)** the person is younger than 18 and is being, or will be, caused to submit to
11 or perform a commercial sex act; and the actor is aware of, yet recklessly
12 disregards, the risk that the person is younger than 18 and is being, or will be,
13 caused to submit to or perform the commercial sex act.

14 **(2) *Definitions.*** For purposes of Section 213.9(1):

15 **(a) “Coercion” means:**

16 **(i)** using or threatening to use physical force or restraint against
17 anyone;

18 **(ii)** taking, destroying, or threatening to take or destroy the person’s
19 money, credit or debit card, passport, driver’s license, immigration
20 document, or other government-issued identification document, including a
21 document issued by a foreign government, or any travel document pertaining
22 to the person;

23 **(iii)** restricting or threatening to restrict the person’s access to a
24 substance that is a controlled substance under the federal Controlled
25 Substance Act, 21 U.S.C. § 801 et seq.;

26 **(iv)** administering or withholding a controlled substance in
27 circumstances that impair the person’s physical or mental ability to avoid,
28 evade, or flee from the actor;

29 **(v)** using a scheme, plan, deception, misrepresentation, or pattern of
30 behavior for the purpose of causing the person to believe that failing to
31 submit to or perform a commercial sex act would result in physical,

1 psychological, financial, or reputational harm to anyone that is sufficiently
2 serious to cause someone of ordinary resolution who is of the same
3 background, in the same circumstances, and in the same physical and mental
4 condition as that person, to submit to or perform a commercial sex act in
5 order to avoid incurring that harm; or

6 (vi) any combination of these circumstances.

7 (b) “Commercial Sex Act” means any act of sexual penetration, oral sex, or
8 sexual contact performed in exchange, or the expectation of exchange, for money,
9 property, services, or any other thing of value given to or received by anyone.

10 (3) *Grading.* Sex Trafficking is a felony of the third degree [*10-year maximum*].

11 (4) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the
12 circumstances described in subsection (1) are present. Submission, acquiescence, or words
13 or conduct that would otherwise indicate consent do not constitute effective consent when
14 occurring under a circumstance described in that subsection. If applicable, the actor may
15 raise an affirmative defense of Explicit Prior Permission under Section 213.10 when:

16 (a) a charge of Sex Trafficking is based on coercion under subsection (1)(a);
17 and

18 (b) the person giving such permission does so before that person has been
19 subjected to trafficking under subsection (1) and before that person has been
20 subjected to coercion under subsection (1)(a).

21 **Comment:**

22 ***1. Sex Trafficking – Section 213.9.***

23 ***a. Overview.*** Section 213.9 addresses sexual abuse through commercial exploitation of
24 individuals who are underage, incompetent, or otherwise vulnerable to mistreatment or
25 manipulation. The other reasons for vulnerability can include physical disability or psychological
26 trauma; advanced age; immigration status or language barriers; flight from civil war, natural
27 disaster, or family violence; addiction to a controlled substance; and a wide range of other
28 circumstances that can be exploited for coercive effect. Trafficking differs from other
29 commercial-sex activities in that trafficking involves a person who is underage, subjected to
30 specifically prohibited forms of coercion, or both. Section 213.9 does not cover commercial sex
31 acts involving adults in circumstances where coercion, as defined in subsection (2)(a), is not

1 proved; for those circumstances other provisions of Article 213 may apply, and the 1962 Code
2 addresses criminal liability for commercial sex acts in Section 251.2 (Prostitution and Related
3 Offenses).

4 Those who engage in sex trafficking may be guilty of sexual-assault offenses if they
5 personally commit acts of sexual penetration, oral sex, or sexual contact with the trafficked
6 person. But traffickers typically profit by making the victim sexually available to others, who
7 may or may not be aware of the coercive means employed or the underage status of the victim.
8 In those circumstances the language of rape and sexual-assault statutes in many states can pose
9 an obstacle to prosecuting traffickers successfully as principals or accomplices. In other states,
10 provisions applicable to rape and sexual assault avoid this problem because they are not limited
11 to individuals who commit sexual acts personally. Instead, these statutes apply to anyone who
12 uses impermissible means with the required awareness that those means will cause another
13 person to submit to or perform prohibited sexual acts. This revision of Article 213 avoids that
14 problem as well because, like these state approaches, its provisions apply to any actor who uses
15 impermissible means with the required awareness that those means will cause a person to submit
16 to or perform prohibited sexual acts, including with someone other than the actor.¹

17 Even under these more flexible provisions, however, an effort to hold a trafficker
18 indirectly liable for sexual acts involving a third party can raise difficult issues of proof and
19 divert attention from what should be the central concern: the conduct of the trafficker personally.
20 In addition, most state statutes applicable to rape and sexual assault do not reach the full gamut
21 of abusive trafficking practices: (1) their required elements typically are not met by the more
22 subtle coercive means that traffickers use to control their victims, and (2) in a majority of the
23 states, age-based offenses of rape and sexual assault do not prohibit sex with adolescents aged 16
24 and 17, a group that is especially vulnerable to exploitation by those who provide commercial
25 sex services. Sex-trafficking laws aim to fill these gaps.

26 Section 213.9 responds to the limitations of traditional sex-offense law in three ways.
27 First, subsection (1) defines an offense applicable to the trafficking activity directly; second,
28 subsections (1)(a) and (2)(a) take into account a broader range of coercive tactics; and third,
29 subsection (1)(b) prohibits the trafficking of any person under 18, regardless of whether the

¹ See Sections 213.1-213.7, *supra*.

Section 213.9. Sex Trafficking

1 specified coercive tactics are used. The offense defined by subsection (1) requires proof of four
2 elements: (i) trafficking activity by the actor; (ii) the actor's knowledge of engaging in
3 trafficking activity and purpose of doing so in order to facilitate a commercial sex act; (iii) either
4 coercion or an underage victim; and (iv) the actor's knowledge that coercion is involved or the
5 actor's recklessness with regard to the risk that an underage victim is involved. The trafficker
6 also could be liable for a more traditional sex offense; Section 213.9 does not preclude
7 conviction on other charges when their elements can be proved as well.²

8 ***b. Trafficking Activity.*** Section 213.9(1) defines trafficking activity to reach any method
9 traffickers use to bring victims under their sway—methods such as recruiting or enticing the
10 victim; transporting the victim, whether within the same city or over a greater distance; isolating
11 the victim; providing the victim shelter or other necessities; and putting the victim in contact
12 with customers willing to pay for the victim's sexual services. Knowingly engaging in one of
13 these trafficking activities with a purpose to facilitate a commercial sex act does not in itself
14 constitute an offense under Section 213.9. An actor is guilty of Sex Trafficking, a serious felony
15 beyond merely facilitating a commercial sexual encounter, only when the actor knows that the
16 victim will be coerced into submitting to or performing a commercial sex act, as specified in
17 subsection (1)(a), or when a victim under 18 will be caused to submit to or perform a commercial
18 sex act and the actor is aware of, yet recklessly disregards, the risk that this will occur, as
19 specified in subsection (1)(b).

20 **Illustrations:**

21 1. Driver operates a taxi service and often receives late-night calls from Boss, the
22 manager of a run-down motel in the suburbs. Boss regularly hires Driver to take Boss and
23 Complainant to various luxury hotels in the city's business center. Driver notices that

² The double jeopardy "same offense" limitation rarely precludes prosecution for two related offenses; it permits separate charges for both whenever each of them requires proof of at least one element not required for conviction of the other. See *Brown v. Ohio*, 432 U.S. 161 (1977); *United States v. Blockburger*, 284 U.S. 299 (1932). Therefore, the principles of parsimony and proportionality should guide prosecutors in the restrained exercise of their charging decisions in situations involving closely related offenses. See NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, *THE GROWTH OF INCARCERATION IN THE UNITED STATES* (2014). See also 1962 Code Section 1.07 ("When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if: ... (d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct....").

Section 213.9. Sex Trafficking

1 Boss often holds Complainant tightly by the arm and roughly shoves or pulls
2 Complainant into and out of the cab. On several occasions, Driver notices that Boss gives
3 Complainant a condom before they leave the cab and overhears Boss tell Complainant to
4 be sure to use it. Investigators establish that Boss tricked Complainant into traveling to
5 the United States by promising work in a computer service center. Once Complainant
6 arrived, Boss took Complainant's passport, forced Complainant to stay at Boss's motel,
7 and insisted that Complainant submit to acts of sexual penetration and oral sex with
8 customers designated by Boss in order to work off a debt supposedly owed for the costs
9 of Complainant's travel to the United States.

10 Boss can be convicted of Sex Trafficking under Section 213.9 because Boss
11 knowingly engaged in trafficking activity (recruiting, harboring, and isolating
12 Complainant, and providing Complainant to customers), and did so for the purpose of
13 facilitating commercial sex acts of sexual penetration and oral sex, knowing that
14 Complainant was being coerced into submitting to those commercial sex acts.

15 Driver did not engage in the trafficking activity of recruiting, harboring, and
16 isolating Complainant. But because Driver knowingly engaged in trafficking activity by
17 transporting Complainant, Driver could potentially face conviction for Sex Trafficking
18 under Section 213.9. In order to convict Driver, the prosecution would need to develop
19 facts sufficient to prove beyond a reasonable doubt all elements of the Sex Trafficking
20 offense—including that Driver knowingly engaged in the trafficking activity of
21 transporting Complainant, knew that Complainant would be engaged in commercial sex
22 acts, and knew that Complainant was being coerced to do so. The prosecution also would
23 need to prove beyond a reasonable doubt not only that Driver knew that Driver was
24 facilitating commercial sex acts, but also that Driver did so not merely in the ordinary
25 course of Driver's taxi business (for example, by charging only the ordinary fare) but *for*
26 *the purpose* of facilitating commercial sex acts (for example, by having some stake in the
27 venture, such as charging a premium for the taxi services provided).

28 2. Accused shares an apartment with Roommate, who, as Accused knows, is 17
29 years old. Roommate earns additional income by meeting out-of-town travelers at a
30 downtown hotel, where Roommate is paid for performing acts of oral sex. Accused
31 works at a nearby restaurant and frequently drives Roommate downtown, drops

Section 213.9. Sex Trafficking

1 Roommate at the hotel, and picks up Roommate later, so that they can drive back to their
2 apartment together. Accused knows that Roommate performs commercial sex acts at the
3 hotel, but does not share in the money Roommate is paid and does not otherwise benefit
4 from Roommate's commercial sex acts.

5 Accused engages in trafficking activity, because Accused knowingly "transports"
6 Roommate. Further, as required by subsection (1)(b), Accused is aware that Roommate is
7 younger than 18 and is being caused to perform commercial sex acts. Nonetheless,
8 Accused is not guilty of the offense of Sex Trafficking under Section 213.9, because,
9 although Accused knowingly transported Roommate, Accused did not transport
10 Roommate *for the purpose* of facilitating commercial sex acts. Rather, Accused drove
11 Roommate to and from the city without getting any personal benefit from whatever
12 activities Roommate engaged in there.

13 3. Accused manages a nonprofit rescue organization that provides food, shelter,
14 and other support for victims seeking to escape from sex traffickers. The organization's
15 work constitutes trafficking activity as defined by Section 213.9(1), because it
16 "harbor[s]" and "maintain[s]" the trafficking victims. Nonetheless, Accused is not guilty
17 of the offense of Sex Trafficking under Section 213.9. A precise explanation of that result
18 depends on whether the trafficking victim is an adult or a minor.

19 (a) If the trafficking victim is an adult, subsection (1)(a) requires that the
20 trafficking activity (such as harboring or maintaining a trafficking victim) occur "when
21 ... coercion is being or will be used" Once the organization begins feeding and
22 housing the trafficking victim in its shelter, coercion will no longer be used to cause the
23 victim's submission to or performance of commercial sex acts. Even if the trafficker later
24 regains control over an adult victim and then coerces the victim to submit to or perform a
25 commercial sex act, Accused would not be guilty of the offense of Sex Trafficking under
26 Section 213.9, for two independent reasons. First, Accused did not provide the
27 organization's support *for the purpose* of facilitating commercial sex acts. Second, at the
28 time Accused provided the organization's support, Accused did not know that coercion
29 was being, or subsequently would be, used to cause the adult trafficking victim to engage
30 in commercial sex acts.

Section 213.9. Sex Trafficking

1 (b) If the trafficking victim is a minor, conviction does not require proof of
2 coercion under subsection (1)(a). Nonetheless, Accused is not guilty of the offense of Sex
3 Trafficking because the requirements for age-based conviction under subsection (1)(b)
4 are not met. That subsection requires that trafficking activity occur “when... the
5 [trafficked] person is less than 18 years of age and is being or will be caused to submit to
6 or perform a commercial sex act.” Once the organization begins feeding and housing the
7 minor in its shelter, the minor will no longer be caused to submit to or perform
8 commercial sex acts. Even if the trafficker later regains control over the minor and then
9 causes the minor to submit to or perform a commercial sex act, Accused would not be
10 guilty of the offense of Sex Trafficking under Section 213.9 for two independent reasons:
11 First, Accused did not provide the organization’s support *for the purpose* of facilitating
12 commercial sex acts. Second, at the time Accused provided the organization’s support,
13 Accused did not recklessly disregard a substantial and unjustifiable risk that the minor
14 subsequently would be caused to submit to or perform a commercial sex act.³

15 4. Same facts as in Illustration 3. Accused knows that a 16-year-old trafficking
16 victim living at the shelter is probably engaging in consensual sexual activity with a 30-
17 year-old aid worker whom the minor met at the shelter. Nonetheless, Accused is not
18 guilty of the offense of Sex Trafficking. In the absence of other facts, the requirements
19 for age-based conviction under subsection (1)(b) are not met, regardless of the age
20 difference between the victim and the other party, because (among other reasons) the
21 sexual acts occurring contemporaneously with the organization’s support are not
22 commercial sex acts.⁴

³ Traffickers not infrequently regain control over their victims in situations like this, and Accused might be aware of some risk that this could occur. Nonetheless, Accused could not be found *recklessly* aware of that risk, because recklessness requires that the risk be “substantial and *unjustifiable*.” 1962 Code Section 2.02(2)(c) (emphasis added). Just as a surgeon would not be reckless to perform an operation that involved a substantial risk of the patient’s death, if that was the patient’s best option, Accused would not be reckless in sheltering a trafficking victim, even when aware of a substantial risk that a trafficker might regain control over the victim, if Accused’s efforts aimed to reduce that risk and thus were justifiable.

⁴ The older participant in the sexual acts might, depending on the circumstances, be guilty of an offense under Section 213.8, dealing with sexual offenses against minors.

5. Same facts as in Illustration 3, except that the organization also provides shelter and other support for victims seeking to escape from domestic violence. Accused knows that one of the victims, an adult, is still under the sway of the abuser, whom the victim occasionally meets outside the shelter, and that the abuser then coerces the victim to submit to acts of sexual penetration by the abuser. Nonetheless, Accused is not guilty of the offense of Sex Trafficking. Absent additional facts, the requirements for coercion-based conviction under subsection (1)(a) are not met because the coerced sexual acts occurring contemporaneously with the organization's support are not commercial sex acts.

c. Coercion. Subsection (1)(a) imposes liability for trafficking activity when the trafficked person is being or will be coerced, and subsection (2)(a) specifies the means of pressure or control sufficient to meet this coercion requirement. These means include physical force and restraint (subsection (2)(a)(i)), as well as a wide range of other tactics that traffickers commonly use to hold vulnerable individuals in their power, such as confiscating the victim's money, credit cards, passport, visa, identification papers, or travel documents (subsection (2)(a)(ii)), and controlling or manipulating an individual's access to addictive or incapacitating drugs (subsection (2)(a)(iii) and (iv)). The means specified in subparagraphs (i), (ii), (iii), and (iv) are impermissible and coercive per se. The offense of Sex Trafficking is established when an actor knows that any of these means is being or will be used to cause a person whom the actor has trafficked (for example, recruited or transported for the purpose of facilitating commercial sex acts) to submit to or perform a commercial sex act. The means used (such as physical force) need not be so powerful that they entirely overwhelm an individual or make any conceivable resistance futile; as discussed in connection with the requirement of a causal link in Sections 213.1 and 213.2, the coercive means are sufficient if they are the but-for and proximate causes of the victim's submission to or performance of the commercial sex act.⁵

The exchange of drugs for sex does not in itself establish the coercion required for a Sex Trafficking conviction, even when a complainant engages in a commercial sexual act *because* drugs were the form of payment. The drugs-for-sex exchange is not in itself coercive within the meaning of subparagraphs (iii) and (iv), because those subparagraphs are met only when the

⁵ See Comments to Sections 213.1 and 213.2.

1 person supplying the drugs controls the victim's access to them (subparagraph (iii)) or when the
2 drugs impair the victim's physical or mental ability to avoid, evade, or flee from the actor, for
3 example when the actor administers a drug that leaves the victim unconscious (subparagraph
4 (iv)). When the drugs are simply a form of payment for a complainant's participation in a sex
5 act, and the accused does not control the complainant's access to the drugs, the requisite coercion
6 is absent.

7 **Illustrations:**

8 6. Accused receives a call from Customer, an out-of-town visitor who wants to
9 hire an "escort" willing to provide sexual services for a \$500 fee. Accused knows that
10 Complainant, an adult who works as a bank teller, has a cocaine habit and often supports
11 that habit by earning extra cash or drugs in exchange for sex. Customer pays Accused the
12 \$500 fee; in return, Accused drives Complainant to Customer's hotel, where Complainant
13 and Customer engage in acts of sexual penetration. Afterward, Accused gives
14 Complainant \$200 worth of cocaine, as previously agreed, and keeps the \$500 fee.

15 These facts, without more, are not sufficient to convict Accused of the offense of
16 Sex Trafficking. Even though Accused engaged in trafficking activity by transporting
17 Complainant to the hotel for the purpose of facilitating a commercial sex act and supplied
18 Complainant with cocaine, on these facts Accused did not use coercion as defined in
19 subsection (2)(a)(iii) and (iv):

20 (a) The facts given do not show coercion under subparagraph (iii), because they
21 are insufficient to indicate that Accused controlled Complainant's access to the drugs. To
22 establish coercion as defined in this subparagraph, the prosecution would need additional
23 evidence, such as proof that Accused was Complainant's drug supplier, threatened to
24 withhold the cocaine if Complainant did not submit to sex with Customer, or prevented
25 Complainant from obtaining drugs from other sources.

26 (b) The facts given do not show coercion under subparagraph (iv), because they
27 do not indicate that Accused impaired Complainant's physical or mental ability to avoid,
28 evade, or flee from Accused: To establish coercion as defined in this subparagraph, the
29 prosecution would need additional evidence, such as proof that Accused administered a
30 strong narcotic to Complainant, without Complainant's knowledge, in order to cause
31 Complainant to lose consciousness, thus preventing Complainant from fleeing.

1 7.⁶ While dating Complainant, Accused repeatedly provides Complainant with
2 oxycodone. After Complainant becomes addicted, Accused tells Complainant that
3 continued access to the drug must be earned by providing sexual services to customers
4 Accused supplies. Accused allows Complainant to live rent-free in an apartment Accused
5 owns and drives Complainant to meet the customers, but Accused refuses to pay
6 Complainant for the sexual services Complainant provides, despite Complainant's
7 requests to be paid in cash. Instead, Accused tells Complainant that Accused will
8 continue to supply oxycodone only so long as Complainant continues to comply with
9 Accused's instructions. Accused occasionally withholds the drug to demonstrate that
10 refusal to cooperate will leave Complainant to suffer acute opiate withdrawal illness. Out
11 of fear that Accused will cut off Complainant's access to the drug, which Complainant is
12 unable to secure elsewhere, Complainant submits to Accused's demands for an extended
13 period before finally turning to law enforcement and seeking medical help.

14 On these facts, Accused can be convicted of Sex Trafficking under Section
15 213.9(1)(a). Accused engaged in trafficking activity by knowingly harboring
16 Complainant and transporting Complainant to the place where the commercial sex acts
17 would occur and did so for the purpose of facilitating those acts. The facts establish the
18 element of coercion under Section 213.9(2)(iii) because Accused threatened to withhold a
19 controlled substance unless Complainant submitted to or performed commercial sex acts,
20 knowing that Complainant was addicted to the drug, that Accused was Complainant's
21 only source for it, and that this coercion was causing Complainant to engage in the
22 commercial sex acts.

23 Beyond the specific methods of coercion listed in subsections (2)(a)(i) through (iv),
24 subsection (2)(a)(v) also treats as impermissible coercion any other tactics sufficiently serious to
25 cause a person of ordinary resolution who is of the same background, in the same circumstances,
26 and in the same physical and mental condition as the victim to submit to or perform a
27 commercial sex act. These methods could include, for example, insisting that imagined debts be
28 worked off by accepting sexual encounters with designated paying customers, or intimidating

⁶ Facts based on *United States v. Mack*, 808 F.3d 1074 (6th Cir. 2015), and *United States v. Fields*, 2013 WL 11318863 (M.D. Fla. Dec. 11, 2013).

1 elderly, traumatized, or mentally impaired individuals, but only if the method used is sufficiently
2 coercive to meet the requirements of subsection (2)(a)(v).

3 **Illustrations:**

4 8.⁷ Accused helps Complainant, an undocumented immigrant, travel from Peru to
5 the United States to work for Accused as a nanny. Later, Accused falsely tells
6 Complainant that Complainant owes Accused \$15,000 for the travel assistance and has
7 only worked off half that amount. Accused refuses Complainant's request to quit the
8 nanny job and insists that Complainant perform commercial sex services when instructed
9 to do so. Accused threatens to accuse Complainant of theft and have Complainant sent
10 back to Peru if Complainant refuses to cooperate.

11 On these facts, Accused can be convicted of the offense of Sex Trafficking under
12 Section 213.9(1)(a). Although Accused did not withhold Complainant's passport or other
13 identification documents, Accused knowingly used deception, financial pressure, threats
14 to accuse Complainant of a crime, and threats to have Complainant deported, all to
15 pressure Complainant to engage in commercial sex acts. A jury could find these tactics
16 sufficiently serious to cause a person of ordinary resolution who is of the same
17 background, in the same circumstances, and in the same physical and mental condition as
18 Complainant to submit to or perform commercial sex acts, thus meeting the requirements
19 necessary to prove coercion under Section 213.9(2)(a)(v). And Accused engaged in
20 trafficking activity by knowingly transporting and housing Complainant for the purpose
21 of facilitating commercial sex acts, knowing that this coercion was causing Complainant
22 to engage in the commercial sex acts.⁸

23 9. Accused meets Complainant at a city park and learns that Complainant, an
24 adult who has little income and no steady job, lives in a shabby, unheated apartment and
25 obtains money for food by occasionally dancing on stage at a local strip club. Accused
26 explains that Complainant can earn more money by working as an "escort" for out-of-

⁷ Facts based on *United States v. Dann*, 652 F.3d 1160 (9th Cir. 2011) (similar tactics used to coerce household helper to continue performing nonsexual services as a nanny).

⁸ Alternatively, on these facts, Accused presumably could be convicted of the lesser included offense of Sexual Assault by Extortion, a felony of the fourth degree under Section 213.4. But because under these circumstances this charge is a lesser included offense of Sex Trafficking, Accused could not be convicted of both. See 1962 Code Section 1.07(1).

town business travelers, with whom Complainant would engage in acts of sexual penetration, oral sex, or sexual contact in return for payments that Accused and Complainant would split. Accused puts Complainant in contact with a series of customers, each of whom pays Accused \$500 per evening in return for Complainant's submission to or performance of these sexual acts. Accused pays Complainant \$250 for each sexual encounter with a customer and keeps the balance.

Accused's actions satisfy the requirement of trafficking activity because Accused "recruit[ed]" Complainant for the purpose of facilitating commercial sex acts. But Accused's acts can meet the additional requirement of coercion under subsections (1)(a) and (2)(a)(v) only if Accused's "scheme, plan, ... or pattern of behavior" would cause a person of ordinary resolution who is of the same background, in the same circumstances, and in the same physical and mental condition as Complainant to engage in the commercial sex acts. On these facts, Complainant was living independently before Complainant met Accused, and Complainant continued to live independently thereafter. Absent additional facts, Complainant apparently could continue to live independently, although less comfortably, without Accused's help. A person of ordinary resolution in these circumstances arguably could choose whether to continue participating in the arrangement. Therefore, a jury might not find beyond a reasonable doubt that the financial harm resulting from Complainant's failing to participate was sufficiently serious to meet the requirements of subsection (2)(a)(v). If not, Accused could not be convicted of Sex Trafficking under Section 213.9(1)(a).

d. Age. When a trafficked person is under the age of 18, subsection (1)(b) permits liability for the offense of Sex Trafficking regardless of whether the circumstances involve the coercion necessary, in the case of an adult victim, for liability under subsection (1)(a).

Illustration:

10. Accused owns the "Barely Legal Spa and Massage Parlor," a business specialized in serving clients who prefer the services of very young staff. Accused knows that many of the employees offer sexual services to their massage clients, and Accused encourages them to do so in return for extra payments that Accused shares with them.

Section 213.9. Sex Trafficking

1 Customers sometimes ask Accused for assurance that the employees are over 18, and
2 Accused routinely answers by saying with a wink, “Oh yes, they are all *barely* legal.”

3 In need of additional employees, Accused drives to a city park frequented by
4 young homeless runaways, approaches Complainant, and offers Complainant a job at
5 “Barely Legal,” after explaining the opportunities Complainant will have to earn good
6 money by satisfying customers’ sexual interests. Accused says the only catch is that all
7 employees must be over 18 and asks if Complainant is old enough. Complainant says,
8 “Yes, of course.” Accused accepts that assurance without asking for identification.
9 Accused drives Complainant to the spa, where Complainant engages in acts of sexual
10 penetration and oral sex with “Barely Legal” customers. In fact, Complainant is just 14
11 years old.

12 Under these circumstances, Accused could potentially be convicted of the offense
13 of Sex Trafficking under Section 213.9(1)(b). Although on these facts there is insufficient
14 evidence to prove that Accused used coercion sufficient to meet the requirements of
15 subsection (1)(a), Accused knowingly engaged in trafficking activity by recruiting,
16 enticing, and transporting Complainant and by providing Complainant to Accused’s
17 customers, and Accused did so for the purpose of facilitating commercial sex acts.
18 Accused also knew that these trafficking activities would cause Complainant to engage in
19 acts of commercial sex. The remaining requirement for conviction under subsection
20 (1)(b) is proof that Accused knew or was aware of, yet recklessly disregarded, the risk
21 that Complainant was younger than 18. If the prosecution presents evidence sufficient to
22 prove beyond a reasonable doubt this element and the other elements of the offense,
23 Accused can be convicted of the offense of Sex Trafficking under Section 213.9(1)(b),
24 even though there is no evidence that Complainant was coerced within the meaning of
25 subsection (1)(a).

26 **2. Grading.**

27 Sex Trafficking is a grave offense, involving the exploitation of particularly vulnerable
28 individuals, often in connection with organized-crime networks that subject dozens of victims to
29 numerous discrete acts of sexual abuse. Under current law, authorized maximum sentences for
30 offenses comparable to Section 213.9 range from a high of life for the federal offense, 30 years

Section 213.9. Sex Trafficking

1 in Florida, and 20 years in Texas to maximums (absent recidivist enhancements) of 16.5 years in
2 Ohio, 12 years in Indiana and Tennessee, and 10 years in Maryland and Virginia.⁹

3 The wide range of these authorized maximums in part reflects the fact that the offense is
4 defined in extraordinarily broad terms; it can potentially extend from a single instance of
5 transporting or providing support to a psychologically coerced adult or a 17-year-old minor to
6 running an organized network involving dozens of trafficked victims. This exploitative conduct
7 deserves significant punishment across the spectrum, but in the less serious cases, judicial
8 sentencing discretion may not consistently reach an appropriately measured sentence, especially
9 when the authorized maximum is quite high. Accordingly, the grading of this unusually
10 heterogeneous offense requires exceptional care.

11 One consideration in setting an appropriate maximum is the recognition that the most
12 egregious instances of the offense, those that typically come to mind when picturing sex
13 traffickers, involve multiple victims and multiple instances of trafficking activity. In such cases,
14 consecutive sentences are an available and appropriate way to reflect the seriousness of conduct
15 that spans many distinct episodes of abuse. The authorized maximum for conviction on a single
16 count therefore need not be high enough to permit a sentence justified by the entire scope of the
17 offender's misconduct. Conversely, a somewhat lower cap on the authorized sentence may be an
18 appropriate way to constrain judicial and prosecutorial sentencing discretion when a conviction
19 rests on a single instance of harboring or transporting a trafficking victim.

20 Mindful of these considerations, Section 213.9 classifies Sex Trafficking as a felony of
21 the third degree.¹⁰ The sentencing provisions of the revised Code regulate the degree of

⁹ See Reporters' Note 3.k., *infra*. In many states additional enhancements apply when the victim is a young child. Even with child-victim enhancements, many states set the maximum for a first offense at 20 years or less. See Reporters' Note 3.k, text at note 107 *infra*. At the opposite end of the spectrum, maximums in child-victim cases of life imprisonment or 99 years are authorized in California, Florida, Georgia, Massachusetts, Missouri, New Jersey, and Texas. *Id.*

¹⁰ Under the revised sentencing provisions of the Model Penal Code, a person convicted of a felony of the third degree "may be sentenced by the court, subject to the provisions of Articles 6B [relating to sentencing guidelines] and 7 [governing judicial sentencing authority], to a term of incarceration ... [that] shall not exceed [10] years." MODEL PENAL CODE: SENTENCING, Section 6.06(6)(b) (Proposed Final Draft, April 10, 2017), approved May 2017. The Comment to this Section of the sentencing provisions explains that "maximum authorized terms are stated in brackets [in part because] recommendations concerning the severity of sanctions that ought to attend particular crimes ... are fundamental policy questions that must be confronted by responsible officials within each state. . . ." *Id.*, Section 6.06, Comment *k*, p. 157.

punishment through a comprehensive system that includes sentencing guidelines,¹¹ structured judicial sentencing discretion,¹² and appellate review,¹³ so that the maximum applicable in an individual case is tied to the specific aggravating and mitigating factors in that case.¹⁴

3. Consent.

When the trafficked individual is under the age of 18, the consent of that individual is irrelevant because, under Section 213.9(1)(b), absence of consent is not an element of the offense when the trafficking activity involves a victim who is a minor. When the trafficked individual is an adult, Section 213.9(1)(a) requires proof that coercion is being or will be used to cause the individual to submit to or perform a commercial sex act, which therefore will be without effective consent. As explained in the Comments to Sections 213.0(2)(e) and 213.1, consent is not freely given and cannot be effective when a person submits to or performs a sexual act because the person faces powerful threats, such as the kinds of coercion specified in Section 213.9(2)(a). When any of those circumstances is proved beyond a reasonable doubt, that fact precludes the possibility of legally effective consent. Section 213.9(4) makes this well-understood principle explicit.

As discussed in connection with Sections 213.1 and 213.2, however, sexual encounters should not invariably give rise to criminal liability when competent adults agree, on a fully voluntary basis, to participate in sexual practices that involve limited degrees of force or coercion. Accordingly, as relevant to Section 213.9, Section 213.10 affords an actor a narrowly framed affirmative defense for situations in which the other person is a competent adult—*not subject to coercion or trafficking activity at the time when permission is given*—who personally gives the actor explicit prior permission to (1) engage in trafficking activity that will facilitate a commercial sex act involving (2) explicitly permitted physical force, restraint, coercion, or

¹¹ Id., Article 6B.

¹²Id., Sections 7.01-7.08.

¹³ Id., Section 7.09.

¹⁴ See id., p. 158: “Under the revised Code’s sentencing system, severity is regulated primarily through sentencing guidelines, the court’s departure power under the guidelines, meaningful appellate sentence review, and invigorated statutory mechanisms ... for subconstitutional proportionality review of excessively harsh penalties.”

1 apparent nonconsent otherwise prohibited by Sections 213.1, 213.2, 213.4, 213.6, or 213.7 (such
2 as transporting the other person to the place where the sex act will take place).

3 **Illustration:**

4 11. Customer offers Complainant \$500 to participate in a sexual encounter in
5 which Customer will meet Complainant at a downtown hotel and then tie down and
6 sexually penetrate Complainant while Complainant pretends to struggle. Complainant, an
7 adult, accepts the offer and explains the circumstances to Accused, asking Accused, in
8 return for a share of the fee, to drive Complainant to the hotel and remain near
9 Customer's hotel room, ready to intervene if necessary to protect Complainant. Accused
10 drives Complainant to the hotel, where the expected encounter occurs without incident.
11 Afterward, Complainant gives Accused \$100 and keeps the rest of the \$500 fee.

12 As an initial matter, these facts arguably meet the Section 213.9 requirements for
13 convicting Accused of the offense of Sex Trafficking. Accused engaged in trafficking
14 activity by transporting Complainant to the hotel for the purpose of facilitating the
15 commercial sex act, and Accused did so knowing that a physical restraint would be used
16 to cause Complainant to submit to that act.¹⁵ Those circumstances, once proved, preclude
17 the possibility of legally effective consent, because the physical restraint was a proximate
18 cause of Complainant's submission.¹⁶ And this principle applies even when the physical
19 restraint is deployed in a manner that Complainant allegedly finds acceptable or even
20 desirable.¹⁷

21 Nonetheless, because Complainant invited Accused's involvement before
22 Accused had engaged in trafficking activity concerning Complainant and before
23 Complainant had been subjected to the contemplated coercion, Accused could seek to

¹⁵ Although on these facts, Complainant was willing to be physically restrained, that restraint *caused* Complainant's submission because it was a necessary antecedent (the but-for cause), and it was not remote or accidental in relation to Complainant's submission (the proximate cause). See Comment 3 to Section 213.1 and Comment 7 to Section 213.2, *supra*. Where this two-pronged causation requirement is met, Accused cannot argue consent or the absence of causation on the ground that the other person "likes it rough." See Comment 3 to Section 213.1, at nn.29-30.

¹⁶ See Comment 3 to Section 213.1 and Comment 7 to Section 213.2, *supra*.

¹⁷ *Id.*

1 raise the affirmative defense of Explicit Prior Permission under Section 213.10. Accused
2 would need to introduce evidence sufficient to establish each of the elements of that
3 defense.¹⁸ If able to make that showing, Accused could not be convicted of Sex
4 Trafficking under Section 213.9(1)(a) unless the prosecution disproved beyond a
5 reasonable doubt at least one of the required elements of the defense under Section
6 213.10.

7 The requirement of explicit prior permission is not met, however, and therefore an actor
8 cannot raise an affirmative defense under Section 213.10, when the other person is already
9 subject to trafficking activity at the time when that person gives permission.¹⁹

10 **Illustration:**

11 12. Accused runs a massage parlor where acts of sexual contact and oral sex are
12 included in the services provided. Accused pays each of Accused's workers a small
13 portion of the fees they earn and also provides them room and board in a dormitory
14 behind the massage parlor.²⁰ Customer offers Accused \$500 to provide Customer a
15 worker who is willing to be tied down and sexually penetrated while struggling. Accused
16 tells Complainant, one of the workers, about the proposal, and Complainant agrees, for
17 \$50, to submit to Customer's request. Prior to the encounter, Complainant and Accused
18 agree on the specific terms of the arrangement, including the kinds of restraints to be
19 used, the time allowed, and the "safe word" Complainant can use at any time to terminate
20 the encounter. Complainant and Accused also agree that Accused will communicate to
21 Customer all the terms of the arrangement, including the "safe word." Accused explains
22 all the conditions to Customer and then provides a private room, adjacent to the massage
23 parlor, where Complainant submits to the agreed-upon acts. Afterward, Accused gives
24 Complainant \$50 and keeps the rest of Customer's \$500 payment.

¹⁸ See Section 213.10, *infra*.

¹⁹ See Section 213.10(3)(d), *infra*.

²⁰ Cf. Nicholas Kulish, et al., *Behind Illicit Massage Parlors Lie a Vast Crime Network and Modern Indentured Servitude*, N.Y. TIMES, March 2, 2019 (reporting on massage parlors where workers are held in squalid conditions and sexually exploited).

Section 213.9. Sex Trafficking

Accused's actions constitute the offense of Sex Trafficking because Accused "harbor[ed]" and "maintain[ed]" Complainant for the purpose of facilitating commercial sex acts, and Accused recruited Complainant for the sexual encounter with Customer, knowing that Customer would cause Complainant to submit by physically restraining complainant.²¹ These circumstances establish the required elements of the offense of Sex Trafficking under Section 213.9(1)(a). Accused might seek to raise a defense of Explicit Prior Permission under Section 213.10, and the facts arguably meet several of the requirements of a Section 213.10 defense: (1) before Complainant was physically restrained, Complainant personally gave Accused explicit permission for physical restraint to be used; (2) the parties agreed on the specific terms of the encounter; and (3) Complainant specified the "safe word" that would withdraw that permission.²² Nonetheless, in contrast to Illustration 11, the facts here fail to meet one of the requirements of Section 213.10, because Complainant gave the necessary permission only at a time when Accused had already subjected Complainant to trafficking activity by harboring, maintaining, and recruiting Complainant for the purpose of facilitating a commercial sex act.²³ Therefore Accused could not successfully raise the defense of Explicit Prior Permission under Section 213.10.

REPORTERS' NOTES

1. General Considerations.

Commercial sex trafficking is a grave and widespread form of sexual abuse that has become an increasing focus of law-enforcement concern over the past two decades.²⁴ The traffickers profit financially by exploiting individuals who are particularly vulnerable, for example because of youth; advanced age; physical or psychological disability; drug addiction; immigration status; flight from civil war, natural disaster, or family violence; and a wide range of

²¹ For analysis of the causation requirement under these circumstances, see Illustration 11 and note 15, *supra*.

²² See Section 213.10(2), *infra*.

²³ See Section 213.10(3)(d)(vi), *infra*. Customer, if prosecuted, would not have a Section 213.10 defense unless Complainant gave explicit prior permission to Customer personally. See 213.10(2), *infra*.

²⁴ See generally VIRGINIA M. KENDALL & T. MARKUS FUNK, CHILD EXPLOITATION AND TRAFFICKING: EXAMINING GLOBAL ENFORCEMENT AND SUPPLY CHAIN CHALLENGES AND U.S. RESPONSES (2d. ed. 2016) (focusing on the trafficking of minors).

1 other circumstances that can be exploited for coercive effect. Yet law enforcement faces
 2 unusually difficult obstacles. Because the victims often live in fear of deportation or retaliation
 3 against themselves or relatives initiated by those who exploit them, these victims are especially
 4 hesitant to seek help from authorities.²⁵ Even when a trafficking scheme comes to light, effective
 5 prosecution can be a daunting challenge because the same climate of fear leaves victims reluctant
 6 to testify.²⁶ Because this conduct is difficult to deter and highly culpable, it calls for severe
 7 sanctions. Under federal law, use of coercion to enforce submission to commercial sex acts is
 8 punishable by a mandatory minimum of 15 years in prison, with a maximum of life.²⁷ In New
 9 York, the offense is a class B felony punishable by up to 25 years' imprisonment.²⁸

10 Although once associated largely with countries outside the Western world, trafficking
 11 (for sex work and other forced labor) now claims an estimated 1.5 million victims in the United
 12 States, Canada, and Western Europe,²⁹ including tens of thousands of known victims within the
 13 United States.³⁰ The first federal statute specifically addressed to the problem, the Trafficking
 14 Victims Protection Act, was enacted in 2000; it has been amended several times since.³¹ And

²⁵ For a probing account of the difficulties victims face in seeking to escape from coercive traffickers and pimps, see, e.g., RACHEL LLOYD, *GIRLS LIKE US* (2011). For discussion in the analogous context of coercive trafficking in migrant labor, see Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409 (2011).

²⁶ See Kulish, et al., *supra* note 20; Patricia Mazzei, “*The Monsters Are the Men*”: *Inside a Thriving Sex Trafficking Trade in Florida*, N.Y. TIMES, Feb. 23, 2019 (reporting that sheriff had “lined up about a dozen Mandarin interpreters” but of dozens of victims, only one was willing to speak with law enforcement).

²⁷ 18 U.S.C. § 1591(b)(1).

²⁸ N.Y. PENAL LAW § 230.34 (2019).

²⁹ See INTERNATIONAL LABOUR ORGANIZATION, *ILO GLOBAL ESTIMATE ON FORCED LABOUR: RESULTS AND METHODOLOGY* (2012), available at http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_182004.pdf.

³⁰ Polaris, *A Look Back: Building a Human Trafficking Legal Framework*, at 1 (2015) (stating that “there are hundreds of thousands of victims of sex and labor trafficking inside our borders”), available at <https://polarisproject.org/>. As of July 30, 2018, Polaris, drawing on its own hotline and other case-specific sources, has recorded sex trafficking and other forced-labor cases in the United States involving over 40,000 victims since 2007, including “reports of 22,191 sex trafficking cases inside the United States.” See <https://polarisproject.org/human-trafficking/sex-trafficking>; National Human Trafficking Hotline, *Hotline Statistics*, available at <https://humantraffickinghotline.org/states>.

³¹ The federal statute reads as follows:

§ 1591. Sex trafficking of children or by force, fraud, or coercion

(a) Whoever knowingly . . . in or affecting interstate or foreign commerce . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person . . . knowing, or . . . in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of

1 although many victims are trafficked from other nations, sex trafficking between and within
2 states is common as well. The federal government plays a pivotal role in stemming sex
3 trafficking, but small-scale trafficking often does not receive federal attention.³² Local authorities
4 therefore have essential responsibilities for prevention and enforcement. In addition, victim

18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years

(e) In this section:

(1) The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term “coercion” means --

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of law or the legal process.

(3) The term “commercial sex act” means any sex act, on account of which anything of value is given to or received by any person.

(4) The term “serious harm” means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm

³² See Toko Serita, *In Our Own Backyards: The Need for a Coordinated Judicial Response to Human Trafficking*, 36 N.Y.U. REV. L. & SOC. CHANGE 635, 646-647 (2012) (noting that “New York’s human trafficking laws now allow state and local law enforcement officers to arrest and state prosecutors to charge people for smaller-scale sex trafficking offenses that federal prosecutors would not have spent the resources to prosecute under the TVPA”).

1 outreach and protective services have an intrinsically local focus. Two states took the lead in
2 enacting anti-trafficking legislation in 2003; all states have now done so.³³

3 Because these state laws vary widely, the National Conference of Commissioners on
4 Uniform State Laws (also known as the Uniform Law Commission) drafted uniform legislation
5 on the subject. In 2013, the Commission approved a Uniform Act on Prevention of and
6 Remedies for Human Trafficking,³⁴ which the American Bar Association promptly endorsed.³⁵

7 Notwithstanding these important initiatives, a revised Model Penal Code cannot bypass
8 the subject. As the Comment notes, traffickers often do not personally perpetrate acts of rape or
9 sexual assault, and those whom they aid and abet in committing sexual acts may not be culpably
10 aware of committing any offense more serious than ordinary patronizing of a prostitute. Sex-
11 trafficking statutes address these and other gaps, but the federal Trafficking Victims Protection
12 Act is not tailored to local law-enforcement concerns, as the explosion of divergent state
13 legislation since 2003 shows.

14 The Uniform Act does not serve the same functions as a Model Code, for two reasons.
15 First, the Uniform Act leaves open for local determination many of the most important issues
16 that a penal code must resolve—in particular the required mens rea,³⁶ the authorized
17 punishment,³⁷ and the kinds of sexual acts that it covers.³⁸ On these matters, the Uniform Act
18 provides scaffolding but does not resolve important policy judgments. Second, when the
19 Uniform Act does suggest operative language, its terms are in some instances (detailed below³⁹)
20 too sweeping to satisfy Model Penal Code requirements of specificity, subjective culpability, and
21 the appropriate calibration of punishment to the degree of fault. Accordingly, the Model Penal

³³ See Polaris, *supra* note 30, at 1-2.

³⁴ NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING (Feb. 25, 2014) (hereinafter cited as “UNIFORM ACT”).

³⁵ *Id.*, at 1.

³⁶ The Act’s “Legislative Note” states that the Uniform Act “does not define ‘knowingly’ or ‘knows,’ both of which are used in this act An enacting state may rely on an existing statutory definition in the general criminal code or a definition drawn from case law as the circumstances dictate. Alternatively, the state could insert a statutory definition An example of such a definition is: ‘Knowingly’ means having actual knowledge of or acting with deliberate ignorance *or reckless disregard* of an element, fact, or circumstance.” (emphasis added). UNIFORM ACT, *supra* note 34, at 7.

³⁷ The Act’s “Legislative Note” says: “A state should ensure that the offense classifications [class b through d] in this act are modified to correspond with the existing grading and punishment ranges of the state. The three classes of felonies in the act are not intended to restrict legislative discretion in the classification of offenses.” *Id.* at 9.

³⁸ Section 2(11) of the Act, in defining the “sexual activity” covered by the Act, says: “‘Sexual activity’ means [insert covered sexual activities]” *Id.* at 7.

³⁹ See Reporters’ Note 3, *infra*.

Code cannot simply endorse or incorporate by reference the text of the Uniform Act; it has an essential independent role to play. At the same time, the Uniform Act retains independent value because it deals with victim protection, victim support, civil remedies, and other matters outside the scope of a penal code.

To facilitate comparison between Section 213.9 and the Uniform Act, this Note sets out the Uniform Act's pertinent text, with italics (not in the original) flagging language and concepts not accepted in Section 213.9. The remainder of this Note explains the reason for those differences.

2. *The Uniform Act.*⁴⁰

Uniform Act on Prevention of and Remedies for Human Trafficking (2013)*

...

Section 2. Definitions. In this [act]:

(1) "Adult" means an individual 18 years of age or older.

(2) "Coercion" means:

(A) the use or threat of force against, abduction of, serious harm to, or physical restraint of, an individual;

(B) the use of a plan, pattern, or statement with intent to cause an individual to believe that failure to perform an act will result in the use of force against, abduction of, serious harm to, or physical restraint of, an individual;

(C) *the abuse or threatened abuse of law or legal process*;

(D) controlling or threatening to control an individual's access to a controlled substance as defined in [insert the appropriate state code sections defining controlled substances];

(E) the destruction or taking of or the threatened destruction or taking of an individual's identification document or other property;

(F) *the use of debt bondage*;

(G) *the use of an individual's physical or mental impairment* when the impairment has a substantial adverse effect on the individual's cognitive or volitional function; or

(H) *the commission of civil or criminal fraud*.

(3) "Commercial sexual activity" means sexual activity for which anything of value is given to, promised to, or received, by a person.

(4) "*Debt bondage*" means inducing an individual to provide:

(A) *commercial sexual activity in payment toward or satisfaction of a real or purported debt*; . . .

(5) "Human trafficking" means the commission of an offense created by Sections 3

⁴⁰ UNIFORM ACT, supra note 34.

* All brackets are in the original. All italics are added.

Section 213.9. Sex Trafficking

through 7.

(6) “Identification document” means a passport, driver’s license, immigration document, travel document, or other government-issued identification document, including a document issued by a foreign government. . . .

(8) “Minor” means an individual less than 18 years of age. . . .

(10) “Serious harm” means harm, whether physical or nonphysical, including psychological, economic, or reputational, to an individual which would compel a reasonable individual of the same background and in the same circumstances to perform or continue to perform . . . sexual activity to avoid incurring the harm.

(11) “Sexual activity” means [insert covered sexual activities]. *The term includes a sexually-explicit performance.* . . .

(13) “Victim” means an individual who is subjected to human trafficking

Section 3. Trafficking an Individual.

(a) A person commits the offense of trafficking an individual if the person knowingly recruits, transports, transfers, harbors, *receives*, provides, *obtains*, isolates, maintains, or entices an individual in furtherance of . . . sexual servitude in violation of Section 5.

(b) Trafficking an individual who is an adult is a [*class c felony*].

(c) Trafficking an individual who is a minor is a [*class b felony*].

Section 5. Sexual Servitude.

(a) A person commits the offense of sexual servitude if the person knowingly:

(1) maintains or makes available a minor for the purpose of engaging the minor in commercial sexual activity; or

(2) uses coercion *or deception* to compel an adult to engage in commercial sexual activity.

(b) It is not a defense in a prosecution under subsection (a)(1) that the minor consented to engage in commercial sexual activity *or that the defendant believed the minor was an adult*.

(c) Sexual servitude under subsection (a)(1) is a [*class b felony*].

(d) Sexual servitude under subsection (a)(2) is a [*class c felony*].

Section 6. Patronizing a Victim of Sexual Servitude.

(a) *A person commits the offense of patronizing a victim of sexual servitude if the person knowingly gives, agrees to give, or offers to give anything of value so that an individual may engage in commercial sexual activity with another individual and the person knows that the other individual is a victim of sexual servitude.*

(b) *Patronizing a victim of sexual servitude who is an adult is a [*class d felony*].*

(c) *Patronizing a victim of sexual servitude who is a minor is a [*class c felony*].*

Section 7. Patronizing a Minor for Commercial Sexual Activity.

(a) *A person commits the offense of patronizing a minor for commercial sexual activity if:*

(1) *with the intent that an individual engage in commercial sexual activity with a minor, the person gives, agrees to give, or offers to give anything of value to a minor or another person so that the individual may engage in commercial sexual activity with a minor; or*

(2) *the person gives, agrees to give, or offers to give anything of value to a minor or another person so that an individual may engage in commercial sexual activity with a minor.*

(b) *Patronizing a minor for commercial sexual activity under subsection (a)(1) is a [class b felony].*

(c) *Patronizing a minor for commercial sexual activity under subsection (a)(2) is a [class c felony].*

3. The Scope and Boundaries of Section 213.9.

Section 213.9 largely follows the Uniform Act and comparable federal legislation in defining the criminal liability of those who engage in trafficking activity in order to facilitate commercial acts of sexual penetration, oral sex, and sexual contact.⁴¹ But in several important respects, Section 213.9 sets a higher bar for criminal liability than the Uniform Act, by omitting or recasting theories of liability that the italicized language of the Uniform Act permits. In addition, the punishment provisions of Section 213.9 depart from these models: the Uniform Act takes no position on punishment, and the federal sentencing scheme is exceptionally harsh, imposing a 15-year mandatory minimum prison sentence, with a maximum of life, even for a first offense involving a single episode with a single victim. In these respects, Section 213.9 takes a different approach.

a. Coercion by “abuse of law or legal process.” The Uniform Act does not define “abuse of law or legal process.” The concept is subject to widely varying interpretations and is too elastic to serve as a premise for criminal liability, even when limited by the requirement in Section 5 of the Uniform Act that this and other forms of prohibited coercion must “compel an adult to engage in commercial sexual activity.”⁴² This language could, for example, treat as a sex-trafficking offense a case in which a landlord announces an intention to evict a tenant for nonpayment of rent, unless the tenant submits to sexual activity. It could also extend to any case in which an actor announces the intent to sue on an allegedly legitimate claim, unless sexual

⁴¹ The Uniform Act includes a section imposing criminal liability on business entities involved in human trafficking. See UNIFORM ACT, *supra* note 34, § 8. Section 213.9 omits the subject of enterprise liability, which is covered in other provisions of the 1962 Code; in an MPC jurisdiction, those provisions would apply to corporations and other entities implicated in a violation of revised Article 213. See 1962 Code Section 2.07. The Uniform Act deals with a number of other matters, also not addressed in Section 213.9 because they lie outside the scope of the Model Code, such as services for victims and civil remedies. See UNIFORM ACT, *supra* note 34, §§ 18-23.

⁴² UNIFORM ACT, *supra* note 34, § 5(a)(2) (emphasis added). Under the Uniform Act, “abuse of law or legal process” constitutes coercion *per se*, without regard to its impact on a reasonable person. § 2(2)(C). A limitation might be implicit in the § 5(a)(2) condition that “coercion” must “*compel* an adult to engage in commercial sexual activity.” But the Uniform Act does not clarify the apparent tension between § 2(2)(C) and § 5(a)(2).

compliance is forthcoming.⁴³ A sexual quid pro quo under these circumstances may or may not qualify as prostitution, or as an extortionate act under Section 213.4, but it does not inherently reflect the kind of serious duress that a law against sex trafficking should target. To the extent that abuse of process plays a role in coercive activity justifiably subject to trafficking penalties, this activity is readily encompassed within the Section 213.9(2)(a) definition of coercion, which extends to “any scheme, plan, deception, misrepresentation, or pattern of behavior . . . [that] would result in physical, psychological, financial, or reputational harm that is sufficiently serious to cause a person of ordinary resolution . . . to submit....”⁴⁴

b. Coercion by “debt bondage.” The Uniform Act defines “debt bondage” as “inducing an individual to provide . . . commercial sexual activity in payment toward or satisfaction of a real or purported debt.” So defined, the term is far too broad, extending to a case in which a person obtains consent to commercial sex by offering to forgive any disputed debt claimed in good faith, or even to forgive an undisputed debt. The federal statute does not include this basis for finding prohibited coercion.⁴⁵ Whether sexual compliance in these circumstances qualifies as the offense of prostitution, it does not in itself represent an appropriately severe level of duress.⁴⁶ To the extent that purported debt is used to obtain unacceptably coercive leverage to engage in commercial sex activity, the tactic will (like “abuse of law”) meet the definition of coercion in Section 213.9(2)(a)(v).⁴⁷

⁴³ The federal statute narrows the abuse-of-process concept to some extent, defining it as “the use or threatened use of a law or legal process . . . for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.” 18 U.S.C. § 1591(e)(1). Yet even as narrowed, the concept remains ambiguous or overbroad as applied to situations like those given in text. In contrast, an act of this nature qualifies as impermissible extortion under Section 213.4 of the revised Code only if a person of ordinary resolution would have been unable to resist it. See Section 213.4(1)(a)(iii).

⁴⁴ Section 213.9(2)(a)(v).

⁴⁵ The federal “peonage” statute prohibiting debt bondage has been interpreted to apply only in cases of *involuntary* servitude. See 18 U.S.C. § 1581(2018), punishing any person who “holds or returns any person to a condition of peonage.” The term “peonage” is understood to mean *compelling* someone to render personal services in order to discharge a debt, and the statutory word “holds” is crucial. See *United States v. Mussry*, 726 F.2d 1448 (9th Cir. 1984) (stating that “hold[ing]” in involuntary servitude requires exercise of control by one individual over another, so that latter is coerced into providing labor services; in determining voluntariness, court considers effect of challenged conduct on reasonable person of same general background as victims; aliens brought to United States illegally to work for far below minimum wage, who were compelled to surrender passports and airplane tickets, were “held” for purposes of § 1581); *Pierce v United States* 146 F.2d 84 (5th Cir. 1944) (stating that employee working to repay debt must be held “against his will”).

⁴⁶ The Comment to this section of the Uniform Act cites at least 28 states and one federal territory as prohibiting some form of “debt bondage” as part of their trafficking statutes, but it does not discuss possible differences in definitions of the term or their application to instances such as those mentioned in text. See UNIFORM ACT, *supra* note 34, Comment at 8.

⁴⁷ See, e.g., *United States v. Mack*, 808 F.3d 1074 (6th Cir. 2015). Defendant provided heroin and cocaine to sexual partners under the impression it was “free,” then informed them they had run up

1 *c. Coercion as including “use of an individual’s physical or mental impairment.”* The
 2 Uniform Act does not define what actions qualify as “use” of an individual’s physical or mental
 3 impairment. The term is potentially far-reaching, and, for the reasons mentioned above, it is not
 4 adequately limited by the requirement that the “use” be what “compel[s] an adult to engage
 5”⁴⁸ No similar language appears in the federal trafficking statute, and the Comment to the
 6 Uniform Act cites no comparable state legislation, stating only that this “is a form of coercion
 7 recently identified as a method used by human traffickers.”⁴⁹ To the extent that the victims’
 8 mental or physical condition plays a role in the coercive methods used, activity justifiably
 9 subject to trafficking penalties can be reached by emphasizing that the impact of the coercive
 10 tactics must always be assessed from the perspective of a similarly situated person. Section
 11 213.9(2)(a)(v) achieves this result in adequate but limiting language by proscribing threats to
 12 inflict “physical, psychological, financial, or reputational harm that is sufficiently serious to
 13 cause a person of ordinary resolution who is of the same background, in the same circumstances,
 14 and in the same physical and mental condition as that person to submit to or perform” the
 15 relevant sexual act.⁵⁰

16 *d. Coercion as including “civil or criminal fraud.”* A well-documented technique sex
 17 traffickers exploit is to give their potential victim a deceptive promise, for example, an offer of
 18 nonsexual employment in a distant city, and then, when the victim is far from home, reveal that
 19 the job requires commercial sexual activity that the victim must perform to repay costs allegedly
 20 incurred for the victim’s travel and housing. The reasons for seeking to deter and punish this
 21 form of exploitation are clear. But the federal Trafficking Victims Protection Act, as well as the
 22 Uniform Act and the Palermo Protocol (an important international convention ratified by the
 23 United States⁵¹), all treat the expansive term “fraud” as sufficient coercion in itself, even without

substantial debt and needed to repay him by having sex with paying customers. Defendant continued to supply drugs, conditional on provision of sexual services, with occasional gaps producing physiological withdrawal. The court held implied threats to cut off drug addicts from supply constituted a coercive threat sufficient to constitute “serious harm” for purposes of § 1591. *Id.* at 1082. Similarly, in *United States v. Dann*, 652 F.3d 1160 (9th Cir. 2011), defendants told an undocumented immigrant working as their nanny that she owed them \$15,000 and had only worked off half that amount; they also threatened to publicly accuse her of theft if she quit and threatened to have her sent back to Peru. The court found sufficient evidence of “serious harm” under all the circumstances.

⁴⁸ See note 42 and accompanying text, *supra*.

⁴⁹ See UNIFORM ACT, *supra* note 34, Comment at 8.

⁵⁰ Cf. *Headley v. Church of Scientology*, 687 F.3d 1173 (9th Cir. 2012). In a civil suit brought under a related statute, 18 U.S.C. § 1595 (2012 & Supp. III 2015), plaintiff alleged that California religious institution forced her to work unusually long hours, under threat of excommunication. The Ninth Circuit held that such threats do not meet statutory requirement of “serious harm,” noting need to “distinguish between improper threats or coercion and permissible warnings of adverse but legitimate consequences.” *Id.* at 1180.

⁵¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, U.N.T.S., vol. 2237, p. 319, Doc. A/55/383, U.S. ratification, Nov. 3, 2005, see

proof that a physical, financial, or psychological constraint gave the fraudster control over the deceived victim's liberty. As discussed in connection with misrepresentation as a possible basis for charging Sexual Assault, false and misleading statements cover a dauntingly wide spectrum of behavior, much of which cannot plausibly warrant conviction of a grave sexual offense.⁵² Section 213.9 permits conviction for fraudulent acts only when they override the victim's capacity for independent judgment or tie the victim into a deceptive arrangement (for example, beating or isolating the victim, or taking or destroying necessary identification documents). Acts that disappoint the victim's expectations of benefits, without impeding the victim's ability to refuse compliance with the demand to engage in the commercial sex acts, do not justify punishment for the serious felony of Sex Trafficking under Section 213.9. The Reporters' Notes discussing the offense of Sexual Assault by Exploitation provide many examples of this sort in scenarios that are by no means rare.⁵³ One additional example illustrates the potential overbreadth of the federal Trafficking Victims Protection Act, the Uniform Act, and the Palermo Protocol:

Illustration:

13. Accused offers to drive Complainant to Hollywood, saying that Complainant has great promise in an acting career. When they arrive, Accused claims connections to the production of pornographic movies and suggests that Complainant audition by engaging in several sex acts with a third party who will pay Accused \$500, a fee that Accused promises to split 50/50 with Complainant. After Complainant performs the sex acts in response to those inducements, Complainant discovers that Accused has lied and has no involvement in producing pornographic films.

Under the federal Trafficking Victims Protection Act (the Uniform Act and the Palermo Convention support a virtually identical analysis), the encounter qualifies as a "commercial sex act" because Accused received something of value (the \$500 payment), and Accused has, in the language of the statute, "transport[ed] a person . . . knowing that fraud . . . will be used to cause the person to engage in a commercial sex act."⁵⁴ Yet this

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en.

Art. 3(a) of the Protocol defines trafficking as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation . . .," and art. 5.1 provides that "[e]ach State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally."

⁵² See Reporters' Note to Section 213.5, *supra*.

⁵³ *Id.*

⁵⁴ 18 U.S.C. § 1591(a).

behavior, though deceitful, has rarely if ever been considered an appropriate basis for conviction on sex-offense charges, much less the severe felony sentences authorized for Sex Trafficking.

This example and others easily imagined make clear that as written, the language of the Trafficking Victims Protection Act and like statutes are too expansive. Section 213.9, in contrast, would not permit conviction for Sex Trafficking on these facts. Section 213.9(2)(a)(v) addresses the underlying concern more precisely and effectively, and without objectionable overbreadth, by treating as impermissible any “misrepresentation, deception or other pattern of behavior . . . sufficiently serious to cause a person of ordinary resolution . . . to submit to or perform a commercial sex act”⁵⁵ The “pattern of behavior” clause of this Section likewise addresses the central concern of the Palermo Protocol provisions on fraud, yet is sufficient to meet the obligations of the United States under that protocol.⁵⁶

e. “Sexual activity” as including “sexually explicit performance.” The Uniform Act does not define the sexual acts included within the scope of prohibited sex trafficking, except to stipulate that “sexually explicit performance” is covered. In contrast, revised Article 213 of the Model Code applies only to acts defined as sexual penetration, oral sex, and sexual contact. Sexually explicit performance by a single individual, whether in live venues or via the increasingly prevalent medium of webcams and other internet media, falls within those terms when it involves masturbation, object penetration, or sexual self-contact caused by another person.⁵⁷ Conduct other than sexual penetration, oral sex, and sexual contact, whether or not coerced, is addressed in Article 251 of the 1962 Code (“Public Indecency”), and is outside the scope of Article 213. Whether—in the absence of sexual penetration, oral sex, or sexual contact—the act of coercing sexual performance (commercial or otherwise) merits the severe sanctions attached to sex trafficking is an issue not reached under Article 213.

f. Trafficking liability of a person who “receives [or] obtains” sexual services. Section 3(a) of the Uniform Act provides that a person commits the offense of sex trafficking not only when the person knowingly recruits, transports, harbors, or isolates a minor or a coerced individual, but also when the person “receives [or] obtains” sexual services from the minor or coerced individual. That language could be interpreted to support a trafficking conviction of a

⁵⁵ Section 213.9(3)(a)(v). Under the Uniform Act, in contrast, “abuse of law or legal process” constitutes coercion per se, without regard to its impact on a reasonable person. See note 41, *supra*.

⁵⁶ To the extent that Palermo Protocol obligations with regard to criminalization might raise questions of unconstitutional vagueness, the Constitution obviously takes precedence. In addition, the United States, when ratifying the Protocol, “reserve[d] the right to assume obligations under this Protocol in a manner consistent with its fundamental principles of federalism, pursuant to which both federal and state criminal laws must be considered in relation to conduct addressed in the Protocol.” See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en.

⁵⁷ See Section 213.0(2)(a) & (c).

1 person who simply purchased sexual services from an individual who was underage or coerced
2 by others. And Sections 6 and 7 of the Uniform Act apply explicitly to a person who patronizes a
3 victim of trafficking.

4 The federal statute has a similarly broad reach. In *United States v. Jungers*⁵⁸ a federal
5 court construed the verb “obtains” in the federal Trafficking Victims Protection Act to include
6 the conduct of a purchaser and thus upheld a trafficking conviction based on the act of
7 patronizing a trafficking victim. Soon after, in 2014, Congress codified the *Jungers* decision by
8 adding the terms “advertises,” “patronizes,” and “solicits” to the Act’s list of trafficking
9 activities.⁵⁹ As a result, given the required proof beyond a reasonable doubt that a defendant
10 acted “in reckless disregard of the fact” that coercion or an underage victim was involved, the
11 statute authorizes the same punishment (imprisonment for a minimum of 15 years, with a
12 maximum of life) for both the person who recruits, harbors, transports, or isolates the victim and
13 the person whose participation is limited to engaging in a single commercial sex act with that
14 victim. Absent greater involvement, punishment in that range for a single act of patronizing a
15 trafficking victim is far out of line with the gravity of the offense, serious though it is. And even
16 under a more moderate sentencing regime, principles of proportionality and just punishment
17 preclude treating the purchaser and the person who (for example) isolated and coerced the victim
18 as having committed the same offense.

19 Accordingly, “receiving” and “obtaining” commercial sex from a trafficking victim are
20 not included among the activities defined as trafficking in Section 213.9(1). Of course, when
21 “receiving” or “obtaining” occur together with such acts as recruiting, harboring, transporting, or
22 isolating, the conduct taken as a whole meets the definition of trafficking activity under Section
23 213.9(1). But “receiving” and “obtaining” cannot by themselves support a conviction for the
24 offense of Sex Trafficking under Section 213.9(1). Whether “receiving” or “obtaining” (i.e.,
25 patronizing) a sex-trafficking victim should be a separate offense is a distinct question, addressed
26 in Comment 3.h below.

27 *g. Using “deception” to compel an adult to engage in commercial sex acts.* Section
28 5(a)(2) of the Uniform Act would create an offense of “Sexual Servitude,” defined to include
29 “us[ing] coercion *or deception* to compel an adult to engage in commercial sexual activity.”⁶⁰

⁵⁸ 702 F.3d 1066 (8th Cir. 2013). Some of the court’s analysis suggests that actions would not meet the “obtains” requirement unless the defendant had or attempted to have “exclusive possession, custody, and control” of the victim, at least for a limited time, and that the statute as it then stood might not reach a defendant who purchased a commercial sex act in other circumstances (in a public setting, for example). *Id.*, at 1076. Such a gloss on the “obtains” requirement became moot, however, after Congress added “patronizes” as an independent form of trafficking activity.

⁵⁹ See 18 U.S.C. § 1591(a) (providing that a person engages in trafficking activity whenever that person “knowingly . . . recruits, entices, harbors, transports, provides, obtains, *advertises*, maintains, *patronizes*, or *solicits* by any means . . . shall be punished . . .” (emphasis added)).

⁶⁰ UNIFORM ACT, *supra* note 34, § 5(a)(2) (emphasis added).

Like the terms, “civil or criminal fraud,” which it largely duplicates, the term “deception” addresses a readily understandable concern. But as stated, the term compounds the overbreadth that results from including fraud as in itself a defined form of coercion. For the reasons discussed in connection with the “civil or criminal fraud” language,⁶¹ the concept of deception, even when qualified by the requirement that the deception “compel” the other party, is unacceptably broad in the context of the sexual offenses. The narrower concept of coercion defined in Section 213.9(2)(a)(v) adequately addresses both the need to cover some deceptions and the need to avoid overbreadth in doing so.

h. Patronizing a coerced or underage person. As discussed in Comment 3.f. above, the federal Trafficking Victims Protection Act applies in equal terms to suppliers of sexual services and their customers—in other words, to the actor who engages in recruiting, transporting, harboring or isolating a coerced or underage person, and to the individual who patronizes a coerced or underage person.⁶² Both the supplier and the customer are subject to the same statutory penalty—a mandatory minimum term of 15 years, with a maximum of life imprisonment. In contrast, the Uniform Act addresses suppliers and customers in separate sections, with distinct penalty provisions. Under both the Uniform Act and the federal statute, however, patronizing in itself is sufficient predicate conduct, and the only additional element of the offense is the requisite awareness that a coerced or underage victim is involved. Because the considerations relevant to criminal punishment of the customer depend in part on whether the victim was coerced or underage, and whether or not the victim has been the target of conventional trafficking activity, these situations are discussed separately.

h(i). Patronizing a coerced victim who has not been subjected to conventional trafficking. In the case of coerced victims, the “patronizing” provisions of the Uniform Act and the federal Trafficking Victims Protection Act extend the Sex Trafficking offense beyond the realm of trafficking activity as traditionally understood, because the crime can be committed even when neither the defendant nor anyone else recruited, transported, harbored, or isolated the victim. In addition to proof of patronizing, the federal Act, for example, requires only “reckless disregard of the fact” that an adult victim was subjected to force, fraud, or coercion; the Uniform Act requires knowledge that the adult victim was subjected to coercion or deception.

In many situations of this kind, criminal liability will not be objectionable in principle; Sections 213.2, 213.4, 213.5, and 213.7, for example, impose felony sanctions on an actor who knowingly or recklessly causes another party to submit to or perform a sexual act by using or threatening force or nonviolent harm, or by using certain forms of deception. A customer who aids in the commission of such an offense by purposely engaging in the requisite sexual act with awareness of those circumstances will face accomplice liability for the violation of one of *those*

⁶¹ See Reporters’ Note 3(d), *supra*.

⁶² See text at note 58, *supra*.

Sections, by the operation of Section 2.06 of the Code.⁶³ But bringing the customer who acts with awareness of those circumstances within the scope of a *trafficking offense*, even though conventional trafficking activity is absent, presents two problems. First, the highly stigmatizing label of “sex trafficking” is misapplied when conventional forms of trafficking are not involved and the gist of the offense is different—not ordinary trafficking but the use of force, nonviolent threats, or deception against the victim. Second, the kinds of coercion and deception sufficient to trigger liability for trafficking are much broader than the kinds of nonviolent threats and deception required for liability under provisions like Sections 213.4, 213.5, and 213.7 of Article 213. That additional reach makes sense in the context of conventional trafficking, but when the constraining effects of recruiting, transporting, harboring, or isolating an individual are absent, liability beyond the boundaries of Sections 213.4, 213.5, and 213.7 cannot be justified. Section 213.9 therefore does not accept “patronizing” as an act sufficient *by itself* to fall within the scope of the Sex Trafficking offense.

h(ii). Patronizing an underage victim who has not been subjected to conventional trafficking. In the case of an underage victim, the “patronizing” provisions of the Uniform Act and the federal Trafficking Victims Protection Act likewise extend the Sex Trafficking offense beyond the realm of trafficking activity as traditionally understood, because the crime can be committed even when neither the defendant nor anyone else recruited, transported, harbored, or isolated the victim. The only offense element, in addition to the act of patronizing, is the required mens rea (if any) with respect to the victim’s age. On that issue, the federal Act requires something less than recklessness,⁶⁴ and the Uniform Act makes the purchase of commercial sex with a minor a strict-liability offense.⁶⁵ The result under both statutes is to attach the stigma of

⁶³ The 1962 Code does not fully specify the mens rea of accomplice liability. The Commentary explains: “There is deliberate ambiguity as to whether the purpose requirement extends to circumstance elements of the contemplated offense or whether, as in the case of attempts, the policy of the substantive offense on this point should control. The ... [actor’s required] attitude towards the circumstances [is] left to the courts.” MODEL PENAL CODE AND COMMENTARIES, Comment to 2.06 at 311 n.37 (AM. L. INST. 1985). In *Rosemond v. United States*, 134 S. Ct. 1240 (2014), the Supreme Court held (without specifying whether the offense element in dispute was a conduct element or an attendant circumstance) that accomplice liability for a violation of 18 U.S.C. § 924(c) (use of a firearm “during and in relation to any crime of violence of drug trafficking crime”) requires a mens rea of knowledge, not purpose. (“What matters ... is that the defendant has chosen, with full knowledge, to participate in the illegal scheme—not that, if all had been left to him, he would have planned the identical crime.”). Compare *United States v. Gardner*, 488 F.3d 700, 714 (6th Cir. 2007), holding that for liability as an accomplice in providing a gun to a convicted felon, the prosecution need show only negligence with respect to the “convicted felon” element. Across a variety of other offenses, no clear pattern emerges; state courts and other federal courts have held that the attendant-circumstance mens rea required for accomplice liability can vary from knowledge to negligence to strict liability. See SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES 717-719 (10th ed. 2017).

⁶⁴ See Comment 3.j. and note 96, *infra*.

⁶⁵ UNIFORM ACT, *supra* note 34, § 7(a)(2) and Comment at 12 (“subsection (a)(2) ... is a strict liability offense”).

Section 213.9. Sex Trafficking

1 “sex trafficking” to any purchaser of sexual services, and to substantially enhance the authorized
2 punishment, whenever the other party is underage, regardless of whether other aggravating
3 circumstances are present.

4 A stringent response to underage commercial sex is not controversial when the customer
5 is guilty of statutory rape. But because both the Uniform Act and the federal Trafficking Victims
6 Protection Act define a “minor” as any person younger than 18, both statutes impose felony
7 sanctions on acts that most jurisdictions do not consider illegal outside the commercial context.⁶⁶

8 Whatever the appropriate policy with respect to criminalization of sex work generally,⁶⁷
9 there is ample justification for defining the purchase of sex from a 16- or 17-year-old as an
10 offense that is more serious than adult prostitution.⁶⁸ Many states do just that, by classifying
11 commercial sex with an adult as a misdemeanor—such as “patronizing a prostitute”—but

⁶⁶ See Reporters’ Notes to Section 213.8 (noting that outside the commercial context, only a minority of states set the age of consent higher than 16, and that even when one participant is under 16, many states do not criminalize noncommercial sex acts when the other person is close in age).

⁶⁷ That policy issue is intensely debated. For representative discussion for and against decriminalization, see JESSICA SPECTOR, ED., PROSTITUTION AND PORNOGRAPHY: PHILOSOPHICAL DEBATE ABOUT THE SEX INDUSTRY (2006). In current law, sex work is prohibited in all states except Nevada, where rural counties have the option to permit commercial sex in “a licensed house of prostitution.” NEV. REV. STAT. ANN. § 201.354(1) (2019) (providing that “[i]t is unlawful for any person to engage in prostitution or solicitation therefor, except in a licensed house of prostitution.”). Licenses are granted by county licensing boards, *id.*, § 244.34 (specifying standards and procedures for license approval), but counties with population more than 700,000 may not do so, *id.*, § 244.34(8) (providing that “[i]n a county whose population is 700,000 or more, the license board shall not grant any license ... for the purpose of operating a house of ... prostitution.”). On one recent count, 10 Nevada counties had issued licenses to operate a house of prostitution. See <https://thenevadaindependent.com/article/the-indy-explains-how-legal-prostitution-works-in-nevada>.

Concern persists that even where licensed and regulated, as in Nevada, brothels can become sites for coercive sex trafficking and other abuses. See, e.g., Brian Joseph, “Lawsuit seeks to close Nevada brothels,” LAS VEGAS REVIEW-JOURNAL, Feb. 25, 2019, <https://www.reviewjournal.com/local/local-nevada/lawsuit-seeks-to-close-nevada-brothels-1605343> (describing federal lawsuit alleging coercion of Nevada sex workers and claiming that the brothels illegally impact interstate and foreign commerce). Compare Ray Hagar, “Nevada brothel workers speak out against bill that would outlaw legal prostitution,” RENO GAZETTE JOURNAL, Mar. 13, 2019 (describing sex workers who deny exploitation and claim: “All of us who worked at the ranches are doing it by choice and it is what we want to do doing. . . . We should be able to make that choice by ourselves.” <https://www.rgj.com/story/news/politics/2019/03/13/nevada-brothel-workers-slam-bill-outlaw-legal-prostitution/3140764002/>).

⁶⁸ Even in the Nevada counties that legalize sex work, participants must be adults; soliciting or providing a person under 18 for commercial sex is a criminal offense. NEV. REV. STAT. ANN. § 201.300(2)(a)(1) (prohibiting providing “child” for prostitution); *id.*, § 201.295 (defining “child” to mean person less than 18 years of age).

grading the offense as a felony when it involves a person between 16 and 18.⁶⁹ This approach, however, does not codify the crime with the “trafficking” offenses, and states typically avoid that label. In 2017, for example, Connecticut repealed a statute that had treated commercial sex with minors as a form of sex trafficking, and replaced it with a stand-alone provision punishing “commercial sexual abuse of a minor.”⁷⁰ To be sure, patronizing often occurs in a trafficking context, but the “trafficking” label and its associated punishment are out of place when it does not—that is, when neither the defendant nor anyone else has used conventional means of trafficking as a way to involve the youthful victim.

Illustration:

14. In a public park, Complainant, a homeless 17-year-old runaway, approaches Accused, who is 23, and offers to walk with Accused to a secluded spot where Complainant will perform oral sex in exchange for \$50. Accused agrees. A policeman observes the act and arrests both Accused and Complainant. Complainant has been living independently, and there is no evidence that anyone recruited, transported, harbored, or isolated Complainant. In most states and under the 1962 Code, Complainant could be convicted of prostitution,⁷¹ and Accused could be convicted of patronizing a prostitute.⁷² But in addition, under the federal Trafficking Victims Protection Act, Accused could be convicted of Sex Trafficking if found to have the necessary awareness of Complainant’s age. In contrast, Section 213.9 would not impose trafficking liability under these circumstances, absent facts establishing that the Complainant had been subjected to trafficking activity of the conventional sort (for example, recruiting, enticing, transporting, or harboring Complainant).

Article 213, in accord with prevalent state approaches,⁷³ considers a sex-trafficking

⁶⁹ E.g., WASH. REV. CODE § 9.68A.100(1) (2019).

⁷⁰ See H.B. 7309, 2017 Gen. Assemb., Jan. Sess. (Ct. 2017), repealing CONN. GEN. STAT. § 53a-83c. Section 83c had been enacted in 2013 as part of legislation aimed at combating human trafficking. See Connecticut State Library, Connecticut General Assembly - House Proceedings 2013, Vol. 56, Part 22, 007580 (2013), http://ctstatelibrary.org/wp-content/lh-bills/2013_PA166_HB5666.pdf (remarks of Rep. Fox, stating that bill targets “the dangers of human trafficking.”); id. at 007585 (remarks of Rep. Burger, stating that bill punishes “the Johns that patronize children that are the victims of human trafficking...”). The replacement provision enacted in 2017 separates this prohibition from the trafficking offenses; it makes the purchase of sexual services from a minor a class B felony when the minor is aged 15-18, and a class A felony when the minor is under the age of 15. CONN. GEN. STAT. § 53a-83b (2018).

⁷¹ See 1962 Code Section 251.2(1). Whether Article 251 of the 1962 Code correctly exposes a minor to conviction under these circumstances is of course debatable, but that issue is beyond the scope of Article 213.

⁷² See 1962 Code Section 251.2(5).

⁷³ See text at notes 90-92, *infra*.

conviction inappropriate in circumstances like those presented in Illustration 14. When an actor purchases sexual services from a minor and does not know that anyone has engaged in conventional trafficking activity involving that minor, Section 213.9 does not apply to the actor's conduct; judgments about criminalization, grading, and labeling in that situation lie outside the scope of the Sex Trafficking offense. The appropriate penal response to commercial sex, in the absence of the narrower range of activity defined as trafficking in Section 213.9(1), is addressed in Section 251.2 of the 1962 Code (Prostitution and Related Offenses) or, in the case of persons younger than 16, in Section 213.8 (Sexual Offenses Involving Minors).⁷⁴ Section 213.9 of the revised Code is limited to the problem of trafficking in its more widely understood forms—recruiting, enticing, transporting, transferring, harboring, providing, isolating, or maintaining a person who is coerced or underage.

When commercial sex involves a minor who *has* been trafficked in the conventional sense, the subject matter falls within the scope of Section 213.9. Accordingly, an actor who purchases sexual services with appropriate awareness of those circumstances is a plausible candidate for a trafficking-related conviction. The next subparagraph of this Comment addresses that question, together with the related question whether to punish the purchaser for the offense of Sex Trafficking when the trafficked participant is not a minor but a coerced adult.

h(iii). Patronizing an underage or coerced victim who has been subjected to conventional trafficking. When a person who purchases sexual services knows or is aware of, yet recklessly disregards, the risk that the other party is a trafficking victim, conviction for a trafficking-related offense is not anomalous in principle. Nonetheless, state statutes and policy discussion reflect considerable disagreement about whether anti-trafficking statutes are wisely used against customers in these circumstances.

The argument in favor of criminalizing the act of a person who patronizes a trafficking victim is straightforward. Trafficking flourishes only in response to the demand for commercial sex, and sanctions targeting the customer can suppress a traffickers' incentives to supply victims of trafficking on order to meet this demand. Indeed, demand-side strategies focused on easy-to-deter customers can be more effective and efficient than supply-side efforts to punish hard-to-deter suppliers who reap millions of dollars in profit from their crimes.⁷⁵ Moreover, because

⁷⁴ MPC Section 251.2(5) classifies the offense of "Patronizing Prostitutes" as a violation, and Section 1.04(5) provides that "[a] violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense." The revised sentencing provisions of the Code "do not speak to penalties for violations. The current revision project does not affect original § 1.04(5)." MODEL PENAL CODE: SENTENCING, *supra* note 10, Section 6.01, Comment *e*, at 37. Thus, Section 1.04(5) of the 1962 Code remains in effect. But because Section 213.9 addresses only the problem of trafficking, it neither faces nor resolves questions concerning the 1962 Code's criminalization and grading for the conduct of the customer in a non-trafficking context.

⁷⁵ See Stephen J. Schulhofer, *Solving the Drug Enforcement Dilemma: Lessons from Economics*, 1994 U. CHI. LEGAL FORUM 207 (1994).

existing penalties for “patronizing a prostitute” are low,⁷⁶ they fail to reflect the culpability of a customer who knowingly or recklessly patronizes a trafficked victim.⁷⁷ Some also argue that misdemeanor penalties afford insufficient deterrence in light of the magnitude of the harm,⁷⁸ given that a substantial proportion of sex workers are trafficking victims and that customers typically know this.⁷⁹ Some studies suggest that customers, even when not specifically seeking trafficking victims, may not care whether the other party to the sexual encounter has been trafficked and may not be deterred by misdemeanor sanctions.⁸⁰ In contrast, states that treat patronizing a sex-trafficking victim as an offense distinct from “patronizing a prostitute” generally classify the offense as a felony carrying heavy sanctions.⁸¹

Nonetheless, several factors complicate the case for deploying trafficking sanctions against customers as such. First, it is often impractical to establish that a customer was aware of

⁷⁶ Offenses like “Patronizing a Prostitute” are generally punished as a misdemeanor. See, e.g., N.Y. PENAL LAW § 230.04 (LexisNexis 2019) (class A misdemeanor); CAL. PENAL CODE § 647 (Deering 2019) (disorderly conduct, which includes patronizing a prostitute, is misdemeanor).

⁷⁷ See Heather C. Gregorio, Note, *More Than “Johns,” Less Than Traffickers: In Search of Just and Proportional Sanctions for Buyers of Sex with Trafficking Victims*, 90 N.Y.U. L. REV. 626, 649 (2015).

⁷⁸ See Samantha Healy Vardaman & Christine Raino, *Prosecuting Demand as a Crime of Human Trafficking: The Eighth Circuit Decision in United States v. Jungers*, 43 U. MEM. L. REV. 917, 952-953 (suggesting that stiff sentences are needed for “maximum deterrence”). Moreover, educational and treatment programs for individuals arrested merely for soliciting illegal commercial sex (“john schools”) are often used in lieu of criminal penalties, further weakening any potential deterrent effect. See Michael Shively, et al., A National Overview of Prostitution and Sex Trafficking Demand Reduction Efforts, National Criminal Justice Reference Service, 61-64 (Apr. 30, 2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/238796.pdf> (noting that about 58 U.S. cities and counties have john schools and about two-thirds of them are structured as diversion programs that dismiss charges upon successful completion).

⁷⁹ Rachel Durchslag & Samir Goswami, *Deconstructing the Demand for Prostitution: Preliminary Insights From Interviews With Chicago Men Who Purchase Sex*, Chicago Alliance Against Sexual Exploitation 20-22 (May 2008), <https://humantraffickinghotline.org/sites/default/files/Deconstructing-the-Demand-for-Prostitution%20-%20CAASE.pdf> (findings of Chicago survey reporting, albeit on basis of small, imperfect survey, that 20% of johns admitted having bought sex from women who were trafficked from other countries, and 32% believed that majority of women in sex work entered sex trade before age of 18); Gregorio, *supra* note 75, at 637 (citing study to effect that 28% of johns are not deterred from purchasing sex even when they learn that the person is likely under 18); Mary Graw Leary, *Dear John, You Are a Human Trafficker*, 68 S.C. L. REV. 415, 435 (2017) (42% of callers responding to false advertisement for prostitution were willing to proceed with transaction even after being warned that victim was a minor).

⁸⁰ See *id.*, at 435-436.

⁸¹ E.g., 18 PA. CONS. STAT. § 3013 (2018) (second-degree felony); TEX. PENAL CODE ANN. § 20A.02 (West 2017) (second-degree felony).

1 the risk that trafficking activity is involved. Fear of their traffickers motivates victims to act as if
2 they are participating voluntarily, and researchers find that most customers want to believe that
3 this is so.⁸² To determine that a customer had sufficient awareness of the trafficking
4 circumstances therefore can be difficult and resource-intensive.⁸³ Proving this to a jury is an
5 additional challenge, since juries are typically skeptical of suppliers of sexual services who claim
6 they were trafficked or coerced.⁸⁴

7 By comparison, prosecution for the simple offense of patronizing a prostitute is
8 straightforward, and even mild sanctions can have considerable impact. Although some
9 advocates doubt the deterrent effect of prosecuting customers for the misdemeanor offense of
10 patronizing a prostitute,⁸⁵ the bulk of the evidence indicates that the deterrence benefit of these
11 prosecutions is substantial.⁸⁶ It is therefore usually more productive to focus prosecutorial
12 resources on enforcement based simply on the purchase of sexual services, without the added
13 complications entailed in a trafficking case.⁸⁷

14 A second major difficulty with treating mere customers as traffickers is that trafficking
15 convictions are a blunt instrument. Those who engage in conventional trafficking activity
16 typically spend considerable time with their victims, while the buyer's encounter with a victim is
17 usually brief.⁸⁸ Thus, offense labels associated with "sex trafficking" have highly misleading
18 connotations when applied to the conduct of a one-time customer, whatever may be the
19 customer's awareness of circumstances in the background. Absent proof of the customer's
20 involvement in trafficking activity itself, the associated stigma and sanctions therefore can be

⁸² See Shively, *supra* n.78, at 4.

⁸³ See Gregorio, *supra* n.77, at 643.

⁸⁴ See *id.*, at 666-667.

⁸⁵ See text at notes 78-79, *supra*.

⁸⁶ A Chicago study, though based only on self-reports, is nonetheless suggestive; it found that 83 percent of purchasers said they would be deterred by jail time, and 82-87 percent by having their name or photo appear in the local paper, on a billboard, or on the Internet. See Durchslag & Goswami, *supra* note 79, at 24. A report on a john-school diversion program in Indianapolis found that of 157 defendants who participated in the program, 95 percent were not rearrested for any crime over a five-year period. See American Prosecutors Research Institute, *Unwelcome Guests: A Community Prosecution Approach to Street Level Drug Dealing and Prostitution* 14 (August 2004), <http://www.demandforum.net/wp-content/uploads/2012/01/apri-report.unwelcome-guests.pdf>. See also Michael Shively, et al., *Final Report on the Evaluation of the First Offender Prostitution Program: Report Summary* 5-6 (March 7, 2008), <http://www.demandforum.net/wp-content/uploads/2012/06/fopp.evaluation.summary.pdf> (reporting that for john-school participants in San Diego, recidivism rates dropped to less than half the pre-program levels).

⁸⁷ Gregorio, *supra* note 77, at 643.

⁸⁸ *Id.*, at 652.

1 greatly disproportionate to the customer’s fault.⁸⁹ The same “culpability gap” and harsh
2 implications of a trafficking conviction also leave many prosecutors especially reluctant to
3 charge that offense,⁹⁰ exacerbating the ever-present concern about haphazard, overly punitive,
4 and racially discriminatory enforcement.

5 None of these complexities detracts from the significant intrinsic culpability of the person
6 who pays for sexual services while aware of trafficking circumstances. The policy question
7 whether to convict that person of a trafficking-related offense is a close one. Significantly, only a
8 minority of states currently take this step. A recent law-review survey identifies six states that
9 impose trafficking-based sanctions in this situation⁹¹; 10 additional states do so as well.⁹²
10 Roughly two-thirds of the states do not; even in the context of contemporary legislative attention
11 to trafficking since 2003, a substantial majority of states treat their anti-prostitution statutes as
12 sufficient to address the problem on the demand side.⁹³ Given the availability of these other
13 statutory avenues for prosecution, together with the dangers of harsh and discriminatory
14 enforcement against a customer who did not personally engage in conventional trafficking
15 activity, the more prudent strategy is to exclude patronizing as such from the reach of the sex-
16 trafficking offense.

17 This approach, the currently prevalent view, obviously does not imply impunity for every
18 customer. That person remains subject to prosecution for other age-based and coercion-based
19 offenses under Article 213 when the facts warrant, and of course that person can be prosecuted
20 for the stand-alone offense of patronizing a prostitute under Article 251. But Section 213.9 limits

⁸⁹ *Id.*, at 637, 653.

⁹⁰ See Leary, *supra* note 79, at 445

⁹¹ Gregorio, *supra* note 77, at 645-646 & nn.93-95 (citing statutes of Arkansas, Louisiana, Oklahoma, Rhode Island, Tennessee, and Washington).

⁹² See GA. CODE ANN. § 16-5-46 (2018); HAW. REV. STAT. § 712-1200 (2018); MISS. CODE ANN. § 97-3-54.1 (2018); MONT. CODE ANN. § 45-5-705 (2017); N.D. CENT. CODE § 12.1-41-05 (2017); 18 PA. CONS. STAT. § 3013 (2018); TEX. PENAL CODE ANN. § 20A.02 (WEST 2017); VT. STAT. ANN. tit.13, § 2655 (2018); W. VA. CODE § 61-14-6 (2018); WYO. STAT. ANN. § 6-2-707 (2018). Ohio does not impose trafficking liability on the patron when the victim is an adult, but does so when the trafficking victim is 16 or 17 years old and the accused is at least four years older. See OHIO REV. CODE ANN. § 2907.07(B)(2) (LexisNexis 2018). The offense is a fifth-degree felony punishable by imprisonment from six-12 months in the case of a first offense. See *id.*, § 2907.07(F)(3).

⁹³ E.g., MINN. STAT. ANN. § 609.322(1)-(1a) (West 2019) (exempting from criminal liability for sex trafficking an individual who acted “as a prostitute or patron”); OHIO REV. CODE ANN. § 2905.32(C) (West 2019) (“In a prosecution under [the trafficking statute], proof that the defendant engaged in sexual activity with any person, or solicited sexual activity with any person, whether or not for hire, without more, does not constitute a violation of this section.”). Ohio does, however, impose sex-trafficking penalties on the patron when a trafficking victim is 16 or 17 years old and the accused is at least four years older. See note 92 *supra*.

liability for Sex Trafficking to those who engage in trafficking activity in the typical ways, set out in the Section—recruiting, enticing, transporting, transferring, harboring, providing, isolating, or maintaining a person who is coerced or underage.

i. Age. Section 213.9(1)(b) punishes trafficking activity, even in the absence of coercion, when the victim is less than 18 years old. Outside the commercial-sex context, most states do not criminalize sexual acts involving minors over the age of 16 on the basis of age alone.⁹⁴ Nonetheless, even where sex work is legal, the occupation is not open to minors, a judgment that is not controversial.⁹⁵ And when trafficking targets individuals under 18, the potential for implicit coercion is sufficiently strong that the conduct is properly treated as equivalent to trafficking coerced adults. This judgment too is uncontroversial.⁹⁶

j. Mens rea. State and federal statutes against sex trafficking display little uniformity in their mens rea requirements. For both adult and minor victims, the federal Trafficking Victims Protection Act requires the prosecution to prove knowledge of the trafficking activity—that is, the acts of recruitment, enticement, harboring, or the like. For an adult victim, the federal Act requires proof of “reckless disregard of the fact” that the victim will be coerced to engage in commercial sexual activity. Where liability rests on the underage status of the victim, the federal Act appears to set a lower mens rea. Nominally, it requires proof of recklessness with respect to the victim’s age. But § 1591(c) qualifies this requirement by stating that when “the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, [etc.], the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years”

The precise effect of § 1591(c) is unclear, but at a minimum, it appears to shift the burden of proof.⁹⁷ And at least with respect to the evidence required to establish the prosecution’s case-

⁹⁴ See note 66, *supra*.

⁹⁵ See note 68, *supra*.

⁹⁶ See, e.g., OHIO REV. CODE ANN. § 2905.32(A)(1) (2019) (same offense applicable to coercive trafficking and trafficking underage victim); WASH. REV. CODE ANN. § 9A.40.100(3)(a) (2019) (same). Several states follow a similar pattern but treat the offense as more serious when it involves a minor, even without proof of specifically identified forms of coercion. See, e.g., FLA. STAT. § 787.06(3)(b), (g) (2019) (coercive trafficking is felony of first degree; trafficking of victim under age 18 is life felony); GA. CODE ANN. § 16-5-46(f)(1), (2) (coercive trafficking carries 20-year maximum; trafficking of victim under age 18 carries 50-year maximum); N.C. GEN. STAT. § 14-43.11 (2019) (coercive trafficking is Class C felony; trafficking of victim under age 18 is Class B2 felony).

⁹⁷ Although TVPA § 1591(a)(1) requires proof of recklessness beyond a reasonable doubt, the “reasonable opportunity” language of § 1591(c) arguably could be understood to substitute a different substantive standard, dropping the required mens rea to a rough equivalent of negligence. More carefully read, however, § 1591(c) leaves the recklessness requirement of § 1591(a) intact. Because it is cast in procedural terms (“the Government *need not prove* [recklessness]”), without expressly overriding the substantive mens rea requirement stipulated in § 1591(a), § 1591(c) is best read as merely shifting the burden of proof. Thus, once the prosecution proves the “reasonable opportunity to observe,” its mens rea burden would be met, but since recklessness remains an element of the offense, § 1591(a) would require

in-chief, subsection (c) appears to substitute a requirement close to strict liability; the prosecution must prove only that the defendant had a “reasonable opportunity to observe” That standard falls short even of negligence, because “reasonable opportunity to observe” does not require proof, as does a negligence standard, that a reasonable person *would have* realized a *substantial, unjustifiable risk* that the person in question was underage.

State statutes take a variety of positions on the mens rea issue. Illinois requires knowledge,⁹⁸ Pennsylvania requires recklessness,⁹⁹ and many jurisdictions require “intent”¹⁰⁰—a standard variously interpreted to require knowledge, recklessness, or possibly negligence. Some jurisdictions use mens rea concepts that are opaque or lie somewhere between knowledge and strict liability. State statutes that rest liability on the underage status of the victim often leave the mens rea undefined,¹⁰¹ or imply that it is a matter of strict liability.¹⁰²

Given the seriousness of the sex-trafficking offense and the severe penalties that apply, Section 213.9(1) requires proof of knowledge of the acts that constitute trafficking (recruiting, harboring, transporting, and the like), together with proof of a purpose to facilitate a commercial sex act involving the trafficked person. For the additional element of coercion, Section 213.9(1)(a) sets the mens rea at knowledge. Although proving actual knowledge can be a daunting challenge for the prosecution, willful blindness satisfies a knowledge requirement,¹⁰³ and in any case knowledge is seldom debatable in the core situations of trafficking that prompt public concern; knowledge should not be ambiguous in a case that warrants the severe sanctions authorized for this offense.

When liability rests on trafficking activity together with the victim’s underage status, Section 213.9(1)(b) rejects the position of many states that negligence or even strict liability can suffice. Strict liability is contrary to foundational principles of the Model Penal Code, even when the age of consent is 16 or younger.¹⁰⁴ It is even more difficult to defend when criminal liability

acquittal when a defendant proves absence of recklessness, presumably by a preponderance of the evidence.

⁹⁸ 720 ILL. COMP. STAT. ANN. § 5/10-9(d) (LexisNexis 2018).

⁹⁹ 18 PA. CONS. STAT. § 3011.

¹⁰⁰ E.g., CAL. PENAL CODE § 236.1(b) (2019).

¹⁰¹ E.g., VA. CODE ANN. § 18.2-357.1(C) (2019).

¹⁰² E.g., CAL. PENAL CODE § 236.1(f) (2019); FLA. STAT. § 787.06(9) (2019); TEX. PENAL CODE § 20A.02(b)(1) (2019).

¹⁰³ MPC Section 2.02(7).

¹⁰⁴ In the case of a victim over the age of 10, the 1962 Code rejected the then-common standard of strict liability and barred conviction for statutory rape on the absence of at least negligence with respect to the age of the victim. 1962 Code Section 213.6(1). In revised Article 213, the age-based offenses of

attaches, regardless of mens rea, to sexual acts with a 17-year-old whose appearance often gives no readily apparent basis for knowing or even suspecting that the individual is younger than 18. Conversely, American law rarely if ever requires a mens rea of knowledge in age-related offenses; recklessness with respect to the underage status of the victim represents a substantial and sufficient degree of culpability. Because of the Code's general commitment to subjective culpability as a prerequisite to criminal sanctions, Section 213.9(1)(b) imposes liability only when the actor knows that trafficking activity is involved and knows or is aware of, yet disregards, a substantial, unjustifiable risk that the person trafficked is under the age of 18.¹⁰⁵

k. Grading. Jurisdictions vary considerably in the sentences they authorize for sex trafficking and comparable offenses. The federal statute is among the most severe, imposing a mandatory minimum of 15 years, with a maximum of life imprisonment, when trafficking involves either coercion or a minor under the age of 14. When coercion is absent and the victim is a minor between the ages of 14 and 18, the federal statute drops its mandatory minimum to 10 years, but the maximum remains at life imprisonment.¹⁰⁶

Penalties available under state trafficking statutes typically are much less severe, with many maximum authorized sentences set between 10 and 20 years' imprisonment.¹⁰⁷ Representative statutory maximum sentences include 7-10 years in Maryland, North Carolina, and Virginia,¹⁰⁸ 12-16 years in Arizona, Indiana, Michigan, Ohio, and Tennessee,¹⁰⁹ 20 years in

Sexual Assault and Sexual Contact require at least recklessness. See *supra*, Section 213.8.

¹⁰⁵ Section 213.6(1) of the 1962 Code provided that when the criminality of a sexual offense depends on a child's being below a critical age other than 10, a mistake-of-age defense requires the defendant to prove the reasonableness of the mistake by a preponderance of the evidence. Under the 1962 Code, however, such offenses always (with one narrow exception) required proof that the child was less than 16 years old. See Section 213.3(1)(a). As a result, the mistake-of-age provision was addressed to mistakes about the age of relatively young children, situations that justify an especially strong duty of care. A comparable willingness to sacrifice the principle of subjective mens rea is much less justified when criminality attaches to acts with older minors, whose appearance typically will not in itself put an actor on notice that the individual is under the age of 18. (The narrow exception just mentioned—the only situation in which the 1962 Code tied the criminality of a sexual offense to a child's being below an age greater than 16—was Section 213.3(2). That provision punished sexual acts with a person less than 21 years old when the actor had responsibilities equivalent to those of a guardian for that person's welfare. See Section 213.3(1)(a), (b). Again, the 1962 Code's restrictive approach to mistake-of-age defenses has little relevance in the context of offenses involving the trafficking of individuals under 18, because any person in the position of a guardian can be expected to have knowledge of the ward's actual age.)

¹⁰⁶ 18 U.S.C. § 1591(b).

¹⁰⁷ See Polaris Project, 2013 Analysis of State Human Trafficking Laws (August 2013), <https://polarisproject.org/sites/default/files/2013-State-Ratings-Analysis.pdf>.

¹⁰⁸ MD. CODE § 11-303 (2019) (10-year maximum); N.C. GEN. STAT. § 14-43.11 (2019) (class C felony); *id.*, § 15A-1340.17 (for class C felony, maximum of 92 months (3.7-7.7 years)); VA. CODE ANN. § 18.2-357.1(B), (C) (2018) (2019) (class 4 felony); *id.*, § 18.2-10(d) (for class 4 felony, 10-year maximum).

1 California, New Jersey, Pennsylvania and Texas,¹¹⁰ 25 years in New York,¹¹¹ and 30 years in
 2 Florida¹¹²—all well below the federal maximum of life imprisonment. Under many state
 3 sentencing regimes, the authorized sentences depend on multiple factors. The New York statutes,
 4 for example, prescribe (i) 1-25 years for sex trafficking, “compelling prostitution” of a minor by
 5 force, fraud, or coercion, or “promoting prostitution” of a minor under 13; (ii) 1-15 years for
 6 “promoting prostitution” of a minor under 18 or “use of a child [under 17] to engage in a sexual
 7 performance”; and (iii) a maximum of seven years for “promoting prostitution of a minor” 18-19
 8 years old or “promoting a sexual performance by a child” under 17.¹¹³ In Texas, the penalty is (i)
 9 up to 20 years for “trafficking in persons” and “compelling prostitution” when the victim is an
 10 adult; (ii) up to life imprisonment for those offenses if the victim is a child under 14; and (iii) up
 11 to 20 years for employing a minor to work in sexually oriented commercial activity or in a sexual
 12 performance.¹¹⁴

¹⁰⁹ ARIZ. REV. STAT. § 13-1307(b) (LexisNexis 2020) (class 2 felony); id., § 13-702(d) (for class 2 felony, 12.5-year maximum; 23 years if prior record enhancement applies); IND. STAT. ANN. § 35-42-3.5-1 (2019) (level 4 felony); id., § 35-50-2-55 (for level 4 felony, 12-year maximum); MICH. COMP. LAWS SERV. § 750.462e, f (LexisNexis 2018) (15 years; 22.5 years if prior-record enhancement applies); OHIO STAT. ANN. § 2905.32 (2019) (first-degree felony); id., § 2929.144 (for first-degree felony, 16.5 years [maximum term is highest minimum term plus 50%; id., § 2929.14 (for first-degree felony, highest minimum term is 11 years)]; TENN. CODE ANN. § 39-13-309(c) (2019) (class B felony); id., § 40-35-112(a)(2) (for class B felony, 12-year maximum; 20 years if prior record enhancement applies).

¹¹⁰ CAL. PENAL CODE § 236.1(b) (2019) (presumptive sentences of 8, 14, or 20 years; 40 years if prior-record enhancement applies); N.J. STAT. ANN. § 2C:13-8 (2019) (first-degree crime); id., § 2C:43-6 (for first-degree crime, 20-year maximum); 18 PA. CONS. STAT. § 3012 (2018) (first-degree felony); id. § 1103(1) (for first-degree felony, 20-year maximum); TEX. PENAL CODE ANN. § 20A.02 (West 2017) (second-degree felony); id., § 12.33 (for second-degree felony, 20-year maximum; 99 years if prior-record enhancement applies).

¹¹¹ N.Y. PENAL LAW § 230.34 (LexisNexis 2018) (Class B felony; 25-year maximum); § 70.00 (prescribing maximum sentences for felonies).

¹¹² FLA. STAT. ANN. § 787.06 (LexisNexis 2018) (first-degree felony, 30-year maximum); id., § 775.082 (establishing maximum sentences for felonies; 99 years if prior-record enhancement applies).

¹¹³ N.Y. PENAL LAW § 230.34 (sex trafficking, Class B felony with range of 1-25 years); id., § 230.33 (“compelling prostitution” of a minor by fraud, force, or coercion, also a Class B felony); id., § 230.32 (“promoting prostitution” of a minor under 13, Class B felony); id., § 230.30 (“promoting prostitution” of a minor under 18, Class C felony with a range of 1-15 years); id., § 263.05 (“use of a child [under 17] in a sexual performance,” Class C felony); id., § 230.25 (“promoting prostitution” of a minor under 19, Class D felony with a range of 1-7 years); id., § 263.15 (“promoting a sexual performance by a child” less than 17 years old, Class D felony); id., § 70.00 (establishing maximum sentences for felonies).

¹¹⁴ TEX. PENAL CODE ANN. § 20A.02 (West 2019) (punishing “trafficking in persons” as second-degree felony, 20-year maximum; first-degree felony with maximum of life imprisonment when victim is a child); id., § 43.05 (punishing “compelling prostitution” with 20-year maximum and “compelling

1 Section 213.9 rejects the most severe of these approaches and disapproves mandatory
 2 minimums in particular. The revised sentencing provisions of the Model Penal Code, like their
 3 predecessors, categorically reject statute-mandated minimums, such as the 15-year minimum
 4 imposed under the federal Trafficking Victims Protection Act.¹¹⁵ The federal maximum term of
 5 life imprisonment also is unjustifiably severe. The great majority of state trafficking statutes
 6 prescribe substantially lower maximum sentences, particularly in the case of adult trafficking
 7 victims. Of the 20 largest states, almost half impose a cap lower than 20 years' imprisonment in
 8 adult-victim cases.¹¹⁶ A number of states authorize penalty enhancements when the trafficking
 9 victim is younger (under 15, for example); even in child-victim cases, however, many states set
 10 the maximum for a first offense at 20 years or less.¹¹⁷

prostitution" of a child with maximum of life imprisonment); *id.*, §§ 43.25, 43.251 (punishing employing a child to work in a sexually oriented commercial activity or sexual performance with 20-year maximum; punishment increased to maximum of life imprisonment if child is under 14); *id.*, § 12.32 (establishing maximum sentence for first-degree felony); *id.*, § 12.33 (establishing maximum sentence for second-degree felony).

¹¹⁵ See MODEL PENAL CODE: SENTENCING, *supra* note 10, Section 6.06, Comment *m*, p. 165 ("The revised Code continues the firm position of the Institute that legislatively mandated minimum sentences are unsound ...") (internal quotation marks omitted).

¹¹⁶ See generally Polaris Project, *supra* note 107. For representative statutes setting a statutory maximum lower than 20 years, see statutes of Arizona, Indiana, Michigan, Maryland, North Carolina, Ohio, Tennessee, and Virginia, cited at notes 105-07 *supra*. See also WASH. REV. CODE § 9.94A.515 (2019) (trafficking 1 is level XIV offense); *id.*, § 9.94A.510 (18.3-year maximum, 19.5 years if prior-record enhancement applies). At the other end of the spectrum, Missouri sets the statutory maximum at life imprisonment even in first-offender adult-victim cases. MO. REV. STAT. § 566.209(2) (2019). For offenders with a prior felony record, statutory maximums for trafficking an adult victim exceed 30 years, CA: CAL. PENAL CODE § 236.1(b) (Deering 2020) (20-year maximum for first-time offender); *id.*, § 667(e)(1) (for prior serious or violent felony offender, double term to 40 years); FLA. STAT. § 787.06(3) (2019) (first-degree felony); *id.*, § 775.084(4)(b)(1) (for repeat offender, first-degree felony max is life); MA: MASS. ANN. LAWS ch. 265, § 52(a) (LexisNexis 2020) (life max for defendant who commits sex-trafficking offense more than once); MO: MO. REV. STAT. § 566.209(2) (2019) (life maximum); TX: TEX. PENAL CODE ANN. § 20A.02(a)(3) (West 2019) (second-degree felony); *id.*, § 12.42(b) (second-degree felony enhanced to first degree if defendant has prior felony conviction; *id.*, § 12.32 (first-degree felony has max of 99 years); and WI: WIS. STAT. ANN. § 940.302(2)(a) (West 2020) (class D felony); *id.*, § 939.50(3)(d) (25-year max); *id.*, § 939.62(1)(c) (can add up to 6 years to statutory max if prior felony conviction within past 5 years).

¹¹⁷ E.g., N.C. GEN. STAT. § 14-43.11(b) (2020) (B2 felony); *id.*, § 15A-1340.17 (16.3 year-maximum for B2 felony; 18.8 years for offender with prior felony record); MICH. COMP. LAWS § 750.462f(2) (2020) (20 years; 30 years for offender with prior felony record); 18 PA. CONS. STAT. § 3011(b) (2020) (first-degree felony); *id.*, § 1103(1) (20-year max for first-degree felony, max penalty will increase to 40 years on April 6, 2020); OHIO REV. CODE ANN. § 2905.32 (LexisNexis 2019) (first-degree felony); *id.*, § 2929.14(a)(1)(a) (highest min for first-degree felony is 11 years); *id.*, § 2929.144(b)(1) (maximum is min plus 50% of min, which is 16.5 years); VA. CODE ANN. § 18.2-357.1(c) (2019) (class 3 felony); *id.*, § 18.2-10(c) (20-year max for class 3 felony).

1 Section 213.9(3) grades the offense toward the low end of currently prevalent state
2 sentencing provisions, classifying it as a felony of the third degree. Under the revised Model
3 Penal Code sentencing provisions, this offense level is subject to “a term of incarceration ...
4 [that] shall not exceed [10] years”; the maximum authorized term is stated in brackets in part
5 because judgments about the sanctions appropriate to a felony of the second degree “are
6 fundamental policy questions that must be confronted by responsible officials within each
7 state.”¹¹⁸

8 Several distinct considerations shape the recommendation to classify the offense at the
9 third-degree felony level. In its most serious forms, sex trafficking is an exceptionally grave
10 offense. An offender, together with several associates, may exploit dozens of vulnerable victims,
11 inflicting permanent physical and psychological scars while reaping millions of dollars in profit.
12 Trafficking rings of this sort, and their devastating consequences, come to light all too often. The
13 sentencing regime must permit emphatic condemnation and stern punishment commensurate
14 with the seriousness of dangerous criminal enterprises like these.

15 At the same time, the sex-trafficking offense necessarily encompasses crimes of far more
16 limited scope. Headline-grabbing criminal syndicates shape public perceptions of the offense,
17 but violations often lack their scope and systematic character. The offender may have exploited a
18 single victim on a single occasion; sex-trafficking prosecutions need not be—and are not—
19 limited to the context of organized crime.¹¹⁹ Judicial sentencing discretion can moderate the
20 potential severity of statutory maximums, but discretion cannot ensure consistently proportionate

Statutes where the maximum in child-victim cases is only slightly higher include ARIZ. REV. STAT. § 13-3212(e) (LexisNexis 2020) (class 2 felony); *id.*, § 13-705(c) (for class 2 felony, 27-year maximum; 37 years for offender with prior felony record); 720 ILL. COMP. STAT. ANN. 5/10-9(c) (LexisNexis 2019) (Class X felony for minor under 17); 730 ILL. COMP. STAT. ANN. 5/5-4.5-25(a) (LexisNexis 2019) (30-year max for class X felony); IND. CODE ANN. § 35-42-3.5-1.3 (LexisNexis 2020) (child sex trafficking level 2 felony); *id.*, § 35-50-2-4.5 (30-year max for Level 2 felony); MD. CODE ANN., CRIM. LAW § 3-1102(c)(2) (LexisNexis 2020) (25-year maximum); TENN. CODE ANN. § 39-13-309(c) (2019) (class A felony); *id.*, § 40-35-112(a)(1) (for class A felony, 25-year maximum, 40 years for offender with prior felony record).

Higher statutory maximums for child-victim trafficking are set in CAL. PENAL CODE § 236.1(c)(2) (Deering 2020) (life); FLA. STAT. § 787.06(3)(g) (2019) (life felony); *id.*, § 775.082(3)(a)(2) (max life for life felony); GA. CODE ANN. § 16-5-46(f)(2) (2019) (life maximum); MASS. ANN. LAWS ch. 265, § 50(b) (LexisNexis 2019) (life maximum); MO. REV. STAT. § 566.211(3) (2019) (life maximum); N.J. STAT. ANN. § 2C:13-8(d) (2019) (life maximum); TEX. PENAL CODE ANN. § 20A.02(a)(7) (West 2019) (first-degree felony); *id.*, § 12.32 (99-year maximum for first-degree felony); WASH. REV. CODE § 9.94A.535(3)(l) (2019) (trafficking of minor supports a sentence above the standard range with no stated maximum).

¹¹⁸ MODEL PENAL CODE: SENTENCING, *supra* note 10, Section 6.06(6)(b), Comment *k*, p. 157.

¹¹⁹ Cf. *United States v. Dann*, 652 F.3d 1160 (9th Cir. 2011) (defendant convicted under federal forced-labor statute, 18 U.S.C. § 1589(a), a provision analogous to federal TVPA (18 U.S.C. § 1591) for using false accusations of theft and threats to engineer household helper’s deportation in order to coerce her to continue performing nonsexual services as a nanny).

1 punishment for more limited offenses of this sort. Unnecessarily long terms of incarceration are
2 prevalent in American criminal law,¹²⁰ and sex offenses are especially likely to draw needlessly
3 harsh punishment, both when legislatures set authorized terms and when judges impose
4 sentences in individual cases.¹²¹

5 In this context, the average of current state practice has less than its usual relevance as a
6 guide to sound policy; to the contrary, criminal-justice professionals largely agree with the
7 approach that the Institute endorsed in revising the sentencing provisions of the Model Penal
8 Code, namely that legislatively authorized sentences tend to be needlessly severe.¹²² Statutory
9 maximums toward the low end of current state legislation therefore can provide the most reliable
10 guidance. A substantial number of states have set maximum sentences for sex trafficking at or
11 near the 10-year level, with no indication that these sentencing caps have proved inadequate.
12 That practical experience provides some assurance that similar caps should suffice for sex-
13 trafficking enforcement elsewhere, absent distinctive concerns in a particular jurisdiction. And
14 the flexibility built into the Code’s sentencing provisions¹²³ leaves room for legislatively
15 authorized sentencing enhancements in cases involving child victims, habitual offenders, or other
16 aggravating circumstances.

17 There remains a legitimate question whether a 10-year sentencing cap would unduly
18 constrain punishment in the kind of case that most often comes to public attention, one that
19 involves an extensive trafficking network, with multiple victims and recurring coerced or
20 underage sexual encounters over an extended period. The sentencing range authorized by statute
21 (unlike a guideline sentencing range) cannot be set at levels that suffice only for the typical or
22 “heartland” case; instead, the *statutory maximum* must afford scope for suitable punishment in
23 exceptionally serious instances of the prohibited conduct.

¹²⁰ See, e.g., MODEL PENAL CODE: SENTENCING, *supra* note 10; Peter Baker, *2016 Candidates Are United in Call to Alter Justice System*, N.Y. TIMES, April 27, 2015 (noting broad consensus among “Democrats and Republicans alike [on need] to reduce the prison population and rethink a system that has locked up a generation of young men, particularly African-Americans.”).

¹²¹ See 1962 Code, Commentary at 286, 298: “There is a danger ... that public apprehension will lead to an overreaction in legislative halls. It is, after all, both politically rewarding and relatively easy to take a public stand by passing a law against plainly offensive and unpopular conduct. Although the point is valid with respect to any crime, it deserves special emphasis here that definition of the crime of rape calls for a balanced judgment ... The Michigan statute seems a good example of the operation of [these] pressures ... [I]t seems plain that the Michigan statute is an overreaction that creates a whole new set of difficulties of its own.”

¹²² See note 120, *supra*.

¹²³ See MODEL PENAL CODE: SENTENCING, *supra* note 10, Section 6.06(6)(b), Comment *k*, p. 157 (“The revised Code does not offer exact guidance on the maximum prison terms that should be attached to different grades of felony offenses. Instead, maximum authorized terms are stated in brackets. . . . [R]ecommendations concerning the severity of sanctions that ought to attend particular crimes. . . . are fundamental policy questions that must be confronted by responsible officials within each state. . . .”).

In the case of a criminal enterprise, however, a 10-year cap does not present this problem, because a separate offense of Sex Trafficking is committed every time an offender, with the required mens rea, trafficks a single minor or coerced adult who will submit to or perform a single commercial sex act. Thus, the offender who trafficks five victims will face five counts of Sex Trafficking, even if each victim submits to or performs only a single commercial sex act. If each of the five victims submits to or performs five commercial sex acts, the offender could face 25 separate counts. Because consecutive sentences are appropriate when an offender victimizes multiple individuals or a single individual on multiple occasions,¹²⁴ a cap of 10 years (for example) on each count would not unduly constrain the punishment available in the case of a large-scale trafficker. The offender convicted of trafficking five victims, each of whom submitted to a single commercial sex act, would face five counts, with a maximum sentence of 50 years' imprisonment; the offender convicted of trafficking five victims, each of whom submitted to five commercial sex acts, would face 25 counts, with a maximum sentence of 250 years' imprisonment.¹²⁵ In these circumstances, a statutory maximum in the 10-year range for each individual count would not force undue leniency.

4. Enforcement Policy.

As in the case of other Article 213 offenses, as indeed throughout the criminal code, police and prosecutors must use caution and common sense in deciding when and how to investigate and bring charges for suspected violations. The criteria for properly exercising that enforcement discretion are not directly within the scope of a Model Code of substantive criminal law. Yet in the case of sex trafficking, the two domains are not so easily separated. Sex-trafficking enforcement poses distinctive difficulties that have a strong bearing on the place of criminal law in overall strategies to combat this acute social problem.

Although anti-trafficking laws aim to protect current and potential victims of this offense, many advocates allege that enforcement practices often expose victims to even greater hardship and danger. Too often, heavy-handed raids focus on rounding up victims to charge them with offenses that criminalize sex work.¹²⁶ There is troublesome evidence that in many jurisdictions,

¹²⁴ See U.S. Sentencing Guidelines (Consecutive Sentences).

¹²⁵ It must not be overlooked that trafficking prosecutors often encounter exceptional difficulty convincing victims to testify. See, e.g., notes 25-26 and accompanying text, *supra*. Thus, an offender who allegedly controlled an extensive trafficking network may ultimately face conviction only on a few counts, representing just a small slice of the offender's suspected involvement. Nonetheless, our system is appropriately committed to the principle that permissible sentences must always be set, not on the basis of suspicion or probabilities, but solely as a function of misconduct proved beyond a reasonable doubt. See *Alleyne v. United States*, 570 U.S. 99 (2013); *Blakeley v. Washington*, 542 U.S. 296 (2004).

¹²⁶ Sex Workers Project, "The Use of Raids to Fight Trafficking in Persons" 17, 19 (2009), available at <http://sexworkersproject.org/downloads/swp-2009-raids-and-trafficking-report.pdf> (describing raids that occur in early morning hours, by undercover officers not in uniform, and alleging that officers often fail to explain what is happening and what will happen to victims); *id.* at 12, 16, 42-44

officers who participate in these raids are not adequately trained to identify arrestees who are trafficking victims. Although federal law states that “victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked[.]”¹²⁷ advocates report that victims arrested in anti-trafficking raids are often traumatized; they may be unable to post bond, subjected to extended pretrial detention,¹²⁸ and often are convicted of crimes they were forced to commit. Offenses committed under duress may include not only prostitution¹²⁹ but also superficially distinct charges that will be more difficult to expunge, including trespass, disorderly conduct, and drug offenses.¹³⁰

These convictions can have devastating collateral consequences. Prostitution is a deportable offense for noncitizens, regardless of their immigration status. Undocumented immigrants swept up in sex-trafficking raids are especially likely to be deported as a result.¹³¹ Citizens also face daunting collateral consequences, including difficulty securing employment, housing, public benefits, and further education, as well as problems retaining child custody.¹³² The potential for these consequences gives traffickers even greater leverage over their victims.¹³³

(alleging that raids often involve intimidation, verbal abuse, the use of excessive force, sexual harassment, sexual abuse of trafficking victims).

¹²⁷ 22 U.S.C. § 7101(b)(19); see Jessica Emerson & Alison Aminzadeh, *Left Behind: How the Absence of a Federal Vacatur Law Disadvantages Survivors of Human Trafficking*, 16 RRG 239, 248-249 (2016).

¹²⁸ See Suzannah Phillips, *Clearing the Slate: Seeking Effective Remedies for Criminalized Trafficking Victims* 18 (2014), <http://www.law.cuny.edu/academics/clinics/iwhr/publications/Clearing-the-Slate.pdf> (describing NYC practice in trafficking raids). Phillips alleges that trafficking victims are arrested and taken to squalid, chronically overcrowded central booking facilities, and held until arraignment, by which time—tired, hungry, and traumatized—they are unlikely to fully disclose their trafficked status to the attorney they first meet at that time. Phillips also observes that the high volume of misdemeanor cases pressures defense attorneys to plead out cases quickly, rather than taking the time to determine whether a defendant is a trafficking victim, and that victims will often be pressured to plead guilty to a lesser offense, unaware of the full consequences.

¹²⁹ See Sex Workers Project, *supra* note 126, at 10, 42; *id.* at 8 (asserting that this experience is common); See also Kate Mogulescu, *The Public Defender as Anti-Trafficking Advocate, An Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking*, 15 CUNY L. Rev. 471, 477-478 (arguing that numerous NYC trafficking victims are prosecuted for prostitution-related activity); Phillips, *supra* note 128, at 16-17 (same); Emerson & Aminzadeh, *supra* note 127, at 240-241 (same).

¹³⁰ Phillips, *supra* note 128, at 15.

¹³¹ See *id.*, at 19.

¹³² Emerson & Aminzadeh, *supra* note 127, at 241; Phillips, *supra* note 128, at 21.

¹³³ See Mogulescu, *supra* note 129, at 482.

As a partial fix for this problem, New York and roughly 30 other states have enacted vacatur laws that permit expungement of victims’ trafficking-related criminal records.¹³⁴ But the absence of similar laws in the remaining states and in the federal system can force trafficking victims to suffer these collateral consequences indefinitely.¹³⁵

These difficulties, some well-documented and others disputed but plausibly alleged, also seem symptomatic of a deeper problem. Some who are highly critical of anti-trafficking laws, as well as many who support them, agree that anti-trafficking efforts across the country tend to overemphasize arrest and prosecution,¹³⁶ rather than giving priority to identifying and protecting victims. As a result, enforcement efforts, even when successful, may be at the expense of victim welfare.¹³⁷ Victims can in effect be treated as “instruments of criminal investigation, rather than as holders of rights.”¹³⁸

For example, to qualify for relief from prosecution, the federal Trafficking Victims Protection Act and many local policies require victims to cooperate with law enforcement.¹³⁹ Victims who are undocumented must cooperate with law enforcement in order to obtain a T-visa and remain in the United States.¹⁴⁰ Victims who do not cooperate, for example by agreeing to

¹³⁴ See Emerson & Aminzadeh, *supra* note 127, at 251-252; Phillips, *supra* note 128, at 46.

¹³⁵ See Emerson & Aminzadeh, *supra* note 127, at 251.

¹³⁶ Federal funding for state anti-trafficking programs, for example, focuses on support for criminal investigation and prosecution. See Sex Workers Project, *supra* note 126, at 7 (citing Global Alliance Against Traffic in Women, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World*, 236-237 (2007)); Women’s Commission for Refugee Women and Children, *The US Response to Human Trafficking: An Unbalanced Approach* 14 (2007).

¹³⁷ See, e.g., Douglas MacMillan & Abha Bhattarai, “Police Crackdowns on Illicit Massage Businesses Pose Harms to the Women They Aim to Help,” WASH. POST, April 3, 2021 (describing this problem in Atlanta and nationally, noting that “[a]dvocates also see police stings as counterproductive: More often than not, they leave the spa workers with arrest records that can hurt their chances for employment, housing or other opportunities. Raids can be psychologically traumatizing to women and result in ongoing stress and fear, as well as distrust of law enforcement.”); Theresa Vargas, “Sex Trafficking Survivors Are Treated as Criminals in Virginia. That Could Soon Change,” WASH. POST, Mar. 24, 2021 (describing similar problems with sex-trafficking raids in Virginia).

¹³⁸ See Emerson & Aminzadeh, *supra* note 127, at 246 (citing Joy N. Ezeilo, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Human Rights Council, U.N. Doc. A/HRC/17/35, 61 (Apr. 13, 2011)).

¹³⁹ See Phillips, *supra* note 128, at 14 (also noting that there is an exception for minors or individuals “unable to cooperate with such a request due to physical or psychological trauma,” but that the exception is limited and not well defined.)

¹⁴⁰ Melissa Ditmore, Anna Maternick, & Katherine Zapert, *The Road North: The Role of Gender, Poverty and Violence in Trafficking from Mexico to the U.S.*, 28-29, available at <https://swp.urbanjustice.org/sites/default/files/swp-2012-the-road-north-en.pdf>.

1 testify against their traffickers in court, may be prosecuted, held in immigration detention, or
 2 jailed as material witnesses.¹⁴¹ Yet cooperation with law enforcement may place victims or their
 3 families at risk of severe retaliation from traffickers.¹⁴²

4 To address these concerns, New York recently instituted a system of Human Trafficking
 5 Intervention Courts.¹⁴³ Their aim is to treat defendants arrested for sex work-related offenses as
 6 victims needing services rather than as offenders deserving punishment.

7 Human Trafficking Intervention Courts typically require victims facing prostitution-
 8 related misdemeanor charges to complete a nonprofit or court-run program to be eligible to have
 9 the charges sealed or dismissed.¹⁴⁴ By most informed accounts, these courts are a significant step
 10 forward in recognizing the proper place of criminal law enforcement while mitigating many of
 11 its dangers for victims. Yet some victim advocates argue that these courts do not fully address
 12 the underlying problems that trafficking prosecutions pose for victims. Some advocates maintain
 13 that victims, because they believe that Intervention Courts will require them to accept unwanted
 14 court intervention in their lives, are discouraged from revealing their trafficked situation. In
 15 addition, the advocates allege, the Intervention Courts may refuse to drop prosecution in the case
 16 of victims who face non-prostitution charges or who have long criminal records.¹⁴⁵ But victims
 17 who fear the consequences of accusing their traffickers or who cannot provide sufficiently
 18 specific evidence of abuse may not qualify for favorable case disposition.¹⁴⁶ And critics claim
 19 that when victims face charges not technically related to prostitution, the Intervention Courts
 20 tend to break from the service-delivery model and instead revert to more traditional criminal
 21 punishments.¹⁴⁷

22 Although these wide-ranging criticisms point to a worrisome potential for overreach and
 23 misplaced priorities in law enforcement, few informed observers favor eliminating criminal
 24 prosecution of traffickers. Nor do these criticisms suggest a fundamental flaw in the design of the
 25 substantive trafficking offenses. Rather, the potential for misapplication of the criminal law in

¹⁴¹ See Emerson & Aminzadeh, *supra* note 127, at 246; Sex Workers Project, *supra* note 126, 45; See Aya Gruber, Amy J. Cohen, & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 Fla. Law Rev. 1333, 1375.

¹⁴² See Ditmore, et al., *supra* note 140, at 16.

¹⁴³ See generally Red Umbrella Project, *Criminal, Victim, or Worker? The Effects of New York's Human Trafficking Intervention Courts on Adults Charged with Prostitution-Related Offenses 3* (Oct. 2014), available at <http://www.nswp.org/sites/nswp.org/files/RedUP-NYHTIC-FINALweb.pdf>.

¹⁴⁴ See *id.*

¹⁴⁵ See Gruber, et al., *supra* note 141, at 1370-1371.

¹⁴⁶ *Id.*, at 1376.

¹⁴⁷ See *id.* at 1372.

Section 213.9. Sex Trafficking

1 this area makes clear that endorsing punitive measures against trafficking presupposes a number
2 of crucial safeguards in implementation. These safeguards include:

3 -- Giving increased attention to training, not only for police and prosecutors, but also for
4 public defenders, court personnel, and judges, all of whom must have a well-informed ability to
5 identify trafficking victims and facilitate their access to support services.

6 -- Developing protocols for anti-trafficking raids and vice enforcement more generally to
7 ensure, among other things, the availability of social workers to help identify and support
8 victims, and to protect victims from detention and incarceration. Similar protocols can be helpful
9 to guide other stages of investigation and prosecution to ensure that victims are treated
10 respectfully and provided necessary services at every step of the criminal process.

11 -- Enacting vacatur laws, to permit expungement of the trafficking-related criminal
12 records of trafficking victims, is essential to break the coercive hold of traffickers. The federal
13 system and many states lack this crucial safeguard.

14 -- Allocating sufficient resources to provide support for victim services as a priority, not
15 simply as an afterthought or as an aim subordinate to politically attractive funding for police and
16 prosecutors.

17 -- Re-examining policies that require victims to cooperate with law enforcement to be
18 eligible for government services or a T-visa, and possibly suspending these policies, pending a
19 comprehensive assessment of their adverse consequences for victims.

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.").

Section 213.10. Affirmative Defense of Explicit Prior Permission

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

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....”).

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).

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*.

Section 213.10. Affirmative Defense of Explicit Prior Permission

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

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.).

1 the jury must acquit if it has a reasonable doubt in that regard. The judge may properly
2 deny that instruction and instead tell the jury it can convict if it finds beyond a reasonable
3 doubt that CW submitted to the acts of penetration because of the force and threats, and
4 that A, B, and C were aware of, yet recklessly disregarded, a substantial and unjustified
5 risk that CW had submitted for that reason. On these facts, A, B, and C violated Section
6 213.2 because they are aware of the facts that make CW's consent ineffective under
7 Section 213.2(3), and they cannot invoke the Section 213.10 defense because there is no
8 evidence that they believed (reasonably or otherwise) that CW had personally given them
9 explicit permission for their use of force. The Section 213.10 defense therefore need not
10 be submitted to the jury.

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

18 **Illustration:**

19 3. Tyler gives Blair permission to draw a gun that is in fact unloaded and to
20 threaten Tyler with death unless Tyler submits to sexual penetration. A person who made
21 this threat without prior permission would face prosecution for Sexual Assault by
22 Aggravated Physical Force or Restraint under Section 213.1. But if Tyler's permission
23 meets all the requirements for explicit permission under Section 213.10(2), Blair can rely
24 on it to raise the defense of Explicit Prior Permission, despite the limitations of Section
25 213.10(3)(c), because on these facts the gun was unloaded and using it to threaten Tyler
26 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."

Section 213.10. Affirmative Defense of Explicit Prior Permission

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.

Section 213.10. Affirmative Defense of Explicit Prior Permission

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).

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).

Section 213.10. Affirmative Defense of Explicit Prior Permission

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*.

Section 213.10. Affirmative Defense of Explicit Prior Permission

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);

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

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

Permission to use force or ignore protests must be explicit and specific in order to 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).

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.

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

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

SECTION 213.11. SENTENCING AND COLLATERAL CONSEQUENCES OF CONVICTION

Comment:

Executive Summary*

1 Sentencing and the collateral consequences of conviction raise unusually complex issues;
2 extensive black letter is required to treat them with precision. But black letter is not the ideal way
3 to convey the provisions' overall aims and effects. This Executive Summary serves that purpose.
4 It first explains why there is a need for Sections 213.11 to 213.11J in the scheme of Article 213. It
5 then summarizes the most prominent features of current law on this subject and explains why it is
6 important for Sections 213.11 to 213.11J to establish a different framework.

7 1. *Why is this subject addressed in Article 213?* Underlying this common question are
8 concerns about preemption and the appropriate scope of the project. Sentencing is treated
9 comprehensively in the Institute's recent revision of the sentencing provisions of the MPC. To
10 reconsider that subject in Article 213 might seem unnecessary or inconsistent with prior judgments
11 of the Institute. Moreover, *collateral* consequences are not intrinsically matters of criminal law
12 and therefore might seem beyond the proper scope of a *penal* code.

13 These concerns are understandable but misplaced. With respect to "preemption,"
14 *MPC:Sentencing* treats sentencing issues only in general terms applicable to any offense. The
15 Comments to *MPC:Sentencing* state that it is not intended to preclude special rules tailored to the
16 specifics of particular offenses.¹ In any event, Sections 213.11-213.11J are not inconsistent with
17 *MPC:Sentencing*; they supplement its provisions without contradicting them.

18 The concern about relevance to criminal law is especially important. In determining
19 whether to criminalize various forms of sexual misconduct, the Article 213 revision must consider
20 all important consequences of doing so, regardless of whether they be labeled "penal" or

* Footnote cross-references in this Executive Summary indicate footnotes in Sections 213.11-213.11J of this Draft.

¹ See MODEL PENAL CODE: SENTENCING, Section 7.06(4) (Official Statutory Text, AM. L. INST., May 24, 2017) (stating that "[a] certificate of restoration of rights removes all mandatory collateral consequences ..., except as provided by Article 213.) See also MODEL PENAL CODE: SENTENCING Section 7.06 Comment *d* (Proposed Final Draft, AM. L. INST., April 10, 2017) (stating that the Section 7.06 provisions concerning relief from collateral consequences are subject to an exception: "for individuals convicted of sexual offenses, the restrictions on relief set forth in Article 213 apply.")

SECTION 213.11. EXECUTIVE SUMMARY

1 “regulatory.” When revising the sentencing provisions of the MPC, the Institute approved a
2 lengthy Article on collateral consequences, defined as “disadvantages, however denominated, that
3 are authorized or required by federal or state law as a direct result of an individual’s conviction
4 [that] are *not part of the sentence* ordered by the court”² In that Article, moreover,
5 *MPC:Sentencing* addresses—and forbids—certain demonstrably noncriminal consequences of
6 conviction—disenfranchisement and disqualification from jury service.³ In short, the Institute has
7 rejected the position that collateral consequences lie outside the domain of the MPC.

8 Collateral consequences are *especially* important for Article 213. Over the past half-
9 century, the principle that frames the sexual offenses has shifted from force and coercion to the
10 **absence of consent**. Updating the MPC to reflect this shift was a primary motivation for the
11 Institute’s decision to revise Article 213. And because absence of consent, rather than only force,
12 coercion, or incapacity, **can now support conviction**, the reach of sexual-offense law has justifiably
13 expanded in most American jurisdictions⁴ and around the world.⁵

14 The crucial question is to determine *how far* this expansion should go. That judgment must
15 be shaped by balancing the need for penal safeguards against the potentially disproportionate
16 consequences of a criminal conviction. A decision to consider the first half of this equation in
17 isolation, without attention to the second half, would be difficult to defend.⁶

18 This is not an abstract question. In prevalent state law, the consequences of a sexual-offense
19 conviction often include highly restrictive “collateral” measures, such as onerous registration

² MODEL PENAL CODE: SENTENCING, Section 7.01 (Official Statutory Text, AM. L. INST., May 24, 2017) (emphasis added).

³ *Id.*, Section 7.03.

⁴ See “Current State of the Law -- Consent-Only Offenses” (Oct. 20, 2016).

⁵ For example, the Istanbul Convention, adopted by the Council of Europe in 2011, requires member states to criminalize all “non-consensual acts of sexual nature.” See Council of Europe Treaty Series - No. 210, *Convention on Preventing and Combating Violence Against Women and Domestic Violence*, May 11, 2011. The Convention was signed by 45 of the Council’s 47 member nations; only Russia and Azerbaijan failed to sign.

⁶ Referring to current Minnesota efforts to revise that state’s definitions of sexual assault, the mother of Jacob Wetterling (the victim of a nationally notorious sexual crime) recently wrote that “[a]ny statutory analysis of the criminal statutes is woefully incomplete without considering the effectiveness, cost, and collateral and material consequences the [sex-offense] Registry poses.” Patty Wetterling, Letter to Minnesota Senators and Representatives, Feb. 8, 2021.

SECTION 213.11. EXECUTIVE SUMMARY

1 duties, limits on employment and residency, and expanded public awareness of a local resident's
2 record of convictions. Courts have held that sex-offense collateral-consequence regimes in Alaska,
3 Kentucky, Michigan, Pennsylvania, and many other states constitute *criminal punishment* and
4 therefore are subject to all the strictures of the criminal law.⁷ Statutory provisions like those are
5 obviously appropriate for a penal code to address. But whether these consequences are penal or
6 regulatory, they have powerful impacts on a convicted individual and therefore must be considered
7 in any judgment about whether to criminalize an area of behavior.

8 An example makes this principle concrete. A decision to punish sexual penetration without
9 force but without consent could be readily supported if the potential prison sentence is low and if
10 the Code stipulates that conviction cannot lead to any “collateral” burdens. But that decision would
11 be difficult to sustain if conviction could lead to life imprisonment even in the absence of
12 aggravating circumstances. That decision likewise would be difficult to sustain if conviction could
13 require lifetime registration with law enforcement and lifetime limits on employment and
14 residency. Yet in many states, current law does exactly that; a penal code that did not address the
15 issue would leave these burdens of conviction in effect. A sound approach to the criminalization
16 decision cannot avoid attention to these consequences.

⁷ In *Smith v. Doe*, 538 U.S. 84, 92 (2003), the Supreme Court held that sex-offense registration regimes are not necessarily punitive and that Alaska SORA was not punitive as a matter of federal constitutional law. Compare *Doe v. State*, 189 P.3d 999 (Alaska 2008) (holding Alaska SORA to be punitive under state constitution); *Doe v. Snyder*, 834 F.3d 696, 705-706 (6th Cir. 2016) (holding that “*Smith* [should not] be understood as writing a blank check to states to do whatever they please in this arena.... Michigan’s SORA imposes punishment”). Accord, *State v. Myers*, 923 P.2d 1024 (Kan. 1996) (holding Kansas SORA to be punitive as applied); *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009) (holding residency restrictions of Kentucky SORNA to be punitive); *State v. Letalien*, 985 A.2d 4 (Me. 2009) (holding Maine SORNA to be punitive on its face); *Doe v. State*, 111 A.3d 1077, 1100 (N.H. 2015) (holding that “[a]s applied to petitioner, ... the punitive effect of [New Hampshire registry law] was enough to overcome any nonpunitive legislative intent”); *Riley v. N.J. State Parole Bd.*, 98 A.3d 544 (N.J. 2014) (holding New Jersey Sex Offender Monitoring Act to be punitive); *Starkey v. Oklahoma Dep’t of Corr.*, 305 P.3d 1004 (Okla. 2013) (holding Oklahoma SORA to be punitive as applied); *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2018) (holding Pennsylvania SORNA to be punitive); *In re C.P.*, 967 N.E.2d 729, 738 (Ohio 2012) (holding that Ohio SORNA imposes cruel and unusual punishment as applied to juveniles).

Cf. *State v. Bani*, 36 P.3d 1255, 1268 (Haw. 2001) (holding Hawaii SORNA to violate procedural due process in the absence of individualized risk assessment); *Doe v. Attorney General*, 686 N.E.2d 1007 (Mass. 1997) (Massachusetts, same); *in re J.B.*, 107 A.3d 1 (Pa. 2014) (holding that Pennsylvania SORNA violates procedural due process as applied to juveniles); *Doe v. Wasden*, 9th Cir. Dec. 9, 2020 (holding that *Smith* does not foreclose plaintiffs’ claim that Idaho SORNA regime is punitive).

SECTION 213.11. EXECUTIVE SUMMARY

1 2. *Current law.* All American jurisdictions currently require persons convicted of certain
2 sexual offenses to register with local law-enforcement where they reside, work, or study, and to
3 continually update the personal information provided. In most states the list of sexual offenses that
4 trigger these obligations is extensive, the obligations are long-lasting, and the steps required to
5 keep the information updated are **onerous**. Many states or their municipalities also prohibit
6 registrants from residing in certain areas; **most prohibit registrants from working in certain**
7 **occupations**.⁸ And in nearly all states, **the registry information is widely available**. Although a few
8 states keep that information confidential except with respect to registrants at high risk of
9 reoffending,⁹ most permit public access to information pertaining to every registered ex-
10 offender.¹⁰ Moreover, **most states require law enforcement to proactively notify the community as**
11 **soon as a new registrant comes to the area. Although a few states notify only groups or individuals**
12 **with a particular need to know, the great majority distribute notification widely, including to**
13 **anyone who asks to be notified, regardless of need to know.**¹¹

14 Federal law complicates this picture. The Sex Offender Registration and Notification Act
15 of 2006 (federal SORNA)¹² requires every state, as a condition of receiving certain federal funds,
16 to maintain a registry of persons convicted of **almost any offense that has a sexual element**.
17 Although federal SORNA does not require states to limit registrants' employment or residency, its
18 other requirements are **more restrictive than much preexisting state law**. The offenses that must
19 trigger a state duty to register include adjudications of delinquency involving use of force by
20 juveniles aged 14 or older and adult convictions even for misdemeanor **contact offenses**¹³;
21 registrants must appear in person, within three business days, to report any change in required

⁸ See generally, text at notes 149, 296-301, 319-322.

⁹ See text at notes 94-99, 276-278.

¹⁰ See text at note 243.

¹¹ See text at notes 243, 274-278.

¹² 34 U.S.C. §§ 20901-20929 (2020).

¹³ *Id.*, § 20911(5) & (8).

SECTION 213.11. EXECUTIVE SUMMARY

1 registry information¹⁴; the duties to register and to update personal information normally continue
2 for at least 15 years even for the lowest-level offenses; and those duties normally continue for life
3 in the case of any penetration offense committed by force or threat.¹⁵ Federal SORNA also requires
4 each state to make available on the Internet most information about every registrant and to
5 immediately notify the entire local community whenever an ex-offender updates registry
6 information or newly registers in the area.¹⁶

7 Given the onerous requirements federal SORNA imposes on registrants and on state
8 officials themselves, a large majority of the states have chosen not to comply with its entire
9 mandate. As of November 2020, only 18 states were fully SORNA-compliant; the rest have opted
10 to disregard one or more of its major provisions, even at the cost of losing millions of dollars in
11 federal funding.¹⁷ Even so, registration requirements, public access to registry information, and
12 proactive community notification about registrants in the area are the norm throughout the United
13 States. And in many jurisdictions the burdens imposed on persons convicted of a sexual offense
14 are even more restrictive than federal SORNA requires. Most states require registrants to submit
15 to GPS monitoring in various circumstances; many restrict Internet usage; and at least 27 states
16 and many municipalities prohibit registrants from living near schools, parks, playgrounds, and
17 day-care centers.¹⁸

18 3. *Assessment.* The aim of these laws is to ease public fear, reduce recidivism, and enable
19 concerned citizens to take steps for self-protection. Yet extensive research demonstrates that these
20 gains have not materialized. To the contrary, there is clear evidence, widely acknowledged by
21 professionals in the field, that these laws are seriously counterproductive.¹⁹ They are expensive

¹⁴ Id., § 20913(c).

¹⁵ Id., § 20915(a).

¹⁶ Id., §§ 20920(a); 20923(b).

¹⁷ See text at note 167. The most frequent reasons for substantial noncompliance were narrower lists of triggering offenses and less frequent obligations to verify and update registry information. See Andrew J. Harris & Christopher Lobanov-Rostovsky, National Sex Offender Registration and Notification Act (SORNA) Implementation Inventory Preliminary Results (July 2016), pp. 4, 13-30 (detailing reasons for noncompliance as of March 2016.)

¹⁸ See text at note 297.

¹⁹ See text at notes 150, 255-256, 316-327.

SECTION 213.11. EXECUTIVE SUMMARY

for local police to administer, unduly hinder the rehabilitation of ex-offenders, and ultimately defeat their own central purposes by *impeding law enforcement and increasing the incidence of sexual offenses*.²⁰

a. *Recidivism*. Although a common view holds that that “[t]he risk of recidivism posed by sex offenders is ‘frightening and high,’”²¹ the available empirical evidence lends little or no support to this claim.²² Even taking into account that reporting rates for sexual offenses are exceptionally low, “[s]ex offenders have some of the lowest recidivism rates of any class of criminal.”²³ This is also true of sexual offenses against children. Again, low reporting rates for offenses against minors make research about recidivism in these cases only suggestive rather than definitive, but to the extent that reliable data are available, they indicate that recidivism rates for these offenses are as low as or lower than for other sexual crimes.²⁴

Comparative recidivism rates, however, are largely beside the point. Sexual offenses are distinctively unsettling and injurious, even more so in the case of sexual offenses against children. Exceptional prevention efforts are unquestionably justified. The crucial point is simply that registration, public access, community notification, residency restrictions, and other special burdens do not have the anticipated preventive effect. Research on this point has been extensive, and its conclusions are *unequivocal: all the available evidence indicates that these special burdens do not reduce the incidence of these offenses*.²⁵

²⁰ See generally *id.*

²¹ *Smith v. Doe*, 538 U.S. 84, 103 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)).

²² See text at notes 111-128.

²³ Stuart A. Scheingold et al., *Sexual Violence, Victim Advocacy, and Republican Criminology: Washington State’s Community Protection Act*, 28 LAW & SOC’Y REV. 729, 743 (1994) (noting that “as few as 5.3% [of sex offenders] re-offend within three years, according to the Bureau of Justice Statistics, as opposed to rates in the 65 to 80% range for drug offenders and thieves.”)

²⁴ See text at notes 111-128.

²⁵ See text at notes 131-135. With respect to the recidivism impact of particular measures, “research provides little if any support for the effectiveness of residential restriction laws in deterring or preventing sexual offenses.” Tewksbury, *Residency Restrictions*, note 299, at 539. See also text at notes 319-323.

SECTION 213.11. EXECUTIVE SUMMARY

1 b. *Self-protection*. Citizen self-protection is a separate goal. Yet public access and
2 community notification seldom prompt individuals to take effective precautions to safeguard
3 themselves or their loved ones. And the very existence of these regimes diverts attention from
4 much more significant sexual dangers, thus in effect fostering a false sense of security and
5 increasing the dangers to children and others.²⁶

6 Schools, day-care centers, and other organizations that serve vulnerable populations
7 present a different issue. They must not employ staff or volunteers who put their clientele at risk
8 of sexual abuse, and their due-diligence obligations in that regard are strong. But background-
9 check mechanisms are available nationally and in all states to meet this need within well-regulated
10 privacy-protective frameworks. Where incomplete or too narrow in their coverage, these
11 background-check mechanisms can be strengthened without resort to county- and municipal-level
12 sex-offense registries, which in any event cannot meet the need—they are overbroad, poorly
13 insulated from *unnecessary* public access, and dangerously *underinclusive* because they omit
14 criminal history pertaining to relevant nonsexual offenses.²⁷

15 c. *Costs*. Substantial costs must be weighed against these scant public-safety benefits.
16 Registration laws are expensive to implement, especially when (as is typical) they target a large,
17 heterogeneous group of ex-offenders. For local police departments, registry management, GPS
18 monitoring, and related duties take personnel away from responding to emergencies, investigating
19 crime, and providing other public services. Out-of-pocket expenses for website technology and for
20 recording and updating registry information can run to several millions of dollars per year.²⁸ Many
21 states find that more selective approaches can achieve nearly all the benefits at much lower cost.²⁹

22 d. *Unintended Effects*. Even more concerning are the counterproductive side effects.
23 Restricted residency pushes registrants into socially disorganized, economically stressed
24 neighborhoods or into homelessness. Public access to registry information, community
25 notification, overbroad limits on employment and residency, and indirect impacts on registrants'

²⁶ See text at note 136 and Reporters' Note to Section 213.11H.

²⁷ See text at notes 258-271.

²⁸ See text at notes 145-146, 309-312.

²⁹ See note 167.

SECTION 213.11. EXECUTIVE SUMMARY

1 ability to find jobs and housing lead to a high incidence of registrant joblessness, social isolation,
2 homelessness, suicide, and even physical violence at the hands of misguided members of the
3 public.³⁰ These effects in turn mean negative impacts *for public safety* because successful
4 reintegration into society requires stable living arrangements, supportive family, and steady
5 employment, while poor social support and psychological stress are important risk factors for
6 sexual recidivism. So the burdens typically imposed on registrants almost inevitably aggravate the
7 very dangers they seek to allay; the adverse impacts on registrants impede their rehabilitation and
8 aggravate their risks of reoffending.³¹ Registration of juveniles has had distinctively harsh
9 consequences, and assessments of its value have been especially negative.³² Because these
10 criminogenic effects can *increase* registrant recidivism, they tend to outweigh any public-safety
11 benefits of self-protection and the enhanced possibilities for surveillance and deterrence of
12 registrants. The result, convincingly documented, is that these laws actually undermine public
13 safety, the exact opposite of what lawmakers and the public so confidently assume they
14 accomplish.

15 4. *Recommendations.*

16 a. *Overall approach.* The strong case against these schemes prompts many experts to
17 unconditionally oppose *any* regime for sex-offense registration or other collateral consequences.
18 The Draft does not endorse that view. First, simply as a pragmatic matter, it is clear that an Institute
19 recommendation to eliminate registries entirely will have no constructive law-reform impact,
20 either now or in any foreseeable political future. Registries and their associated features currently
21 command overwhelming public support, based on emotions and intuitions not easily dislodged.
22 Those actively engaged in the reform effort on the ground are emphatic that there is no legislative
23 audience for an approach that categorically opposes registries altogether.³³

³⁰ See text at notes 149, 253-256, 319-322.

³¹ See text at notes 150, 255-256, 316-327.

³² See note 81 and text at notes 190-204.

³³ See, e.g., William Buhl, J.J. Prescott & Miriam Aukerman, *Michigan Poised to Double Down on Failed Sex Offender Registry*, DETROIT FREE PRESS, Dec. 10, 2020 (statement of “a judge whose hands were tied by SORA’s one-size-fits-all approach, a researcher who has documented the counterproductive impact of registries, and an attorney who has represented [registrants]” arguing that in Michigan “[l]egislators should bring together stakeholders and experts to draft an evidence-based statute, looking to examples like the draft model law written by the American Law Institute.”); Patty Wetterling, Letter to

SECTION 213.11. EXECUTIVE SUMMARY

1 On the merits, moreover, unqualified opposition to registries in any form reaches farther
2 than a discriminating analysis can justify. Sex-offense collateral consequences in the United States
3 are certainly too harsh, a fact that no doubt contributes to the strongly negative reaction that the
4 registry concept so often prompts. But the overly severe, counterproductive effects are not inherent
5 in registries as such. Instead, they result from features common in the United States but readily
6 severable and virtually unheard of elsewhere in the world.

7 Nearly every Western nation maintains registries of persons who have been convicted of a
8 sexual offense. But unlike American registries, those of other countries are almost exclusively for
9 law-enforcement use, with either very limited need-to-know access for others or (in the great
10 majority of countries) no public access at all. Registry regimes outside the United States typically
11 include none of the elements that make American sex-offense regimes so destructive—most
12 obviously, the sweeping and illogical restrictions on residency, but also, for registries themselves,
13 the overbroad list of offenses that require registration, burdensome and overly long-lasting update
14 duties, unrestricted public access, and sweeping community notification disconnected from any
15 plausible need to know.³⁴

Minnesota Senators and Representatives, Feb. 8, 2021 (urging appointment of a Working Group to consider “many needed reforms” because Minnesota SORNA is “overbroad” and “must be scaled back.”); Eric Janus, Letter to Minnesota Senators and Representatives, Feb. 8, 2021 (same); Ira Ellman, email to Stephen Schulhofer, Nov. 10, 2020 (describing difficult, nearly unsuccessful California effort to enact modest SORNA amendments, merely to differentiate triggering offenses by tiers, and concluding “The idea of proposing [California] simply abolish its registry never occurred to anyone. [Even in] this heavily blue state in which Democrats enjoy legislative super majorities, that would have been a complete non-starter.”); Eric S. Janus, email to Stephen Schulhofer, Jan. 21, 2021 (“Although I doubt that there are good grounds for uniquely targeting sex crimes for even highly confined registration laws, I believe that the current ALI draft moves substantially in the right direction. I am aware of efforts in some states ... [to] rein in registration laws. A model law that focuses on the one arguably valid foundation for such laws—assisting law enforcement—would be of enormous benefit as a guide to state legislative efforts.”); Eric Tennen (Boston attorney who has represented several hundred registrants), Letter to Stephen Schulhofer, Feb. 16, 2021:

“I [do not] support registration. ... But as a practical matter, I recognize there is no real legal or political route to abolition.... I believe [the ALI’s] efforts can more realistically achieve reform than simply taking the position registration should not exist.... I do not believe that even our progressive [Massachusetts] Legislature would entertain calls to abolish our registry. However, I do believe our Legislature might be responsive to evidence-based arguments to scale back registration... Therefore, [I support] ALI’s efforts on this front. I believe Council Draft 11 is an extremely well argued, well researched proposal. It is both modest and groundbreaking. Modest because it recognizes the reality of registration; groundbreaking because it insists registration be objective and scientific.”

³⁴ See text at notes 30-80.

SECTION 213.11. EXECUTIVE SUMMARY

1 In light of these concerns, the Draft does not condemn sex-offense collateral consequences
2 wholesale. Instead, it recommends a selective approach. Because a sex-offense registry provides
3 locally relevant information that police cannot obtain from ordinary criminal-history databases
4 when they have not identified a particular suspect,³⁵ registries facilitate high-priority investigations
5 of serious sexual offenses. That gives them the important practical advantages that prompt virtually
6 all Western nations to maintain sex-offense registries for law-enforcement use.³⁶ As long as the
7 confidentiality of these records is preserved, registration for law-enforcement purposes poses
8 relatively few dangers to public safety and to the welfare of registrants themselves.

9 The Draft therefore accepts the value of registries available exclusively to law enforcement,
10 but requires that they be structured to avoid undue burdens on registrants. At the same time, the
11 Draft limits and carefully targets other special burdens, permitting them only on a substantially
12 more restricted basis than that found in much of current American law, in order to make their
13 imposition more coherent and less prone to abusive application.

14 b. *Principal details.* The Draft's core recommendation is to permit sex-offense registries
15 for the exclusive use of law enforcement, while deploying a range of devices, some conspicuous
16 and others more granular, to minimize or eliminate unnecessarily harsh and counterproductive
17 features of currently prevalent law. Seven of these limiting devices are especially important:

18 1) *Triggering offenses.* Section 213.11A sharply restricts the class of individuals to whom
19 the duty to register and other sex-offense collateral consequences apply. It precludes registration
20 of nearly all juveniles, and for adults, it imposes the threshold duty to register only upon conviction
21 of offenses that **most strongly arouse public concern**, specifically:

22 (i) Sexual Assault by Aggravated Physical Force or Restraint.

23 (ii) Sexual Assault by Physical Force, but only when committed after the offender
24 had previously been convicted of a felony sex offense.

25 (iii) Sexual Assault of an Incapacitated Person, but only when committed after the
26 offender had previously been convicted of a felony sex offense.

27 (iv) Sexual Assault of a Minor, but only when the minor is younger than 12 and the
28 actor is 21 years old or older.

³⁵ See text at notes 85.

³⁶ See text at notes 30-80.

SECTION 213.11. EXECUTIVE SUMMARY

(v) Incestuous Sexual Assault of a Minor, but only when the minor is younger than

16.

2) *Updating information.* Section 213.11E permits registrants to update required information by email or other readily accessible means of communication, without needing to make overly frequent personal appearances or navigate other burdensome bureaucratic obstacles.

3) *Duration of duties.* The registration framework shortens in three ways the duration of required registration. Section 213.11F(2) limits to 15 years the registrant's duty to keep registry information current. Section 213.11F(3) provides for automatic termination of that duty at an earlier date if the registrant meets specified rehabilitative goals during the initial registration period. Finally, Section 213.11J permits the registrant to apply for early removal from the registry upon an appropriate showing of rehabilitation.

4) *Public access to registry information.* Section 213.11H marks a major departure from the American practice of investing considerable resources in an effort to maximize public awareness of registry information. It permits only government law-enforcement agencies and personnel to access registry information. Non-law-enforcement access is precluded, and Section 213.11H imposes on authorities who have access to registry information a strong obligation to preserve its confidentiality.

A legitimate need for non-law-enforcement access arises when an individual is being considered for a position of trust involving contact with a vulnerable population. But the FBI has authority to share criminal-history information with state agencies responsible for licensing and employment background checks in regulated areas, including for individuals who work with vulnerable populations.³⁷ Although some state regimes do not apply to all arguably relevant occupations and may have other gaps, the solution to that problem is simply to fill those gaps directly, after expressly confronting the conflicting public-safety benefits and privacy costs. Whether that step is taken or not, local sex-offense registries cannot fill such gaps because they omit criminal history information pertaining to large numbers of crucially relevant nonsexual offenses and therefore are vastly underinclusive.³⁸ To open local registries for these purposes would create unnecessary risks, given the availability of pertinent records (including for relevant

³⁷ See text at note 262.

³⁸ See text at notes 262-271.

SECTION 213.11. EXECUTIVE SUMMARY

1 *nonsexual* offenses) from national and state databases subject to stronger oversight and controls.
2 Since the legitimate need can be met adequately, and indeed more adequately, in other ways,
3 Section 213.11H does not permit non-law-enforcement access to registry information.

4 5) *Community notification*. Because persons and organizations with a justifiable need to
5 know have access to criminal-record information on a well-regulated basis through the criminal-
6 history background-check systems just mentioned, Section 213.11I(3) bars proactive government
7 measures broadly notifying community organizations and individuals that a registrant resides,
8 works, or studies in the area.

9 6) *Other burdens*. Section 213.11I tightly constrains, and in most cases eliminates, other
10 burdens and restrictions applicable specifically to persons convicted of a sexual offense. It creates
11 a strong presumption against GPS monitoring, residency restrictions, limits on Internet access, and
12 the like, permitting them only when an individual, case-by-case risk assessment strongly supports
13 the need for such a measure, to an extent that outweighs its potential for costly, counterproductive,
14 and criminogenic effects. The official making the determination must carefully consider the
15 public-safety need for the particular measure; weigh that need against its impact on the registrant,
16 the registrant's family, and the registrant's prospects for rehabilitation; and ensure that any
17 measure approved is drawn as narrowly as possible to achieve its public-safety objectives.

18 7) *Relief from registration and other burdens*. Section 213.11J establishes standards and
19 procedures by which registrants can petition for early relief from registration and other special
20 burdens of a sex-offense conviction.

1 **SECTION 213.11. SENTENCING AND COLLATERAL CONSEQUENCES OF CONVICTION**

2 **(1) *Definitions.*** For purposes of this Article:

3 (a) “sentencing consequences” are penalties, disabilities, or disadvantages that
4 are part of the sentence imposed by the court or by an agency authorized to set the
5 terms of parole or post-release supervision in connection with conviction of an Article
6 213 offense; and

7 (b) “collateral consequences” are penalties, disabilities, or disadvantages,
8 however denominated, that are authorized or required by federal, state, or local law
9 as a direct result of an individual’s conviction of an Article 213 offense but are not
10 part of the sentence imposed by the court or by an agency authorized to set the terms
11 of parole or post-release supervision in connection with that conviction.

12 **(2) *General Rule.*** Sentencing procedure, the authorized disposition of a person
13 convicted of an Article 213 offense, sentencing consequences, and collateral consequences are
14 specified in Articles 6 and 7 of this Code,* and are subject to the additional requirements of
15 this Section.

16 **(3) *Additional Requirements for Sentencing Consequences.*** Notwithstanding any
17 contrary provisions of law, the conditions of any suspended sentence under Section 6.02(2),
18 any sentence to probation under Section 6.05, and any terms of parole or post-release
19 supervision under Section 6.13 must be eligible for early relief under Section 213.11J and
20 must not include:

21 (a) a condition that:

22 (i) imposes an obligation to register with law enforcement that carries
23 requirements other than those authorized under Sections 213.11A-213.11G
24 and Section 213.11J;

25 (ii) permits access to the person’s registry information, except as
26 authorized under Section 213.11H; or

27 (iii) authorizes or permits any government official to notify a public or
28 private entity or individual, other than a government law-enforcement agency

* MODEL PENAL CODE: SENTENCING, *Official Statutory Text* (May 24, 2017).

1 or individual, that the person is registered with law enforcement or resides,
2 works, or studies in the locality;

3 (b) a condition that restricts the person's occupation or employment, except as
4 required by state law or authorized under paragraph (d) of this subsection; or

5 (c) except as authorized under paragraph (d) of this subsection, a condition
6 that:

7 (i) requires the person to submit to GPS monitoring; or

8 (ii) restricts the person's education, Internet access, or place of
9 residence.

10 (d) The court, and any agency authorized to set the terms of parole or post-
11 release supervision, may impose a condition, not required by state law, that restricts
12 the person's occupation or employment, or a condition specified in paragraph (c) of
13 this subsection, only if the court or agency determines that the condition is manifestly
14 required in the interest of public safety. That determination must be:

15 (i) made after due consideration of the nature of the offense; all other
16 circumstances of the case; the person's prior record; and the potential
17 negative impacts of the burden, restriction, requirement, or government
18 action on the person, on the person's family, and on the person's prospects for
19 rehabilitation and reintegration into society; and

20 (ii) accompanied by a written statement of the official setting the
21 condition, explaining the need for it, the evidentiary basis for the finding of
22 need, and the reasons why a more narrowly drawn condition would not
23 adequately meet that need.

24 (e) Any condition imposed under paragraph (d) must be:

25 (i) drawn as narrowly as possible to achieve the goal of public safety;
26 and

27 (ii) imposed only for a period not to exceed that permitted under
28 Section 213.11F for the duties to register and keep the registration current.

29 ***(4) Additional Requirements for Collateral Consequences that are Applicable Primarily***
30 ***to Persons Convicted of a Sexual Offense.*** Notwithstanding any contrary provisions of law,
31 collateral consequences applicable primarily to persons convicted of a sexual offense,

1 including the obligation to register with law enforcement; associated duties; restrictions on
2 occupation and employment, education, and place of residence applicable primarily to
3 persons convicted of a sexual offense; and other collateral consequences applicable primarily
4 to persons convicted of a sexual offense, are authorized and their scope and implementation
5 are delineated as follows:

6 (a) The person's obligation to register for law-enforcement purposes is
7 governed by Section 213.11A.

8 (b) Notification of the person's obligation to register and associated duties
9 is governed by Section 213.11B.

10 (c) The time of initial registration is governed by Section 213.11C.

11 (d) The information required upon registration is specified in Section
12 213.11D.

13 (e) The duty to keep registration current is specified in Section 213.11E.

14 (f) The duration of the registration requirements is specified in Section
15 213.11F.

16 (g) Penalties for failure to register are governed by Section 213.11G.

17 (h) Access to registry information is governed by Section 213.11H.

18 (i) Collateral consequences applicable primarily to persons convicted of a
19 sexual offense, other than the obligation to register for law-enforcement purposes
20 and restrictions on occupation and employment required by state law, are
21 governed by Section 213.11I.

22 (j) Standards and procedures for relief from the obligation to register,
23 associated duties, and other collateral consequences applicable specifically to
24 persons convicted of a sexual offense are governed by Section 213.11J.

25 **Comment.**

26 *1. Scope.* In current American law, persons convicted of a sexual offense face a variety
27 of legal burdens not typically imposed on persons convicted of other serious crimes—burdens such
28 as obligations to register with local law enforcement, GPS monitoring of their location, and
29 restrictions on permissible places of residence. No single body of law generates all these burdens
30 or even any particular type of restriction. For instance, a residency restriction may be imposed by

Section 213.11. Sentencing and Collateral Consequences of Conviction

1 the sentencing court as condition of probation, imposed by a parole board as a condition of
2 postrelease supervision, mandated by state law, or even applicable in some municipalities of the
3 state but not in others. Articles 6 and 7 of *Model Penal Code: Sentencing* apply to sentencing
4 procedures, sentencing consequences, and collateral consequences for criminal offenses generally,
5 including those defined in Article 213. Section 213.11 and Sections 213.11A-213.11J of Article
6 213 supplement those provisions with additional requirements tailored to the particular
7 circumstances of the sexual offenses. These additional requirements apply not only when the
8 relevant consequences are imposed by the sentencing court or parole board (“sentencing
9 consequences”), but also when they do not arise in the sentencing process but instead are ordered
10 by other state agencies or mandated by other federal, state, or local laws (“collateral
11 consequences”).¹

12 For sentencing consequences, subsection (3) specifies the additional requirements that
13 govern and supersede any contrary provisions of law, with respect to the conditions listed in
14 subsection (3)(a), (b), and (c).

15 For collateral consequences, subsection (4) specifies that the additional requirements of
16 Sections 213.11A-213.11J govern and supersede any contrary provisions of law, with respect to
17 collateral consequences that are “applicable primarily to persons convicted of a sexual offense.”
18 The additional requirements of Sections 213.11A-213.11J are not limited to consequences that
19 apply *only* to persons convicted of a sexual offense. Some statutes provide for burdens that are
20 applicable not only to persons convicted of a sexual offense but also to persons convicted (for

¹ The Article 7 provisions applicable to collateral consequences reach “penalties, disabilities, or disadvantages ... authorized or required by state or federal law [that] are not part of the sentence ordered by the court.” MODEL PENAL CODE: SENTENCING, Section 7.01 (AM. L. INST., Official Statutory Text, May 24, 2017) (hereafter *MPCS Statutory Text*). The Comment to this Section indicates that its requirements do not govern “locally imposed” consequences of conviction. MODEL PENAL CODE: SENTENCING, Section 6x.01, Comment *b*, p. 278 (AM. L. INST., Proposed Final Draft, April 10, 2017) (hereafter *MPCS Proposed Final Draft*) (stating that this Section “excludes from the definition of collateral consequences all informal, locally imposed, private, and extralegal consequences of conviction”). The Comment could be read as intended to exclude “locally imposed” consequences of conviction only when they are *informal* or *private*, or also when they are formally mandated by the laws of a city or county. Either way, for sexual offenses, the difference between state-level and local-level law is not relevant to the concerns that animate Article 213, and important burdens of conviction, such as residency restrictions, often are grounded in municipal ordinances rather than statewide legislation. See text at note 297, *infra*. The standards and procedures of Section 213.11 and Sections 213.11A-213.11J therefore apply to restrictions under local as well federal and state law.

example) of kidnapping or child abduction. When those burdens are triggered by conviction of an Article 213 offense, the provisions of Sections 213.11A-213.11J apply and supersede contrary provisions of the laws in question, because those laws apply only to persons convicted of sexual offenses and a small number of other serious crimes. But these additional requirements do not affect collateral consequences—such as limits on the right to vote, serve on a jury, or receive public benefits²—that may result from conviction for any serious crime or for a wide range of diverse felonies.

Section 213.11 and Sections 213.11A-213.11J do not apply in connection with conviction for an offense other than one defined by Article 213. Sentencing procedure, sentencing consequences, and collateral consequences for offenses outside Article 213 are governed by Articles 6 and 7 of *Model Penal Code: Sentencing*.

2. General Principles.

All American jurisdictions require persons convicted of a sexual offense to register with local law-enforcement authorities where they reside, work, or are enrolled as a student,³ and to continually update the personal information provided. Typically, these registries permit the general public to access more limited, but still extensive personal information about the registrant through a separate public website that does not post especially sensitive personal-identity information, such as the registrant's social security number.

Beyond these core features, there is considerable variation in the registry regimes and other restrictions applicable specifically to persons convicted of a sexual offense. The majority of jurisdictions require law-enforcement agencies to notify concerned community organizations or the public generally when a person who has been convicted of a sexual offense moves into the area. And most jurisdictions require these persons to submit to GPS monitoring of their location at all times. Additional restrictions targeting persons convicted of a sexual offense are also

² See, e.g., *MPCS Statutory Text*, supra note 1, Section 7.03.

³ Federal SORNA (the Sex Offender Registration and Notification Act of 2006), for example, defines “student” as “an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education.” SORNA § 20911(11).

1 common, though by no means universal. For example, many states or their municipalities prohibit
2 these persons from residing in certain areas or working in certain occupations.⁴

3 The objective of these laws is to reduce recidivism and enable the public to take measures
4 for self-protection, or at least ease public fear of crimes that are particularly unsettling and
5 injurious. Yet despite the intuitive plausibility of these benefits, extensive research demonstrates
6 convincingly that the expected gains have not materialized.⁵ At the same time, the laws have a
7 broad range of well-documented, undesirable consequences. Most obvious are the onerous burdens
8 on registrants themselves,⁶ but the less evident effects are important and too often overlooked. In
9 part because the burdens imposed on registrants can be powerfully criminogenic, these laws appear
10 to result in more rather than less crime, including sexual crime, and ultimately impair rather than
11 enhance public safety,⁷ undermining the very purposes that lawmakers and the public pursue in
12 supporting these policies.

13 Because the registries provide locally relevant information that police cannot obtain from
14 ordinary criminal-history databases when they have not identified a particular suspect,⁸ sex-
15 offense registries facilitate high-priority investigations of serious sexual offenses. That gives them
16 important practical advantages for the police,⁹ and virtually all Western nations maintain sex-
17 offense registries for law-enforcement use.¹⁰ But unrestricted public access to the registries,
18 community notification, limits on residency and employment, and similar burdens are a different
19 matter. These wider measures, which with few exceptions are unique to the United States,¹¹ can
20 be dangerously counterproductive.¹²

⁴ See generally, text at notes 149, 296-301, 319-322, *infra*.

⁵ See text at notes 131-136, *infra*.

⁶ See, e.g., text at notes 149, 253-256, 319-322, *infra*.

⁷ See generally text at notes 150, 255-256, 316-327, *infra*.

⁸ See text at notes 84-85, *infra*.

⁹ *Id.*

¹⁰ See text at notes 30-80, *infra*.

¹¹ *Id.*

¹² See text at notes 150, 255-256, 316-327, *infra*.

Section 213.11. Sentencing and Collateral Consequences of Conviction

1 In light of these concerns, the Institute calls for a cautious, discriminating approach to
2 measures that impose on persons convicted of a sexual offense special burdens not applicable to
3 persons convicted of most other serious crimes. It recognizes that registries available *exclusively*
4 to law enforcement serve valuable, cost-effective functions and, if reasonably implemented, need
5 not be punitive or unduly burdensome for the registrant. A registry can fulfill its purposes while
6 insuring, for example, that the person concerned can satisfy the associated duties, such as the
7 obligation to keep registry information current, without being obliged (as is often the case in
8 current registry regimes) to navigate an obstacle course of daunting bureaucratic requirements.

9 At the same time, in the interests of both fairness and public safety, the Institute finds it
10 important to limit and carefully target other special burdens potentially applicable to these persons.
11 Subsections (3) and (4) therefore authorize other special burdens only on a substantially more
12 restricted basis than that found in much of current American law, in order to make their imposition
13 more consistent, coherent, and less prone to abuse or oppression in application or effect.

14 Specifically, under the grading provisions of Article 213, only the most serious sexual
15 offenses trigger an obligation to register with law enforcement and other burdens applicable
16 specifically to persons convicted of a sexual offense. And conviction of one of these especially
17 serious offenses authorizes only a few, narrowly tailored burdens in the interests of public safety
18 and public peace of mind. Moreover, the same limitations apply to all legal penalties, disabilities,
19 or disadvantages that result from conviction of an Article 213 offense, regardless of whether those
20 burdens are imposed in connection with sentencing or under other legal authority.

21 When the obligation to register applies, Sections 213.11A-213.11G and Section 213.11J
22 define and constrain the requirements associated with registration, Section 213.11H permits only
23 law-enforcement agencies and personnel to access registry information, and Section 213.11I
24 permits specified additional burdens (GPS monitoring and restrictions on the person's occupation,
25 employment, education, Internet access, or place of residence) only in compliance with detailed
26 safeguards. Other burdens applicable specifically to persons convicted of a sexual offense (in
27 particular, non-law enforcement access to registry information and community notification) are
28 not authorized within the safeguards of Section 213.11I and therefore are precluded entirely.

29 To make those limitations effective in connection with sentencing, subsection (3)(a)(i)
30 provides that a suspended sentence, a sentence to probation, and any terms of parole or postrelease
31 supervision must be eligible for early relief under Section 213.11J and must not impose an

Section 213.11. Sentencing and Collateral Consequences of Conviction

1 obligation to register with law enforcement except as authorized under Sections 213.11A-213.11G
2 and Section 213.11J. Those limits on the obligation to register and their justification are discussed
3 in the Comments and Reporters' Notes to those Sections.

4 Subsection (3)(a)(ii) provides that sentencing consequences must not permit access to
5 registry information, except as authorized under Section 213.11H, which imposes on law
6 enforcement a strong obligation to preserve the confidentiality of that information. That limitation
7 and its basis are discussed in the Comments and Reporters' Notes to Section 213.11H.

8 Under subsection (3)(a)(iii), sentencing consequences must not authorize or permit
9 notification to any public or private individual or agency, other than law enforcement, that the
10 person concerned is registered with law enforcement or resides, works, or studies in the locality.

11 Under subsection (3)(b), sentencing consequences must not authorize or permit a condition
12 that restricts the person's occupation or employment, except as required by state law or authorized
13 under the procedural safeguards and substantive standards of paragraph (d) of subsection (3).
14 Many state-law restrictions on occupation and employment apply to a broad range of felony
15 offenses and therefore are not affected by the rules and limitations imposed by Sections 213.11-
16 213.11J. But those Sections do apply to state laws that primarily target sexual offenses, and many
17 state laws relating to occupation and employment do just that.¹³ These laws raise issues that are
18 in part distinct from those presented by other sex-offense collateral consequences. Often they are
19 embedded in detailed occupational licensing schemes that Article 213 should not categorically
20 override, and their justifications are stronger than those that can plausibly apply to registration,
21 residency restrictions, GPS monitoring, and the like. Restrictions on employment in nursing homes
22 and day-care centers, for example, can reasonably be based on a broader list of triggering sexual
23 offenses than those which arguably warrant duties to register with law enforcement. Paragraph (b)
24 therefore does not require case-by-case justification under paragraph (d) for restrictions on
25 occupation and employment that are required by state law. But restrictions on occupation and
26 employment not required by state law can be imposed only in compliance with paragraphs (d) and
27 (e).

¹³ See, e.g., Miss. Code Ann. § 43-15-303 (prohibiting organizations involved in child care from employing sex offenders or permitting them to volunteer). See also text at note 102, *infra*.

Section 213.11. Sentencing and Collateral Consequences of Conviction

Under paragraph (c) of subsection (3), sentencing consequences also may extend to GPS monitoring or restrictions on the person's education, Internet access, or place of residence (as well as restrictions on the person's occupation and employment that are not required by state law), but again, only as authorized under paragraphs (d) and (e). Paragraph (d) imposes procedural safeguards and substantive standards that require a showing of specific need, assessed after due consideration of the potential negative impacts on the registrant, the registrant's family and the registrant's prospects for rehabilitation and reintegration into society. Under paragraph (e), any such restrictions must be drawn as narrowly as possible to achieve the goal of public safety and must not be imposed for longer than the period permitted under Section 213.11F for the duties to register and keep the registration current. The reasons for precluding community notification as a sentencing consequence and for allowing the other listed burdens only in compliance with specific procedural and substantive safeguards are explained in the Comments and Reporters' Notes to Section 213.11I.

To make the same limitations effective for collateral consequences, Subsection (4) and Sections 213.11A-213.11J impose essentially identical procedures and standards in connection with penalties, disabilities, and disadvantages that result directly from conviction of an Article 213 offense but are not part of the sentence or the terms of parole or postrelease supervision. The justification for those procedures and standards, explained in the Comments and Reporters' Notes to Sections 213.11A-213.11J, is the same for collateral consequences as it is for sentencing consequences.

REPORTERS' NOTES

1. Introduction: Sex-Offense Sentencing Consequences and Collateral Consequences Generally.

Every state currently has legislation requiring persons convicted of a sexual offense, on release from custody, to register with local authorities in their place of residence, to keep authorities informed of changes in their address, and to observe a variety of other restrictions. This legislation makes their personal information available to law enforcement and typically permits the general public to retrieve much but not all of this information through a public website. Many of these laws also establish a regime of community notification—a requirement that local authorities take affirmative steps to inform the public about the names and addresses of persons convicted of a sexual offense who reside, work, or study in the area.

1 Federal law requires every state, as a condition of receiving certain federal funds, to
 2 establish an Internet-accessible registry of persons convicted of a sexual offense, with certain
 3 minimum information about these persons.¹⁴ To facilitate public access to the state-run websites,
 4 the Department of Justice maintains a central resource, the National Sex Offender Public Website
 5 (NSOPW), that links to the state websites and thus directs a concerned citizen to information that
 6 may be publicly available at the state’s registry. Federal law, in addition, requires the FBI to
 7 maintain a national database, the National Sex Offender Registry (NSOR), that includes more
 8 detailed information about each person required to register in a jurisdiction’s sex offense registry.
 9 NSOR, however, is available only to law enforcement and other authorized criminal-justice
 10 agencies.¹⁵

11 Although originally inspired by concern over violent recidivists, these laws now apply even
 12 to persons with no prior criminal record who are convicted of a broad range of sexual offenses,
 13 often including possession of child pornography and statutory rape (sometimes including statutory
 14 rape in which victim and perpetrator are close in age). And states and localities have used these
 15 regimes as the basis for what has been aptly described as “a cluster of ancillary social control
 16 strategies,”¹⁶ including (in many states) GPS monitoring and limits on places where registrants
 17 can reside or work.

18 Collateral consequences of conviction are not confined to the sex offenses, and in recent
 19 years they have proliferated across broad swaths of the criminal law, prompting several prominent
 20 law-reform bodies to address collateral sanctions applicable to offenders in general.¹⁷ These
 21 initiatives have considered under one umbrella virtually the entire gamut of collateral sanctions
 22 triggered by conviction not only of sexual offenses but also offenses ranging from homicide to
 23 drug crimes, securities fraud, and drunk driving; likewise these assessments seek to cover the entire
 24 gamut of collateral consequences, including disenfranchisement, ineligibility for public housing,
 25 loss of other public benefits, barriers to occupational licensing, and the like.

26 These efforts mainly aim to identify general principles and corresponding statutory
 27 language suitable for application to any collateral consequence associated with conviction for any
 28 offense. Because they cover so much terrain, they cannot delve into the substantive question of
 29 when a given sanction should be available for a given offense. Rather, of necessity they focus on
 30 general principles of procedural fairness that can be cast in broadly applicable terms—for example,

¹⁴ 34 U.S.C. § 20922.

¹⁵ See generally <https://smart.ojp.gov/nsopw-nsor-fact-sheet>.

¹⁶ Wayne A. Logan, *Origins and Evolution*, in WAYNE A. LOGAN & J. J. PRESCOTT, EDS., *SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS* 1, 14 (forthcoming 2021).

¹⁷ See American Bar Association, *Standards for Collateral Sanctions and Discretionary Disqualification of Convicted Persons* (2004); National Conference of Commissioners on Uniform State Laws, *Uniform Collateral Consequences of Conviction Act* (2009); *MPCS Statutory Text*, supra note 1, Art. 7.

1 requiring that the sentencing judge explain applicable collateral consequences to defendants prior
2 to entry of a guilty plea and at sentencing; that appropriate authorities compile in one place a list
3 of the jurisdiction’s collateral sanctions; that jurisdictions allow offenders to seek relief from
4 inappropriate collateral sanctions; and that sentencing commissions develop guidelines for courts
5 to use in making substantive decisions about whether to impose a given collateral sanction or grant
6 relief from it.¹⁸ These treatments inevitably stop short of the sustained attention to the range of
7 issues that arise in the context of collateral consequences applicable specifically to the sexual
8 offenses.

9 The effects of these measures in the context of the sexual offenses are not only important
10 in their own right, but they also have important implications for the substantive definition of the
11 sexual offenses. In deciding the proper scope of penal prohibitions, legislative bodies must
12 consider the severe collateral consequences typically triggered by state offenses denominated as
13 “rape” or “sexual assault.” Concerns of this nature presumably shaped the Institute’s original
14 decision, in 1962 MPC Section 213.5, to address matters of procedure and evidence distinctive to
15 rape that go beyond mere substantive crime definition. Sections 213.11A-213.11J likewise reflect
16 the judgment that sound treatment of the sexual offenses in Article 213 cannot confine itself to
17 offense definitions alone but must also address sanctions and collateral consequences authorized
18 or required upon conviction.

19 Note 2 examines the historical development of collateral consequences and other special
20 burdens applicable specifically to persons convicted of a sexual offense. Note 3 surveys practices
21 abroad with respect to special burdens applicable to persons convicted of a sexual offense. Note 4
22 provides a brief overview of the policy concerns surrounding these laws and explains the
23 judgments underlying Sections 213.11-213.11J. Note 5 describes in detail the restrictions and
24 disabilities in question and variation in the relevant state and federal legislation, with respect to
25 both registration regimes and other consequences applicable specifically to persons convicted of a
26 sexual offense. Note 6 examines the policy goals of this kind of legislation and assesses the
27 evidence bearing on its effects, both intended and unintended. Note 7 explains the approach of
28 Article 213 with regard to these collateral consequences and other burdens applicable specifically
29 to persons convicted of a sexual offense.

30 **2. Historical Background.**

31 Since the 1930s and before, persons convicted of a sexual offense have faced a variety of
32 special sanctions, including mandatory sterilization and indefinite commitment for psychiatric
33 treatment.¹⁹ But these measures had relatively little visibility or importance when the Model Penal

¹⁸ See, e.g., *MPCS Statutory Text*, supra note 1, Art. 7.

¹⁹ See WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 1-48 (2009); PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA (1998); Karen J. Terry & Alissa R. Ackerman, *A Brief History of Major Sex Offender Laws*, in RICHARD G. WRIGHT, ed., SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS 50, 51-53 (2d ed. 2015).

Code was originally drafted. That picture changed dramatically in the early 1990s, when public interest in identifying persons previously convicted of a sexual offense emerged with new intensity following several highly publicized murders of young children.²⁰ In 1993, 12-year-old Polly Klaas was kidnapped, raped, and murdered by a man with a prior record for the commission of serious violent crimes. The next year, seven-year-old Megan Kanka was sexually assaulted and killed by a person who lived across the street and had previously been convicted of multiple sexual offenses. Several similar incidents were widely publicized during the 1990s and shortly thereafter.²¹ The legislative reaction to the Klaas killing focused on the “three-strikes-and-you’re-out” solution, which mandates extended terms of imprisonment for offenders previously convicted of two serious or violent felonies.²² In New Jersey, Megan Kanka’s murder prompted a different response, imposing registration requirements applicable only to persons convicted of a sexual offense. Within weeks of the killing, the state assembly declared a legislative emergency, and a sex-offender registration law passed, without committee hearings, about two months later.²³

In 1990, Patricia Wetterling responded to the murder of her 11-year-old son Jacob by establishing a foundation to press for the enactment of registration laws applicable to persons convicted of a sexual offense.²⁴ A year after New Jersey’s enactment of Megan’s Law, her efforts bore fruit when Congress, as part of the Violent Crime Control and Law Enforcement Act of 1994, enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, which required all states, on pain of loss of federal funding, to establish a system of registration for all persons convicted of a sexually violent offense or any criminal offense against a minor.²⁵

²⁰ See generally Logan, *Origins and Evolution*, supra note 16, at 1-16; Terry & Ackerman, supra note 19, at 74-94.

²¹ In the Sex Offender Registration and Notification Act of 2006 (“SORNA”), Congress’s “declaration of purpose,” 34 U.S.C. § 20901 (2019), lists more than a dozen specific victims.

²² See Michael Vitello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395 (1997).

²³ See Michelle Ruess, *Second Thoughts About Megan’s Law: Concern Growing over Ripple Effects*, RECORD (Hackensack, N.J.), Feb. 19, 1996, at A1 (describing rapid passage of Megan’s Law); Robert E. Freeman-Longo, *Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 303, 316 (1997) (same). The statute is now codified at N.J. STAT. ANN. § 2C:7-6 (West 1995 & Supp. 2011).

²⁴ Jacob’s body was missing for almost 30 years, having been found only in 2016, and his murderer was unknown until he confessed at that time. But from the outset the crime was assumed to be the work of a sexual predator.

²⁵ See 42 U.S.C. § 14071(f)(1) (Supp. III 1997).

1 Congress subsequently repealed that statute and replaced it with a broader law—the Sex
2 Offender Registration and Notification Act of 2006 (SORNA).²⁶ SORNA directs each state to
3 maintain a registry of persons convicted of any sexual offense and requires states to create a crime,
4 punishable under state law by more than a year’s imprisonment, for a person convicted of a sexual
5 offense who fails to register or meet a deadline for updating required registry information.²⁷
6 SORNA also establishes the National Sex Offender Public Website (NSOPW), which serves as a
7 central clearing house linking to the public websites established by individual states.²⁸ After the
8 passage of SORNA, many states expanded their own registration requirements and enacted other
9 special restrictions. In addition, it is a federal crime, punishable by up to 10 years in prison, for a
10 person convicted of a state-law sex offense to travel interstate without maintaining an up-to-date
11 registration with state authorities.²⁹

12 3. Practices Abroad.

13 Many places outside the United States, including the United Kingdom (UK), Canada, and
14 the European Union (EU), require persons who have been convicted of a sexual offense to register
15 with law enforcement or other official authority. Like the United States, these jurisdictions have
16 faced pressure to make sex-offense registry information readily available to the general public, but
17 unlike the United States, they have generally declined to do so.³⁰ Typically, their registry
18 information can be retrieved only by law enforcement, or they permit somewhat wider access in
19 limited circumstances. One fundamental reason is that other nations generally treat criminal-

²⁶ PUB. L. NO. 109-248, tit. I, 120 Stat. 590 (2006) (codified as amended at 34 U.S.C. §§ 20901-20929 (2019)).

²⁷ 34 U.S.C. § 20913(e).

²⁸ See text at note 15, *supra*.

²⁹ 18 U.S.C. § 2250.

³⁰ For detailed discussion, see James B. Jacobs & Dimitra Blitsa, *US, EU & UK Employment Vetting as Strategy for Preventing Convicted Sex Offenders from Gaining Access to Children*, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 12-64 (Nov. 2012), available at <http://ssrn.com/abstract=2176897>. For limited exceptions to this no-public-access principle, see text *infra* at note 62 (discussing community notification that some Canadian provinces authorize with respect to certain high-risk registrants), notes 65-66 (noting that one Australian state (Western Australia) permits public searches of the local registry, but only for missing and high-risk registrants or to determine whether a particular person in contact with their child is registered), and 78 (describing Poland’s dual registries: one accessible only to public officials and employers whose staff works with children, and the second accessible to the public generally, but listing only the most dangerous perpetrators of sexual crimes, such as those who have raped children or committed rapes with “extraordinary cruelty”).

1 history information as confidential, in order to protect the privacy of those who have been
2 convicted of crime and aid their rehabilitation.³¹

3 A global survey conducted by the U.S. Department of Justice in 2016 found that although
4 most nations surveyed maintain sex-offense registries in some form, usually the registries either
5 are not available to the public at all, or individuals and organizations with special need can query
6 the database about high-risk registrants under certain circumstances.³² Virtually none of the
7 foreign countries listed in the 2016 survey permits the prevalent U.S. practice of proactive
8 notification of sex-offense registry information to unlimited community organizations and the
9 general public.³³ More recently, at least two Latin American nations have enacted sex-offense
10 registry laws, but they too reject the U.S. practice of proactive community notification; access to
11 sex-offense registry information is largely restricted to law enforcement, with limited exceptions.³⁴

12 The following sections of this Note provide additional detail for the common-law countries
13 and Europe.

³¹ See, e.g., James B. Jacobs & Elena Larruri, *Are Criminal Convictions a Public Matter?: The USA and Spain*, 14 PUNISHMENT & SOC'Y 3, 12-14 (2012). On respect for this principle in countries outside the United States, see text accompanying notes 30-80, *infra*.

³² U.S. Dept. of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *Global Survey of Sex Offender Registration and Notification Systems* 17-22 (2016), <https://smart.gov/pdfs/global-survey-2016-final.pdf>. One nation (Chile) is listed as permitting data-base queries by the general public. *Id.*, at 18.

³³ South Korea is the only jurisdiction other than the United States that the DoJ survey lists as authorizing proactive notification to the public generally. *Id.*, at 21. The survey noted (*id.*, at 17-21) that a few jurisdictions authorize public notification limited to cases involving particular high-risk registrants: Bahamas, Bermuda, Canada (discussed in text at note 62, *infra*), Guernsey, and New Zealand (see also text at note 63, *infra*); the survey lists two jurisdictions as providing notice in high-risk cases but only to limited categories of recipients: “individuals and organizations who need the information” (Nigeria) or “parents, in certain circumstances” (Portugal, see also text at note 73, *infra*).

³⁴ See Misterio Público, *El Reglamento del Registro Nacional de Agresores Sexuales del Misterio Público* (May 14, 2018), available at https://consultasmp.mp.gob.gt/docs_download/Reglamento%20del%20RENAS.pdf (Guatemala); *Artículo 3, D-1954432, Ley que Establece las Medidas de Protección a la Sociedad contra Agresores Sexuales*, promulgated July 28, 2020, <http://silpy.congreso.gov.py/expediente/118670> (Paraguay). As of December 2019, no other Latin American country appeared to have a national-level sex-offense registry at all; registry systems were proposed but not yet enacted in Argentina and Mexico. See *Creacion del Registro Nacional de Delincuentes Sexuales (RENADSE)*, 1617-D-2015 (Argentina); Rolando Ramos, *Buscan fichar a agresores sexuales*, EL ECONOMISTA, Dec. 30, 2019, <https://www.economista.com.mx/politica/Buscan-fichar-a-agresores-sexuales-20191230-0067.html> (Mexico); *Ley de Registro de Agresores Sexuales en la CDMX incluirá nombre, la foto, alias y ADN*, INFOBAE, Dec. 3, 2019, <https://www.infobae.com/america/mexico/2019/12/03/ley-de-registro-de-agresores-sexuales-en-la-cdmx-inclui-ra-nombre-la-foto-alias-y-adn-de-los-agresores-sexuales> (visited Sep. 6, 2020) (discussing proposed registry for ex-offenders residing in Mexico City and noting that access will be limited to public officials or persons authorized by judicial authorities).

1 *a. United Kingdom.* The disabilities imposed on persons who have been convicted of a
2 sexual offense are far more limited in the UK than in the United States, largely because of concern
3 that widespread dissemination of criminal history and burdensome disabilities can undermine the
4 rehabilitation of ex-offenders.³⁵

5 The UK first implemented a sex-offense registry through the Sex Offenders Act of 1997,
6 later superseded by the Sex Offences Act of 2003.³⁶ England/Wales, Scotland, and Northern
7 Ireland each have separate registry systems,³⁷ but because those of Scotland and Northern Ireland
8 largely build on and mirror the regime for England/Wales, this summary of the provisions
9 applicable in England is approximately accurate for the rest of the UK as well.

10 Upon release from custody, persons convicted of a sexual offense must report to local
11 police, provide certain personal details (for example, birthday, national insurance number, names
12 used, and where they are living or planning to travel), and keep these details current for as long as
13 they remain on the registry. Registrants must also provide notice when they travel abroad or stay
14 in a house with children, and must provide a DNA sample, fingerprints, and a current photograph.³⁸

³⁵ See Jacobs & Blitsa, *supra* note 30.

³⁶ Kate Blacker & Lissa Griffin, *Megan's Law and Sarah's Law: A Comparative Study of Sex Offender Community Notification Schemes in the United States and the United Kingdom*, 46 CRIM. L. BULL. 987, 994 (2010); Kristen M. Zgoba & Devin Cowan, *Sexual Offense Legislation Across the Pond: A Review of Community Sentiment Toward the United Kingdom's Implementation of Sarah's Law*, 32 SEXUAL ABUSE 476, 477 (2020).

³⁷ See Kieran McCartan, Hazel Kemshall, & James Hoggett, *Reframing the Sex Offender Register and Disclosure: From Monitoring and Control to Desistance and Prevention*, in 2 CONTEMPORARY SEX OFFENDER MANAGEMENT 208, 215 (Hazel Kemshall & Kieran McCartan, eds., 2017). Policing policy in both Scotland and Northern Ireland is under separate, local, control. See ROB MAWBRY & ALAN WRIGHT, POLICE ACCOUNTABILITY IN THE UNITED KINGDOM) 2,4 (Commonwealth Human Rights Initiative, 2005), available at https://www.humanrightsinitiative.org/programs/aj/police/res_mat/police_accountability_in_uk.pdf (describing UK's "tripartite system of police accountability"). Scotland has its own registry system, much like that of the regime in England/Wales, though apparently less formalized. See Scottish Government, *Multi-Agency Public Protection Arrangements (MAPPA): National Guidance 2016* (Mar. 3, 2016) (describing Scottish participation in ViSOR and disclosure policies). For Northern Ireland, see Public Protection Arrangements in Northern Ireland, *PPANI Annual Report: 1st April 2016 – 31st March 2017* (2017) (describing Northern Ireland's "framework for managing the risks to the public posed by sexual and certain violent offenders").

³⁸ See *R(F) and Another v. Sec'y of State for the Home Dept.*, [2010] UKSC 17 (describing provisions of the Sexual Offences Act of 2003, §§ 80, 83(5)); Home Office, Guidance on Part 2 of the Sexual Offences Act of 2003, at 3, 12-13 (Sep. 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/755142/11.18guidanceonpart2ofthesexualoffencesact2003.pdf; Blacker & Griffin, *supra* note 36, at 999; David Edwards, *ViSOR—Violent and Sex Offender Register*, 51 CRIM. JUSTICE MATTERS 28 (2003).

1 The Violent and Sex Offenders Register (ViSOR) allows law enforcement to access information
2 in the registry and to track offenders within their jurisdiction.³⁹

3 Parliament originally mandated “an indefinite period” of registration for persons
4 “sentenced to imprisonment or detention for 30 months or more.”⁴⁰ However, in *R(F) v. Sec’y of*
5 *State for the Home Dep’t*,⁴¹ the UK Supreme Court held that provision invalid. The court ruled it
6 a “disproportionate interference” with the individual’s right to privacy under the European
7 Convention on Human Rights, because it made “no provision for individual review of its
8 requirements.”⁴² Parliament, responding in 2012, amended the applicable statute to provide a
9 mechanism by which registrants subject to lifetime registration could have that requirement
10 reviewed and, in some cases, lifted.⁴³ Early relief from the registration requirement apparently has
11 become more the norm than the exception. Between 2016 and 2018, 72 percent of the registrants
12 who asked to be taken off the registry had their requests granted.⁴⁴

13 Unlike the United States, England does not permit unlimited public access to registry
14 information.⁴⁵ Instead, England provides for “controlled disclosure” of information about certain
15 registrants, but only if they have been convicted of a sex offense against a child.⁴⁶ Under that

³⁹ See Jack O’Sullivan et al., *Understandings, Implications and Alternative Approaches to the Use of the Sex Offenders Register in the UK*, 13 IRISH PROBATION J. 84, 86 (2016); McCartan et al., *supra* note 37, at 212.

⁴⁰ See *R(F) v. Sec’y of State*, *supra* note 38, at ¶ 10 (reviewing Sexual Offences Act 2003, § 82).

⁴¹ *Id.* at ¶ 58.

⁴² *Id.*

⁴³ See UK Home Office and Nat’l Police Chief’s Council, *Sex Offender Notification Requirements: Review Mechanism* (July 2017) (outlining review procedures), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/626930/Sex_Offender_Notification_Requirements_-_Review_Mechanism_leaflet_.pdf.

⁴⁴ Jim Norton, *Sex Offenders Allowed to Sign Off Danger List*, THE DAILY MAIL, Jan. 3, 2020, <https://www.dailymail.co.uk/news/article-7846583/Sex-offenders-allowed-sign-danger-list.html> (reporting that over the three-year period, 1,288 applications had been filed seeking removal from the registry, and only 363 had been refused).

⁴⁵ See HAZEL KEMSHALL, UNDERSTANDING THE MANAGEMENT OF HIGH RISK OFFENDERS 118-119 (2008) (explaining that “the UK has not adopted public disclosure or community notification as per the USA models”).

⁴⁶ See U.K. Home Office, *Protecting Children* (Mar. 3, 2010), <https://webarchive.nationalarchives.gov.uk/20100412124519/http://www.homeoffice.gov.uk/about-us/news/child-sex-offenders-disclosure.html>; U.K. Home Office, *The Child Sex Offender (CSO) Disclosure Scheme Guidance Document* [hereinafter *CSOD Guidance*] (Nov. 5, 2010). A separate regime, known as Clare’s Law, provides for somewhat more expansive disclosure to interested persons of information about persons with a history of domestic violence or abuse. See U.K. Home Office, *Domestic Violence Disclosure Scheme (DVDS) Guidance* [hereinafter *DVDS Guidance*] 4 (Dec. 2016), available at

1 regime, known as Sarah’s Law,⁴⁷ members of the public may inquire whether a specific individual
 2 poses an ongoing risk to their child.⁴⁸ Before disclosure is made, the application by the parent or
 3 guardian is subject to an apparently rigorous series of reviews. The official assessing the disclosure
 4 application must consider whether a registered ex-offender “wishes to make representations in
 5 order to ensure that the [official] has all the information necessary to conduct the balancing
 6 exercise he is required to perform justly and fairly.”⁴⁹ Disclosure “must be ... limited to very
 7 pressing cases”; otherwise, “the presumption is against disclosure.”⁵⁰ The low reported rates of
 8 disclosure⁵¹ seem to bear out the apparently restrictive character of this standard. And when
 9 disclosure is permitted, Home Office Guidance requires all persons receiving a disclosure to “sign
 10 an undertaking that they agree that the information is confidential and they will not disclose this
 11 information further” and warns them that “legal proceedings could result if this confidentiality is
 12 breached.”⁵²

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/575361/DVDS_guidance_FINAL_v3.pdf; Jamie Grace, *Clare’s Law, or the National Domestic Violence Disclosure Scheme: The Contested Legalities of Criminality Information Sharing*, 79 J. CRIM. L. 36, 38 (2015).

⁴⁷ Sarah Payne disappeared in 2000, while playing near her grandparents’ home. Her naked body was found 16 days later in a shallow grave. The crime had been perpetrated by Roy Whiting, a registered sex offender living only five miles from where she had gone missing; he had been convicted of kidnapping and sexually assaulting a nine-year-old girl five years earlier but had served only half of his four-year sentence for those prior offenses. For Sarah’s killing, Whiting was convicted of murder and sentenced to life in prison. See Sally Lipscombe, Library of the House of Commons, *Sarah’s Law: the Child Sex Offender Disclosure Scheme*, at 3 (Mar. 6, 2012), <https://researchbriefings.files.parliament.uk/documents/SN01692/SN01692.pdf>; Mark Townsend, *Sarah Payne’s Killer in Plea for Early Release*, THE OBSERVER ONLINE, Mar. 11, 2006, <https://www.theguardian.com/uk/2006/mar/12/ukcrime.theobserver> (relating details about the case).

⁴⁸ See McCartan et al., *supra* note 37, at 213-215.

⁴⁹ See *X (South Yorkshire) v. Secretary of State for the Home Dep’t*, [2013] 1 WLR 2638. See also *CSOD Guidance*, *supra* note 30, § 5.5.4 (stating that “[i]f the application raises ‘concerns’, the police must consider if representations should be sought from the subject to ensure that the police have all necessary information to make a decision in relation to disclosure.”).

⁵⁰ *X (South Yorkshire)*, *supra* note 49, at ¶ 70.

⁵¹ As of 2015, English, Welsh, and Scottish authorities had received 5,357 disclosure applications and had made disclosure in only 877 cases (roughly 16%). See Martin Evans, *Sarah’s Law is ‘not working’, NSPCC warn*, THE TELEGRAPH (Jul. 30, 2015). See also *Details of 700 paedophiles disclosed since Sarah’s Law launched*, THE GUARDIAN (Dec. 23, 2013) (reporting 15% disclosure rate as of end of 2013); More recent data apparently are not available.

⁵² *CSOD Guidance*, *supra* note 46, § 5.2.12. Stressing the gravity of this commitment to confidentiality, the CSOD Guidance adds “that it is an offence under Section 55 of the Data Protection Act 1998 for a person to knowingly or recklessly obtain or disclose personal data without the consent of the

Other mechanisms for disclosure outside the domain of law enforcement are likewise limited in scope. Multi-Agency Public Protection Arrangements (MAPPA) require police, prison, and probation authorities to work with other agencies to manage the risk posed by persons who have been convicted of a sexual offense.⁵³ MAPPA allows authorities to disclose registrant information when necessary to protect a child from serious harm.⁵⁴ English employers and volunteer organizations can use the government’s Disclosure and Barring Service to check the criminal history of job applicants, especially for those who apply for positions that afford close contact with children and other especially vulnerable groups⁵⁵; indeed, they have a legal obligation to do so.⁵⁶ A public agency determines which forms of private employment should be closed to persons who have been convicted of a sexual offense.⁵⁷

b. Canada. The sex-offense registration system in Canada is similar to that in the UK. Registry information is available to law enforcement for the purpose of investigating and preventing sexual offenses but generally is not available to the public.⁵⁸

Following a high-profile abduction and murder, the province of Ontario created a sex-offense registry (OSOR) in 2001. When other provinces prepared to follow suit, Canada in 2004 adopted a National Sex Offender Registry (NSOR), administered by the Royal Canadian Mounted Police.⁵⁹ Whereas registration in Ontario (under the OSOR) is required automatically upon conviction, the original 2004 legislation placed offenders on the national registry (NSOR) only by court order at the prosecutor’s request, which the judge could reject if it was found not to be in the

data controller (i.e. the agency holding the information that will be disclosed, which in most cases will be the police).” *Id.*

⁵³ See *CSOD Guidance*, supra note 46, at 65; Blacker & Griffin, supra note 36, at 995-996.

⁵⁴ Criminal Justice Act, 2003, c. 44, Pt. 13 § 327A (Eng.).

⁵⁵ See <https://www.gov.uk/government/organisations/disclosure-and-barring-service>.

⁵⁶ See TERRY THOMAS & KEVIN BENNETT, *EMPLOYMENT SCREENING AND NON-CONVICTION INFORMATION: A HUMAN RIGHTS PERSPECTIVE* 1-27 (2019); *CSOD Guidance*, supra note 46, at 66-68.

⁵⁷ *Id.*

⁵⁸ See Janine Benedet, *A Victim-Centered Evaluation of the Federal Sex Offender Registry*, 37 QUEEN’S L.J. 437, 464 (describing effect of 2011 amendment to Canada’s Sex Offender Information Registration Act); Barb Sweet, *Sex Offender Lists Are Private in Canada, But Should They Be?*, THE TELEGRAM (St. Johns, Newfoundland), Feb. 19, 2019, available at <https://www.thetelegram.com/news/local/sex-offender-lists-are-private-in-canada-but-should-they-be-285847/>.

⁵⁹ See Lisa Murphy, J. Paul Fedoroff & Melissa Martineau, *Canada’s Sex Offender Registries: Background, Implementation, and Social Policy Considerations*, 18 CANADIAN J. OF HUMAN SEXUALITY 61, 62-63 (2009).

public interest.⁶⁰ Subsequently, registration was made mandatory for all those convicted of any of the particularly serious sex offenses designated by the Act.⁶¹

National sex-offense registry information in Canada is available only to the police, but individual provinces have established separate community-notification schemes to notify the public about high-risk registrants.⁶² In 2015, the Tougher Penalties for Child Predators Act enacted the High Risk Child Sex Offender Database Act, to create a national database centralizing information about high-risk registrants, but it includes only information that the police or other authority has previously disclosed publicly (though often just locally).⁶³

c. Australia and New Zealand. Beginning with New South Wales in 2001, each Australian state and territory has created a sex-offense registry linked to an Australian National Child Offender Register (ANCOR).⁶⁴ In 2012, Western Australia became the only Australian state to allow public access.⁶⁵ Its three-tier system (1) publicizes missing registrants who have not complied with reporting obligations, (2) allows members of the public to search for high-risk registrants in their local area, and (3) allows members of the public to inquire whether a particular person in contact with their child is a sex-offense registrant, a system similar to the CSODS in the UK.⁶⁶ In 2016, New Zealand created a sex-offense registry that is not publicly available.⁶⁷

d. European Union. EU regulations require specific safeguards to protect the confidentiality of criminal-history information and stipulate that registries of criminal convictions “may be kept only under the control of official authority.”⁶⁸ Sex-offense registries therefore are

⁶⁰ Id., at 63, 65.

⁶¹ See Benedet, *supra* note 58, at 464 (2012) (detailing 2011 amendments to 2004 Act). The 2011 amendments also made registration mandatory for persons charged with those offenses but found not criminally responsible by reason of mental disorder. The Canada Supreme Court recently held that provision unconstitutional. See *Ontario (Attorney General) v. G.*, 220 SCC 38 (Canada S. Ct., Nov. 20, 2020), available at <https://www.scc-csc.ca/case-dossier/cb/2020/38585-eng.aspx>.

⁶² See Michael Petrunik, Lisa Murphy & J. Paul Fedoroff, *American and Canadian Approaches to Sex Offenders: A Study of the Politics of Dangerousness*, 21 FED. SENT. REP. 111, 118-119 (2008); Lisa Murphy & J. P. Federoff, *Sexual Offenders’ Views of Canadian Sex Offender Registries: A Survey of a Clinical Sample*, 45 CANADIAN J. OF BEHAVIOURAL SCIENCE 238, 239 (2013).

⁶³ See Tougher Penalties for Child Predators Act § 29(5).

⁶⁴ See S. Caroline Taylor, *Community Perceptions of a Public Sex Offender Registry Introduced in Western Australia*, 18 POLICE PRACTICE AND RESEARCH 275, 279-280 (2017).

⁶⁵ Id.

⁶⁶ See *About Community Protection*, <https://www.communityprotection.wa.gov.au/About>.

⁶⁷ See New Zealand Police, *CSO Register: Information for People on the Register* (Oct. 2016), https://www.police.govt.nz/sites/default/files/documents/cso_register_information_booklet.pdf.

⁶⁸ European Parliament & Council, *European Union Directive 95/46/EC*, 24 Oct. 1995, art. 8(5). The EU’s General Data Protection Regulation (2016) protects the confidentiality of criminal conviction

not precluded, and the EU’s directive on child sexual abuse⁶⁹ states that Member States “may consider” adopting measures “such as the registration in sex offender registers of persons convicted of [sex] offences.” But with its overriding commitment to privacy and the rehabilitation of ex-offenders, the EU generally forbids public disclosure of registry information. The directive on child sexual abuse adds that “[a]ccess to those registers should be subject to limitation in accordance with national constitutional principles and applicable data protection standards, for instance by limiting access to the judiciary and/or law enforcement authorities.”⁷⁰

The EU has modified that background presumption only to the extent of seeking to bar persons from working with children if they have previously been convicted of a sexual offense against a child and seeking to make convictions for sexual offenses against children available to employers whose staff serve that clientele.⁷¹ The EU relies on each of its Member States to implement this obligation, and most have established such screening systems.⁷² National laws generally limit employer access to conviction records to protect the rights of those who have been convicted. Some EU members, including France and Portugal, have established sex-offense registries that are available to law enforcement but closed to the public.⁷³ Some EU states require screening for a broad range of professional or voluntary activities, but most require screening only for specific activities (e.g., child-care or public-sector employees).⁷⁴ While it is sometimes possible for employers to access criminal records directly (usually for employers directly involved

records and likewise permits processing of such records “only under the control of official authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects.” European Parliament & Council, *Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data*, Regulation 2016/679, 27 April 2016, 2016 O.J. (L 119) 1, art. 10.

⁶⁹ European Parliament & Council, *Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography*, Directive 2011/93 of 13 December 2011, art. 10.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See Amandine Scherrer & Wouter van Ballegooij, *Combating Sexual Abuse of Children: Directive 2011/93/EU*, European Implementation Assessment, at 41-43 (April 2017), [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/598614/EPRS_STU\(2017\)598614_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/598614/EPRS_STU(2017)598614_EN.pdf).

⁷³ See Scherrer & van Ballegooij, *supra* note 72, at 44 (France); *Child Sex Offender Register Approved*, THE PORTUGAL NEWS (Aug. 20, 2015), <http://theportugalnews.com/news/child-sex-offender-register-approved/35648> (Portugal); see U.S. Dept. of Justice, *supra* note 32, at 9, 18, 21.

⁷⁴ See generally Missing Children Europe, ECPAT, ENASCO, *A Survey on the Transposition of Directive 2011/93/EU on Combating Sexual Abuse and Sexual Exploitation of Children and Child Pornography* 33-38 (2015), <https://missingchildreneurope.eu/Portals/0/Docs/A%20survey%20on%20transposition%20of%20Directive%20against%20child%20sexual%20exploitation%20and%20abuse.pdf>.

in education or child care), generally, job applicants themselves present their criminal record to employers.⁷⁵ A few EU Member States require employers to check with a dedicated screening agency, like those of most American states and the Disclosure and Barring Service in England.⁷⁶

The number of Member States with such registries has increased in recent years, but many states within the EU do not have any sex-offense registration requirements.⁷⁷ Poland is in the minority that discloses information on certain high-risk ex-offenders on a publicly available website. It maintains both a “Restricted Access Register” and a “Public Register.” The former contains information on the perpetrators of all sexual crimes. Access to it is limited in three ways: First, all individuals have the right to know if data about themselves is included in the Register. Second, courts, prosecutors, police, and other authorized official authorities have access to information from the Register when their mission requires. Finally, employers and those responsible for activities related to upbringing, education, recreation, treatment or childcare are required (on pain of criminal sanctions) to check whether data pertaining to a future employee or person admitted to that activity is included in the Register. The Public Register is available to everyone on the Internet, but it contains information only about the most dangerous perpetrators of sexual crimes, such as individuals who have raped children or committed rapes with “extraordinary cruelty.” The courts determine which offenders qualify for inclusion on the Public Register.⁷⁸

Public interest in greater access to information about persons who have been convicted of a sexual offense has prompted efforts to establish a sex-offense registry for the EU as a whole. But given that rehabilitating ex-offenders and protecting personal data remain European priorities, these efforts to date have not succeeded.⁷⁹ Instead of an EU-wide sex-offense registry, the EU has emphasized the need to improve information sharing between authorities across national borders.⁸⁰

⁷⁵ Id.

⁷⁶ See notes 269-270 *infra* (discussing Pennsylvania regime); Missing Children Europe, note 74 *supra* (discussing England); <https://www.gov.uk/government/organisations/disclosure-and-barring-service> providing details concerning background checks by the UK’s Disclosure and Barring Service).

⁷⁷ Scherrer & van Ballegooij, *supra* note 72, at 44.

⁷⁸ On all the above points, see Polish Ministry of Justice, *Sex Offenders Register*, https://rps.ms.gov.pl/en-US/Public#.

⁷⁹ See Commission Reply to Petition No 2147/2014 by Jos Aalders (Dutch), On Registration of Paedophiles in Europe, (Jan. 27, 2016), https://www.europarl.europa.eu/doceo/document/PETI-CM-576744_EN.pdf?redirect; see also Sarah Hilder, *Managing Sexual and Violent Offenders Across EU Borders*, in 2 CONTEMPORARY SEX OFFENDER MANAGEMENT 95-96 (Hazel Kemshall & Kieran McCartan, eds., 2017).

⁸⁰ See Scherrer & van Ballegooij, *supra* note 72, at 44-47.

4. Overview of Policy Concerns and the Judgments Underlying Sections 213.11A-213.11J.

Laws of this kind pose several distinct policy issues: What, precisely, is their underlying justification? Does their adverse impact on the convicted person’s prospects for gainful employment and reintegration into the community outweigh their potential contribution to social protection and public peace of mind? Do registries in fact provide such peace of mind, and how might they be structured for optimal effect?

Despite their prevalence in the United States, registration and other collateral-consequence laws targeting persons convicted of a sexual offense rest on highly contested premises. The best available studies discredit many of their central justifications. At the same time, the research provides strong evidence of unintended negative impacts, including tendencies (especially for the broadest of these laws) to *aggravate* recidivism and *jeopardize* public safety, the very opposite of the results that lawmakers and the general public expect registration and community notification to accomplish.

This realization is now widespread among criminal-justice professionals, even those who otherwise disagree about almost all other policies relating to sexual offenses. Among victim-advocacy organizations, many continue to support public access to the registries, community notification, residency and employment restrictions, and the like.⁸¹ But many other victim advocates oppose key aspects of these policies, because they see harsh collateral consequences as major contributors to recidivism, to the frequent reluctance of police and prosecutors to properly charge serious sex offenders, and to the frequent reluctance of judges and juries to support justified convictions.⁸² In candid moments, many state lawmakers, even while supporting this legislation

⁸¹ For example, Victor Vieth is the Director of Education and Research for the Zero Abuse Project. See <https://www.zeroabuseproject.org/about/>. Vieth strongly supports registration, public access and community notification with respect to adults convicted of a sexual offense. He argues that people who lead busy lives often do not pay sufficient attention to the dangers that a sexual predator might pose to their children. Once they learn there is a registrant in their neighborhood, their attention can be engaged. Organizations like his can then intervene to offer a wider perspective on those dangers, not only from a particular registrant but from as-yet-undetected offenders; educators can also discuss effective protective measures while also cautioning against overreaction. “Education is crucial,” he says. Vieth warns, however, that juveniles should “almost never” be on a public sex-offense registry, and that the need for public access and community notification must always rest on an individualized appraisal of risk, one not based entirely on the offense of conviction, but rather based on rigorous assessment of as many as a dozen factors that affect the risk posed by a particular individual. Vieth cautions that this is not a “one size fits all” problem; the focus must be on “what we need to do to help this particular offender.” Victor Vieth, Zoom interview with Stephen Schulhofer, April 8, 2021.

⁸² See text at notes 151-161, 190-193, 324-329, *infra*. But see note 81, *supra* (victim advocate Victor Vieth expressing support for community notification).

1 themselves, describe it as overbroad and largely counterproductive, but politically impossible to
2 oppose.⁸³

3 Mindful of these assessments, Sections 213.11A-213.11J authorize special sex-offense
4 sentencing burdens and collateral consequences only on terms substantially narrower than those
5 found in currently prevalent state and federal legislation. Positions supported by strong currents of
6 public opinion and widely endorsed in the political process cannot be ignored, and Article 213
7 does not lightly depart from them. At the end of the day, however, the Model Code must be guided
8 by the best available evidence and judgments not deformed by known imperfections in the relevant
9 political deliberations.

10 Section 213.11 and Sections 213.11A-213.11J therefore limit special sex-offense
11 sentencing consequences and collateral consequences to the domains most likely to offer public-
12 safety benefits, without strong counterproductive side effects. It does so through four distinct
13 mechanisms.

14 First, the relevant provisions sharply distinguish registration for law-enforcement purposes
15 from other burdens and restrictions, including community notification, residency and employment
16 limitations, and other measures applicable specifically to those who have been convicted of a
17 sexual offense. Up-to-date local registration serves legitimate law-enforcement purposes. Of
18 course, when police investigating a sexual crime identify a particular “person of interest,” they can
19 access national databases for information about that individual’s criminal record.⁸⁴ But queries to
20 a national database are beside the point when police are unable to pinpoint a suspect. In that
21 situation, a local registry becomes a valuable aid to the investigation⁸⁵—bearing in mind, to be
22 sure, the dangers of a premature focus on someone who happens to have a prior record for a sexual
23 offense. Registration solely for law-enforcement use is therefore far more cost-effective than other

⁸³ See Mary Katherine Huffman, *Moral Panic and the Politics of Fear: The Dubious Logic Underlying Sex Offender Registration Statutes and Proposals for Restoring Measures of Judicial Discretion to Sex Offender Management*, 4 VA. J. CRIM. L. 241, 248-249 (2016) (arguing that “sex offender registration and notification laws proceed from emotion and political posturing to ensure re-election ..., rather than from empirical data. The intersection of public fear, a ratings-driven media, and lawmakers motivated by personal aggrandizement has led to the present, popular yet ill-conceived, political and legislative responses to sex offending.”).

⁸⁴ The National Sex Offender Registry (NSOR), maintained by the Federal Bureau of Investigation, provides a centralized database of registered sex offenders, but it is available only to law enforcement and authorized criminal-justice agencies. See <https://smart.ojp.gov/nsopw-nsor-fact-sheet>. For criminal records generally, the National Crime Information Center (NCIC) maintains an electronic clearinghouse of crime data available to criminal-justice agencies nationwide. See <https://www.fbi.gov/services/cjis/ncic>. Neither of these databases is open to the general public. See 28 C.F.R. §§ 20.33, 50.12.

⁸⁵ The available empirical research on this point is thin, but its conclusions are in accord. See David M. Bieri & Kristen M. Budd, *Registration and the Closure of Stranger-Perpetrated Sex Crimes Reported to Police*, SEXUAL ABUSE (SAGE) 1, 1 (2020) (reporting study finding that “incidents of stranger-perpetrated sexual assault were cleared 23% to 28% faster post-registration implementation”).

1 burdens and restrictions widely imposed on those who have been convicted of a sexual offense.
2 Moreover, so long as the confidentiality of these records is preserved, registration exclusively for
3 law-enforcement purposes poses relatively few dangers to public safety and to the welfare of
4 registrants themselves. Other social-control measures applicable to persons convicted of a sexual
5 offense, in contrast, impose steep implementation costs for law enforcement and entail other
6 significant, well-documented difficulties⁸⁶; accordingly they must be targeted and managed with
7 particular care.

8 Sections 213.11A, 213.11D, and 213.11E, reflecting these judgments, require all adults
9 convicted of a registrable offense to provide up-to-date registry information to local law-
10 enforcement authorities. But Section 213.11H imposes on those authorities a strong obligation to
11 preserve the confidentiality of that information, and Section 213.11I strictly limits community
12 notification and other burdens applicable specifically to persons convicted of a sexual offense.

13 Second, Section 213.11A sharply restricts the class of individuals to whom the threshold
14 duty to register applies. It precludes registration of nearly all juveniles, and for adults, it imposes
15 the threshold duty to register only upon conviction of offenses that **most strongly arouse public**
16 **concern.**

17 Third, the registration framework shortens in two ways the duration of required
18 registration. The serious offenses that require registration under Section 213.11A would, under
19 federal and most state law, trigger an obligation to register for life. In contrast, Section 213.11F
20 limits to **15 years** the registrant's duty to keep registry information current and provides for
21 automatic termination of that duty at an earlier date if the registrant meets specified rehabilitative
22 goals during the initial registration period; in either case the registrant is removed from the registry
23 at the end of the applicable period. In addition, Section 213.11J permits the registrant to apply for
24 early removal from the registry or relief from some or all of the duties associated with registration
25 upon an appropriate showing of rehabilitation.

26 Fourth, Section 213.11I tightly constrains, and in most cases eliminates, other burdens and
27 restrictions applicable specifically to persons convicted of a sexual offense, such as community
28 notification, limits on occupation and employment not required by state law, and limits on
29 residency, internet access, and the like. In current law, community notification is widely required
30 for a long list of sex-related offenses, and a wide range of other burdens, though not mandated by
31 federal law, is also commonly imposed. In contrast, Section 213.11I permits community
32 notification and other measures targeting persons convicted of a sexual offense **only when an**
33 **individual, case-by-case risk assessment strongly supports the need for such measures,** to an extent
34 that outweighs their potential for costly, counterproductive, and criminogenic effects.

35 ***5. Current Law: What Burdens Are Imposed and on Whom?***

36 As discussed above, federal SORNA requires each state, on pain of losing federal funds,
37 to maintain a registry applicable to persons convicted of a sexual offense and specifies many

⁸⁶ See text accompanying notes 145-246, 190-204, 255-256, 283-295, *infra*.

parameters that state registration regimes must satisfy to comply with the federal mandate, including the offenses that must trigger the obligation to register, the information states must include in their registries, the duration of a registrant’s duties, and the frequency with which registrants must provide updates. Separately, SORNA requires states to make it a criminal offense, punishable by at least a year in prison, for a designated offender to miss a deadline for updating registry information or fail to register at all.⁸⁷ Beyond federal mandates pertaining to the registry system itself, federal SORNA directs states to afford public access to their registry and establish a program for promptly notifying concerned entities and individuals in the community about any change in information pertaining to registrants in the area. Federal SORNA does not seek to dictate state approaches to other measures that target persons convicted of a sexual offense, such as GPS monitoring and limits on residency, employment, and Internet usage.

All states have a registration regime applicable to persons convicted of a broad list of sexual offenses.⁸⁸ But states vary considerably in the extent to which they conform to federal SORNA expectations with respect to many of the ostensibly mandated details, particularly with regard to triggering offenses, public access, and community notification. States also vary in the extent to which they impose other burdens applicable specifically to persons convicted of a sexual offense.

a. Which Offenses? Federal SORNA requires states to impose the obligation to register as a “sex offender” and meet an array of other requirements on anyone convicted of a broad list of sexual offenses, both felonies and misdemeanors. Juvenile-delinquency adjudications are included if the minor was at least 14 years old at the time of an offense involving sexual penetration by the use of force.⁸⁹ The designated offenses range from the most violent sex crimes to any offense of coerced sexual contact, solicitation of a minor to engage in any sexual conduct, possession of child pornography, “video voyeurism” (defined as photographing or filming the private area of an individual without the individual’s consent),⁹⁰ and any other sexual conduct not involving consenting adults, even low-level misdemeanors such as public indecency. For example, for an offense comparable to MPC Section 251.1, the petty misdemeanor of committing “any lewd act which [the actor] knows is likely to be observed by others who would be affronted,” SORNA requires mandatory registration, public access, and community notification under the “sex offender” label.

Federal SORNA establishes a three-tier offender-classification system based solely on the seriousness of the sex offense and whether it was the defendant’s first. All persons convicted of a qualifying sex offense, regardless of classification, must (to comply with SORNA) face at

⁸⁷ Federal SORNA § 20913(e).

⁸⁸ See Catherine Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Law*, 63 HASTINGS L.J. 1071, 1078 (2012) (describing sex-offender registry laws enacted in the wake of federal SORNA).

⁸⁹ SORNA § 20911(5), (8); 18 U.S.C. § 2241(a)(1).

⁹⁰ See 18 U.S.C. § 1801 (2019).

1 minimum all of the measures detailed in Note 4(d) below with respect to registration, public access
 2 to registry information, and community notification—that is, proactive law-enforcement measures
 3 to alert schools, other local agencies, and the general public to the identity of registered sex
 4 offenders present in the area. The three tiers differ only in the length of time the individual is
 5 subject to the restriction and the accompanying duty to keep registration information current (15
 6 years for the least serious offenses, life for the most serious), and the frequency with which the
 7 registrant must appear personally to confirm the required information (once a year for the least
 8 serious offenses, quarterly for the most serious).

9 Many states likewise automatically impose the burdens of registration and related collateral
 10 consequences on all persons convicted of any of almost any sex-related crimes. The triggering
 11 offenses typically include all felonies and misdemeanors, however classified, that fall within the
 12 purview of Article 213, as well as many offenses that do not—for example, possession of child
 13 pornography, solicitation to practice prostitution, sexual performance involving a minor, and
 14 exhibitionism. In some states, the list of covered misconduct includes as many as 40 distinct
 15 offenses.⁹¹ In some of these jurisdictions, the burdens of a sex-offense conviction automatically
 16 extend not only to registration, often for life, but also to stringent residency restrictions.⁹² Some
 17 states grade offenses according to tiers of seriousness, but as under federal SORNA, their tiers are
 18 determined solely by prior record and the nature of the offense of conviction.

19 Other state regimes are more nuanced. Many exclude minors from registration and other
 20 obligations.⁹³ Some states further narrow the universe of potential registrants by using a ranking
 21 system to vary the scope of the collateral burdens as a function of the intensity of perceived need.⁹⁴
 22 One common approach eschews categorization based solely on the conviction offense and prior
 23 record. Instead, many states classify persons convicted of a sexual offense on the basis of an
 24 individualized risk assessment that considers a variety of factors pertinent to the nature and
 25 seriousness of the risk posed, such as whether the victim of the offense was a minor, and the age

⁹¹ See, e.g., UTAH CODE ANN. § 77-27-21.5(g), (n) (2011) (listing 29 registerable offenses); LA. REV. STAT. ANN. § 15:541(24)(a) (2011) (listing 26 registerable offenses); N.Y. CORRECT. LAW § 168-a (2011) (listing over 40 registerable offenses).

⁹² See Chiraag Bains, *Next-Generation Sex Offender Residency Statutes: Constitutional Challenges to Residency, Work, and Loitering Restrictions*, 42 HARV. C.R.-C.L.L. REV. 483 (2007); Brian J. Love, *Regulating for Safety or Punishing Depravity? A Pathfinder for Sex Offender Residency Restriction Statutes*, 43 CRIM. L. BULL. 834 (2007). For discussion of states where residency restrictions are automatic or discretionary, see Mary A. Lentz, § 13:3. Missing children—Megan’s Law: Missing, Abused, and Neglected Children: Residency Laws for Sex Offenders in Various States, in LENTZ SCHOOL SECURITY (2011-2012 ed.); D. Scott Bennett, Sex Offender Registry Laws and School Boards, INQUIRY AND ANALYSIS, NAT’L SCHOOL BOARDS ASS’N (Feb. 2008).

⁹³ See, e.g., Lisa Ann Minutola & Riya Saha Shah, *A Lifetime Label: Juvenile Sex Offender Registration*, 33 DEL. LAW. 8, 12 (2015).

⁹⁴ See text at notes 94-99, 276-278, *infra*.

1 difference and relationship between victim and perpetrator.⁹⁵ In New York, the level of assessed
 2 risk affects the duration of the obligation to remain registered and the type of information that can
 3 be publicly released.⁹⁶ Minnesota and New Jersey, among other states, rely on actuarial assessment
 4 to distinguish persons convicted of a sexual offense on the basis of risk and assign more serious
 5 collateral consequences to those who pose the greatest danger to the public.⁹⁷ In Georgia, a “Sex
 6 Offender Registration Review Board”⁹⁸ uses research-based assessments to assign “points” that
 7 are used to compute a score indicating a high, moderate, or low risk of reoffending; sexual attacks
 8 against strangers and a history of multiple offenses are among the factors considered indicative of
 9 high risk.⁹⁹

10 *b. Which Burdens?*

11 All states require registrants to update their registry information periodically and authorize
 12 criminal punishment for failing to register or keep registry information up to date.¹⁰⁰ And the great
 13 majority permit everyone in the general public to access a website containing a wealth of personal
 14 information about each registrant, though not including the registrant’s Social Security number,
 15 the names of victims and information about arrests not resulting in conviction.¹⁰¹ Similarly, most
 16 states or localities, at their own initiative, regularly distribute registry information to the entire

⁹⁵ E.g., N.Y. CORRECT. LAW, §§ 168-169-W (2019). See generally Russell Hinton, “Georgia’s Sexual Offender Registry” GEORGIA DEPARTMENT OF AUDITS AND ACCOUNTS PERFORMANCE AUDIT OPERATIONS (2010), available at <http://www.atlantaunfiltered.com/wp-content/uploads/2010/08/sex-offender-registry-audit.pdf> (noting that many law-enforcement officials follow classification systems that are more nuanced, and therefore more restrictive than the ostensibly mandatory federal regime).

⁹⁶ See [N.Y.] Div. of Crim. Just. Services, “Risk Level & Designation Determination,” https://www.criminaljustice.ny.gov/nsor/risk_levels.htm (visited Jul. 29, 2019) (stating that “risk level governs the amount and type of information which can be released as community notification and also impacts duration of registration”).

⁹⁷ See text at notes 276-278, *infra*.

⁹⁸ See GA. CODE ANN. § 42-1-12 et seq. (2019). For discussion of Georgia protocols for actuarial risk assessment, see Sexual Offender Registration Rev. Board [Ga.], *Sexual Offender Registration Review Board Standing Procedure* (last visited July 29, 2019) <https://www.sorrb.org/board-information/standing-procedures>.

⁹⁹ For example, sexual attacks against strangers and a history of multiple offenses are high-risk indicators of recidivism. See Russell Hinton, “Georgia’s Sexual Offender Registry” GEORGIA DEPARTMENT OF AUDITS AND ACCOUNTS PERFORMANCE AUDIT OPERATIONS (2010), available at <http://www.atlantaunfiltered.com/wp-content/uploads/2010/08/sex-offender-registry-audit.pdf>.

¹⁰⁰ See Carpenter & Beverlin, *supra* note 88, at 1078 (2012) (describing sex-offender registry laws enacted in the wake of federal SORNA).

¹⁰¹ For details, see Reporters’ Note to Section 213.11H, *infra*. See also “Collateral Consequences,” ABA CRIMINAL JUSTICE SECTION, <http://www.abacollateralconsequences.org/search/?jurisdiction=37>.

community or to pertinent government agencies and to private organizations where contact with children or other vulnerable individuals might occur.

Nearly all states bar persons convicted of a sexual offense from working as teachers, as security guards, and in other sensitive occupations, but many exclude these persons from numerous additional occupations.¹⁰² Persons convicted of a sexual offense are commonly prohibited from living near schools, parks, and other places where children congregate.¹⁰³ And even when these registrants are not formally excluded from living or working at a certain place, community notification can create almost insuperable barriers to finding a landlord or employer willing to deal with them. More than 45 states now require GPS monitoring under some circumstances.¹⁰⁴ Limits on using the Internet, once common,¹⁰⁵ are now restricted by the First

¹⁰² See *id.*; Sara Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner's Perspective*, 42 HARV. C.R.-C.L. L. REV. 513, 515 (2007).

¹⁰³ *Id.*, at 514-515 (summarizing states' residency-restriction laws). For further detail, see notes 297-301, *infra*.

¹⁰⁴ See A. McJunkin & J.J. Prescott, *Fourth Amendment Constraints on the Technological Monitoring of Convicted Sex Offenders*, 21 NEW CRIM. L. REV. 379 (2018) (noting that "[m]ore than forty U.S. states currently track at least some of their convicted sex offenders using GPS devices."); Kamika Dunlap, *Sex Offenders After Prison: Lifetime GPS Monitoring?*, FINDLAW BLOTTER, Feb. 1, 2011; Michelle L. Meloy & Shareda Coleman, *GPS Monitoring of Sex Offenders*, in WRIGHT, *supra* note 3, at 243 (reporting that as many as 46 states use GPS monitoring to track persons convicted of a sexual offense under some circumstances).

The Supreme Court has held that GPS monitoring of a sex-offense parolee constitutes a search that must meet Fourth Amendment requirements of reasonableness, but the Court did not reach the question whether such monitoring passes muster under that standard. *Grady v. North Carolina*, 575 U.S. 306 (2015). The lower courts are split on the question whether lifetime GPS monitoring satisfies Fourth Amendment requirements of "reasonableness." Compare *Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016) (upholding Wisconsin regime); *Doe v. Bredezen*, 507 F.3d 998 (6th Cir. 2007) (same, Tennessee regime); *State v. Bowditch*, 364 N.C. 335, 700 S.E.2d 1 (N.C. 2010) (same, North Carolina regime), with *State v. Grady*, 826 S.E.2d 451 (N.C. 2019) (holding North Carolina GPS monitoring requirement unreasonable as applied to Grady); *Riley v. New Jersey State Parole Bd.*, 219 N.J. 270, 98 A.3d 544 (N.J. 2014) (striking down New Jersey GPS monitoring law); *Commonwealth v. Cory*, 454 Mass. 559, 911 N.E.2d 187 (Mass. 2009) (same, Massachusetts regime).

¹⁰⁵ See Charles Wilson, *Court Upholds Ind. Facebook Ban for Sex Offenders*, ASSOCIATED PRESS, June 25, 2012, available at http://abcnews.go.com/Technology/wireStory/judge-upholds-ind-facebook-ban-sex-offenders-16642465#.T-ikN_LNnio (discussing cases in which courts have held bans on Internet use compatible with the First Amendment).

Amendment.¹⁰⁶ Other restrictions, less common for the time being, sometimes include chemical castration.¹⁰⁷

6. Results.

Because most states have implemented simultaneously a package of diverse duties and restrictions applicable to persons convicted of a sexual offense, much of the data-driven research does not tease out the separate effects of registration alone or of other common elements of sex-offense policy. The overall picture therefore is best understood by beginning with what is known about the impact of special sex-offense consequences generally, noting where available the findings pertinent to particular components of those policies. This Note then focuses on the likely benefits and costs of these individual components, and the Notes to Sections 213.11H and 213.11I return to that question, with more sustained attention to the impact of collateral consequences other than law-enforcement registration alone.

a. Intended Effects and Inherent Limitations. The various collateral-consequence measures (registration, public access, notification, residential restrictions, employment restrictions, and the like) differ substantially in the burdens they impose on registrants, but broadly speaking they share the same two goals—not to inflict punishment, a goal incompatible with the basis on which the courts have upheld these regimes¹⁰⁸—but rather to reduce recidivism and to facilitate self-protective measures on the part of the public. A collateral aim, no doubt, is to alleviate public fear, even if the measures have no concrete effect on the behavior of offenders or law-abiding citizens. Some state legislators have occasionally articulated a third objective that is specific to residency restrictions—the goal of making life so difficult for persons convicted of a sexual offense that they will simply choose to leave the state.¹⁰⁹

¹⁰⁶ *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).

¹⁰⁷ See Alan Blinder, *What to Know about the Alabama Chemical Castration Law*, N.Y. TIMES, June 11, 2019. Other states imposing chemical castration on some paroled sex offenders include California, Florida, Louisiana, and Wisconsin. *Id.*

¹⁰⁸ E.g., *Smith v. Doe*, 538 U.S. 84 (2003). A number of courts, however, have held that a particular state’s regime *is* punitive and therefore is unconstitutional. E.g., *Doe v. Snyder*, 834 F.3d 696, 705-706 (6th Cir. 2016) (holding that Michigan SORA is punitive); cf. *Doe v. Wasden*, 9th Cir. Dec. 9, 2020 (holding that *Smith* does not foreclose plaintiffs’ claim that Idaho SORNA regime is punitive). See also *Doe v. State*, 189 P.3d 999 (Alaska 2008) (holding that Alaska statute upheld against federal challenge in *Smith* is punitive under state constitution); *State v. Letalien*, 985 A.2d 4 (Me. 2009) (holding state SORNA to be punitive); *Riley v. N.J. State Parole Bd.*, 98 A.3d 544 (N.J. 2014) (same); *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2018) (same); *Starkey v. Oklahoma Dep’t of Corr.*, 305 P.3d 1004 (Okla. 2013) (holding state SORA to be punitive as applied); *State v. Myers*, 923 P.2d 1024 (Kan. 1996) (same); *Doe v. State*, 111 A.3d 1077, 1100 (N.H. 2015) (same); *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009) (holding residency restrictions of Kentucky SORNA to be punitive); *In re C.P.*, 967 N.E.2d 729, 738 (Ohio 2012) (holding that Ohio SORNA, as applied to juveniles, imposes cruel and unusual punishment.).

¹⁰⁹ See Nancy Badertscher, *Law to Track Sex Offenders Studied*, ATLANTA J.-CONST., Aug. 16, 2005, at B1 (quoting Representative Keen, the sponsor of proposed residency restrictions, as saying: “If it

Four dimensions of the question warrant discussion. First, the primary objective of these special burdens—reducing recidivism—has been extensively studied, and the research findings are **unequivocal**: With the possible exception of regimes that make registry information available only to law enforcement, these policies have had no measurable deterrent effect. Second, there is also significant research examining how members of the public alter their behavior in response to these laws. On this point the studies find no significant benefits and powerfully counterproductive side effects: community notification, unrestricted citizen access to registry information, and restrictions on residency and employment have little impact on citizens’ self protective measures but are associated with strongly negative impacts on registrants, including great difficulty reintegrating into society and significantly enhanced rates of recidivism.¹¹⁰ Third, there is an inherent mismatch between the risks that different sorts of offenders pose and the restrictions to which they are subject. Finally, the laws are expensive to implement. These four points are discussed in turn.

(i) *Reducing Recidivism*. Endorsing a widely held view, the Supreme Court has declared that “[t]he risk of recidivism posed by sex offenders is ‘frightening and high.’”¹¹¹ More concretely, the Court has suggested that recidivism rates for persons convicted of a sexual offense are much higher than recidivism rates for persons convicted of other crimes.¹¹²

There is little or no reliable data to support these common perceptions. Indeed, the available evidence points strongly in the opposite direction. Although methodological limitations call for some caution in interpreting this research, the studies tend to suggest that sex-offense recidivism is *not* exceptionally high,¹¹³ a fact that should surprise anyone who confidently accepts the conventional wisdom on this subject.

For reasons developed below, the necessary policy judgments with respect to sex-offense registration and related restrictions ultimately do not turn on whether sex-offense recidivism is

becomes too onerous and too inconvenient, [sex offenders] just may want to live somewhere else... And I don’t care where, as long as it’s not Georgia”); Editorial, *Sex Offenders Won’t Vanish for Good*, ATLANTA J.-CONST., Mar. 23, 2006, at 14A (quoting Jerry Keen, House Majority Leader, as stating: “Candidly ... they will in many cases have to move to another state”).

¹¹⁰ See Reporters’ Notes, *infra*.

¹¹¹ *Smith*, *supra* note 108, 538 U.S. at 103 (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)).

¹¹² *Id.*

¹¹³ See, e.g., Ira Mark Ellman & Tara Ellman, “*Frightening and High*”: *The Supreme Court’s Crucial Mistake About Crime Statistics*, 30 CONSTIT. COMM. 495 (2015). See also Heather Ellis Cucolo & Michael L. Perlin, “*The Strings in the Books Ain’t Pulled and Persuaded*”: *How the Use of Improper Statistics and Unverified Data Corrupts the Judicial Process in Sex Offender Cases*, 69 CASE W. RES. L. REV. 637 (2019). One writer notes that there is “vanishingly little evidence for the Supreme Court’s assertion,” and that the origin of its mistake was simply “a throwaway line in a glossy magazine.” Adam Liptak, *Did the Supreme Court Base a Ruling on a Myth?*, N.Y. TIMES, Mar. 6, 2017.

1 “high” or “low.” But misunderstanding about the data is sufficiently widespread to warrant further
2 discussion.

3 On several occasions, the Supreme Court has stated that “convicted sex offenders are much
4 more likely than any other type of offender to be rearrested for a new rape or sexual assault.”¹¹⁴
5 The claim is literally true but misleading. It relies on a Bureau of Justice Statistics finding that a
6 convicted rapist is more likely than someone convicted of some other crime (e.g., bank robbery)
7 to be arrested subsequently for rape;¹¹⁵ the study does not find that rapists, as compared to other
8 offenders, have a higher rate of recidivism *for their own offense of conviction*. Nor does it find that
9 rapists, as compared to other offenders, have a higher rate of recidivism for subsequent crime
10 generally. To the contrary, the data strongly suggest that “[s]ex offenders have some of the lowest
11 recidivism rates of any class of criminal.”¹¹⁶ In a 2002 Department of Justice study, sex crimes
12 were one of the offense categories for which convicted offenders had the lowest rates of rearrest
13 for any new offense, and only 2.5 percent of released rapists were rearrested for a new rape.¹¹⁷ A
14 more recent DoJ study followed offenders over a longer period and found a 7.7% rate of rearrests
15 for rape or sexual assault;¹¹⁸ by comparison, 13.4 percent of released robbers were rearrested for
16 a new robbery and 22 percent of offenders convicted of a nonsexual assault were rearrested for a
17 new assault.¹¹⁹ Again, the likelihood of rearrest for any crime was lower for those initially

¹¹⁴ *Smith*, supra note 108, 538 U.S. at 103 (quoting *McKune*, supra note 111, 536 U.S. at 33).

¹¹⁵ U.S. Dept. of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders* 27 (1997). The most recent DoJ study is to similar effect: persons released after imprisonment for a sex offense were more than three times as likely as other released prisoners to be arrested for rape or sexual assault (7.7% versus 2.3%). See U.S. Dept. of Justice, Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005-14)*, at 1 (2019).

¹¹⁶ Stuart A. Scheingold et al., *Sexual Violence, Victim Advocacy, and Republican Criminology: Washington State’s Community Protection Act*, 28 LAW & SOC’Y REV. 729, 743 (1994) (noting that “as few as 5.3% [of sex offenders] re-offend within three years, according to the Bureau of Justice Statistics, as opposed to rates in the 65 to 80% range for drug offenders and thieves.” See also Katherine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 578 (1997) (noting evidence that convicted rapists are less likely to reoffend than convicted burglars and thieves); WESLEY G. JENNINGS, RICHARD TEWKSBURY & KRISTEN ZGOBA, SEX OFFENDERS: RECIDIVISM AND COLLATERAL CONSEQUENCES, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/238060.pdf> (2011).

¹¹⁷ U.S. Dept. of Justice, *Prisoners Released in 1994*, supra note 116, at 1, 9.

¹¹⁸ U.S. Dept. of Justice, *9-Year Follow-Up*, supra note 115, at 1.

¹¹⁹ U.S. Dept. of Justice, *Prisoners Released in 1994*, supra note 116, at 1, 9. See also U.S. Dept. of Justice, *Sex Offenses and Offenders*, supra note 115, at 25-26 (among felony offenders placed on probation, “rapists had a lower rate of re-arrest for [any] new felony and a lower rate of re-arrest for a violent felony than most categories of probationers with convictions for violence”). All such studies are of

convicted of a sexual offense, and same-offense rearrest rates after conviction for a sexual offense were lower—much lower—than same-offense rearrest rates after conviction for many other crimes. Similar findings apply to sexual offenses against children; across the range of sexual offenses against minors, observed recidivism rates are as low or even lower than for sexual crimes against adults.¹²⁰

The qualifications to this picture run in two opposing directions. First, because so many sexual offenses are never reported, the *observed* recidivism rates substantially understate *actual* recidivism rates for these offenses. And this distortion arguably bolsters the case for registration and related policies to strengthen the prevention of crimes that are more frequent than might appear. But from the opposite direction, estimates that take account of unreported crimes may actually *overstate* the recidivism risk *for the relevant group of offenders*.

Note first the reasons why overall recidivism rates for sex offenses are *higher* than the typical recidivism studies suggest. Sex offenses are massively underreported,¹²¹ and this may be especially true for offenses against children.¹²² The most recent Department of Justice victimization survey estimated that only about 25 percent of rapes and sexual assaults were reported to law enforcement while the reporting rate for all violent crime was 43 percent, almost

course sensitive to the definition of reoffending (which offenses and whether established by arrest or conviction), and the time period over which recidivism is measured.

¹²⁰ An Ohio study is especially helpful because it followed ex-offenders for 10 years after release from custody, and the period largely preceded the enactment of SORNA-like provisions, so those laws cannot be credited with contributing to the relatively low recidivism rates found. See OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, TEN-YEAR RECIDIVISM FOLLOW-UP OF 1989 SEX OFFENDER RELEASES (2001) (finding 10-year recidivism rate of 8.5% when initial sex offense was against minor; 17.5% when initial sex offense was against adult). With a smaller sample and only a six-year follow-up period, British researchers found that reoffense rates were roughly similar for those whose initial offense was against an adult and those whose initial offense was against a child. See Roger Hood, et al., *Sex Offenders Emerging from Long-Term Imprisonment*, 42 BRITISH J. CRIMINOLOGY 371 (2002) (reoffense rate of 8.5% following adult-victim offense; reoffense rate of 10% following child-victim offense).

¹²¹ See, e.g., *Belleau v. Wall*, supra note 104, at 933-934 (lengthy discussion of recidivism statistics for sex offenders, stressing that rampant underreporting of sex crimes has substantial distorting effect on those statistics).

¹²² See, e.g., R. Pryzbylski, *Adult Sex Offender Recidivism*, in U.S. Department of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *Sex Offender Management Assessment and Planning Initiative*, available at https://www.smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf (noting that under-reporting is especially great when a child victim knows the perpetrator, which is true in most child sexual-abuse cases).

twice as high.¹²³ And victimization surveys are themselves subject to significant underreporting problems, much more so for sexual offenses than for other crimes and probably more so for sexual offenses against children than for sexual offenses against adults. In other words, the true gap between reporting rates for sexual offenses and for other offenses is almost certainly even larger than the gap found in studies that attempt to estimate that gap empirically.

Other sources likewise provide evidence of massive underreporting. News reports all too frequently reveal instances of perpetrators who exploit a position of trust, for example as a coach or as clergy, to abuse as many as a dozen or more victims over a period of years without ever being detected.¹²⁴ More systematic studies, for example examining previously untested rape kits, also show high rates of serial offending by previously undetected perpetrators.¹²⁵

¹²³ Rachel E Morgan & Barbara Oudekerk, *Criminal Victimization, 2018*, U.S. Dept of Justice, Bureau of Justice Statistics, NCJ 253043, at p. 8, Table 5 (2019). A recent article, using a complex statistical model, concludes that the reporting rate for sexual offenses is a great deal lower. See N. Scurich & R. S. John, *The Dark Figure of Sexual Recidivism*, 37 BEHAV. SCI. & LAW 158 (2019). For pointed criticism of the methodology underlying this paper's analysis, see Ira Mark Ellman, *When Animus Matters and Sex Offense Underreporting Does Not: The Sex Offender Registry Regime*, U. PA. J. L. & PUB. AFFAIRS (forthcoming Nov. 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3817201; Tamara Rice Lave, J. J. Prescott & Grady Bridges, *The Problem with Assumptions: Revisiting The Dark Figure of Sexual Recidivism*, forthcoming in BEHAV. SCI. LAW (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3672031; Brian R. Abbott, *Illuminating the Dark Figure of Sexual Recidivism*, 38 BEHAV. SCI. LAW 543–558 (2020).

¹²⁴ In Pennsylvania, a retired football coach working with a charity to aid underprivileged youth was convicted of sexually abusing numerous underage boys over a 15-year period before being formally investigated and charged. See Malcolm Gladwell, *In Plain View: How Child Molesters Get Away with It*, THE NEW YORKER, Sept. 24, 2012. See also *When the Athlete is a Child: An Assessment of USA Swimming's Safe Sport Program* (Gundersen National Child Protection Training Center, Jan. 27, 2014) at 10, available at <https://www.usaswimming.org/docs/default-source/safe-sportdocuments/safe-sport-basics/2014-vieth-report.pdf> (reporting instances of serial child abuse by swimming coaches who escaped detection for many years); T.J. Quinn & Greg Amante, *Sex Abuse Pervasive in USA Swimming*, April 27, 2010, available at <http://sports.espn.go.com/espn/otl/news/story?id=5071820> (same); Laura Russell, *Pursuing Criminal Liability for the Church and Its Decision Makers for Their Role in Priest Sexual Abuse*, 81 WASH. U. L. Q. 885, 888-95 (2003) (describing widespread allegations of unreported sexual abuse by Catholic priests).

¹²⁵ E.g., Rachel Lovell, et al., *Offending Histories and Typologies of Suspected Sexual Offenders Identified via Untested Sexual Assault Kits*, 47 CRIM. JUST. & BEHAV. 407 (2020) (reporting that approximately 30% of suspected sexual offenders identified through previously untested rape kits had at least one arrest for rape, and that more than 20% of the suspected sex offenders had their DNA in two or more of the untested rape kits in the sample); Rebecca Campbell, et al., *Connecting the Dots: Identifying Suspected Serial Sexual Offenders Through Forensic DNA Evidence*, 10 PSYCHOL. OF VIOLENCE 255 (2020) (reporting that in analysis of more than 7,000 untested rape kits, 35.7% of the suspected perpetrators in the sample had two or more sexual assaults linked via DNA); Rachel Lovell et al., *Describing the Process*

1 Pointing in the opposite direction, however, is the need for precision in identifying the
2 population whose recidivism risk is relevant. Low rates of reporting and arrest, together with the
3 case attrition that occurs at every stage of the criminal process (with especially large impact in sex-
4 offense prosecutions), mean that the great majority of those who commit sexual offenses are not
5 convicted in the first place, so they are not on a registry when they commit their subsequent
6 offenses. Registry regimes cannot help prevent this predominant segment of recidivist sex
7 offenses.¹²⁶ In fact, many professionals believe that registries, public access, and community
8 notification actually *impede* effective enforcement by focusing police and public attention on a
9 relatively small population of unlikely recidivists, at the expense of attention to the much larger
10 population of potential offenders not yet caught and therefore not yet on any registry.¹²⁷

11 Moreover, serial offending by perpetrators before they are first caught and by individuals
12 who escape detection entirely tells us little about the risk of reoffending by an individual after
13 being identified, prosecuted, convicted, incarcerated (if the charges are serious), and then released.

14 Properly understood, in other words, the data invoked to support burdens that especially
15 target persons convicted of a sexual offense paradoxically show how *misdirected* these laws can
16 be. A Justice Department analysis of prisoners released in 1994 found that among 1,717 ex-
17 prisoners subsequently arrested for rape, *less than five percent* had previously been convicted of
18 that offense.¹²⁸ Thus by focusing attention on offenders previously convicted of sexual offenses,

and Quantifying the Outcomes of the Cuyahoga County Sexual Assault Kit Initiative, 57 J. CRIM. JUST. 106 (2018) (reporting that out of the 1,429 defendants identified by testing previously untested rape kits, 27% were associated with more than one victim).

Several studies report high rates of serial offending, without distinguishing stranger assaults from assaults involving family members or acquaintances, and without distinguishing perpetrators who assaulted different victims from the arguably distinct behavioral problem of repeatedly assaulting the same victim. E.g., Heidi M. Zinzow & Martie Thompson, *A Longitudinal Study of Risk Factors for Repeated Sexual Coercion and Assault in U.S. College Men*, 44 ARCHIVES OF SEXUAL BEHAV. 213 (2015) (in self-reports by 238 college men who acknowledged committing at least one sexual assault, 68% had done so repeatedly, including 14% who offended four times and 23% who offended five or more times); David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73 (2002) (in sample of 1,882 college-aged men who acknowledged acts of interpersonal violence, 6% acknowledged committing rape or attempted rape, and 63% of those men reported committing repeat rapes, averaging at 5.8 rapes each).

¹²⁶ This point would require qualification if registry regimes have a general deterrent effect, but the research to date finds that they do not. See notes 131-135, *infra*.

¹²⁷ See Ellman, *supra* note 123.

¹²⁸ U.S. Dept. of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994*, at 9-10 (2002).

1 registration requirements risk diverting attention from the vastly larger pool of individuals who
2 will eventually commit such crimes against children, adults, or both—individuals who were
3 previously convicted of other offenses or not previously convicted of any crime at all.

4 Although persons convicted of a sexual offense and therefore potentially subject to a
5 registry regime are not necessarily more likely than other offenders to reoffend, special burdens
6 can be defended on the basis that sex crimes, being distinctively harmful and unsettling, warrant
7 exceptional effort to prevent them.¹²⁹ And of course this is especially true for sexual offenses
8 against children. As one group of authors who are sympathetic to registration policies
9 concludes:¹³⁰

10 The risk of recidivism is far below our worst fears and substantially less than the
11 overwhelmingly large percentages that have sometimes been cited by legislators in
12 advocating for legislation related to sexual offending.... While the risk of
13 recidivism is clearly less than it sometimes has been portrayed, it is large enough
14 that it justifies investing in effective management and treatment methods and
15 maintaining a healthy degree of vigilance.

16 The crucial question, then, is whether registration and other special burdens have succeeded in
17 reducing the incidence of these crimes. The research suggests that in nearly all respects they have
18 not.

19 Before-after studies have found no significant correlation between recidivism rates and the
20 passage of registration laws, public registries, and community notification.¹³¹ A regression

¹²⁹ See, e.g., *Belleau v. Wall*, supra note 104, at 933-934 (court, in holding that GPS monitoring of registrant was “reasonable” under Fourth Amendment, commented, “Readers of this opinion who are parents of young children [should] ask themselves whether they should worry that there are people in their community who have ‘only’ a 16 percent or an 8 percent probability of molesting young children—bearing in mind the lifelong psychological scars that such molestation frequently inflicts.”).

¹³⁰ Theodore P. Cross, et al., *Adult Sex Offenders Against Children: Etiology, Typologies, Investigation, Treatment, Monitoring, and Recidivism*, in R. GEFNER et al. (eds.), *HANDBOOK OF INTERPERSONAL VIOLENCE ACROSS THE LIFESPAN* 1, 19, 21 (2020).

¹³¹ For New Jersey, a statewide study found a long-term downward trend in sex-offense rates, with an acceleration of the trend when Megan’s Law passed in 1994. But when disaggregated to the county level, that effect became negligible; in six counties (of 21 studied) there was no statistically significant change in the long-term downtrend, and in six others, the acceleration of that trend preceded passage of Megan’s Law. Kristen Zgoba & Philip Witt, *Megan’s Law: Assessing the Practical and Monetary Efficacy*, N.J. Dep’t of Corrs. (Dec., 2008), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf>. The New Jersey study based sex-offending rates on arrest data, a potential source of bias, either because registered offenders were more easily targeted and arrested (an effect that would generate arrest statistics higher than the actual rate of reoffending post-1994), or because law-enforcement arrest efforts slackened in a false-sense-of-security effect (which would generate arrest statistics lower than the actual rate of reoffending post-1994).

1 analysis found that *registration alone*, by keeping police informed about persons in the area who
 2 had been convicted of a sexual offense, tended to reduce the frequency of reported sex offenses
 3 against neighbors of the registrant (but not against family members or more distant strangers).¹³²
 4 *Notification laws* had some apparent crime-reduction effect by deterring *nonregistered* individuals
 5 from committing offenses that would render them eligible for this sanction,¹³³ but community

Whatever the bias, it would seem that any positive effect on recidivism was too slight to be detected in any but very subtle analysis. In a different research sample, the New Jersey researchers tracked persons convicted of a sexual offense following their release from prison between 1990 and 2000; the researchers found a significant drop in reoffending post-1994 (from 50 percent to 41 percent), but the drop cut across all offenses, with no statistically significant drop for *sexual* offenses, with respect either to likelihood of rearrest or time from prison release to rearrest. *Id.* at 21-32.

A before-after study of community notification in the state of Washington produced similar findings: no significant drop in the rate of rearrest for sex crimes, and a slightly larger but still statistically insignificant drop in the rate of rearrest for crimes generally. Donna D. Schram & Cheryl Darling Milloy, *Community Notification: A Study of Offender Characteristics and Recidivism* 17, 19, Washington State Institute for Public Policy (Oct., 1995), available at <http://www.wsipp.wa.gov/rptfiles/chrrec.pdf>. In the case of crimes generally, there was a substantial difference in the time to the first rearrest (a median of only 25 months for the notification group but much better—62 months—for the control group); nonetheless, this difference could have been due to the use of arrest statistics as a proxy for reoffending rates, and in any case the difference was observed only in rearrests for crimes generally, not in rearrests for sex crimes.

A study relying on three distinct data sets and three outcome measures (crime rates for sex offenses, recidivism rates for sex offenders, and location-specific incidence of offenses) found “[no] support [for] the hypothesis that sex-offender registries are effective tools for increasing public safety.” Amanda Y. Agan, *Sex Offender Registries: Fear without Function?*, 54 J. L. & ECON. 207, 207 (2011). See also J.J. Prescott, *Portmanteau Ascendant: Post-Release Regulations and Sex Offender Recidivism*, 48 CONN. L. REV. 1035 (2016) (noting that “empirical researchers to date have found essentially no reliable evidence that these laws work to reduce sex offender recidivism (despite years and years of effort), and some evidence (and plenty of expert sentiment) suggests that these laws may increase sex offender recidivism.”)

¹³² J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J. L. & ECON. 161 (2011). On the complexity of disentangling the effects of registration as such from accompanying measures involving community notification, see James Vess et al., *International Sex Offender Registration Laws: Research and Evaluation Issues Based on a Review of Current Scientific Literature*, 14 POLICE PRACTICE AND RESEARCH: AN INTERNATIONAL JOURNAL 322 (2014).

¹³³ Deterrence has not been officially advanced as a policy rationale for registration laws, and to do so would undermine of the argument that these collateral consequences are nonpunitive. That rationale is the foundation for Supreme Court decisions holding that many of these state regimes are “regulatory” measures, and therefore are not subject to the federal constitution’s *ex post facto* prohibition. E.g., *Smith*, *supra* note 103, at 92-96; *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003).

notification also tended to increase recidivism among persons who *were* registered. As a result, “any beneficial effect of registration on recidivism is dampened by the use of notification, and [thus] . . . the punitive aspects of notification laws may have perverse consequences.”¹³⁴

Overall, the available research does not conclusively exclude the possibility that registration, notification, restricted residency, and similar collateral consequences could potentially contribute to public safety. But after two decades of experience with such laws, and with the considerable body of evidence that experience has generated, their beneficial effects (if any) have yet to be demonstrated. Moreover, this is not a case where skeptics can be faulted for claiming that absence of evidence is evidence of absence. In this instance, there is evidence, considerable evidence, and it shows that these laws have not reduced recidivism. A careful recent assessment, summing up the results of a comprehensive literature review, offers this appraisal:¹³⁵

The story that emerges across dozens of papers, data sources, and empirical methods is coherent and convincing: there is scant evidence that SORN reduces recidivism or otherwise increases public safety, with the possible exception of some tentative evidence that registration alone (i.e., without notification . . .) might reduce sexual offense recidivism.

One reason for this inability to detect public-safety benefits may be that some benefits were realized but were offset by the negative consequences for public safety that these laws also entail. That possibility is examined in Note 6(b) below.

(ii) *Transparency and Self-Protection*. Public access and community notification give the public and **organizations responsible** for the welfare of vulnerable populations an ability to take precautions. Indeed, the perception of transparency and empowerment seems to follow almost axiomatically from public access and community notification. But their effects have been decidedly mixed. The evidence is discussed in the Reporters’ Note to Section 213.11H, which addresses the specifics of public access to registry information. Overall, the research suggests that public awareness typically prompts few self-protective measures, and that the very existence of these regimes tends to divert attention away from much more significant sexual dangers.¹³⁶

(iii) *Mismatch*. The collateral-consequence laws under consideration here were initially prompted by cases like Megan Kanka’s: a young child sexually assaulted by a stranger with a prior history of sexual offenses who was, unbeknownst to her parents, living nearby. Nonetheless, from the start these laws extended their reach to offenses against adults and to perpetrators who were well known to their victims. Such expansive conceptions of the persons to be targeted are

¹³⁴ Prescott & Rockoff, *supra* note 132, at 181.

¹³⁵ Amanda Agan & J. J. Prescott, *Offenders and SORN Laws*, in LOGAN & PRESCOTT, *supra* note 16, at 102, 102-103 (assessing all the empirical research prior to 2021).

¹³⁶ See Reporters’ Note to Section 213.11H, *infra*.

understandable and potentially justified, but they sweep within the single rubric of the “sex offender” individuals who may present no current danger or who present a range of different risks that call for different measures of social protection. Persons convicted of a sexual offense can be distinguished on several important dimensions. But those differences are not necessarily stable. Another problem is that not all perpetrators “specialize” in a particular type of victim or a sexual offense. Instead, research finds significant rates of “crossover” sexual offending (“polymorphism” in the language of behavioral science). Four “mismatch” concerns are crucial for sound registration policy.

First is the “stranger danger” myth. Though contemporary sex-offense registration regimes grew out of highly publicized stranger crimes, most sexual assaults—by a wide margin—involve family members or acquaintances. In a Wisconsin sample of 200 recidivists previously convicted of a sexual offense, *none* had perpetrated crimes against strangers; a more comprehensive Justice Department study found that among child victims of sexual abuse, 34 percent had been molested by family members and an additional 25 percent by close acquaintances.¹³⁷ Moreover, despite important qualifications in the “crossover” literature discussed below, perpetrators who molest a family member seldom go on to target strangers. It should be superfluous to point out that the needs for notification and residency restrictions are quite different (if they apply at all) when a parent is convicted of molesting the parent’s own child; yet stranger assaults and acquaintance assaults are legally identical offenses. That means that in the prevalent state and federal approach, classifying offenders automatically based on the legal offense of conviction, stranger and acquaintance offenses entail precisely the same collateral consequences.

Second, the “child victim” concern is not a myth, but it often involves a distinctive set of behavioral and rehabilitative issues. Some persons who target young, preadolescent children present different risks from those of the perpetrator who has assaulted an adult. Many classification regimes automatically place offenses against minors in a more serious category, but some do not. And even where that distinction is drawn, it is often insufficiently discriminating. Classifications often fail to take into account the age of the minor victim or to differentiate between adults who target young, preadolescent children and offenders who are themselves teenagers who had consensual sex with other teens who were identical in age or nearly so.

Third is the mismatch between risks and remedies. Often offenses involving adult victims, even those in the least serious category, nonetheless remain subject to almost all the collateral consequences applicable to offenses against children. In the federal regime, for example, the only respect in which those consequences differ from those applicable to offenses against children is in the length of the registration period (15 years rather than 25 years or life). Yet many of the required collateral consequences—such as the federal mandate to notify day-care centers and common state mandates barring residence close to school zones (not to mention prohibitions on living near a

¹³⁷ See Jill Levenson, *Sex Offender Residence Restrictions*, in WRIGHT, *supra* note 19, at 267, 275; PATRICIA TJADEN & NANCY THOENNES, FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, available at <https://www.ncjrs.gov/pdffiles1/nij/210346.pdf> (2006).

school-bus stop)—apply even though the necessity for these measures is different or nonexistent when the offender is an employer who groped an adult employee in the store room or a person who raped an adult stranger but shows no indication of being attracted to preadolescent children.¹³⁸

Fourth, “cross-over” offending complicates this picture. Although in conventional wisdom, the person who sexually molests a young child and the person who forcibly rapes an adult are often assumed to harbor different sexual proclivities, this is not uniformly true. Those who sexually abuse children do not necessarily “specialize” in offenses against young victims.¹³⁹ One recent study of the issue found that among recidivist offenders, 37 percent of those who initially raped or sexually assaulted an adult subsequently committed a sexual offense against a prepubescent child.¹⁴⁰ Research finds similar, though less pronounced, polymorphism across the stranger-acquaintance divide. In one study of sexual recidivists, over 25 percent had sexually assaulted both strangers and nonstrangers,¹⁴¹ but other studies find recidivist targeting patterns to be “highly stable” in terms of victim-perpetrator relationship (i.e., stranger vs. acquaintance vs. intrafamilial)

¹³⁸ In many states, residency restrictions apply to all persons convicted of a sexual offense regardless of their classification. Catherine Elton, *Behind the Picket Fence*, THE BOSTON GLOBE, May 6, 2007, at 36; Geraghty, *supra* note 102, at 516.

¹³⁹ See T.D. Miethe, J. Olson & O. Mitchell, *Specialization and Persistence in the Arrest Histories of Sex Offenders: A Comparative Analysis of Alternative Measures and Offence Types*, 43 J. Res. Crime & Delinq. 204 (2006).

¹⁴⁰ Jenna Rice & Raymond A. Knight, *Differentiating Adults with Mixed Age Victims from Those Who Exclusively Sexually Assault Children or Adults*, 31(4) SEXUAL ABUSE: A J. OF RES. AND TREATMENT 410, 411 (2019). Accord, Skye Stephens, et al., *Examining the Role of Opportunity in the Offense Behavior of Victim Age Polymorphic Sex Offenders*, 52 J. CRIM. JUST. 41, 41 (2017) (reporting “high levels of polymorphism” in regard to the targeting of adult vs. child victims); Skye Stephens, et al., *The Relationships Between Victim Age, Gender, and Relationship Polymorphism and Sexual Recidivism*, 30(2) SEXUAL ABUSE: A J. OF RES. AND TREATMENT 132, 141 (2018) (finding age-based polymorphism to be most common type). An earlier study found a much higher rate of adult-victim/child-victim crossover offending (70%) among prison inmates, but a much lower rate (18%) among parolees; researchers speculated that parolees may have been less truthful for fear of triggering greater parole restrictions. See Peggy Heil, et al., *Crossover Sexual Offenses*, 15 SEXUAL ABUSE: A J. OF RES. AND TREATMENT 221, 229 (2003). See also Mariana A. Saramago, Jorge Cardoso & Isabel Leal, *Victim Crossover Index Offending Patterns and Predictors in a Portuguese Sample*, 24 SEXUAL ABUSE: A J. OF RES. AND TREATMENT 1, 1 (2018) (finding that among sexual recidivists in a Portuguese prison, 48% had victims in different age categories).

Related, but indicative of the widely divergent estimates of age-based polymorphism, see Jessica N. Owens, et al., *Investigative Aspects of Crossover Offending from a Sample of FBI Online Child Sexual Exploitation Cases*, 30 AGGRESSION AND VIOLENT BEHAVIOR 3, 3 (2016) (reporting that “[r]eliable estimates vary about the percentage of child pornography offenders who also engage in other sexual crimes against children, ranging from 3 to 5% to 85%.”).

¹⁴¹ Rachel Lovella, et al., *Offending Patterns for Serial Sex Offenders Identified via the DNA Testing of Previously Unsubmitted Sexual Assault Kits*, 52 J. CRIM. JUST. 68, 72 (2017). The authors also find that among recidivists who targeted strangers, there was significant crossover offending by age. Id.

as well as the victim's gender.¹⁴² Crossover offending cautions against narrowly matching collateral sanctions to the character of the triggering offense. But because baseline rates of recidivism for sexual offenses are quite low,¹⁴³ crossover offenses by previously convicted recidivists represent a small sliver of the total problem, arguably not enough to justify the law-enforcement effort and expense devoted to the issue. And some aspects of crossover offending actually reinforce these reasons to restrict rather than extend the scope of registration and notification. One study of sexual recidivists released on parole found that only 4.5 percent had been arrested only for sex offenses. The others had heterogeneous prior records—they had either committed a nonsexual offense first (and hence would not have been on a registry prior to committing their sexual offense) or they had committed a sex offense first (and hence would have been on a registry subject to law-enforcement attention in that regard, but then went on to commit a nonsexual offense).¹⁴⁴

(iv) *Cost*. Legislators sometimes assume that registration, residency restrictions, and other collateral burdens imposed on persons convicted of a sexual offense are virtually cost-free so far as the state itself is concerned. But these measures are expensive to implement, especially when (as is typical) the requirements target a large, heterogeneous group of offenders. Recording and updating the required information and installing the requisite website technology can cost each jurisdiction millions of dollars per year,¹⁴⁵ without even counting the resulting need for law-enforcement personnel to reduce the time they can devote to responding to emergencies and other duties.¹⁴⁶

This experience raises great doubt about whether these measures are fiscally viable and worth their direct costs to state and local government. Many state criminal-justice agencies, after careful assessment, have concluded that they are not, especially when more selective approaches can achieve most or all of the benefits at considerably lower cost.¹⁴⁷

b. Unintended Effects. In contrast to the intended benefits of collateral sanctions, for which empirical measures of success are disappointing or nonexistent, unintended negative side effects are well-documented. This is particularly true with respect to burdens that extend beyond the

¹⁴² Stephens, et al., *supra* note 140, at 41 (finding rates of polymorphism below 10% for victim gender and below 20% in terms of victim-offender relationship).

¹⁴³ See text at notes 117-119, *supra*. On the inferences to be drawn from the fact that a high percentage of sex offenses are not reported and therefore are not included in deflate these recidivism figures, see text at notes 122-126, *supra*.

¹⁴⁴ See Jeffrey Lin & Walter Simon, *Examining Specialization Among Sex Offenders Released from Prison*, 28(3) SEXUAL ABUSE: A J. OF RES. AND TREATMENT 253, 263 (2016).

¹⁴⁵ See text accompanying notes 309-321, *infra*. See also Hinton, *supra* note 99, at 2.

¹⁴⁶ See Geraghty, *supra* note 102, at 518.

¹⁴⁷ See notes 163-166, *infra*.

disclosure of registry information solely to law-enforcement agencies—burdens such as public access, community notification, and restrictions on residency and employment. The issue is discussed in more detail in the Reporters’ Note to Section 213.11I, which addresses the specifics of collateral consequences additional to the duty to register with law enforcement.¹⁴⁸

The negative impacts *on registrants* include difficulty in obtaining housing and employment, psychological stigma, and physical abuse by misguided members of the public.¹⁴⁹ These consequences in turn mean negative impacts *for public safety* because the adverse personal impacts for registrants impede their reintegration into society and aggravate their risks of reoffending.¹⁵⁰

It could be that the intuitively plausible law-enforcement benefits of these laws partially or fully offset these negative consequences for public safety, a result that would explain the inability of researchers to detect any *net* reduction in **reoffending rates**. If so, the resulting symmetry is a poor one, taking no account of the human consequences for registrants and their families, and

¹⁴⁸ See Reporters’ Note to Section 213.11I, *infra*.

¹⁴⁹ See, e.g., *Doe v. Snyder*, 834 F.3d 696, 705-706 (6th Cir. 2016). In holding that Michigan statute cannot pass muster as a legitimate public-safety, regulatory measure and therefore constitutes “punishment,” the court described the legislation as:

[a] regime that severely restricts where people can live, work, and “loiter,” that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and that requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe.... It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families, with whom, due to school zone restrictions, they may not even live.

Accord, *E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir. 1997) (“The record documents that registrants and their families have experienced profound humiliation and isolation as a result of the reaction of those notified. Employment and employment opportunities have been jeopardized or lost. Housing and housing opportunities have suffered a similar fate. Family and other personal relationships have been destroyed or severely strained. Retribution has been visited by private, unlawful violence and threats. . . .”). See also Jill S. Levenson et al., *Grand Challenges: Social Justice and the Need for Evidence-based Sex Offender Registry Reform*, 43 J. SOC. & SOC. WELFARE 3, 11-12 (noting that the challenges of reintegration after conviction of a criminal offense are especially pronounced for persons placed on a sex-offense registry).

A recent review of the academic literature (thus not taking into account findings of record in cases like *Doe v. Snyder* and *Verniero*) notes methodological shortcomings in much of that literature calls for further research with more rigorous research design. See U.S. Library of Congress, Federal Research Division, *Sex Offender Registration and Notification Policies: Summary and Assessment of Research on Claimed Impacts on Registered Offenders* (June 2020).

¹⁵⁰ Prescott & Rockoff, *supra* note 132, at 181.

1 achieving a public-safety equilibrium only by driving up law-enforcement effort and expense to a
2 sufficient extent to counterbalance the *increased* danger of future sexual offenses.

3 Perhaps unexpectedly, victim advocates and organizations actively engaged in providing
4 support services for rape survivors often share these concerns and forcefully criticize burdens that
5 especially target persons convicted of a sexual offense. A **recurring grievance** is the way that public
6 access and community notification have “done a disservice by . . . the construction of sexual assault
7 risk—who poses it, who faces it, and how to mitigate it—and [by] the reinforcement of a victim
8 hierarchy that demeans most victims.”¹⁵¹ Victim services organizations like state-based
9 Coalition[s] Against Sexual Assault (CASA’s) **repeatedly** elaborate on this theme. A victim
10 advocate affiliated with a CASA in the Northeast explained that these laws “have confused the
11 public by emphasizing the least common offender.”¹⁵² At another CASA, an advocate noted that
12 “Vulnerability [for sexual abuse] is actually reinforced by these laws because it turns the attention
13 [of the public and law enforcement towards] one-percent of the **crime**.”¹⁵³

14 Similarly, advocates often object that special burdens tied to conviction of a sexual offense
15 “reinforce a narrow [view] that only forced sexual contact with a stranger that results in grave
16 bodily harm is a ‘real’ assault, and that only child victims are ‘real victims’”¹⁵⁴; that view in turn
17 “makes it harder [for victims] to come forward [because the laws] **reinforce** the notion that [the
18 justice system, the public, and service providers] are only interested in a specific offender type.”¹⁵⁵

19 **Another** prominent concern for many victim advocates has been that expensive initiatives
20 to impose collateral-consequence restrictions on registrants have been coupled with “absolutely
21 no corresponding increase in material support for victim services.”¹⁵⁶ Further, “[a]ccording to
22 several CASAs, these expensive laws have demonstrated little to no discernable impact on
23 reducing recidivism. Instead, they eat up scarce resources, scare victims into not reporting [an
24 abusive] loved one, and reinforce to the public stereotypes about what violence is and who

¹⁵¹ Rachel Kate Bandy, *The Impact of Sex Offender Policies on Victims*, in RICHARD G. WRIGHT, ed., *SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS* 491 (2009).

¹⁵² Id. (quoting CASA interviewee).

¹⁵³ Id. (quoting CASA interviewee located on West coast).

¹⁵⁴ Id., at 493.

¹⁵⁵ Id., (quoting CASA interviewee based in Southeast). But see note 81 *supra* (reporting views of victim advocate Victor Vieth).

¹⁵⁶ Id., at 502 (reporting views of a West Coast CASA).

perpetrates it.”¹⁵⁷ One advocate summarizes that “[t]hese policies are about a *sense* of safety, not *real safety*.”¹⁵⁸

Patricia Wetterling, the mother of a murder victim, is widely credited with playing a pivotal role in enactment of SORNA’s predecessor, the first federal legislation *mandating* the creation of state regimes for registering persons convicted of a sexual offense.¹⁵⁹ Wetterling continues to support registration as a useful law-enforcement tool, along with notification when it is carefully done (“the way we do it in Minnesota”¹⁶⁰), but she has come to regret much of the overextended legislation that her initiative spawned. She describes *residency restrictions* as “ludicrous,” noting that “most sex offenses are committed by somebody that gains your trust, or is a friend or relative.... [N]one of these laws address the real [problem] that nobody wants to talk about.”¹⁶¹

Registration of juveniles convicted of a sexual offense has had distinctively harsh consequences, and assessments of its value have been especially negative. The relevant research is discussed in the Reporters’ Note to Section 213.11A(3), which imposes special limits on juvenile registration.

7. The Model Code: Sections 213.11A-213.11J. A regime to govern sex-offense sentencing and collateral consequences must address a dense thicket of substantive and procedural issues. Distinctive features of local law necessarily affect the appropriate statutory structure and language dealing with operational detail. Thus, many facets of scope and implementation do not lend themselves to treatment in a Model Code intended for a multi-jurisdictional audience. Crucial issues of drafting and policy, however, are common to all jurisdictions and can be addressed in universal terms: Which offenses and which perpetrators should ever be subject to restrictions specific to persons convicted of a sexual offense? How much information should be publicly accessible? Should particular burdens (for example, limits on where a registrant can reside) ever be imposed upon conviction of a sexual offense? If so, which sexual offenses should trigger exposure to that burden, and should it be imposed automatically or only after an individualized assessment of benefits and costs? What should be the duration of the measure in question? What procedural safeguards should attend the determination of whether a particular person should be

¹⁵⁷ Id., at 505.

¹⁵⁸ Id. (quoting a West Coast CASA advocate and noting that as a result, the unintended byproduct of these laws “may well be the creation of more victims.”).

¹⁵⁹ See text at notes 24-25, *supra*.

¹⁶⁰ In Minnesota, the extent of community notification depends on an assessment of the registrant’s dangerousness and the degree of community members’ need to know. See text at note 276, *infra*.

¹⁶¹ Patricia Wetterling & Richard G. Wright, *The Politics of Sex Offender Policies: An Interview with Patricia Wetterling*, in WRIGHT, *supra* note 19, at 69, 71. For further discussion of Wetterling’s further criticism of residency restrictions, see Reporters’ Note to Section 213.11H, *infra*.

1 subject to a particular measure or whether a previously imposed burden should be lifted? Sections
2 213.11A-213.11J address broadly relevant issues of this kind.

3 Sections 213.11A-213.11J do not accept the federal framework as a given and instead
4 reconsider the federal baseline on its merits, for two reasons. First, the federal “mandate” is quite
5 weak, because noncompliance causes states to lose only 10 percent of their federal law-
6 enforcement grants.¹⁶² By comparison, the costs of compliance typically are many times greater.
7 For example, in California, the state’s Sex Offender Management Board estimated that complying
8 with federal SORNA would cost the state at least \$38 million, as against a loss of only \$2.1 million
9 in federal funds.¹⁶³ For Texas, comparable figures were assessed at a cost of \$39 million for
10 SORNA compliance, as against a loss of only \$1.4 million in federal funding.¹⁶⁴ In Colorado, the
11 state estimated that the federal funds lost (\$240,000) would suffice to implement SORNA only in
12 a single mid-size law-enforcement agency.¹⁶⁵ As a result, in most states, SORNA is seen as an
13 unfunded mandate of considerable proportions.¹⁶⁶

14 Second, and partly as a consequence of the first point, as of 2020, only 18 states had
15 complied with the federal mandate.¹⁶⁷ All states have some system for registering persons

¹⁶² 34 U.S.C. § 20925(a) (2019).

¹⁶³ California Sex Offender Management Board, Adam Walsh Act Statement of Position 3-4 (n.d.), available at http://www.opd.ohio.gov/AWA_Information/AWA_CA_SOMB_SORNA_Position_Paper.pdf. The implementation costs continue to dwarf even the more substantial loss of federal funds (\$3.2 million) that California faced for fiscal 2011. See National Conference of State Legislatures, SORNA Noncompliance Penalties, available at <http://www.ncsl.org/Portals/1/documents/cj/jagstatedollars.pdf>.

¹⁶⁴ Senate Criminal Justice Committee [Texas], Interim Report 14 (Dec. 15, 2010), available at <http://www.senate.state.tx.us/75r/Senate/commit/c590/c590.InterimReport81.pdf>.

¹⁶⁵ Colorado Sex Offender Management Board, White Paper on the Adam Walsh Child Protection & Safety Act of 2006, at 17 (Sept. 2008), available at http://dcj.state.co.us/odvsom/Sex_Offender/SO_Pdfs/SOMB%20AWA%20White%20Paper%20Final%20-%202009-19-08.pdf. In 2013 Colorado nonetheless took steps sufficient to convince DoJ’s SMART Office to certify that the state had “substantially implemented SORNA.” See U.S. Dept. of Justice, Office of Justice Programs, SMART Office, *SORNA Substantial Implementation Review, State of Colorado – Revised* (Oct. 29, 2013). In addition to the California, Colorado, and Texas assessments just cited, see also Hinton, *supra* note 99, at 9-18.

¹⁶⁶ See Dylan Scott, *States Find SORNA Non-Compliance Cheaper*, Nov. 7, 2011, available at <http://www.governing.com/blogs/fedwatch/States-Find-SORNA-Non-Compliance-Cheaper.html#>; Levenson, *supra* note 136, at 15 (noting that “[m]ore than half of states have elected not to comply with the AWA due to the financial burden it placed on them, because the loss of federal dollars was estimated to be less than the costs of implementing new mandates.”).

¹⁶⁷ See U.S. Dept. of Justice, Office of Justice Programs, SMART Office, “Jurisdictions That Have Substantially Implemented SORNA,” <https://smart.ojp.gov/sorna/substantially-implemented> (accessed Nov. 10, 2020) (listing 18 states that have substantially implemented SORNA). Prior to 2016, the Department of Justice considered only 17 of the 50 states to be SORNA-compliant. DoJ guidance finalized in August 2016 provided states “greater flexibility” in implementing SORNA’s requirements with respect

convicted of a sexual offense, but the majority have chosen to go their own way, adopting more flexible approaches, even at the cost of losing some federal funds. The collateral burdens imposed on persons convicted of a sexual offense vary widely, exceeding the federal minimum in some jurisdictions but falling below it in others. This pattern suggests widespread dissatisfaction with the federal regime, whether because of fiscal or policy concerns.

For these reasons, Sections 213.11A-213.11J, while targeting issues that the federal mandate currently leaves to the discretion of the states, also evaluate, and in part reject, approaches that current federal law seeks to mandate nationwide. The potential benefits of sex-offense collateral consequences become attenuated, and costs together with negative side effects dominate decisively when—as under currently prevalent law—the obligation to register applies indiscriminately to persons of widely divergent culpability and future risk; when public access to registry information is essentially unlimited; and when special measures go beyond registration to include affirmative community notification, occupational and residency restrictions, and the like. The broad, inflexible sweep of collateral-consequence sanctions under federal SORNA and under the legislation of most states is unjust and counterproductive. On this point, well-considered arguments for a more limited approach have won a positive reception in the legislatures and law-enforcement agencies of a significant minority of the states, even in the face of considerable political risk. By delineating a balanced, discriminating approach, Sections 213.11A-213.11J offer a template for legislatures willing to consider much-needed reform in this area. The Article 213 offense definitions limit eligibility for collateral sanctions of any sort, and for eligible offenses, Sections 213.11A-213.11J provide a structure for selectively assessing the need to burden the registrant with particular sorts of collateral consequences beyond the threshold requirement of registration itself. These provisions require restraint in imposing registration, community notification, residency restrictions, and related collateral consequences, in light of the public-policy costs of such sanctions that, although not readily apparent to the general public, are nonetheless substantial and well-documented in all the relevant research.

Section 213.11A establishes the scope of the threshold duty to register. Issues relevant to implementing that duty are discussed in the Reporters' Notes to Section 213.11B (for the notice that must be given to a person convicted of a sexual offense), Section 213.11C (for the time when the obligation to register ripens), Section 213.11D (for the information registrants and states themselves must provide), Sections 213.11E and 213.11F (for the registrant's duty to periodically update registry information and the duration of that duty), and Section 213.11G (for penalties applicable to failure to register or update registry information as required). Consequences other than registration are discussed in more detail in the Reporters' Notes to subsequent Sections, which restrict, substantively and procedurally, the registrant's exposure to other collateral consequences. Section 213.11H strictly limits public access to registry information. Section 213.11I establishes a

to juvenile registration. See Office of the Attorney General, Supplemental Guidelines for Juvenile Registration Under the Sex Offender Registration and Notification Act, 81 Fed. Reg. 50,522, 50,552 (Aug. 1, 2016). The relaxation of these rules permitted a modest increase in the count of SORNA-compliant states.

Section 213.11. Sentencing and Collateral Consequences of Conviction

1 formal procedure for deciding on the need for additional obligations or disabilities; identifies
2 factors the authorized official must weigh in determining whether a particular registrant should
3 incur such consequences; and requires a written explanation of the reasons why any additional
4 collateral consequence is justified in the interest of public safety, after due consideration of its
5 impact on the registrant's prospects for successful reintegration into law-abiding society. Finally,
6 Section 213.11J addresses procedures by which registrants can obtain early relief from sex-offense
7 duties and disabilities, including the duty to keep registry information current.

1 **SECTION 213.11A. REGISTRATION FOR LAW-ENFORCEMENT PURPOSES**

2 ***(1) Offenses Committed in This Jurisdiction***

3 (a) Except as provided in subsection (3), every person convicted of an offense
4 that is designated a registrable offense in this Article must, in addition to any other
5 sanction imposed upon conviction, appear personally and register, at the time
6 specified in Section 213.11C, with the law-enforcement authority designated by law
7 in the [county] where the person resides. If the person who is required to register
8 under this subsection does not reside in this jurisdiction, but works in this
9 jurisdiction, registration must be accomplished in the [county] where the person
10 works; if the person does not reside or work in this jurisdiction but is enrolled in a
11 program of study in this jurisdiction, registration must be accomplished in the
12 [county] where the person studies.

13 (b) Notwithstanding any other provision of law, no conviction for an offense
14 under this Article, or for any other criminal offense in this jurisdiction, will require
15 the person convicted to register with law enforcement or other governmental
16 authority in a registry regime applicable primarily to persons convicted of a sexual
17 offense, unless this Article designates that offense as a registrable offense.

18 ***(2) Offenses Committed in Other Jurisdictions***

19 (a) ***Duty to register and related duties.*** Every person currently obliged to
20 register with law enforcement or other public authority in another jurisdiction,
21 because of a sexual offense committed in that jurisdiction, who subsequently resides,
22 works, or enrolls in a program of study in this jurisdiction, must register with the
23 law-enforcement authority designated by law and comply with the requirements of
24 Sections 213.11A-213.11G, **provided that the offense committed in the other**
25 **jurisdiction is comparable to an offense that would be registrable under this Article**
26 **if committed in this jurisdiction.**

27 (b) ***Place of registration.*** If the person who is obliged to register under
28 paragraph (a) resides in this jurisdiction, registration must be accomplished in the
29 [county] where the person resides. If the person who is obliged to register under
30 paragraph (a) does not reside in this jurisdiction, but works in this jurisdiction,
31 registration must be accomplished in the [county] where the person works; if the

1 person does not reside or work in this jurisdiction but is enrolled in a program of
2 study this jurisdiction, registration must be accomplished in the [county] where the
3 person studies.

4 (c) *Determining the comparability of in-state and out-of-state offenses*

5 (i) **Standard.** An offense committed in another jurisdiction is
6 **comparable** to a registrable offense under this Article if and only if the
7 elements of the out-of-state offense are no broader than the elements of that
8 registrable offense. When, regardless of the conduct underlying the out-of-
9 state conviction, the out-of-state offense can be committed by conduct that is
10 not sufficient to establish a registrable offense under this Article, the two
11 offenses are not comparable.

12 (ii) *Procedure.* Before determining that an offense committed in another
13 jurisdiction is comparable to a registrable offense under this Article, the
14 authority designated to make that determination must give the person
15 concerned notice and an opportunity to be heard on that question, either orally
16 or in writing.

17 (d) Notwithstanding any other provision of law, no conviction for a sexual
18 offense in another jurisdiction will require the offender to register with law
19 enforcement or other governmental authority in this jurisdiction, unless that
20 conviction currently requires the offender to register with law enforcement or other
21 governmental authority in the jurisdiction where the offense was committed and the
22 conviction is for an offense comparable to an offense that would be registrable under
23 this Article if committed in this jurisdiction.

24 (3) *Persons under the age of 18.* No person may be subject to the obligation to register
25 under subsection (1) of this Section, to other obligations or restrictions under this Section, or
26 to additional collateral consequences under Section 213.11I, on the basis of a criminal
27 conviction for an offense committed when the person was **under the age of 18**, or on the basis
28 of an adjudication of delinquency based on conduct when the person was under the age of
29 18; provided, however, that this subsection (3) does not apply to a person convicted of a
30 criminal offense of Sexual Assault by Aggravated Physical Force or Restraint if the person
31 was at least 16 years old at the time of that offense.

Comment:

1. Offenses Committed in This Jurisdiction. Section 213.11A(1) applies to collateral consequences potentially applicable on the basis of an offense committed in this jurisdiction.

a. Subsection (1)(a). In order to serve law-enforcement purposes, subsection (1)(a) requires a person convicted of a sexual offense to register with a locally designated law enforcement agency and fulfill related duties when this Article designates it as a registrable offense.

The following offenses are the only offenses designated as registrable under this Article:

(i) Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint.

(ii) Section 213.2. Sexual Assault by Physical Force, but only when committed after the offender had previously been convicted of a felony sex offense.

(iii) Section 213.3(1). Sexual Assault of an Incapacitated Person, but only when committed after the offender had previously been convicted of a felony sex offense.

(iv) Section 213.8(1). Sexual Assault of a Minor, but only when the minor is younger than 12 and the actor is 21 years old or older.

(v) Section 213.8(2). Incestuous Sexual Assault of a Minor, but only when the minor is younger than 16 years old.

Subsection (1)(a) requires persons convicted of any of these designated offenses to register with law-enforcement authorities in the [county] where the person resides. Municipal organization and local logistical capabilities will determine for each state the official agency and jurisdictional level where the registration obligation is centered. But because registration in the scheme of Article 213 is designed to serve primarily law-enforcement objectives, the agency must in any event be one with a law-enforcement mission. For example, in California, persons required to register must do so “with the chief of police of the city in which he or she is residing, or the sheriff of the county if he or she is residing in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California, the California State University, or community college if he or she is residing upon the campus or in any of its facilities.”¹⁶⁸ In Pennsylvania, persons required to register must do so with an appropriate official

¹⁶⁸ CAL. PENAL CODE § 290(b) (2019).

1 of the correctional facility where incarcerated prior to release, with the Pennsylvania Board of
2 Probation and Parole, or with the Pennsylvania state police, depending on the circumstances.¹⁶⁹

3 *b. Subsection (1)(b).* Existing sex-offense registration requirements and related provisions
4 are codified in diverse places within the corpus of state law. In addition, many jurisdictions impose
5 registration and related obligations on the basis of sexual offenses other than rape and sexual
6 assault—including sex-related offenses that fall outside the scope of Article 213, such as
7 exhibitionism, stalking, and possession of **child pornography**. Section 213.11A(1)(b) provides that
8 an obligation to register with law enforcement, related duties, and other collateral consequences
9 applicable primarily to persons convicted of a sexual offense may not be imposed on an offender
10 on the basis of any offense committed in this jurisdiction that is not defined by Article 213 and
11 designated by this Article as a registrable offense.

12 Subsection (1)(b) therefore makes clear that the registration provisions of Section 213.11A
13 supersede prior law governing sex-offense registration and other sentencing and collateral
14 consequences provisions applicable primarily to sex offenses in the jurisdiction. Once enacted, the
15 Article 213 designation of offenses that are registrable, and the provisions of Sections 213.11A-
16 213.11J specifying the scope and limits of sentencing consequences and collateral consequences
17 applicable primarily to persons convicted of a sexual offense constitute the exclusive source of
18 law applicable to these collateral consequences in the jurisdiction. Collateral consequences not
19 applicable primarily to persons convicted of a sexual offense—that is, obligations or restrictions
20 applicable both to persons convicted of sexual offenses and to persons convicted of a broad range
21 of other offenses, such as disqualifications from voting, jury service, or eligibility for public
22 benefits—are governed by Model Penal Code: Sentencing and are not affected by the provisions
23 of Sections 213.11A-213.11J.

24 **2. Offenses Committed in Other Jurisdictions.** Section 213.11A(2) applies to sex-offense
25 collateral consequences potentially applicable when a person enters this jurisdiction to reside,
26 work, or enroll in a program of study after having been convicted of a sexual offense in another
27 jurisdiction.

¹⁶⁹ 42 PA. CONS. STAT. ANN. § 9799.19 (2019)

1 a. *Duty to Register.* Under subsection (2)(a), an out-of-state conviction triggers the
2 registration obligations of Section 213.11A if and **only if the person** in question is currently obliged
3 to register as a sex offender in the jurisdiction where the offense was committed *and* the offense
4 is comparable to one that would be registrable if committed in this jurisdiction. Altogether,
5 therefore, there are four situations in which an out-of-state conviction does not require a person to
6 register or face other sex-offense collateral consequences in this jurisdiction when subsequently
7 residing, working, or enrolling in a program of study in this jurisdiction: (1) the out-of-state
8 conviction is for an offense that is not registrable in either jurisdiction; (2) the out-of-state
9 conviction is for an offense that is registrable where committed but would not be registrable if
10 committed in this jurisdiction; (3) the out-of-state conviction is for an offense that would be
11 registrable if committed in this jurisdiction but is not registrable where committed; and (4) the out-
12 of-state conviction is for an offense that is registrable in both jurisdictions, but the person
13 concerned is not *currently* obliged to register in the out-of-state jurisdiction because the person has
14 received a full pardon, the conviction has been expunged, or the person's obligation to register in
15 the out-of-state jurisdiction has terminated in any other way.

16 b. *Place of Registration.* When a person required to register under subsection (2)(a) **resides**
17 in this jurisdiction, registration must be accomplished in the [county] where the person resides.
18 When that person works in this jurisdiction but does not reside in this jurisdiction, registration
19 must be accomplished in the [county] where the person works; if the person does not reside or
20 work in this jurisdiction but is enrolled in a program of study in this jurisdiction, registration must
21 be accomplished in the [county] where the person studies.

22 c. *Comparability.* The facts underlying the particular conviction for the out-of-state offense
23 in question are not relevant in determining comparability. Instead, subsection (2)(c)(i) provides
24 that an offense committed in another jurisdiction is “comparable” when and only when the
25 elements of the out-of-state offense are no broader than the elements of an offense that is
26 registrable under this Article. And because substantial liberty interests are implicated in a decision
27 that triggers the duty to register, subsection (2)(c)(ii) provides that the authority designated to
28 determine comparability must give the affected person notice and an opportunity to be heard on

that question, either orally or in writing.¹⁷⁰ Subsection (2)(c)(ii) does not resolve the question whether the affected person, if indigent, must be afforded counsel at state expense. When necessary, courts must resolve that question in light of the seriousness of the registration consequences and the complexity of the legal question specific to the particular case.

This elements-only standard is intended to ensure that comparability decisions will not turn on elusive inquiries into the particular facts underlying an out-of-state conviction; rather, those decisions can be made by comparing the definitional elements of the relevant Article 213 offense to those of the out-of-state offense, as clarified by applicable case law. This standard also is intended to ensure that once the comparability or noncomparability of two offenses is established, the issue will be settled for all other cases involving those two offenses; the decisionmaking authority will not have to revisit the issue *de novo* and delve into underlying facts case by case in future situations involving the same two offenses.

As a result, when the definition of the out-of-state offense permits conviction in circumstances that are insufficient to establish a registrable offense under this Article, the two offenses are **not comparable**. For example, if negligence suffices to establish the mens rea element of the out-of-state offense while the relevant Article 213 offense requires proof of recklessness, the two offenses are not comparable, even though the facts proved at trial or admitted on a guilty plea might establish that the defendant in the actual case acted recklessly or even purposely. Conversely, if a knowing mens rea or specific intent is required to establish the mens rea element of the out-of-state conviction while the relevant Article 213 offense requires only recklessness, and if there is no other difference between the elements of the two offenses, then the two offenses are comparable, because any conviction for the out-of-state offense necessarily establishes that the person concerned could have been convicted of the relevant Article 213 offense if the conduct in question had occurred in this jurisdiction.

3. Persons under the Age of 18. Subsection (3) protects persons who were under 18 at the time of the offense from the obligation to register and from other collateral consequences applicable primarily to persons convicted of sexual offenses, regardless of whether the potential

¹⁷⁰ See, e.g., *Meredith v. Stein*, 355 F. Supp. 3d 355 (E.D.N.C. 2018) (determination that an out-of-state conviction was “substantially similar” to a registrable state offense, without providing the affected person an opportunity to be heard, held to violate procedural due process); *Creekmore v. Attorney General of Texas*, 341 F. Supp. 2d 648, 666 (E.D. Tex. 2004) (same).

trigger for those consequences is an adjudication of delinquency or a criminal conviction under this Article, except that minors convicted of a criminal offense of Sexual Assault by Aggravated Physical Force or Restraint remain subject to the requirements of Section 213.11A if they were at least 16 years old at the time of that offense.

REPORTERS' NOTES

The findings canvassed in the Reporters' Notes to Section 213.11 above cast considerable doubt on the efficacy and wisdom of nearly all the common collateral-consequence requirements enacted for sex offenses since the early 1990s. One response to that assessment would be to discard registration-related practices entirely and treat persons convicted of sexual offenses who live in the community no differently from anyone else who has a criminal record. That approach, however, gives insufficient weight to legitimate social interests, especially the law-enforcement interests that a local registry can serve.

To be sure, law-enforcement officials can readily retrieve criminal-history information, regardless of the jurisdiction where the conviction occurred, when they need background on a person of interest in a particular criminal investigation. But that option is more cumbersome than the ability to quickly determine through a local registry whether that individual has a serious sex-offense record. And a search of the national data base for the criminal history of an individual suspect is beside the point when there is a need to identify the unknown perpetrator of a serious sexual crime. At least to the extent that the information does not leave law-enforcement hands, its public-safety value easily outweighs the potential costs. An obligation to register with local law-enforcement authority therefore seems readily defensible for persons convicted of the most serious sexual offenses. Section 213.11A delineates the appropriate reach of that obligation.

A significant difficulty is that once information exists anywhere in cyberspace, its confidentiality is fragile, no matter what the law may say.¹⁷¹ Whether the combined risks of data breach and data misuse outweigh the law-enforcement value of location-specific information about persons convicted of a sexual offense is not easy to determine; the answer inevitably depends in large part on local cyber-security measures and the danger posed by those who commit particular types of offenses. The difficulty of appraising these factors counsels in favor of limiting the registration obligation, with its attendant costs, to individuals most likely to pose a significant public-safety threat, and then relying on registrant-specific assessments of risk, as several states already do, to determine the frequency and duration of information-update obligations, eligibility for early termination of registration, and other collateral consequences.¹⁷²

¹⁷¹ Leakage of ostensibly confidential information was a problem for registry information even before the Internet. See Logan, *supra* note 19, at 229 n.218.

¹⁷² Cf. *R(F) v. Sec'y of State for the Home Dep't*, *supra* note 38, at ¶ 58 (holding mandatory registration a "disproportionate interference" with offenders' rights to privacy, and therefore a violation of

A separate but especially salient interest is the value of heightened possibilities for citizen self-protection in settings such as schools, day-care centers, and nursing homes, where staff have frequent, unsupervised access to young children and other particularly vulnerable individuals. That interest is discussed in connection with the provisions of Section 213.11H, which govern public access to registry information.

1. Section 213.11A(1): Adults Convicted of Sex Offenses in This Jurisdiction. The Article 213 offense definitions classify as “registrable,” and therefore capable of triggering sex-offense collateral consequences, only those sexual offenses most likely to signal a propensity for dangerous predatory sexual behavior. The following Article 213 offenses are classified as registrable:

(i) *Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint.* This, the most serious sexual offense, involves exceptionally aggressive sexual abuse that clearly justifies special concern about the danger of violent recidivism.

(ii) *Section 213.2. Sexual Assault by Physical Force.* This offense covers a wide range of sexual misconduct, from that involving reckless uses of “aggravated physical force” to many lesser degrees of force and threat, including any amount of physical force that is more than negligible, provided of course that the offender has the necessary culpable awareness of causing the other person to submit to or perform penetration or oral sex by those forcible means. So defined, the offense includes within its reach misconduct that, while very serious, does not necessarily mark the offender as a threat to children or a potentially violent predator. To require registration for all such persons would therefore be overbroad. Section 213.2 therefore classifies the offense as registrable only when the offense conduct occurs after the perpetrator had previously been convicted of a felony sex offense.

(iii) *Section 213.3(1). Sexual Assault of an Incapacitated Person.* This offense similarly covers a wide range of sexual misconduct. The conduct within its reach, while very serious, does not necessarily mark the perpetrator as a threat to children or a potentially violent predator. To require registration for all such persons would therefore be overbroad. A sexual offense against an incapacitated person does, however, support a stronger concern about potential recidivism when the perpetrator has a history of one or more previous convictions for serious sexual assault. Section 213.3(1) therefore classifies the offense as registrable only when the assault occurs after the perpetrator had previously been convicted of a felony sex offense.

(iv) *Section 213.8(1).* This offense is registrable when it involves sexual penetration or oral sex with a victim younger than 12 by an offender who is 21 years old or older. This is predatory sexual abuse of exceptionally serious nature, justifying the special precautions that registration with law enforcement permits.

the European Convention on Human Rights, because it made “no provision for individual review of its requirements.”).

(v) *Section 213.8(2)*. This offense is registrable when it involves sexual penetration or oral sex with a victim under the age of 16 by a person who is a parent, guardian, or other adult in a similarly direct position of trust and responsibility for the victim's **welfare**. This is exceptionally serious sexual misconduct, involving exploitation and abuse of trust that calls for the special precautions that the sex-offense registry permits.

The one comparably dangerous Article 213 offense not classified as registrable is the **offense of Sex Trafficking** under Section 213.9. Like the registrable offenses, it is an especially serious felony involving predatory behavior and exploitation of vulnerable victims. But as its motivation is primarily economic, it calls for a different kind of law-enforcement attention. Unless its perpetrators are themselves guilty of other Article 213 offenses, they do not warrant inclusion in a registry that aims to identify a different sort of offender.

The other Article 213 offenses all involve serious crimes, and their perpetrators undoubtedly may include a number of potential recidivists. But the empirical research and experience detailed above make clear that the currently prevalent approach, which seeks to cast the widest conceivably defensible net, is unjust, costly, and counterproductive. With respect to the Article 213 offenses not designated as registrable, the social harms of registration demonstrably outweigh its potential benefits. Making this judgment explicit, Section 213.11A(1)(b) stipulates that no conviction for any other criminal offense under Article 213 can be the basis for requiring registration with law enforcement or any other obligation applicable primarily to persons convicted of a sexual offense.

Several jurisdictions extend their sex-offense registry systems to *nonsexual* offenses that arguably pose similar risks (for example, **kidnapping a child**).¹⁷³ Given the limited value and

¹⁷³ Federal SORNA is an example. SORNA § 20911(5)(A)(ii) defines the term “sex offense” to include “a criminal offense that is a specified offense against a minor,” and subsections (7)(A) & (B) of that section define the term “specified offense against a minor” to include “an offense against a minor ... (unless committed by a parent or guardian) involving kidnapping [or] false imprisonment.” See also VA. CODE ANN. 9.1-902 (Sex Offender and Crimes Against Minors Registry Act); *Rainer v. State*, 690 S.E.2d 827 (Ga. 2010) (nonparental false imprisonment is registrable); *Commonwealth v. Thompson*, 548 S.W.3d 881 (Ky. 2018) (attempted kidnapping of a minor is registrable); *People v. Knox*, 903 N.E.2d 1149 (N.Y. 2009) (nonparental kidnapping and unlawful imprisonment are registrable); *State v. Smith*, 780 N.W.2d 90 (Wis. 2010) (nonparental false imprisonment is registrable); *Lozada v. South Carolina Law Enforcement Division*, 719 S.E.2d 258 (S.C. 2011) (Pennsylvania conviction for unlawful restraint registrable as kidnapping in South Carolina). But see *People v. Diaz*, 32 N.Y.3d 538 (2018) (murder of 13-year-old girl in Virginia, registrable under Virginia’s Sex Offender and Crimes Against Minors Registry Act, held not registrable under New York Sex Offender Registry Act, because Virginia law did not require defendant to register “as a sex offender”); *Doe v. Sex Offender Registry Board*, 11 N.E.3d 153 (Mass. App. Ct. 2014) (federal conviction for kidnapping of a minor not registerable in Massachusetts); *State v. Coman*, 273 P.3d 701 (Kan. 2012) (bestiality not a registrable offense); *State v. Haynes*, 760 N.W.2d 283 (Mich. Ct. App. 2008) (same); *State v. Duran*, 967 A.2d 184 (Md. 2009) (indecent exposure not registrable because

substantial social costs of registration even in the case of explicitly sexual crimes,¹⁷⁴ and the dangers of mission creep if registries begin to sweep nonsexual crimes within their purview, there is strong reason to limit a registration regime to the serious sexual offenses that fall within the scope of Article 213. Accordingly, Section 213.11A(1)(b), reflecting the majority view among the states, stipulates that no conviction for a criminal offense in this jurisdiction can trigger an obligation to register or any other obligation applicable primarily to persons convicted of a sexual offense, unless the offense is a registrable offense under this Article.

2. Section 213.11A(2): Adults Convicted of Sex Offenses in Other Jurisdictions. In virtually all jurisdictions, a person’s conviction for a sexual offense can sometimes trigger an obligation to register when the person moves elsewhere to live, work, or study. Many states require sex-offense registration for a much broader array of offenses than those that trigger registration obligations under Article 213, including, in some states, nonsexual offenses.¹⁷⁵ The policy judgment underlying Section 213.11A—that sex-offense registration should be carefully targeted—makes registration inappropriate in such cases.

The converse situation is less straightforward. A person may have committed an offense that would be registrable if committed in this jurisdiction but is not registrable in the jurisdiction where it was committed. That situation will seldom arise in practice, because few states if any restrict the registration obligation more narrowly than does Article 213. In such an event, however, the policy underlying Section 213.11A arguably might call for the public-safety measures that Sections 213.11A-213.11J contemplate. Nonetheless, when such an offense was not registrable where committed, the offender would not receive registration-related notice at the time of conviction. It is therefore neither practical nor fair for that offender to face Section 213.11A requirements when subsequently entering this state.

A related situation in which the registration obligations of this jurisdiction could be broader than that of another jurisdiction can arise when the person concerned, after meeting all registration-related obligations in that jurisdiction, has been removed from its registry. Or similarly, a person ordinarily subject to registration in the other state for an offense that is registrable in this jurisdiction may receive a pardon or succeed in having the out-of-state conviction expunged. The Department of Justice reports that “[o]n occasion, offenders have had their convictions expunged, but still might face registration requirements in other states.”¹⁷⁶ In these cases as well, the policy

lewdness element of the crime incorporated conduct that was not sexual in addition to conduct that could be sexual).

¹⁷⁴ See Reporters’ Notes to Section 213.11, *supra*.

¹⁷⁵ See note 173, *supra*.

¹⁷⁶ U.S. DEP’T OF JUST., SEX OFFENDER REGISTRATION AND NOTIFICATION IN THE UNITED STATES: CURRENT CASE LAW AND ISSUES (2019), at 2 (noting that “at least one state has [determined] that

1 judgment underlying Section 213.11A—that sex-offense registration should be carefully
2 targeted—makes registration inappropriate.

3 For those reasons, Section 213.11A(2)(a) provides that the out-of-state offense triggers the
4 registration obligations of Sections 213.11A-213.11J if and only if two requirements are met: the
5 person must be currently obliged to register as a sex offender in the jurisdiction where the offense
6 was committed *and* the offense must be one that would be currently registrable if committed in
7 this jurisdiction. As a corollary, Section 213.11A(2)(d) makes explicit that no conviction for an
8 offense that would not be registrable if committed in this jurisdiction can be the basis for imposing
9 registration requirements or any other obligation that this jurisdiction applies primarily to persons
10 convicted of a sexual offense.

11 Section 213.11A(2)(b) explains *where* that person must register. If the person lives in this
12 jurisdiction, registration must be accomplished in the [county] where the person lives. If the person
13 does not live in this jurisdiction, but works in this jurisdiction, registration must be accomplished
14 in the [county] where the person works. If the person does not live or work in this jurisdiction but
15 studies in this jurisdiction, registration must be accomplished in the [county] where the person
16 studies.

17 Section 213.11A(2)(c) explains the standard and procedures for determining whether an
18 out-of-state offense triggers a duty to register. The required procedure is straightforward: Under
19 subsection (2)(c)(ii), the decisionmaking authority must give the affected person notice and an
20 opportunity to be heard on the comparability question, either orally or in writing.

21 The standard for determining comparability merits more extended discussion. States
22 typically provide that a person’s out-of-state conviction triggers an obligation to register as a sex
23 offender only when that offense “is ‘comparable,’ ‘similar’ or ‘substantially similar’ to one or
24 more of the receiving jurisdiction’s registerable [sic] offenses.”¹⁷⁷ Most states designate a central
25 authority to make that determination, but some do not.¹⁷⁸

26 Comparability issues arise with some frequency, because of a lack of congruence between
27 the out-of-state offense and the nearest equivalent registrable offense in the receiving state. Under
28 current law, that issue is easily resolved when the question is whether comparability should be
29 determined by the names of the two offenses or instead by their facts and definitional elements.
30 The label itself is not relevant; two offenses can be comparable, even when they have different

‘out-of-state offenders whose convictions have been expunged must register ... [so long as] they were
required to register’ in another jurisdiction as a sex offender”).

¹⁷⁷ Id.

¹⁷⁸ Id. In several states, a local sheriff’s determination that an out-of-state conviction was
“substantially similar” to a registrable state offense, without providing the affected person an opportunity
to be heard, was held to violate procedural due process. See *Meredith v. Stein*, 355 F. Supp. 3d 355
(E.D.N.C. 2018); *Creekmore v. Attorney General of Texas*, 341 F. Supp. 2d 648, 666 (E.D. Tex. 2004).

names or captions, if their elements are identical.¹⁷⁹ For example, assume that a person has been convicted of “child molestation,” an offense that is registrable where committed but that does not exist under that name in the jurisdiction to which the person subsequently moves. If that offense, as defined, requires proof of sexual contact with a minor under the age of 14 and if that conduct suffices to establish a registrable offense (perhaps labeled “sexual abuse of a minor”) in the receiving jurisdiction, the latter jurisdiction can justifiably conclude that the two offenses are comparable and that the person concerned must register in the place where that person moves.

Conversely, offenses sometimes are *not* comparable even though they carry the same label. Assume that (1) two states have a registrable offense of “sexual abuse of a minor,” (2) the out-of-state registrable offense requires proof of sexual contact with a minor under the age of 16, (3) the receiving state’s registrable offense requires proof of sexual contact with a minor under the age of 14, and (4) the victim of this particular offense was 15 years old. The two offenses are *not* comparable, even though they carry identical names, because neither the elements of the out-of-state offense nor the **underlying facts** in the particular case suffice to establish a registrable offense in the receiving jurisdiction.¹⁸⁰

Greater difficulty arises when the formal elements of the offense and the conduct underlying the conviction point in different directions. Assume that (1) an out-of-state offense of “child molestation,” registrable where committed, requires proof of sexual contact with a minor under the age of 16, (2) the receiving state’s nearest equivalent registrable offense (“aggravated sexual abuse of a minor”) requires proof that the victim was under 12, and (3) the victim of this particular offense was 10 years old. Judged by the underlying facts, the out-of-state offense is comparable to the receiving state’s registrable offense of “aggravated sexual abuse of a minor.” But judged only by its definitional elements, the out-of-state offense is not comparable because some conduct falling within its scope (e.g., sexual abuse of a 15-year-old) does not trigger registration duties in the receiving state.¹⁸¹

No uniform approach has emerged to resolve this issue. When the elements of the out-of-state offense cover some conduct that is registrable in the receiving state and some that is not, many jurisdictions limit the inquiry to the formal elements of the offenses in question.¹⁸²

¹⁷⁹ E.g., WYO. STAT. ANN. § 7-19-301(a)(viii)(B) (2019) (out-of-state conviction is registrable when “containing the same or similar elements ... as sufficient to prove a Wyoming registrable sex offense”).

¹⁸⁰ E.g., *State v. Duran*, 967 A.2d 184 (Md. 2009) (out-of-state conviction for indecent exposure not registrable in Maryland because lewdness element of out-of-state offense could be satisfied by nonsexual as well as sexual conduct).

¹⁸¹ Cf. *State v. Hall*, 294 P.3d 1235 (N.M. 2013) (holding that California conviction for annoying or molesting children not registrable in New Mexico without evidence of actual conduct comparable to the registrable New Mexico offense).

¹⁸² E.g., *State v. Doe*, 425 P.3d 115, 119-121 (Alaska 2018) (Washington crime of communicating with a minor for immoral purposes and California crime of molesting a child younger than 18 held not

1 Elsewhere, statutes or case law requires or permits the decisionmaking authority to determine
 2 comparability by looking to the facts underlying the conviction in the particular case.¹⁸³ This
 3 approach is not intrinsically unworkable when the relevant facts are stipulated (as they might be
 4 when the conviction is by guilty plea) or otherwise clearly established by the record. But some
 5 jurisdictions permit wide-ranging inquiry into the circumstances underlying the out-of-state
 6 conviction,¹⁸⁴ a potentially complex factfinding process with significant possibilities for
 7 unfairness. Some jurisdictions, acknowledging this difficulty, permit inquiry into the underlying

similar to Alaska offense of attempted sexual abuse of a minor because “it is the law that must be similar
 [This] does not mean that the elements of the offense must be identical or even substantially equivalent,
 but the elements do have to be categorically alike with no significant differences [We] employ a
 categorical approach by looking to the statute . . . of conviction, rather than to the specific facts underlying
 the crime.”); *State v. Duran*, 967 A.2d 184 (Md. 2009) (out-of-state conviction for indecent exposure not
 registrable in Maryland because lewdness element of the offense could be satisfied by nonsexual as well as
 sexual conduct); *Doe v. Sex Offender Registry Bd.*, 925 N.E.2d 533 (Mass. 2010) (Board may not consider
 facts underlying the conviction); *Commonwealth v. Sampolski*, 89 A.3d 1287 (Pa. Super. Ct. 2014)
 (determination must be based on elements of the offense).

¹⁸³ E.g., WYO. STAT. ANN. § 7-19-301(a)(viii)(B) (2019) (treating out-of-state convictions as
 registrable when “containing the same or similar elements, or arising out of the same or similar facts or
 circumstances” as sufficient to prove a Wyoming registrable sex offense); *United States v. Byun*, 539 F.3d
 982 (9th Cir. 2008) (conviction for alien smuggling properly triggered registration where underlying facts
 involved sex trafficking); *State v. Hall*, 294 P.3d 1235 (N.M. 2013) (California conviction for annoying or
 molesting children not registrable in New Mexico if underlying conduct not comparable to New Mexico
 registrable offense; “courts must look beyond the elements of the conviction to the defendant’s actual
 conduct.”); *North v. Bd. of Exam’rs of Sex Offenders*, 871 N.E.2d 1133, 1139 (N.Y. 2007) (“[W]here the
 offenses overlap but the foreign offense also criminalizes conduct not covered under the New York offense,
 the Board must review the conduct underlying the foreign conviction to determine if that conduct is, in fact,
 within the scope of the New York offense.”); *State v. Lloyd*, 132 Ohio St. 3d 135, 970 N.E.2d 870 (“If the
 out-of-state statute defines the offense in such a way that the court cannot discern from a comparison of the
 statutes whether the offenses are substantially equivalent, a court may ... rely on a limited portion of the
 record in a narrow class of cases where the factfinder was required to find all the elements essential to a
 conviction under the listed Ohio statute.”); *State v. Howe*, 212 P.3d 565, 567 (Wash. Ct. App. 2009)
 (quoting *State v. Morley*, 952 P.2d 167, 175-176 (Wash. 1998)) (“[I]f the elements are not identical, or the
 foreign statute is broader than the Washington definition of the particular crime,’ then, as a second step, the
 trial court may examine the facts of the out-of-state crime.”).

See also Sam Ashman, Note, *The Danger in New Mexico’s Method of Deciding Whether an Out-
 of-State Conviction is a Registrable Sex Offense*, 49 N.M. L. REV. 354 (2019).

¹⁸⁴ E.g., *State v. Orr*, 304 P.3d 449, 451-452 (N.M. Ct. App. 2013) (“Although we do not have a
 sufficient record on appeal, the State has indicated that during the pendency of this appeal, it obtained
 several documents from the district attorney’s office and court in North Carolina, including an investigation
 report, grand jury indictment, transcript of plea, prior convictions for sentencing, and judgment and
 commitment, to understand the underlying facts and procedural posture of Defendant’s conviction in North
 Carolina. Accordingly, we remand this case to the district court for further proceedings”).

facts only when the statutory elements are “substantially similar”¹⁸⁵ (an elusive inquiry in itself), or when a formal record readily establishes those facts.¹⁸⁶ Even this narrower approach means that the comparability of an in-state offense to an out-of-state offense is never categorically resolved; that issue always depends on the facts underlying the out-of-state conviction in each case.

Accordingly, subsection (2)(c) provides that comparability must be determined solely by comparing the definitional elements of the two offenses. An offense is comparable to a registrable offense under Article 213 if and only if the elements of the out-of-state offense are no broader than the elements of an offense that is registrable under this Article. When, regardless of the conduct underlying the out-of-state conviction, the out-of-state offense can be committed by conduct that is not sufficient to establish a registrable offense under this Article, the two offenses are not comparable. This definitional-elements standard avoids the inconvenience for the decisionmaker and the risk for the person concerned when the judgment about comparability requires determining the specific facts underlying each out-of-state conviction. It also serves the goal of judicial economy in that it permits the comparability of two offenses to be definitively resolved for all future situations implicating those offenses, even when cases potentially involve different underlying facts. **The Supreme Court uses essentially this standard**, which it calls the “modified categorical approach,” when it assesses the nature of a prior conviction for federal sentence-enhancement purposes.¹⁸⁷

¹⁸⁵ Dep’t Pub. Safety v. Anonymous, 382 S.W.3d 531, 535 (Tex. Ct. App. 2012) (“individual facts and circumstances underlying the foreign conviction [could be considered] only after determining that the elements of the two statutes were objectively substantially similar, although not identical For a foreign statute to be substantially similar to a [registrable] offense, ‘the elements being compared . . . must display a high degree of likeness, but may be less than identical.’ ... [E]xcept in unusual cases, the elements of the relevant offenses [must] be compared for substantial similarity without regard to individual facts and circumstances.”)

¹⁸⁶ E.g., CAL. PENAL CODE § 290.005(a) (West 2018) (treating out-of-state convictions as registrable “based on the elements of the convicted offense or facts admitted by the person or found true by the trier of fact”); State v. Lloyd, 132 Ohio St. 3d 135, 970 N.E.2d 870 (“court may ... rely on a limited portion of the record in a narrow class of cases where the factfinder was required to find all the elements essential to a conviction under the listed Ohio statute.”); State v. Werneth, 197 P.3d 1195, 1198 (Wash. Ct. App. 2008) (Georgia conviction for child molestation held not registerable in Washington: “[T]he out-of-state court did not necessarily find each fact essential to liability for the proposed Washington counterpart. [Therefore,] Mr. Werneth’s Georgia crime cannot count as Washington’s crime of attempted second degree child molestation ‘without more.’ ‘More’ means proof that the Georgia court *entered findings of fact* that support the additional elements of the Washington offense.”) (emphasis added).

¹⁸⁷ See *Deschamps v. United States*, 470 U.S. 254 (2013). The Court’s requirement that offenses be compared in “categorical” (definitional-elements) terms is modified only for “divisible” statutes—those that set out several offense elements in the alternative. In that situation, “[a court can] consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant’s prior conviction. The court can then do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the ... crime [to which it must be compared].” *Id.*, at 257. The problem of “divisible” statutes apparently has not arisen in determining the comparability of sexual offenses. If it does, the relevant

1 **3. Section 213.11A(3): Persons under the Age of 18.**

2 Under current law, many states impose duties to register and other sex-offense collateral
3 consequences for a long list of sexual offenses even when the perpetrator was younger than 18 at
4 the time of the misconduct. Registration is widely required, often for life, not only when the youth
5 is convicted of a criminal offense as an adult but also in many circumstances where the offense
6 was the basis for an adjudication of delinquency.¹⁸⁸ Federal SORNA seeks to require states to
7 extend registration to juveniles adjudicated delinquent if they were at least 14 years of age at the
8 time of the offense and the offense was comparable to or more severe than the federal crime of
9 aggravated sexual abuse (defined as including sexual penetration by use of force) or an attempt or
10 conspiracy to commit that offense.¹⁸⁹

11 The research is replete with heartbreaking stories of the unnecessarily cruel, life-destroying
12 impact of placing individuals on a sex-offender registry for offenses committed as minors.¹⁹⁰ The
13 impact has been not only harsh but exceptionally counterproductive. Patricia Wetterling is
14 especially outspoken in condemning juvenile registration. “I don’t see any, not one redeeming
15 quality in doing that. . . . Registering juveniles is ludicrous and wrong always.” Noting that she
16 objected to the language covering juveniles when the Jacob Wetterling bill was being drafted, she
17 recalls that she “kept raising questions about treating juveniles the same way we treat adults. It
18 makes no sense at all I was told not to worry about the juvenile provisions because that would
19 get thrown out. I was told there was no way that it would pass . . . and yet [it did].”¹⁹¹

20 Victim advocates report that “juvenile offender registration [has] inadvertently created a
21 disincentive for victims to disclose [their victimization].”¹⁹² They say their clients “fear that there
22 are no intermediate interventions available,” and that when abused at the hands of a juvenile, “they
23 fear that the youth will be required to register as a sex offender and will, therefore, be ‘branded’
24 for life despite being potentially amenable to treatment.”¹⁹³

statutory detail would guide a judgment about whether a similar “modified” approach was appropriate, but beyond the definitional elements, the comparability judgment could be informed by consulting, at most, only “a limited class of documents,” not the underlying facts.

¹⁸⁸ See Elizabeth J. Letourneau, *Juvenile Registration and Notification are Failed Policies That Must End*, in LOGAN & PRESCOTT, *supra* note 16, at 164, 166-168.

¹⁸⁹ SORNA § 20911(8) (2019); 18 U.S.C. § 2241.

¹⁹⁰ HUMAN RIGHTS WATCH, *RAISED ON THE REGISTRY* (2013).

¹⁹¹ Wetterling & Wright, *supra* note 161, at 99, 101. See also note 81, *supra*.

¹⁹² Bandy, *supra* note 151, at 471, 488.

¹⁹³ *Id.*

1 Apart from the vivid anecdotal evidence, systematic research consistently tells a similarly
 2 negative story. Findings suggest that registration of juveniles has no preventive effect¹⁹⁴ and
 3 substantial criminogenic consequences,¹⁹⁵ with overall effects that are unambiguously counter-
 4 productive for the individual concerned and for society as a whole.¹⁹⁶ One quantitative study
 5 estimates that juvenile registration alone saddles the public with social costs, net of benefits,
 6 amounting to at least \$40 million per year, and that community notification pertaining to offenders
 7 placed on a registry as minors generates net social costs of at least \$10 billion per year.¹⁹⁷

8 Studies from other methodological perspectives regularly reach qualitatively similar
 9 results.¹⁹⁸ In 2016, the Federal Advisory Committee on Juvenile Justice, in recommendations to
 10 the Justice Department’s Office of Juvenile Justice and Delinquency Prevention, reported that
 11 juvenile sex-offender registration laws “are inconsistent with research and evidence-based practice
 12 and undermine positive outcomes.” The Committee urged rejection of the registration approach
 13 for juveniles in preference to using “evidence-based, community based and family-focused
 14 responses,” and formally recommended that SORNA be amended “to exempt juveniles from sex

¹⁹⁴ See Letourneau, *Failed Policies*, supra note 188, at 170 (reporting that “studies examining the policies of several states and the federal government have all concluded that subjecting children to SORN has no impact on sexual recidivism”); Elizabeth J. Letourneau et al., *Juvenile Registration and Notification Policy Effects: A Multistate Evaluation Project*, National Criminal Justice Reference Service, <http://www.ncjrs.gov/App/publications/abstract.aspx?ID=273674> (January 2018); Cynthia J. Najdowski et al., *Adolescent Sex Offender Registration Policy: Perspectives on General Deterrence Potential from Criminology and Developmental Psychology*, 22 PSYCHOL., PUB. POL’Y, & L. 114 (2016).

¹⁹⁵ Catherine L. Carpenter, *Throwaway Children: The Tragic Consequences of a False Narrative*, 45 SW. L. REV. 461 (2016).

¹⁹⁶ For a review of methodological issues in some of the reports referenced here and a call for more systematic research, see U.S. Library of Congress, supra note 149, at 4-5.

¹⁹⁷ See Richard B. Belzer, *The Costs and Benefits of Subjecting Juveniles to Sex-Offender Registration and Notification*, 41 R STREET POL’Y STUDY (2015), <https://www.rstreet.org/wp-content/uploads/2015/09/RSTREET41.pdf>. See also Levenson, supra note 149, at 15 (explaining that “[t]he expenditures of registry programs include local police surveillance and compliance verification of RSOs [registered sex offenders], costs associated with non-compliance, such as courts and incarceration, and expenses for continuous technological improvements to build and maintain online registries and to seamlessly update and connect registry systems with other databases ... When quantifiable costs are summed, they are estimated to range from \$10 billion to \$40 billion nationally per year.”).

¹⁹⁸ See, e.g., J.C. Sandler, et al., *Juvenile Sexual Crime Reporting Rapes Are Not Influenced by Juvenile Sex Offender Registration Policies*, PSYCH., PUB. POL’Y & L. (forthcoming 2020); E.J. Letourneau, et al., *Juvenile Registration and Notification Policies Fail to Prevent First-Time Sexual Offenses: A Replication Study* (manuscript under review, 2019); A.J. Harris, et al., *Collateral Consequences of Juvenile Sex Offender Registration and Notification: Results from a Survey of Treatment Providers*, 28 SEXUAL ABUSE: A J. OF RES. AND TREATMENT 770 ((2016); Najdowski et. al., supra note 158.

offender registration, community notification, and residency restriction laws.”¹⁹⁹ Largely concurring in this recommendation, the Justice Department’s official guidance on the subject noted that “[j]uvenile cases have been pled to non-registration offenses at the expense of the juvenile not being eligible for treatment,” even though “[c]ost-benefit analysis demonstrates that sex-offender treatment programs for youth can provide a positive return on taxpayer investment.” The Department concluded that “[f]urther expansion of SORN [Sex Offender Registration and Notification] with juveniles is not recommended.”²⁰⁰

Responding in part to these assessments, several state courts have held that mandatory registration of juveniles convicted of a sexual offense is unconstitutional because it lacks an individualized assessment of risk.²⁰¹ At a minimum, the research suggests, juvenile registration must be reserved for “situations where either unique risk or needs are clearly associated with the commission of a crime”²⁰² and individuals convicted (or adjudicated delinquent) for conduct as minors must have viable opportunities to terminate their registration duties at an early date. But even a limited period on a sex-offense registry leaves a youthful offender’s sex-offense record widely available through public and private databases, in effect creating long-term punishment and

¹⁹⁹ GEORGE W. TIMBERLAKE & AMY M. DAVENPORT, FED. ADVISORY COMM. ON JUVENILE JUSTICE, RECOMMENDATIONS OF THE FEDERAL ADVISORY COMMITTEE ON JUVENILE JUSTICE 4 (2016), https://facjj.ojp.gov/ojpasset/Documents/FACJJ_Recommendation_OJJD_November_2016.pdf.

²⁰⁰ U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, SEX OFFENDER MANAGEMENT ASSESSMENT AND PLANNING INITIATIVE (2016).

²⁰¹ *In re C.P.*, 967 N.E.2d 729 (Ohio 2012) (finding automatic, lifelong registration of juvenile to violate constitutional prohibition against cruel and unusual punishment); *In re J.B.*, 107 A.3d 1 (Pa. 2014) (finding automatic, lifelong registration of juvenile to violate procedural due process). See also Marsha Levick & Riya Saha Shah, *The Momentum Builds: Challenging Lifetime Registration of Juveniles Convicted of Sexual Offenses in the Post-Roper Era*, 40 N.Y.U. REV. L. & SOC. CHANGE HARBINGER 115 (2016).

²⁰² Amanda M. Fanniff et al., *Juveniles Adjudicated for Sexual Offenses: Fallacies, Facts, and Faulty Policy*, 88 TEMP. L. REV. 789, 799 (2016). The authors argue that a “reasonable strategy would be to target the highest risk [juvenile sex offenders] for the ... most invasive social control policies,” but note the difficulty of developing the accurate risk assessment tools on which such a strategy depends. As a result other prevention strategies “may prove more fruitful than registration and notification policies, ... without [their] potential harmful effects.” *Id.*, at 800-801.

See also Lydia D. Johnson, *Juvenile Sex Offenders: Should They Go to a School with Your Children or Should We Create a Pedophile Academy*, 50 U. TOL. L. REV. 39, 54-56 (2018) (arguing that registry obligations for juveniles should be limited to those who commit crimes such as forcible rape or sexual assault of minor children younger than 14, and those juvenile offenders who fail to complete an assigned rehabilitation treatment program).

1 leading many to argue that minors should be exempt from registration and notification
2 requirements entirely.²⁰³ Eleven states specifically exclude minors from their state sex-offender
3 registries, despite the federal mandate to the contrary.²⁰⁴

4 Reflecting these persuasive assessments, Section 213.11A(3) rejects registration and all
5 associated disabilities for juveniles—that is, offenders under the age of 18 at the time of their
6 offense—regardless of the underlying offense, except in the case of offenders over 16 who are
7 criminally convicted of a sexual assault involving aggravated physical force or restraint, in
8 violation of Section 213.1.

9 **SECTION 213.11B. NOTIFICATION OF THE OBLIGATION TO REGISTER AND ASSOCIATED**
10 **DUTIES**

11 **(1) Before accepting a guilty plea, and at the time of sentencing after conviction on a**
12 **guilty plea or at trial, the sentencing judge must:**

13 **(a) inform the person who is subject to registration of the registration**
14 **requirement;**

15 **(b) explain the associated duties, including:**

16 **(i) the identity and location, or procedure for determining the identity**
17 **and location, of the law-enforcement agency where the person must appear to**
18 **register as required by Section 213.11A;**

19 **(ii) the duty to register with a law-enforcement agency in any locality**
20 **where the person subsequently resides, including the possible duty to register**
21 **with a law-enforcement agency or other government authority in another**
22 **jurisdiction to which the person subsequently moves;**

23 **(iii) the duty to report to that office or agency periodically in person, as**
24 **required by Section 213.11E(1); and**

25 **(iv) the duty to promptly notify at least one of the local jurisdictions**

²⁰³ Ashley R. Brost & Annick-Marie S. Jordan, *Punishment That Does Not Fit the Crime: The Unconstitutional Practice of Placing Youth on Sex Offender Registries*, 62 S.D. L. REV. 806, 817, 829 (2017).

²⁰⁴ Minutola & Shah, *supra* note 93, at 8.

1 where the person is registered of any change in the registry information
2 pertaining to that person, as required by Section 213.11E(2);

3 (c) notify the person of the right to petition for relief from those duties as
4 provided in Section 213.11J;

5 (d) confirm that defense counsel has explained to that person those duties and
6 the right to petition for relief from those duties;

7 (e) confirm that the person understands those duties and that right;

8 (f) require the person to read and sign a form stating that defense counsel and
9 the sentencing judge have explained the applicable duties and the right to petition for
10 relief from those duties, and that the person understands those duties and that right;

11 (g) ensure that if the person convicted of a sexual offense cannot read or
12 understand the language in which the form is written, the person will be informed of
13 the pertinent information by other suitable means that the jurisdiction uses to
14 communicate with such individuals; and

15 (h) satisfy all other notification requirements applicable under Model Penal
16 Code: Sentencing, Section 7.04(1).

17 (2) At the time of sentencing, the convicted person shall receive a copy of the form
18 signed pursuant to subsection (1)(f) of this Section.

19 (3) If the convicted person is sentenced to a custodial sanction, an appropriate official
20 must, shortly before the person's release from custody, again inform the person of the
21 registration requirement, explain the associated rights and duties, including the right to
22 petition for relief from those duties, and require the person to read and sign a form stating
23 that those rights and duties have been explained and that the person understands those rights
24 and duties. At the time of release from custody, the person concerned shall receive a copy of
25 that form.

26 **Comment:**

27 *Subsection (1)* specifies the procedures for notifying persons convicted of a sexual offense
28 of applicable registration rights and duties and also details the information that must be included
29 in that notification. *Subsection (2)* requires the sentencing judge to provide the person a copy of
30 the form signed pursuant to subsection (1). For a person who is incarcerated after conviction,

subsection (3) specifies the procedures for again notifying an incarcerated person of applicable registration rights and duties prior to that person's release from custody.

REPORTERS' NOTES

The notification provisions of federal SORNA are stated in the briefest terms, requiring only that an appropriate official "inform the sex offender of the duties of a sex offender ...[,] explain those duties; [and] require the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement."²⁰⁵ Subsection (1) adds specificity by building on the notification protocols applicable to collateral consequences generally under the sentencing provisions of the Model Penal Code.²⁰⁶

Going beyond those protocols:

(a) subsection (1)(b), consistent with federal SORNA, requires the sentencing judge to explain the required information to the person concerned;²⁰⁷

(b) subsection (1)(d) requires the judge to ensure that defense counsel has also explained that information,

(c) subsection (1)(e) requires the judge to make a record showing that the person understands that information;

(d) under subsection (1)(f), the judge must, consistent with federal SORNA, require the person concerned to read and sign a form stating that defense counsel and the judge have explained the relevant information and that the person understands it; and

(e) subsection (1)(g) calls attention to the need to communicate effectively with convicted persons who cannot read or understand the language in which notification is given.

SECTION 213.11C. TIME OF INITIAL REGISTRATION

A person subject to registration must initially register:

(a) if incarcerated after sentence is imposed, then within three business days after release; or

(b) if not incarcerated after sentence is imposed, then not later than five

²⁰⁵ SORNA § 20919(a).

²⁰⁶ See *MPCS Statutory Text*, supra note 1, Section 7.04(1).

²⁰⁷ MPC requires the sentencing judge to provide that information to the person in writing but does not explicitly require the judge to explain it or assure that the person understands.

1 **business days after being sentenced for the offense giving rise to the duty of**
2 **registration.**

3 **Comment:**

4 Section 213.11C specifies the time when the obligation to register ripens.

REPORTERS' NOTES

5 Federal SORNA requires persons who must register to do so within a strict time frame. If
6 they have been incarcerated, they must register “*before* completing a sentence of imprisonment
7 with respect to the offense giving rise to the registration requirement.”²⁰⁸ Those who were not
8 sentenced to a term of imprisonment must register “not later than 3 business days after being
9 sentenced for that offense.”²⁰⁹ These deadlines are unnecessarily tight and a considerable challenge
10 to meet. Not all incarcerated offenders will know prior to release exactly where they will be living,
11 and even when their new address is known in advance, incarcerated offenders can hardly be
12 expected to travel to their new residence *before release* and then appear *in person* at the designated
13 local agency, as federal SORNA and most state registry regimes require.²¹⁰ Taken literally, these
14 provisions guarantee that persons subject to registration who are incarcerated after conviction will
15 commit a crime the moment they step outside the prison gate. To avoid this absurd result, several
16 jurisdictions designate an authority to register affected individuals prior to release.²¹¹ SORNA
17 authorizes the Attorney General to prescribe rules for registering those who are unable to comply
18 with these deadlines,²¹² but to date no federal solution to this problem has taken effect.²¹³ And the
19 three-day time limit for persons required to register but not sentenced to incarceration, though not
20 inherently ridiculous, is also unnecessarily tough to meet.

²⁰⁸ SORNA § 20913(b)(1) (emphasis added).

²⁰⁹ SORNA § 20913(b)(2).

²¹⁰ SORNA § 20918 requires those subject to registration to appear periodically in person at the site designated for registration in order to allow the jurisdiction to take a current photograph.

²¹¹ See discussion in *Registration Requirements under the Sex Offender Registration and Notification Act*, 15804 Fed. Reg. 49332 (proposed Aug. 13, 2020), <https://beta.regulations.gov/document/DOJ-OAG-2020-0003-0001> (noting that several states and the District of Columbia have such provisions).

²¹² SORNA § 20913(d) (authorizing Attorney General to prescribe rules for the registration of persons who are unable to comply with the deadlines prescribed in § 20913(b)).

²¹³ See *Registration Requirements*, supra note 211, at § 72.7(a)(2) (proposing rule that would allow individuals in this situation to comply with SORNA by registering within three business days of entering a jurisdiction following release from custody).

Section 213.11C sets more realistic deadlines that adequately meet any realistic public-safety concern—a deadline of three business days *after* release for persons required to register who are incarcerated after sentencing and a deadline of five days after sentencing for those who are not sentenced to incarceration.

SECTION 213.11D. INFORMATION REQUIRED IN REGISTRATION

(1) A person subject to registration under Section 213.11A must provide the following information to the appropriate official for inclusion in the law-enforcement registry:

- (a) the name of the person (including any alias used by the person);**
- (b) the Social Security number, if any, of the person;**
- (c) the address of each place where the person resides or expects to reside;**
- (d) the name and address of any place where the person works or expects to work;**
- (e) the name and address of any place where the person is a student or expects to be a student;**
- (f) the license-plate number and a description of any vehicle owned or regularly operated by the person.**

(2) *Supplementary Information.* The local jurisdiction in which a person registers must ensure that the following information is included in the registry for that person and kept up to date:

- (a) the text of the provision of law defining the sexual offense for which the person is registered;**
- (b) the person’s criminal history, including the date and offense designation of all convictions; and the person’s parole, probation, or supervised-release status;**
- (c) any other information required by law.**

(3) *Registrants Who Lack a Stable Residential Address.* If a person required to register lacks a stable residential address, the person must, at the time of registration, report with as much specificity as possible the principal place where the person sleeps, instead of the information required under subsection (1)(c).

(4) The local jurisdiction in which a person registers must promptly provide the information specified in subsections (1), (2), and (3) of this Section to an appropriate law-

1 enforcement authority in every other jurisdiction in which the registrant works or expects
2 to work and is enrolled or expects to enroll in a program of study.

3 (5) *Correction of Errors.* Each locality where a person registers and each locality that
4 receives information about a registrant pursuant to subsection (4) of this Section must
5 provide efficacious, reasonably accessible procedures for correcting erroneous registry
6 information. Each locality where a person registers must, at the time of registration, provide
7 the registrant instructions on how to use those procedures to seek correction of registry
8 information that the registrant believes to be erroneous.

9 **Comment:**

10 Subsections (1) and (2) specify the information that the registrant and the registering
11 authority itself must provide. They require the disclosure of considerable detail, as do all existing
12 registration regimes, consistent with their perceived public-safety objectives.

13 Subsection (3) explains the information to be provided, instead of the location of the
14 person's residence, when the registrant lacks a stable residential address. Subsection (4) requires
15 each locality where a person registers to inform the registrant, at the time of registration, how to
16 seek correction of registry information that the registrant considers erroneous. It does not specify
17 any particular correction procedures but leaves those details to each local jurisdiction, subject to
18 the requirement that the procedures afforded be reasonably user-friendly and offer expeditious
19 means to determine the validity of a registrant's complaint and to correct information found to be
20 erroneous.

REPORTERS' NOTES

21 1. *Subsections (1) and (2): The Required Information.* Federal SORNA directs states to
22 obtain from each person required to register a long list of personal information, including the
23 registrant's name, address, and Social Security number; the location of the registrant's current
24 employment or school; and the license-plate number and description of any vehicle owned or
25 operated by the registrant. In addition, states must themselves provide to the directory the
26 registrant's criminal history, physical description and a current photo, fingerprints, palm prints, a

DNA sample, and a photocopy of the registrant's driver's license or identification card.²¹⁴ States vary considerably in the information that registrants must provide.²¹⁵

Subsections (1) and (2) follow federal SORNA requirements with respect to the information required to be reported.

2. Subsection (3): Registrants Who Lack a Stable Residential Address. Nineteen states and the District of Columbia provide no statutory guidance on how registrants who lack a stable residential address can satisfy their obligation to report their place of residency. Federal SORNA is silent on this issue as well, although some clarification is offered in guidance issued by the Attorney General. Subsection (3) provides that a person required to register who lacks a stable residential address can instead report with as much specificity as possible the principal place where the person sleeps.

3. Subsection (4): Sharing Information with Other Law-Enforcement Authorities. Subsection (4) requires the jurisdiction in which a person first registers to provide the registry information concerning that person to an appropriate law-enforcement authority in every other jurisdiction in which the registrant works, studies, or expects to work or study.

4. Subsection (5): Correction of Errors. Like Federal SORNA,²¹⁶ Subsection (5) requires states to have a process for correcting erroneous registry information and to make sure that registrants are made aware of the available procedures. Under Subsection (5), each locality where a person registers must inform the registrant, at the time of registration, how to seek correction of erroneous registry information. Subsection (5) does not stipulate the details that an appropriate system must include, since those matters depend in large measure on local logistics, customs, and agency procedures. But the correction processes afforded must be reasonably easy to use; they must ensure that complaints will be resolved promptly and that information found to be erroneous will be corrected without unnecessary delay.

SECTION 213.11E. DUTY TO KEEP REGISTRATION CURRENT

(1) Periodic Updates. A person who is required to register under Section 213.11A must, not less frequently than once every year, appear **in person** in at least one jurisdiction

²¹⁴ SORNA § 20914.

²¹⁵ See Carpenter & Beverlin, *supra* note 88, at 1078 (2012) (describing sex-offense registry laws enacted in the wake of SORNA).

²¹⁶ See 34 U.S.C. § 20920(e).

1 where the person is required to register, verify the current accuracy of the information
2 provided in compliance with Section 213.11D(1), allow the jurisdiction to take a current
3 photograph, and report any change in the identity of other jurisdictions in which the person
4 is required to register or in which the person works or is enrolled in a program of study.

5 **(2) *Change of Circumstances***

6 (a) Except as provided in paragraph (b) of this subsection, a person subject to
7 registration under Section 213.11A must, not later than five business days after each
8 change of name and each change in the location where the person resides, works, or
9 is enrolled in a program of study, notify at least one local jurisdiction specified in
10 Section 213.11A of:

11 (i) all changes in the information that the person is required to provide
12 under Section 213.11D, and

13 (ii) the identity of all other jurisdictions in which the person resides,
14 works, or is enrolled in a program of study.

15 (b) Registrants who lack a stable residential address, and therefore report
16 instead the principal place or places where they sleep, as provided in Section
17 213.11D(3), must confirm or update those locations once every 90 days but need not
18 do so more often.

19 (c) Each jurisdiction that maintains a **registry** of persons who have been
20 convicted of a sexual offense must permit registrants to notify the jurisdiction, by one
21 or more reliable, readily accessible methods of communication of the jurisdiction's
22 choosing, such as U.S. mail, submission of an appropriate form online, or otherwise,
23 of any change of name, residence, employment, student status, or vehicle regularly
24 used, and any change in the identity of all other jurisdictions in which the person
25 resides, works, or is enrolled in a program of study.

26 (d) Each jurisdiction where a person registers pursuant to Section 213.11A
27 must advise the registrant, at the time of registration, of the registrant's option to use
28 the means of communication established under subsection (2)(c), rather than
29 appearing personally for that purpose, if the registrant so chooses.

30 (3) The local jurisdiction notified of any changes pursuant to subsections (1) and (2)
31 must promptly provide the registrant a written receipt confirming that the updated

1 **information has been provided, and must provide that information to all other jurisdictions**
2 **in which the person resides, works, or is enrolled in a program of study.**

3 **Comment:**

4 Subsection (1) requires periodic updates of registry information in person once a year.

5 In Subsection (2), paragraph (a) requires registrants to report more promptly—within five
6 business days—any changes to a registrant’s name, residence, place of work, place of study, or
7 vehicle regularly used and to inform the jurisdiction notified about all other jurisdictions in which
8 the person is required to register. Paragraph (b) applies to registrants who lack a stable residential
9 address and therefore instead report on registration the principal place or places where they sleep.
10 It requires registrants in that position to update the relevant information once every 90 days, but
11 does not require them to report a change of residence more often, even when a registrant has
12 relocated more frequently during that period.

13 Subsection (2)(c) requires jurisdictions to permit registrants to report changed
14 circumstances by one or more readily used means of communication of the jurisdiction’s choosing,
15 and subsection (2)(d) requires jurisdictions to advise registrants of their ability to use that option,
16 if they prefer, rather than reporting the change of information in person.

17 Subsection (3) requires the jurisdiction initially notified of any changes pursuant to
18 subsections (1) and (2) to provide the updated information promptly to all other jurisdictions in
19 which the person is required to register.

REPORTERS’ NOTES

20 **1. *Periodic Updates.*** Federal SORNA requires registrants to appear periodically in person
21 in at least one jurisdiction where they are required to register, allow that jurisdiction to take a
22 current photograph, and “verify the information in each registry in which that offender is required
23 to be registered.”²¹⁷ The required frequency of these periodic updates under federal SORNA varies
24 from quarterly to yearly, depending on the seriousness of the offense that triggers the obligation
25 to register. But updates only on an annual or semiannual basis are permitted only for lower-level

²¹⁷ 34 U.S.C. § 20918.

offenses that Section 213.11A does not treat as registrable at all.²¹⁸ Federal SORNA requires updates at least every three months for all of the offenses that are registrable under Article 213.

Such frequent updates in person are unnecessarily burdensome and in effect punitive, because registrants are in any event required to notify the pertinent local agency within a matter of days whenever there is a change in the registrant's name, residence, vehicle, or place of work or study. Absent such a change of circumstances, reporting in person serves only to assure the current accuracy of the offender's personal appearance as recorded in the photograph on file, and that need is adequately met on an annual basis.²¹⁹ Therefore, absent a change in circumstances, Section 213.11E requires periodic personal appearance only once a year.

2. Change of Circumstances. Under federal SORNA, state registration regimes must require registrants to appear in person before appropriate state authorities, not later than three business days after any change of name, residence, or place of work or study, in order to update the pertinent information. Requiring the registrant to provide these updates *in person* and to do so within *three days* is unnecessarily burdensome and in effect punitive because, with respect to information of this nature, in-person appearance provides no assurance of accuracy that cannot be achieved by requiring submission of appropriate documentation in writing, whether by U.S. mail, completion and internet transmission of suitable fill-in forms made available online, or other means of efficient communication. Several jurisdictions disregard these SORNA requirements by allowing more time for information updates and permitting updated information to be submitted by mail or the internet rather than in person.²²⁰

In accord with these sensible, more flexible approaches, subsection (2)(a) requires registrants to provide the necessary notice within five business days rather than just three, subsection (2)(b) requires each jurisdiction to permit registrants to report these changes by one or more reliable, readily accessible means of communication of the jurisdiction's choosing, and subsection (2)(c) requires jurisdictions to advise registrants of that option.

²¹⁸ Federal SORNA permits annual updates for Tier I offenses and semiannual updates for Tier II offenses.

²¹⁹ Federal SORNA does not treat a registrant's deliberate alteration of personal appearance (for example, by changing hair style or hair color) as a change of circumstance requiring immediate notification, so even the most frequent periodic update required by federal SORNA (once every three months) does not effectively guard against a predator who alters personal appearance to evade SORNA surveillance.

²²⁰ See ANDREW J. HARRIS & CHRISTOPHER LOBANOV-ROSTOVSKY, NATIONAL SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA) IMPLEMENTATION INVENTORY: PRELIMINARY RESULTS 24-25 (2016), <https://www.ncjrs.gov/pdffiles1/nij/grants/250132.pdf> (citing as an example that Iowa gives offenders five days to update information and noting that SORNA's mandate for registrants to update their information *in person* is one of the most frequent reasons for state noncompliance with SORNA; giving Massachusetts, Alaska, and Arkansas as examples of states that do not require in-person updates of registrant information).

Nineteen states and the District of Columbia provide no statutory guidance on how registrants who lack stable living arrangements can satisfy their obligation to report and continuously update their information pertaining to their place of residency. Among states that address the problem, periodic update requirements range from 90 days (Arizona, California) to a month (Texas), a week, or even every three days (Georgia, North Dakota).²²¹ In Florida, registrants who provide a “transient residence” when they register “must report in person every 30 days to the sheriff’s office in the county in which [they are] located” even when they remain at the same transient address.²²² But every registrant in Florida must “within 48 hours after vacating the permanent, temporary, or transient residence, report [that change] in person to the sheriff’s office of the county in which he or she is located.”²²³ In practice, therefore, Florida registrants who do not have a stable residence can be required to update their registry information far more often than once a month.²²⁴

Registry requirements, along with unrestricted public access, community notification, and restrictions on housing and employment, are themselves a major cause of homelessness among those who have been convicted of a sexual offense.²²⁵ Adding insult to injury for those who lack stable housing, the extra burdens of more frequent updating and the shortened periods for doing so can make compliance virtually impossible. Even more stringent than Florida’s requirement of an update within 48 hours of every change of a transient location, Minnesota and Washington require notification within 24 hours.²²⁶

The relatively simple approach of Arizona and California,²²⁷ allowing registrants in this position to update the relevant information once every 90 days, mitigates the considerable burden that periodic update requirements impose on a class of registrants who already face a welter of

²²¹ See ARIZ. REV. STAT. §13-3822(A) (person who registers as a transient must report and re-register every 90 days); CAL. PENAL CODE § 290.012(b) (West 2017) (same); N.Y. CORRECT. LAW § 168-f(3) (McKinney 2012) (same); TEX. CODE CRIM. PROC. ANN. art. 62.051(j)(1)--(2) (West 2017) (transient must report every 30 days); E. Esser-Stuart, Note, “*The Irons Are Always in the Background*”: *The Unconstitutionality of Sex Offender Post-Release Laws as Applied to the Homeless*, 96 TEX. L. REV. 811 (2018).

²²² FL. STAT. ANN. 943.0435(4)(b)(2).

²²³ FL. STAT. ANN. 943.0435(4)(b)(1).

²²⁴ Compare *State v. Burbey*, 403 P.3d 145 (Ariz. 2017) (rejecting argument that state’s 72-hour notice requirement is triggered whenever a transient changes his or her transient location; instead transient must re-register only once every 90 days).

²²⁵ See generally Jill Levenson, et al., *Where for Art Thou: Transient Sex Offenders and Residence Restrictions*, <https://journals.sagepub.com/doi/pdf/10.1177/0887403413512326>.

²²⁶ MINN. STAT. 243.166 (subdiv. 3a (a)) (2019); see *Boyd v. State*, 408 P.3d 362 (Wash. Ct. App. 2017) (upholding similar Washington provision).

²²⁷ See note 221, *supra*.

difficulties, without presenting any apparent inconvenience for law enforcement. Subsection (3) therefore adopts a 90-day update requirement for registrants who lack a stable residence to report changed circumstances, and does not require more frequent updates when these registrants move one or more times in the interim.

SECTION 213.11F. DURATION OF REGISTRATION REQUIREMENT

(1) Subject to the provisions of subsection (3) of this Section and Section 213.11J, a person required to register must keep the registration current for a period of 15 years, beginning on the date when the registrant is released from custody after conviction for the offense giving rise to the registration requirement; or if the registrant is not sentenced to a term of incarceration, beginning on the date when the registrant was sentenced for that offense.

(2) At the expiration of that 15-year period, the duty to keep that registration current will terminate; the person who had been registered will not be subject to any further duties associated with that registration requirement; and no public or private agency other than a government law-enforcement agency shall thereafter be permitted access to the person's registry information.

(3) *Early Termination.* If, during the first 10 years of the period during which a person is required to keep registration information current, the person:

(a) successfully completes any period of supervised release, probation, or parole, and satisfies any financial obligation such as a fine or restitution, other than a financial obligation that the person, despite good-faith effort, has been unable to pay; and

(b) successfully completes any required sex-offense treatment program; and

(c) is not convicted of, or facing pending charges for, any subsequent offense under this Article, or any subsequent sexual offense in another jurisdiction that would be an offense under this Article if committed in this jurisdiction; then:

the duty to keep that registry information current will terminate; the person who had been registered will not be subject to any further duties associated with that registration requirement; and subsequent access to registry information will be governed by subsection

1 (4).

2 (4) *Access to Registry Information After Termination.* When the person's obligation to
3 register and to keep registry information current terminates under subsection (2) or (3),
4 subsequent access to registry information is limited as follows:

5 (a) Registry information recorded as of the date when termination takes effect
6 may remain available to any government law-enforcement agency seeking disclosure
7 of that information in compliance with Section 213.11H(1)(a).

8 (b) Except as provided in paragraph (a), no public or private agency may
9 thereafter be permitted access to registry information concerning the person whose
10 obligation to register and keep registry information public has terminated.

11 (5) *Notice of Termination.* When a person's duty to register terminates under
12 subsection (2) or (3), the law-enforcement agency in the local jurisdiction where the person
13 resides must:

14 (a) include in its registry a notice that the person's duty to register and all
15 duties associated with that registration requirement have terminated; and

16 (b) upon the person's request, notify all other jurisdictions where the person
17 is registered and where information about the registrant has been provided pursuant
18 to Section 213.11D(4) that the person's duty to register and all duties associated with
19 that registration requirement have terminated and that no public or private agency
20 other than a government law-enforcement agency shall thereafter be permitted to
21 have access to that registry information.

22 (6) *Certification.* When a person's duty to register terminates under subsection (2) or
23 (3), the law-enforcement agency in the local jurisdiction where the person resides must, upon
24 request, provide that person a certificate attesting that person's duty to register and all duties
25 associated with that registration requirement have terminated.

26 **Comment:**

27 Section 213.11F(1) specifies the duration of the registration requirement, including the
28 duration of the registrant's continuing obligation to keep registry information current.

29 Subsection (2) provides that the duty to keep registration information current and all other
30 duties associated with registration terminate after 15 years. It also specifies that no public or private

Section 213.11F. Duration of Registration Requirement

1 agency other than a government law-enforcement agency may thereafter access the person's
2 registry information.

3 Subsection (3) provides for early termination of registration duties and associated
4 consequences, when the registrant is not convicted of a subsequent sexual offense and complies
5 with other obligations associated with the original conviction.

6 After termination, subsection (4) limits access to registry information under subsection (2)
7 or (3).

8 Subsection (5) provides that when a person's registration duties terminate, the agency in
9 the local jurisdiction where that person resides must, upon the person's request, report that
10 termination to all other jurisdictions where the person is registered and where information about
11 the person has been provided pursuant to Section 213.11D(4). That local agency must also caution
12 those jurisdictions that no public or private agency other than a government law-enforcement
13 agency may have access to that registry information.

14 Subsection (6) provides that when a person's registration duties terminate, the law-
15 enforcement agency in the local jurisdiction where the person resides must, upon request, provide
16 that person a certificate attesting that person's duty to register and all duties associated with that
17 registration requirement have terminated.

REPORTERS' NOTES

18 Federal SORNA specifies the duration of registration and the accompanying duty to keep
19 information current—15 years for Tier I offenses (the least serious); 25 years for Tier II offenses;
20 and life for Tier III offenses, which include offenses comparable to the offenses registrable under
21 Article 213. The statute affords only limited opportunity for early relief from these obligations.
22 For persons convicted of Tier I offenses who maintain a clean record for 10 years, registry
23 obligations terminate at the end of that period, that is, five years early. For persons adjudicated
24 delinquent on the basis of Tier III offenses who maintain a clean record for 25 years, registry
25 obligations terminate at the end of that period, rather than remaining in effect for life. Under federal
26 SORNA, no other registrants are eligible for early relief from registry obligations. Thus, even a
27 juvenile registrant must remain on the registry for at least 25 years, and Tier III adult registrants
28 must be retained for life on the registry, with all its attendant obligations, even if they remain
29 entirely crime-free for decades.²²⁸

²²⁸ SORNA § 20915. A “clean record” is defined as “(a) not being convicted of any offense for which imprisonment for more than 1 year may be imposed; (B) not being convicted of any sex offense;

1 States vary considerably in the duration of the registrant’s obligation to keep registry
2 information current, but lifetime registration is widely required for the most serious offenses, such
3 as those that are registrable under Article 213. Early relief also varies considerably but many states,
4 including the 22 that are SORNA-compliant, impose inescapable lifetime registration on persons
5 convicted of the most serious sexual offenses.²²⁹

6 There is no plausible justification for maintaining the registry obligation for such an
7 extended period, without regard to the registrant’s subsequent behavior. Among the minority of
8 registrants who recidivate at all, nearly all do so within five or at most 10 years of release from
9 custody.²³⁰ Together with the natural decline of offending rates by age, a crime-free period of 10
10 years provides strong assurance that the likelihood of the registrant’s committing a new sexual
11 offense is remote, certainly no higher than the risk that a person of the same age with no previous
12 sex-offense record will commit a new sexual offense. Although the possibility of a false negative
13 cannot be excluded, that vanishingly small risk must be weighed against the substantial costs to
14 law enforcement itself—in terms of required personnel, attention and, resources—of maintaining
15 and constantly updating registry information on thousands of ex-offenders who will never pose
16 any threat to public safety.

17 Accordingly, Section 213.11F sets the duration of the duty to register and its associated
18 duties at 15 years. Subsection (3) provides for early termination of those duties after 10 years if,
19 during that period, the registrant successfully completes any period of supervised release,
20 probation, or parole; satisfies related conditions; successfully completes any required sex-offense
21 treatment program; and is not convicted of any new sexual offense. In the event that the registrant
22 does commit a new sexual offense during that period, of course, the registrant will face a new
23 criminal sentence, along with whatever additional registry obligations are triggered by the new
24 offense. In addition to the possibilities for early termination, Section 213.11J adds a procedure
25 under which a registrant can petition for discretionary early relief at any time.

(C) successfully completing any periods of supervised release, probation, and parole; and (D) successfully completing an appropriate sex offender treatment program”.

²²⁹ See Carpenter & Beverlin, *supra* note 88, at 1078 (2012).

²³⁰ See generally R. Karl Hanson et al., *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 PSYCHOL. PUB. POL’Y AND L. 48, 57 (2017); R. Karl Hanson et al., *High-Risk Sex Offenders May Not Be High Risk Forever*, 29 J. INTERPERS. VIOLENCE 2792 (2014)

SECTION 213.11G. FAILURE TO REGISTER

(1) *Offense of Failure to Register.* A person required to register under Section 213.11A is guilty of Failure to Register, a misdemeanor, if that person knowingly fails to register as required by Sections 213.11A, 213.11C, 213.11D, and 213.11E(1), or knowingly fails to update a registration as required by Section 213.11E(2).

(2) *Affirmative Defense.* In a prosecution for Failure to Register under subsection (1) of this Section, it is an affirmative defense that:

(a) circumstances beyond the control of the accused prevented the accused from complying;

(b) the accused did not voluntarily contribute to the creation of those circumstances in reckless disregard of the requirement to comply; and

(c) after those circumstances ceased to exist, the accused complied as soon as reasonably feasible.

Comment:

Section 213.11G defines the misdemeanor offense of Failure to Register, applicable to a person required to register who knowingly fails to do so as required or knowingly fails to update registry information as required. The relevant requirements are defined in Section 213.11A (specifying who must register and where), Section 213.11C (specifying when registration must occur), Section 213.11D (specifying the information that the registrant must provide), Section 213.11E(1) (defining the duty to appear periodically to verify the current accuracy of information the registrant has provided), and Section 213.11E(2) (defining the duty to update required information in the event of changed circumstances).

Section 213.11G(2) provides an affirmative defense for a person who cannot comply with any of these required obligations because of circumstances beyond that person's control, provided that the person (1) did not voluntarily contribute to creating those circumstances in reckless disregard of the requirement to comply and (2) subsequently complied as soon as reasonably feasible.

The offense is graded as a misdemeanor. Under the sentencing provisions of the Model Penal Code, a person convicted of a misdemeanor “may be sentenced ... to a term of incarceration ... [that] shall not exceed [one year].”²³¹

REPORTERS’ NOTES

Federal SORNA requires states to make it a criminal offense, punishable by “a maximum term of imprisonment that is greater than 1 year,” for a person required to register to fail to do so or to miss a deadline for updating any change of the required information.²³² In addition, federal law makes it a crime, punishable by up to 10 years in prison, **to travel** interstate after knowingly failing to register or update a required registration.²³³

State statutory offenses for failure to register and for failure to fulfill related duties vary widely. In some states, failure to register carries a sentence equivalent to the potential punishment for the sexual offense that triggered the underlying registration requirement. In other states, the sanction can be even greater. In Ohio and Washington State, a conviction for failing to register can increase the risk classification level that determines the scope and duration of the registrant’s registration-related duties, including the registrant’s eligibility to be placed on the public online registry.²³⁴ **At least 35 states** reportedly classify even a first conviction for failure to register as a felony, with authorized penalties varying from just one year’s incarceration to prison terms ranging from five to 10 years and higher.²³⁵ Regardless of the additional prison time a failure-to-register conviction carries, **it often** extends the registrant’s registration period and **adds** to the associated duties.

The need to ensure an adequate incentive for compliance obviously requires that failure to register and failure to comply with associated duties carry consequences. But the harsh penalties

²³¹ *MPCS Statutory Text*, supra note 1, Section 6.06. The maximum term is “stated in brackets [in part because] recommendations concerning the severity of sanctions that ought to attend particular crimes ... are fundamental policy questions that must be confronted by responsible officials within each state. . . .” MODEL PENAL CODE: SENTENCING Section 6.06(7)(a) (AM. L. INST., Proposed Final Draft 2017) Section 6.06, Comment *k*, p. 157.

²³² SORNA § 20913(e).

²³³ 18 U.S.C. § 2250(a) (2019).

²³⁴ Massachusetts, for example, imposes mandatory minimum sentences rising from six months for the first offense to five years’ incarceration after multiple convictions for failing to register. In Washington State, registrants convicted of failing to register (FTR) face imprisonment for up to 57 months, depending on the number of previous failure-to-register convictions. It is worth repeating though that offenders charged with their first FTR violation still risk being charged with a felony if the underlying conviction was for a felony sex offense. Until 2008, Georgia imposed a life sentence for sex-offense registrants convicted of a second FTR offense, a penalty that was ultimately held unconstitutional.

²³⁵ E.g., Kansas, South Dakota, Tennessee, and New York; Arkansas, Hawaii, and North Dakota.

1 prescribed by currently prevalent state laws are almost entirely counterproductive. Studies find
2 that noncompliance with registration duties does not signal an increased risk of committing a new
3 sexual offense; instead noncompliance typically reflects the registrant's underlying social,
4 economic and psychological deficits, such as cognitive impairment and poor capacity for self-
5 control.²³⁶ As a result, the added burdens triggered by a prosecution for noncompliance can make
6 failure to keep up with registration requirements even more likely in the future. Recognizing this
7 difficulty, the offense under Section 213.11G requires a mens rea of knowledge and makes the
8 offense punishable only as a misdemeanor.

9 **SECTION 213.11H. ACCESS TO REGISTRY INFORMATION**

10 **(1) Confidentiality**

11 **(a) Each law-enforcement agency with which a person is registered and each**
12 **law-enforcement agency that receives information about a registrant pursuant to**
13 **Section 213.11D(4) must exercise due diligence to ensure that all information about**
14 **the registrant remains confidential, except that relevant information about a specific**
15 **registrant must be made available to any government law-enforcement agency that**
16 **requests information to aid in the investigation of a specific criminal offense.**

17 **(b) Any disclosure pursuant to paragraph (a) must include a warning that:**

18 **(i) the law-enforcement agency receiving the information must exercise**
19 **due diligence to ensure that the information remains confidential;**

20 **(ii) such information may be disclosed and used as provided in**
21 **paragraph (a), but otherwise must not be disclosed to any person or public or**
22 **private agency;**

23 **(iii) such information may be used only for the purpose requested;**

24 **(iv) such information may not be used to injure, harass, or commit a**
25 **crime against the registrant or anyone else; and**

26 **(v) any failure to comply with the confidentiality and use-limitation**
27 **requirements of paragraph (b) could result in civil or criminal penalties.**

²³⁶ See Mary Katherine Huffman, *Moral Panic and the Politics of Fear: The Dubious Logic Underlying Sex Offender Registration Statutes and Proposals for Restoring Measures of Judicial Discretion to Sex Offender Management*, 4 VA. J. CRIM. L. 241, 260 (2016).

1 **(2) *Unauthorized Disclosure of Registry Information.* An actor is guilty of**
2 **Unauthorized Disclosure of Registry Information if:**

3 **(a) the actor, having received registry information as provided in subsection**
4 **(1), knowingly or recklessly discloses that information, or permits that information to**
5 **be disclosed, to any person not authorized to receive it; or**

6 **(b) the actor obtains access to registry information by computer trespassing or**
7 **otherwise in violation of law and subsequently knowingly or recklessly discloses that**
8 **information, or permits that information to be disclosed, to any other person.**

9 **Unauthorized Disclosure of Registry Information is a felony of the fourth degree [five-**
10 **year maximum].**

11 **Comment:**

12 Section 213.11H seeks to reserve registry information exclusively for law-enforcement
13 use. Subsection (1) therefore requires that registry information be disseminated no more widely
14 than necessary to serve direct law-enforcement objectives. Information concerning a specific
15 registrant must be provided to a government law-enforcement agency that requests assistance in
16 connection with the investigation of a specific criminal offense. Private police and private security
17 guards do not have comparable responsibilities for investigating and prosecuting criminal offenses
18 and therefore are not eligible to gain access to registry information under this provision.

19 Unauthorized Disclosure of Registry Information is a felony of the fourth degree. Under
20 subsection (2)(a), it is committed when an actor who obtains registry information under subsection
21 (1) subsequently knowingly or recklessly discloses it to someone not authorized to receive it.
22 Under subsection (2)(b), the offense is committed when an actor obtains registry information
23 illegally and subsequently knowingly or recklessly discloses it to another person. In both cases the
24 offense requires that the actor disclose the information to another person. An actor who obtains
25 registry information illegally (by computer trespassing, for example) but does not disclose it to
26 others may face civil or criminal liability under other provisions of law but is not punishable under
27 this Section. The sentencing provisions of the Model Penal Code provide that a felony of the fourth
28 degree is punishable by imprisonment for a term that “shall not exceed [five] years.”²³⁷ The

²³⁷ *MPCS Statutory Text*, supra note 1, Section 6.06.

1 maximum term is stated in brackets because the Code “does not offer exact guidance on the
2 maximum prison terms that should be attached to different grades of ... offenses.”²³⁸

REPORTERS’ NOTES

3 Federal SORNA and most state registration regimes contemplate largely unrestricted
4 public access to registry information. The federal statute requires states to post on the Internet and
5 make available to the general public, in conveniently searchable form, all information included in
6 the registry, subject to specified exceptions.²³⁹ States are required to withhold from the public the
7 registrant’s Social Security number, the names of victims, and all information about arrests that did
8 not result in conviction. In addition, states are permitted to withhold information concerning
9 registrants convicted of certain low-level offenses, when the victim of the offense was an adult. For
10 the more serious offenses, and for all covered offenses involving a victim who is a minor, states
11 are permitted to withhold (in addition to Social Security number and records of arrests not resulting
12 in conviction) only the name and location of a registrant’s employer or (for a student) place of
13 study. In other words, for registrants convicted of more serious offenses, and for *any* registrant
14 convicted of a covered offense involving a victim who is a minor, states *must* make available to
15 any member of the public the registrant’s current address, physical description, current photo, a
16 photocopy of the **registrant’s driver’s license**, and identifying information for any vehicle the
17 registrant uses. In addition, the state information must be submitted to the Attorney General, who
18 maintains a national registry of the same information,²⁴⁰ and a public website (the Dru Sjodin
19 National Sex Offender Public Website) with most of the same information accessible in searchable
20 form on the Internet, subject to the same restrictions.²⁴¹ Though many foreign countries maintain
21 sex-offense registries of some sort, this practice of largely unrestricted public access to registry
22 information is virtually unheard of outside the United States.²⁴²

²³⁸ The maximum term is “stated in brackets [in part because] recommendations concerning the severity of sanctions that ought to attend particular crimes ... are fundamental policy questions that must be confronted by responsible officials within each state. . . .” MODEL PENAL CODE: SENTENCING (AM. L. INST., Proposed Final Draft 2017) Section 6.06, Comment *k*, p. 157, Section 6.06, Comment *k*, p. 157.

²³⁹ SORNA § 20920.

²⁴⁰ SORNA § 20921.

²⁴¹ SORNA § 20922.

²⁴² See JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD*, 159-160 (2015) (referring to this practice as “American criminal record exceptionalism”); WAYNE A. LOGAN, MARGARET COLGATE LOVE & JENNY ROBERTS, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY AND PRACTICE* (2018) § 5.3 (2018)(noting that “[o]utside of the United States, unrestricted access to criminal record information is generally only possible for law enforcement agencies, prosecutors, courts, prison

1 A large majority of the states comply with federal SORNA’s public-access requirement by
 2 maintaining registries readily accessible to any member of the general public.²⁴³ But a few states,
 3 resisting the broad mandate of federal SORNA, permit public access to their registries only with
 4 respect to registrants determined to present a particularly high risk of reoffending.²⁴⁴ In
 5 Massachusetts, a sex-offense registry board classifies registrants by assessing the risk of
 6 reoffending in accordance with criteria outlined by statute.²⁴⁵ Prior to 2013, only registrants placed
 7 at the highest level (Level 3) were listed on the Massachusetts registry’s public website; a 2013
 8 enactment extended public access to registrants classified at Level 2 after that date.²⁴⁶ In
 9 Minnesota, a committee assesses reoffense risk on a case-by-case basis,²⁴⁷ and the state’s
 10 website lists only registrants placed at the highest level.²⁴⁸ New Jersey posts information on high-
 11 risk and some moderate-risk registrants.²⁴⁹ In New York a board of examiners classifies registrants
 12 based on risk of reoffending,²⁵⁰ and only those placed at the two highest levels are listed on the
 13 state’s public website.²⁵¹

14 Public access, however, is only the beginning of a pervasive system for raising community
 15 awareness and sensitivity with regard to the persons in the area who have been previously
 16 convicted of a sexual offense. Federal SORNA requires each local jurisdiction to employ active
 17 measures to alert interested individuals and public and private agencies when such a person
 18 registers in the area. Most states take similar steps with regard to public access and community
 19 notification.

20 Section 213.11H deals with access to registry information, while Section 213.11I
 21 (Additional Collateral Consequences of Conviction) addresses (along with a variety of other

administration authorities, and listed public agencies dealing with particularly important and delicate matters.”). See also text accompanying notes 30-80, *supra*.

²⁴³See “Collateral Consequences,” ABA CRIMINAL JUSTICE SECTION, <http://www.abacollateralconsequences.org/search/?jurisdiction=37>.

²⁴⁴ See Wayne A. Logan, *Sex Offender Registration and Notification*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 397, 404 (Erik Luna ed., 2017) (citing Massachusetts, New York, and Minnesota as states that follow this approach).

²⁴⁵ Mass. Gen. Laws Ann. ch. 6, § 178K.

²⁴⁶ See *id.* § 178D; *Moe v. Sex Offender Registry Bd.*, 467 Mass. 598 (2014) (holding that the 2013 statute extending public access from level 3 to level 2 offenders cannot have retroactive application).

²⁴⁷ Minn. Stat. Ann. § 244.052 subd. 3.

²⁴⁸ *Id.* subd. 4b.

²⁴⁹ N.J. Stat. Ann. § 2C:7-13.

²⁵⁰ N.Y. Correct. Law § 168-l.

²⁵¹ N.Y. Correct. Law § 168-q.

collateral consequences) proactive measures to alert individuals and organizations in the community. Accordingly, details particular to community notification are discussed in the Reporters' Note to Section 213.11I. Many issues, however, are common to public access and community notification; these are discussed here.

Open records and government transparency are bedrock, if oversimplified, values in American political culture.²⁵² In addition, both public access and community notification can enable citizens to feel a sense of empowerment with regard to crimes that many consider especially sinister, unpredictable, and frightening. Payoffs of this kind are arguably important even if such laws have no effect on actual recidivism rates.

But the empirical research shows that actual effects are complicated, even with respect to these seemingly inherent benefits. Public access to registry information and indiscriminate community notification designed to alert the population to the presence in its midst of a person who has been convicted of a sexual offense have been responsible for unwarranted public alarm at the same time that they generate acutely counterproductive side effects.

Studies in Ohio and Minnesota found no statistically significant relationship between being notified about a high-risk registrant in the neighborhood and taking steps to protect *oneself* (such as installing better locks or lighting).²⁵³ But among residents who were parents, those receiving notification in both states were more likely to take steps to **protect their children**, such as warning them not to talk to strangers and not to let unknown persons into the home.²⁵⁴

Of course, such warnings should be routine for all children; it would be worrisome if some parents not receiving notification and finding nothing of note at their own initiative neglected to warn their children out of a false sense of security (false because children are equally if not more vulnerable to attack by individuals with no prior sex-offense record and recidivist sex offenders *not* living in their own neighborhoods). It would be similarly worrisome if parents who receive notification tend to emphasize the dangers of stranger abuse at the expense of warnings and protective measures appropriate with respect to the even-higher risk of abuse at the hands of relatives, teachers, and other acquaintances. In any case, without minimizing the importance of such warnings, it is safe to say that state and local law enforcement could easily use other public-education measures, where necessary, to encourage wise child-protection behavior on the part of parents and teachers, without incurring the direct costs (and indirect consequences for registrants)

²⁵² See generally JACOBS, *supra* note 242.

²⁵³ Rachel Bandy, *Measuring the Impact of Sex Offender Notification on Community Adoption of Protective Behaviors*, 10 CRIMINOLOGY & PUBLIC POLICY 237 (2011) (Minneapolis); Victoria S. Beck, James Clingermayer, Robert J. Ramsey & Lawrence F. Travis, *Community Response to Sex Offenders*, 32 J. PSYCHIATRY & L. 141 (2004) (Hamilton County, Ohio).

²⁵⁴ Bandy, *supra* note 253, at 249, 255; Beck, et al., *supra* note 253, at 163. See also Levenson, *supra* note 149, at 6-7 (noting that “[f]ew people seem to utilize registries with any regularity or take preventive measures after searching a registry”).

1 entailed in public registries and community-notification laws that spotlight the small part of the
2 overall risk that stems from particular individuals.

3 Negative impacts on registrants are convincingly documented in an extensive literature.
4 They include a high incidence of joblessness, social isolation, homelessness, suicide, and on
5 occasion even physically violent victimization at the hands of self-appointed vigilantes or
6 psychologically unstable citizens who object to having a “sex offender” nearby.²⁵⁵ Because these
7 powerfully criminogenic effects hinder the registrant’s rehabilitation and make recidivism more
8 likely, they offset to some extent and probably outweigh the potential public-safety benefits of
9 self-protection and the enhanced possibilities for surveillance and deterrence of registrants.²⁵⁶

10 In light of these considerations, Section 213.11H marks a major departure from the
11 prevalent American practice of investing considerable resources in an effort to maximize public
12 awareness of registry information. Both to promote just treatment of persons convicted of sexual
13 offenses and, importantly, to further public-safety goals rather than impeding them, Section
14 213.11H prohibits unrestricted public access and makes registry information available solely for
15 law-enforcement purposes, in order to ensure maximum feasible confidentiality for registry
16 information.²⁵⁷

17 A discrete and legitimate need for non-law-enforcement access arises when a school, day-
18 care center, or other organization or person needs to perform a background check on an individual
19 being considered for a position of trust involving contact with a vulnerable population.²⁵⁸
20 Commercial services cull criminal-history information from courthouse docket sheets and other
21 open records, but the information available from these sources is frequently incomplete or
22 inaccurate,²⁵⁹ leaving a justifiable desire for access to more reliable, official sources.²⁶⁰ Although

²⁵⁵ See, e.g., *Verniero*, supra note 149, 119 F.3d at 1102 (noting that “[r]etribution has been visited by private, unlawful violence and threats . . .”).

²⁵⁶ Prescott & Rockoff, supra note 132, at 181.

²⁵⁷ *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), appears to grant First Amendment protection for the disclosure and sale of ostensibly confidential records (in that case the prescribing practices of doctors), but only in a situation where the person concerned acquires the information in a lawful manner; *Sorrell* grants no right of access to the information itself. Because the offense of Unauthorized Disclosure defined by subsection (2) applies only to individuals who obtain or disclose registry information unlawfully, the offense presumably does not raise First Amendment problems.

²⁵⁸ See LOGAN, ET AL., supra note 242 at § 5.34 (noting that “[c]riminal history background screening is a legitimate step that employers and volunteer organizations take to protect their customers, their employees, their assets, and the public.”).

²⁵⁹ *Id.*, at §§ 5.6, 5.10. Commercial services of this kind are regulated under the Fair Credit Reporting Act (FCRA). 15 U.S.C.A. §§1681 et seq., but the quality of their reports is very uneven. *Id.*

²⁶⁰ Employers and others with needs of this sort can turn to NSOPW, the national clearing house specifically maintained as a resource for locating information on persons convicted of a sexual offense. See text at note 15 & note 84, supra. But NSOPW merely directs such inquiries to state-run public websites; the

1 most private-sector employers cannot directly access the FBI’s national databases for criminal-
 2 history information,²⁶¹ a cluster of discrete statutory authorities permits the FBI to share criminal-
 3 history information with state and local government agencies responsible for licensing and other
 4 background checks in regulated areas, including, for example, day-care and nursing-home workers
 5 and others who work with vulnerable populations, such as persons who are disabled.²⁶²

6 As it currently stands, however, that system does not meet all legitimate background-check
 7 needs in every jurisdiction. Some states do not have the kind of **licensing regime** needed to give
 8 them access to FBI databases; their regimes may not apply to all arguably relevant occupations;
 9 and volunteer positions may not be covered at all. Responding to concerns like these from
 10 organizations that employ staff in a wide range of positions of trust (not only those involving
 11 potential sexual abuse), the **Attorney General** in 2006 proposed widening the options for private-
 12 sector direct access to FBI databases, subject to certain privacy safeguards.²⁶³ But Congress did
 13 not accept those recommendations, in part because of the risks to privacy when criminal-history
 14 information is more widely disseminated.²⁶⁴

15 A sex-offense registry offers a possible way to meet the remaining need. But local registries
 16 have serious weaknesses as **background-check mechanisms**. Unless a potential employer collects
 17 an applicant’s DNA or fingerprints, a local registry is readily subject to false negatives, due to
 18 variation in the spelling of names or a **job applicant’s willful misrepresentation**. In any case, local
 19 registries, broad as they are, fall far short of reaching all relevant offenses of concern, most of
 20 which do not include a **sexual element**. In the case of nursing homes, for example, federal
 21 regulations prohibit the employment of anyone convicted of crimes involving abuse, neglect,
 22 exploitation, mistreatment, or misappropriation of property.²⁶⁵ States typically require criminal

information sought cannot be obtained in this way if access to the relevant state’s registry is restricted exclusively to law enforcement agencies, as Section 213.11H generally requires.

²⁶¹ LOGAN, ET AL., *supra* note 242, at § 5.37.

²⁶² *Id.*, at § 5.45. See also National Child Protection Act of 1993, Pub. L. No. 103-209, 107 Stat. 2490 (1993) (allowing businesses or organizations working with children to ask a state agency to check FBI records on employees and volunteers).

²⁶³ See U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 7 (2006), available at https://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf.

²⁶⁴ See U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-162, CRIMINAL HISTORY RECORDS: ADDITIONAL ACTIONS COULD ENHANCE THE COMPLETENESS OF RECORDS USED FOR EMPLOYMENT-RELATED BACKGROUND CHECKS 17 (2015), available at <https://www.gao.gov/assets/670/668505.pdf> (noting among other concerns, that FBI officials worried that criminal history information made available to the private sector could not be securely protected, with a resulting threat to privacy rights).

²⁶⁵ 42 C.F.R. § 483.12(a)(3).

1 background checks for all nursing-home employees who have contact with residents, and specify
 2 a broad list of offenses for which conviction is a presumptive or conclusive bar to employment—
 3 not only sexual offenses, but also homicide, robbery, burglary, abuse of children or the elderly,
 4 nonsexual assault, drug offenses, theft, forgery, financial crimes, and fraud.²⁶⁶ In Pennsylvania,
 5 child-safety advocates expressed alarm that the state’s sex-offense registries omitted child-abuse
 6 allegations known to children’s protective services that were determined to be well founded but
 7 did not result in criminal prosecution.²⁶⁷ If sum, because local law-enforcement registries are
 8 prone to false negatives and are vastly underinclusive, they cannot possibly serve the legitimate
 9 need for a reliable source of needed background-check information.

10 At the same time, opening local registries to private-sector inquiries, even if only on a need-
 11 to-know basis, endangers the successful reintegration and rehabilitation of ex-offenders, because
 12 judgments about disclosure are highly decentralized—initially left to the discretion of county and
 13 municipal-level law enforcement, with subsequent protection of confidentiality entrusted to
 14 countless private employers and their human-resources personnel. These privacy issues recently
 15 led the FBI and Congress to resist wider private-sector direct access to the FBI’s criminal history
 16 database,²⁶⁸ and they apply even more strongly in the case of private-sector access to local
 17 registries.

²⁶⁶ E.g., CAL. HEALTH & SAFETY CODE § 1569.17 (disqualifying offenses include robbery, sexual battery, child abuse, elder or dependent-adult abuse, arson, and kidnapping); FLA. STAT. ANN. § § 430.0402, 435.04 (disqualifying offenses include murder, burglary, sexual battery, kidnapping, sexual and nonsexual abuse of minors and other vulnerable populations, forgery, fraud, and identity theft); ILL. ADMIN. CODE tit. 77, § 955.160 & App. C & § 955.275 & App. B (disqualifying offenses, with option to apply for waiver, include assault, burglary, arson, hijacking, cruelty to children, theft, and credit-card fraud); id., § 955.160 & App. A. (disqualifying offenses, with only narrow possibility for waiver, include murder, armed robbery, sexual crimes, and financial exploitation of the elderly); N.Y. EXEC. LAW § 845–b(5) (disqualifying offenses, subject to a narrow exception, include all Class A felonies and any felony involving assault, a sexual offense, larceny, prescription-medication theft, drug offenses, or endangering the welfare of the elderly); 35 PA. STAT. ANN. § 10225.502-503 (disqualifying offenses include controlled-substance offenses, violent crimes, sex offenses, offenses endangering children, theft, and forgery); TEX. HEALTH & SAFETY CODE ANN. § 250.006 (disqualifying offenses include homicide; kidnapping; arson; robbery; sex offenses; injury to a child, elder, or disabled person; money laundering; health-care fraud; burglary; assault; theft; disorderly conduct; and misapplication of fiduciary property).

²⁶⁷ See JOINT STATE GOVERNMENT COMMISSION, CHILD PROTECTION IN PENNSYLVANIA: PROPOSED RECOMMENDATIONS, REPORT OF THE TASK FORCE ON CHILD PROTECTION (November 2012), available at <http://www.childprotection.state.pa.us/Resources/press/2012-1127%20Child%20Protection%20Report%20FINAL.pdf>; Center for Children’s Justice, Children’s Justice & Advocacy Report: Act 153 of 2014 (Nov. 3, 2014), <http://www.c4cj.org/files/cjar1132104backgroundchecks.pdf>.

²⁶⁸ See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 264.

Good solutions to the background-check concern are readily available, moreover, without the risks of private-sector access to local registries. If a state’s licensing system leaves gaps of the kind just discussed, the obvious answer **is simply to fill those gaps directly**, by expanding the list of licensed occupations and offenses of concern, after expressly confronting the conflicting public-safety benefits and privacy costs. For example, Pennsylvania recently enacted a comprehensive system that requires every person who seeks access to a position involving contact with children to obtain a background clearance from a state agency and submit it to the employer or organization concerned.²⁶⁹ Pennsylvania lawmakers designed the system to ensure that background checks do not miss relevant information that might not appear in a sex-offense registry.²⁷⁰ At the same time the system minimizes the threat to the ex-offender’s privacy because the applicant for a position initiates the clearance process and either obtains the necessary certification or simply declines to pursue the job application. Britain’s Disclosure and Barring Agency serves a similar purpose and operates in a similar way.²⁷¹

Since the relevant needs can be better met in ways that also offer the advantage of stronger oversight, Section 213.11H does not permit non-law-enforcement access to registry information.

SECTION 213.11I. ADDITIONAL COLLATERAL CONSEQUENCES OF CONVICTION

(1) Definition. For purposes of this Section, the term “additional collateral consequence” means any collateral consequence, as defined in Section 213.11(1)(b), that is applicable primarily to persons convicted of a sexual offense, other than the obligation to register with law enforcement specified in Section 213.11A, the associated duties and restrictions specified in Sections 213.11C-213.11G, and any restriction on occupation or employment required by state law. These additional collateral consequences include any government-imposed program or restriction applicable primarily to persons convicted of a

²⁶⁹ 23 Pa. Cons. Stat. Ann. §§ 6344 *et seq.* These clearances consist of (1) a criminal history report from the Pennsylvania State Police; (2) a child-abuse history certification from the Department of Human Services; and (3) a federal criminal history obtained after submitting fingerprints through the Pennsylvania State Police to the FBI. *Id.* §§ 6344(b), 6344.2(b). An employer or organization must obtain this documentation from applicants prior to their employment or volunteering and must maintain it on file. *Id.* § 6344(b.1) & (b.2). The certifications remain valid for five years, after which the employee or volunteer must obtain new clearances. *Id.* § 6344.4.

²⁷⁰ See PA. HOUSE J., 2014 Reg. Sess., No. 64 (Oct. 14, 2014), at 1568-1569.

²⁷¹ See text at note 55, *supra*.

1 sexual offense that restricts the convicted person's occupation or employment except as
2 required by state law; limits the convicted person's education, Internet access, or place of
3 residence; uses methods such as GPS monitoring to track the person's movements; notifies
4 a community organization or entity or a private party that the person resides, works, or
5 studies in the locality; or permits a public or private agency, organization, or person to access
6 registry information, except as authorized by Section 213.11H. An "additional collateral
7 consequence" under this Section does not include a collateral consequence that applies to
8 persons convicted of many different offenses, such as government-imposed limits on voting,
9 jury service, access to public benefits, and other government-imposed penalties, disabilities,
10 and disadvantages that result from conviction of a wide variety of offenses, including but not
11 limited to sexual offenses.

12 (2) *Additional Collateral Consequences Precluded for Persons Not Required to Register.*
13 Notwithstanding any other provision of law, no person shall be subject to an additional
14 collateral consequence, as defined in subsection (1), unless that person has been convicted of
15 a registrable offense and is required to register with law enforcement under Section 213.11A.

16 (3) *Additional Collateral Consequences Precluded for Persons Required to Register.*
17 Notwithstanding any other provision of law, a person required to register with law
18 enforcement under Section 213.11A must not be subject to any government action notifying
19 a community organization or entity or a private party that the person resides, works, or
20 studies in the locality; and must not be subject to any government action permitting a public
21 or private agency, organization, or person to access registry information, except as
22 authorized by Section 213.11H.

23 (4) *Additional Collateral Consequences Available for Persons Required to Register.*
24 Notwithstanding any other provision of law, a person required to register with law
25 enforcement under Section 213.11A may be subject to an additional collateral consequence
26 not specified in subsection (3), but only if an official designated by law, after affording the
27 person notice and an opportunity to respond concerning the proposed additional collateral
28 consequence, determines that the additional collateral consequence is manifestly required in
29 the interest of public safety, after due consideration of:

- 30 (a) the nature of the offense;
31 (b) all other circumstances of the case;

1 (c) the person’s prior record; and

2 (d) the potential negative impacts of the burden, restriction, requirement, or
3 government action on the person, on the person’s family, and on the person’s
4 prospects for rehabilitation and reintegration into society.

5 **(5) *Limitations.*** The designated official who approves any additional collateral
6 consequence pursuant to subsection (4) of this Section must determine that the additional
7 collateral consequence:

8 (a) satisfies all applicable notification requirements set forth in Section
9 213.11B;

10 (b) is authorized by law;

11 (c) is drawn as narrowly as possible to achieve the goal of public safety;

12 (d) is accompanied by a written statement of the official approving the
13 additional collateral consequence, explaining the need for it, the evidentiary basis for
14 the finding of need, and the reasons why a more narrowly drawn restriction,
15 disability, or government action would not adequately meet that need; and

16 (e) is imposed only for a period not to exceed that permitted under Section
17 213.11F for the duties to register and keep the registration current.

18 **(6) *Confidentiality.*** In any proceeding under subsection (4) to consider whether to
19 impose an additional collateral consequence, the official responsible for making the
20 determination must insure that the identity of the registrant concerned remains confidential.

21 **Comment:**

22 Section 213.11I determines when conviction for a sexual offense can trigger collateral
23 consequences beyond the basic duties to register with law enforcement and to keep the registry
24 information up to date.

25 Subsection (1), together with Section 213.11(1)(b), defines the operative term “additional
26 collateral consequence” and makes clear that it includes any government action or government-
27 imposed burden or limitation applicable primarily to persons convicted of a sexual offense, other
28 than the basic duties associated with registration itself and any restriction on occupation or
29 employment required by state law. The additional collateral consequences referenced include such
30 common restrictions as limits on a registrant’s employment that are not required by state law, and
31 limits on a registrant’s education, Internet access, and residency. Also included are the widespread

Section 213.11I. Additional Collateral Consequences of Conviction

1 practices of GPS monitoring, notifying community organizations and private citizens that a person
2 previously convicted of a sexual offense is present in the area; and allowing non-law-enforcement
3 agencies and officials to access registry information. These measures are permitted only when
4 authorized under the conditions specified in subsections (2), (3), (4), and (5).

5 Because the “additional collateral consequences” governed by Section 213.11I include
6 only burdens applicable primarily to sex offenses as such, Section 213.11I does not affect collateral
7 consequences triggered by wider categories of offenses, such as the restrictions that many
8 jurisdictions impose on ex-offenders’ rights to vote, serve on juries, or receive public benefits.

9 Subsection (2) provides that “additional collateral consequences,” as defined, are
10 categorically precluded in the case of persons not subject to registration under Section 213.11A.
11 Subsection (3) identifies two groups of “additional collateral consequences” that are categorically
12 precluded even for persons who *are* subject to registration—namely, any government action
13 notifying a community organization or entity or a private party that the person resides, works, or
14 studies in the area; and any other government action providing or permitting access to registry
15 information by any entity or individual other than a law-enforcement agency or official.

16 Under subsection (4), “additional collateral consequences” not identified in subsection (3)
17 are not categorically prohibited, but they may be imposed only in compliance with the procedures
18 and standards specified in subsections (4) and (5). The person concerned must have notice of the
19 additional collateral consequences proposed and an opportunity to respond. Thereafter, the official
20 designated to make the determination may authorize one or more of the permissible “additional
21 collateral consequences,” but only upon finding that each additional consequence is manifestly
22 required in the interest of public safety, after considering all relevant circumstances, including the
23 nature of the offense, the person’s prior record, the potential negative impacts of the additional
24 restriction, disability, or government action on the person, the person’s family, and the person’s
25 prospects for rehabilitation and reintegration into society.

26 Subsection (5) further limits the imposition of additional collateral consequences by
27 requiring that they be authorized by law, drawn as narrowly as possible, and accompanied by a
28 written statement explaining the need for the additional restriction, disability, or government
29 action; its evidentiary basis; and the reasons why a more narrowly drawn additional consequence
30 would be inadequate. In addition, no additional collateral consequence may be imposed for a
31 period that exceeds the duration of the person’s registry obligations under Section 213.11F.

Subsection (6) requires that the official responsible for making the determination under subsection (4) must insure that the identity of the registrant concerned remains confidential.

REPORTERS' NOTES

Section 213.11I establishes procedures and standards for imposing additional collateral consequences, beyond those delineated in Sections 213.11A-213.11H. It precludes imposition of any additional collateral consequence on the basis of a conviction for an offense that is not a registrable offense under Article 213. It also precludes two groups of consequences even when the triggering offense *is* registrable: community notification and non-law-enforcement access to registry information. But it authorizes a variety of additional collateral consequences, including restrictions on employment, residency, and Internet access, GPS monitoring, and a number of other restrictions and disabilities, provided that the decision to impose one of these permissible consequences must be made in compliance with the requirements of subsections (4) and (5).

Regarding community notification, federal SORNA not only requires states to make specified information pertaining to registrants publicly available on the Internet but also, at their own initiative, to take active steps to alert individuals or organizations about the presence of sex-offense registrants in their communities. Direct notification of information pertaining to registrants who reside, work, or are enrolled in a program of study in the locality (other than information exempted from public access, such as registrants' Social Security numbers) must be given regularly to schools, public-housing agencies, and:²⁷²

“Any agency responsible for conducting employment-related background checks ...[;]

“Social service entities responsible for protecting minors in the child welfare system[;] and

“Volunteer organizations in which contact with minors or other vulnerable individuals might occur.”

Beyond those organizations with a potential need to know, federal SORNA also requires the appropriate local agency to provide direct notification of registrant information to “[a]ny organization, company, or individual who requests such notification” Moreover, federal SORNA allows any concerned organization or individual to opt to receive this notification as frequently as once every five business days.²⁷³ Many states similarly invest heavily in proactive community notification. In New Mexico, the county sheriff must notify “every licensed daycare center, elementary school, middle school and high school within a one-mile radius of the sex offender’s residence,” and any member of the public can request registrant information or view it

²⁷² SORNA § 20923(b).

²⁷³ SORNA § 20923(c).

on the Internet.²⁷⁴ As in the case of the ability of private individuals and organizations to access registry information at their own initiative, such widespread proactive community notification is virtually unheard of outside the United States.²⁷⁵

A few states, in disregard of the federal mandate, proactively notify only a narrower list of potentially interested groups. In Minnesota, for example, the extent of community notification varies as a function of “the level of danger posed by the offender, ... the offender’s pattern of offending behavior, and ... the need of community members for information to enhance their individual and collective safety.”²⁷⁶ Thus, for Level 1 registrants, Minnesota law enforcement has discretion to notify other law-enforcement agencies, victims, and witnesses; for Level 2 registrants, law enforcement may notify, in addition, any agencies that serve a population at risk of victimization that are located near the registrants’ home, such as educational institutions or day-care centers, as well as individuals likely to be victimized by the registrant; for Level 3 registrants, law enforcement may also notify other members of the community whom the registrant is likely to encounter.²⁷⁷ The New Jersey scheme is similar: County prosecutors classify registrants into one of three tiers according to the risks they pose. For Tier 1 (low-risk) registrants, only law-enforcement agencies are notified. For Tier 2 (moderate-risk) registrants, schools, licensed day-care centers, summer camps, and registered community organizations are also notified. For Tier 3 (high-risk) registrants, the general public is notified as well.²⁷⁸

Most states, however, proactively notify any organization or individual that requests notice about new registrants and updated new registry information, without requiring a showing of any particular need to know.²⁷⁹ For example, in Pennsylvania, the state maintains a website listing all registered persons who have been convicted of a sexual offense, with their home and work addresses, the license-plate number of their car, and their sex-offender classification. The website advises those who visit it that the information it provides “could be a significant factor in protecting yourself, your family members, or persons in your care” from the “recidivist acts” of the

²⁷⁴ N.M. Stat. Ann. § 29-11A-5.1.

²⁷⁵ See text at notes 30-80, *supra*.

²⁷⁶ MINN. STAT. ANN. § 244.052 subd. 4(a).

²⁷⁷ *Id.* subd. 4(b).

²⁷⁸ N.J. Stat. Ann. § 2C:7-8.

²⁷⁹ See “Collateral Consequences,” *supra* note 101. States use different approaches to community notification. Louisiana, for example, requires offenders themselves to notify their neighbors through the mail. La. Stat. Ann. § 15:542.1. In New York, law-enforcement authorities have discretion to share the information more widely. N.Y. Correct. Law § 168-l.

1 individuals listed.²⁸⁰ In a recent year, three million people accessed the site.²⁸¹ To further enhance
2 public awareness, the Pennsylvania State Police send out “red alerts” by email to all persons who
3 ask to be informed whenever a registrant in their area adds or deletes a home, work, or school
4 address; in a recent year the State Police sent out almost four million of these red alerts.²⁸²

5 The research establishes **unambiguously** that community notification has no measurable
6 public-safety benefits but acute costs. In several widely reported incidents, persons who had been
7 convicted of a sexual offense have been brutally attacked and even murdered by neighbors who
8 learned of their presence through registration and notification programs.²⁸³ More systematic
9 research has largely depended on registrant self-reports, arguably a reason to discount some of the
10 unfavorable consequences described. Subject to that caveat, however, the studies find extensive
11 evidence of **noxious impacts**.

12 Among registrants subject to community notification in Connecticut and Indiana (an
13 undifferentiated group of defendants convicted of any sex offense), 21 percent lost a job because
14 a boss or co-worker learned of their status,²⁸⁴ 21 percent were forced to move out of their residence
15 because a landlord or neighbor found out, 10 percent had been physically assaulted after
16 community notification had been given, and 16 percent of registrants reported that a member of
17 their household had been threatened, harassed, or assaulted.²⁸⁵ Roughly half reported fearing for
18 their safety, and a similar proportion said they felt alone and isolated because of community

²⁸⁰ See <https://www.pameganslaw.state.pa.us/>.

²⁸¹ Pennsylvania State Police, Megan’s Law Section, 2017 Annual Report, at 5-6, available at <https://www.pameganslaw.state.pa.us/Documents/MegansLawAnnualReport.pdf>.

²⁸² *Id.*

²⁸³ See *Doe v. Pataki*, 120 F.3d 1263, 1279 (2d Cir. 1997) (noting “numerous instances in which sex offenders have suffered harm in the aftermath of notification—ranging from public shunning [to] physical attacks, and arson”); *Verniero*, *supra*, 119 F.3d at 1102 (“[While] incidents of ‘vigilante justice’ are not common, they happen with sufficient frequency and publicity that registrants justifiably live in fear of them”). See also *Washington State Man Accused of Slaying Two Sex Offenders*, REUTERS, June 5, 2012, available at <http://www.nytimes.com/reuters/2012/06/05/us/05reuters-usa-sexoffenders>. One of the *amicus* briefs filed in a companion case to *Smith v. Doe*, 538 U.S. 84, 103 (2003), describes numerous specific instances in which registration laws resulted in sex-offense registrants being subjected to grave physical assault, harassment, threats, loss of employment or loss of housing, including being driven into homelessness or moving out of state; the brief also describes many specific instances in which such laws drove a sex-offense registrant to suicide. *Godfrey v. Doe*, No. 01-729, October Term 2001, Brief Amicus Curiae of the Public Defender For The State of New Jersey, et al., at 7-21, 2002 WL 1798881 (July 31, 2002).

²⁸⁴ Jill S. Levenson, David A. D’Amora, & Andrea Hern, *Megan’s Law and its Impact on Community Re-Entry for Sex Offenders*, 25 BEHAV. SCI. & L. 587, 594 (2007).

²⁸⁵ *Id.*

1 notification.²⁸⁶ On a more positive note, 22 percent of the registrants said registration and
 2 notification had helped them avoid reoffending, but a larger proportion expressed feelings of
 3 hopelessness, with 44 percent of the registrants agreeing with the statement that “no one believes
 4 I can change, so why even try.”²⁸⁷

5 Adverse impacts may be even more widespread among registrants in the highest risk
 6 categories.²⁸⁸ In a sample of high-risk sex-offense registrants in Wisconsin, all but one said that
 7 notification made it harder for them to reintegrate into the community.²⁸⁹ The study found that 83
 8 percent had been excluded from a residence, and 57 percent had lost a job because of community
 9 notification.²⁹⁰ More than three-quarters reported being ostracized by neighbors and
 10 acquaintances, or either humiliated, harassed, or threatened by community residents or others.²⁹¹
 11 In two-thirds of the cases, adverse effects extended to the parents or children of registrants;
 12 relatives commonly experienced emotional distress and sometimes had been humiliated or
 13 ostracized by acquaintances.²⁹² Similar findings recur throughout the literature. In a Florida study,
 14 35 percent of the sex-offense registrants were forced to move, 27 percent lost their jobs, and 19
 15 percent had been harassed.²⁹³ In light of this research and their own on-the-ground experience, a
 16 number of states resist public demands for indiscriminate community notification and restrict that
 17 measure to a narrow category of registrants determined to be at highest risk of reoffending.²⁹⁴ In
 18 Washington, the state’s Sex Offender Policy Board unanimously recommended that “sex offender

²⁸⁶ Id.

²⁸⁷ Id.

²⁸⁸ Richard G. Zevitz & Mary Ann Farkas, National Institute of Justice, Sex Offender Community Notification: Assessing the Impact in Wisconsin (Dec. 2000), available at <https://www.ncjrs.gov/pdffiles1/nij/179992.pdf>.

²⁸⁹ Id. at 9.

²⁹⁰ Id. at 10.

²⁹¹ Id. at 9.

²⁹² Id.

²⁹³ Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J. CONTEMP. CRIM. JUST. 67, 67-79 (2005). To similar effect, see also Anne-Marie McAlinden, THE SHAMING OF SEXUAL OFFENDERS: RISK, RETRIBUTION AND REINTEGRATION 116 (2007) (“[t]he community’s abhorrence and rejection of sex offenders” prevents reintegration); Richard Tewksbury, *Experiences and Attitudes of Registered Female Sex Offenders*, 68 FED. PROBATION 30, 31 (2004) (female sex-offense registrants experienced harassment, as well as loss of jobs, friendships, and residences); Richard Tewksbury & Matthew Lees, *Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences*, 26 SOC. SPECTRUM 309, 330-333 (2006) (78 percent of sex-offense registrants in Illinois said that restrictions had “impeded their ability to reintegrate into community life”).

²⁹⁴ See, e.g., text at notes 94-99, 276-278, *supra*.

1 registration information should be exempt from public disclosure.” The Board noted that “this
2 information has been held from public disclosure for decades, and has proven to be in the best
3 interests of the public, of victims of sexual assault, of community safety, and of registered sex
4 offenders—both in terms of facilitating their successful reintegration into the community and in
5 terms of their physical safety.”²⁹⁵

6 **In sum, community notification does much more harm than good.** Section 213.11I(3)
7 categorically bars this practice.

8 *GPS monitoring, Internet access, and limits on employment and residency* are not
9 addressed in federal SORNA, and state approaches vary widely. Nearly all states bar persons who
10 have been convicted of a sexual offense from working in particularly sensitive areas of
11 employment (such as teachers and security guards), but the list of excluded occupations is far from
12 uniform.²⁹⁶ At least 27 states and many municipalities prohibit some or all persons who have
13 committed a sexual offense from living within 500, 1,000, or 2,000 feet of schools, parks,
14 playgrounds and day-care centers.²⁹⁷ In densely populated counties, such residency restrictions
15 can make it virtually impossible for persons who have been convicted of a sexual offense to live
16 anywhere in the jurisdiction.²⁹⁸ Some states bar persons who have been convicted of a sexual
17 offense from living close to school-bus stops, a requirement that can preclude them, even in rural
18 areas, from residing almost anywhere in the county.²⁹⁹ Compounding the burden of such
19 restrictions, parolees are often required as a condition of their parole (and on pain of parole
20 revocation), to obtain employment within 45 days of release, even though community notification

²⁹⁵ WASHINGTON ST. SEX OFFENDER POL’Y BOARD, General Recommendations for Sex Offender Management, 6-7 (2016) https://sgc.wa.gov/sites/default/files/public/sopb/documents/general_recommendations.pdf.

²⁹⁶ See “Collateral Consequences,” supra note 101; Geraghty, supra note 102, at 515 (2007).

²⁹⁷ Id., at 514-515 (summarizing states’ residency-restriction laws); accord, Jill Levenson, *Sex Offender Residency Restrictions*, in WRIGHT, supra note 19, at 267, 268 (stating that 30 states impose residency restrictions); “Collateral Consequences,” supra note 101 (indicating 22 states that impose residency restrictions). In some states, residency restrictions imposed by municipalities have been held invalid on the ground that they are preempted by state legislation. See, e.g., *People v. Diack*, 26 N.E.3d 1151 (N.Y. 2015).

²⁹⁸ See, e.g., *Williams v. Dep’t of Corr. & Cmty. Supervision*, 979 N.Y.S.2d 489 (N.Y. Sup. Ct. 2014) (upholding constitutionality of condition that paroled sex offender not live within 1,000 feet of a school or other places where children congregate; the restriction ruled out virtually all of Manhattan and the Bronx, but court noted that large areas of Brooklyn and Queens remained available). Compare *In re Taylor*, 343 P.3d 867 (Cal. 2015) (holding that California voter initiative barring all persons who have been convicted of a sexual offense from living within 2,000 feet of schools and playgrounds was unconstitutional as applied to parolees living in San Diego County, because the restriction placed more than 97% of the county’s affordable housing off limits).

²⁹⁹ Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 HARV. C.R.-C.L. L. REV. 531, 533 (2007).

puts employers on alert not to hire them,³⁰⁰ or to reside in a particular county, even though virtually no housing may be available to them there.³⁰¹

At least 17 states require persons who have been convicted of a sexual offense to wear a GPS monitoring device that enables law enforcement to determine their location at all times, and most others require GPS monitoring under some circumstances.³⁰² Less common for the time being, but worthy of note, are statutes in at least three states (Indiana, Louisiana, and Nebraska) that prohibit persons who have been convicted of a sexual offense from using the Internet to engage in social networking.³⁰³ Instead of imposing a categorical ban on Internet use, a California voter initiative required sex-offense registrants to provide to law enforcement all their email addresses and user names, and to notify authorities within 24 hours of any changes to that information.³⁰⁴ Alabama recently joined a small group of states taking the lead in another area, imposing chemical castration as a condition of parole after conviction for certain sexual offenses.³⁰⁵

These burdens and limitations have prompted a host of constitutional challenges. The Supreme Court has held that a complete ban on use of the Internet violates the First Amendment.³⁰⁶ Many of the other issues have produced conflicting holdings, with little prospect that litigation will abate any time soon.³⁰⁷ Even where courts have found such restrictions constitutionally

³⁰⁰ See, e.g., *State v. Dull*, 351 P.3d 641 (Kan. 2015) (considering burden of requirement to secure employment within 45 days as a factor rendering mandatory lifetime supervision unconstitutional as applied to juvenile sex offender).

³⁰¹ See text at notes 297-299, 319-322, *infra*.

³⁰² See Kamika Dunlap, *Sex Offenders After Prison: Lifetime GPS Monitoring?* FINDLAW BLOTTER, February 1, 2011; Michelle L. Meloy & Shareda Coleman, *GPS Monitoring of Sex Offenders*, in WRIGHT, *supra* note 151, at 243 (reporting that as many as 46 states use GPS monitoring under some circumstances to track persons who have been convicted of a sexual offense). Courts are split on the question whether such monitoring violates the Fourth Amendment. See note 101, *supra*.

³⁰³ See Charles Wilson, *Court Upholds Ind. Facebook Ban for Sex Offenders*, ASSOCIATED PRESS, June 25, 2012, available at http://abcnews.go.com/Technology/wireStory/judge-upholds-ind-facebook-ban-sex-offenders-16642465#.T-ikN_LNnio (discussing cases in which courts have held bans on internet use compatible with the First Amendment).

³⁰⁴ *Doe v. Harris*, 772 F.3d 563 (9th Cir. 2014) (upholding preliminary injunction against enforcement of this restriction on ground of its likely unconstitutionality under the First Amendment).

³⁰⁵ See Alan Blinder, *What to Know about the Alabama Chemical Castration Law*, N.Y. TIMES, June 11, 2019. Other states imposing chemical castration on some paroled sex offenders include California, Florida, Louisiana, and Wisconsin. *Id.*

³⁰⁶ *Packingham v. North Carolina*, *supra* note 106.

³⁰⁷ With respect to the constitutionality of mandatory lifetime GPS monitoring of sex offenders, compare *Belleau v. Wall*, *supra* note 104 (upholding Wisconsin provision to that effect), with *State v. Dykes*, 728 S.E.2d 455 (S.C. 2012) (holding South Carolina provision to that effect unconstitutional as a violation of due process). See also note 104, *supra*.

permissible, however, the cases have underscored the overbreadth and unfairness that the restrictions can present both generally and as applied to particular registrants, juveniles and elderly parolees in particular.

Overall, the evidence bearing on the impact of these measures establishes with little doubt that they are responsible for wasted law-enforcement effort and misdirected civilian efforts at self-protection, with little to no public-safety payoff, and harsh, criminogenic impact on the registrants themselves.³⁰⁸ The evidence with respect to particular measures is discussed in the paragraphs that follow.

GPS monitoring of sex-offense registrants has cost the state of California \$60 million annually.³⁰⁹ Monitoring costs for states and localities involve more than simply the additional dollar outlays. In some jurisdictions, sheriff's deputies and other government employees have had to reduce the time they can devote to other duties, including 9-1-1 dispatch, in order to monitor registrant residences and post eviction notices for those living in impermissible zones.³¹⁰ GPS locational monitoring of registrant movements requires law-enforcement agents to spend more time at their computers and less time directly supervising parolees or carrying out other duties in the field.³¹¹ To make matters worse, 99 percent of the GPS alerts received in some jurisdictions have come from low-battery signals or other false alarms; only one percent indicated that a registrant had entered a restricted area.³¹² Of course, the low incidence of true alarms would be consistent with the hypothesis that GPS monitoring deters registrants from violating their restrictions, but even if this is the case, the frequency of false alarms means that any such gains come at a high price in terms of required law-enforcement attention.

Despite these concerns, GPS monitoring can be justified in discrete situations. Importantly, it can be a preferable alternative to a sentence to incarceration, and it has not been associated with acute criminogenic effects. Section 213.11I therefore does not preclude imposition of this measure, but seeks to prevent its indiscriminate use by requiring compliance with substantive and procedural limitations.

With respect to *residency restrictions*, the evidence of possible benefit is similarly disappointing, and in this case the unintended, criminogenic effects have been acute. The Minnesota Department of Corrections found that among persons rearrested after release from prison after serving a sentence for a sexual offense (seven percent of all sex offenders released, a figure far lower than the recidivism rate for other serious crimes), “[n]ot one . . . would likely have

³⁰⁸ See also Reporters’ Notes to Sections 213.11A & 213.11H, *supra*.

³⁰⁹ See Don Thompson, *California to Change Sex-Offender Tracking*, Associated Press, May 26, 2011, available at http://www.msnbc.msn.com/id/43186851/ns/us_news-.

³¹⁰ See Geraghty, *supra* note 102, at 518.

³¹¹ See Thompson, *supra* note 309.

³¹² *Id.*

1 been deterred by a residency restriction law,” largely because “[those who] established direct
2 contact with victims . . . were unlikely to do so close to where they lived.”³¹³ The Colorado
3 Department of Corrections found that persons convicted of child molestation who reoffended did
4 not live closer to child-care facilities and schools than individuals without a prior criminal record
5 who were arrested for similar crimes; the Department therefore concluded that “[p]lacing
6 restrictions on the location of . . . supervised sex offender residences may not deter the sex offender
7 from re-offending and should not be considered as a method to control sexual offending
8 recidivism.”³¹⁴ Other available evidence on the efficacy of residency restrictions is uniformly to
9 the same effect.³¹⁵

10 These consequences in turn mean negative impacts for public safety because the adverse
11 personal impacts for persons who have been convicted of a sexual offense impede their
12 reintegration into society and aggravate their risks of reoffending. Successful reintegration and
13 law-abiding behavior typically depend on stable living arrangements, supportive family
14 relationships, and steady employment,³¹⁶ while poor social support and psychological distress are
15 important risk factors for sexual recidivism.³¹⁷ Thus, any direct gains from greater law-
16 enforcement efficacy or from improved public awareness and self-protection may be outweighed
17 by an **increased likelihood of recidivism**.³¹⁸

18 The negative consequences of restricted living arrangements (whether as a direct
19 consequence of residency prohibitions or an indirect effect of community notification) can be
20 dramatic, because these limitations tend to push registrants into socially disorganized,

³¹³ Minn. Dept. of Corr., Residential Proximity & Sex Offense Recidivism in Minnesota 1, 2 (2007), available at <http://www.corr.state.mn.us/publications/documents/04-07SexOffenderReport-Proximity.pdf>.

³¹⁴ Sex Offender Mgmt. Bd., Colo. Dep’t of Pub. Safety, Report on Safety Issues Raised by Living Arrangements for and Location of Sex Offenders in the Community 4 (2004), available at <http://dcj.state.co.us/ors/pdf/docs/FullSLAFinal.pdf>.

³¹⁵ See also text at notes 319-323, *infra*. A recent review of the literature bearing on these issues finds no studies to support a contrary conclusion, but notes methodological weaknesses in the available research and calls for better study design in future research. See U.S. Library of Congress, Federal Research Division, Sex Offender Registration and Notification Policies: Summary and Assessment of Research on Claimed Housing Impacts on Registered Offenders (June 2020).

³¹⁶ CUMMING & BUELL, SUPERVISION OF THE SEX OFFENDER (1997); Levenson, *Sex Offender Residence Restrictions*, *supra* note 137, at 282-283; Elton, *supra* note 138, at 38 (“community reintegration, therapy, and stability help reduce recidivism among the majority of [sex] offenders”).

³¹⁷ R.K. Hanson & A. J. R. Harris, *Dynamic Predictors of Sexual Recidivism* (1998), available at <http://www.static99.org/pdfdocs/hansonandharris1998.pdf>; Levenson, *Sex Offender Residence Restrictions*, *supra* note 137, at 267, 281.

³¹⁸ Prescott & Rockoff, *supra* note 132, at 181.

1 economically disadvantaged communities.³¹⁹ In Iowa, residency restrictions barred sex-offense
 2 registrants from 98 percent of one county’s housing units,³²⁰ and throughout the state many of
 3 them became homeless.³²¹ In one Florida county, restrictions on living near a school-bus stop left
 4 only one percent of the county open to residency by sex-offense registrants.³²² At the same time,
 5 “research provides little if any support for the effectiveness of residential restriction laws in
 6 deterring or preventing sexual offenses.”³²³

7 In sum, residency restrictions have frequent, well-documented adverse impacts on
 8 registrants. And (other things being equal) these impacts tend to make recidivism *more likely*.

9 Many victim advocates share these reservations. They list a wide range of harmful impacts
 10 for victims, for example, that “residency restrictions ... have inadvertently created a disincentive
 11 for victims to disclose [their victimization].”³²⁴ Victims informed about residency restrictions
 12 “rolled their eyes, seemingly in exasperation” at the irrelevancy of these laws to their situation.³²⁵

13 A state Coalition Against Sexual Assault reported that residency restrictions “have actually
 14 impeded public safety because they have reinforced to the public grossly inaccurate depictions of
 15 the type of sexual assault risk one is most likely to face. . . . [b]y focusing on the ‘stranger danger’
 16 myth, people are less aware of a more likely assailant: a person they know. These myths, in turn,
 17 have created a public demand for sexual assault risk mitigation (e. g. residency restrictions,
 18 offender registries and notification) aimed at particularly scary, but unlikely, threats.”³²⁶ Many of
 19 these coalitions have “publicly denounced residency restriction laws, describing them as
 20 ‘irresponsible’ and ‘counterproductive.’”³²⁷

³¹⁹ Tewksbury, *Experiences and Attitudes*, supra note 293, at 533.

³²⁰ See Brian J. Love, *Regulating for Safety or Punishing Depravity? A Pathfinder for Sex Offender Residency Restriction Statutes*, 43 CRIM. L. BULL. 834, 835 (2007).

³²¹ See Elton, supra note 138, at 38. See also Allison Frankel, *Pushed Out and Locked In: The Catch-22 for New York’s Disabled, Homeless, Sex-Offender Registrants*, 129 YALE L.J. F. 279, 285-286 (2019) (noting that because of “the abundance of schools and population density in New York City, ... most of the City, and practicably all of Manhattan, [are] off-limits to registrants.”)

³²² See Tewksbury, *Experiences and Attitudes*, supra note 293, at 533.

³²³ Tewksbury, *Residency Restrictions*, supra note 299, at 539. See also Am. Cor. Ass’n, Resolution on Neighborhood Exclusion of Predatory Sex Offenders (Jan. 24, 2007) (stating that “there is no evidence to support the efficacy of broadly-applied residential restrictions on sex offenders”); Levenson, et al., *Grand Challenges*, supra note 136, at 22 (arguing that restrictions on registrant residency are counterproductive).

³²⁴ Bandy, supra note 151, at 471, 488.

³²⁵ Id., at 490.

³²⁶ Id., at 491-492 (paraphrasing CASA interviewee based in Southwest).

³²⁷ Id., at 492 (explaining that these provisions “provide the public with a false sense of security and serve to reinforce stereotypes about the typical offender and the typical victim”).

1 Patricia Wetterling, one of the original leaders of the movement for registration and
2 community notification, is equally emphatic. Residency restrictions, she says, are “wrong and
3 ludicrous and make no sense at all. We’re putting all our energy on the stranger, the bad guy, and
4 the reality is it’s most sex offenses are committed by somebody that gains your trust, or is a friend
5 or relative, and so none of these laws address the real, sacred thing that nobody wants to talk
6 about.”³²⁸ Wetterling adds, “When these guys are released from prison, we want them to succeed.
7 . . . All of these laws they’ve been passing make sure that they’re not going to succeed. They don’t
8 have a place to live; they can’t get work. Everybody knows of their horrible crime and they’ve
9 been vilified. There is too much of a knee jerk reaction to these horrible crimes. . . . [T]here is no
10 safe place for these guys. We have not built into the system any means for success”³²⁹

11 Unless carefully targeted, therefore, burdens of these kinds almost inevitably aggravate the
12 very dangers that they are intended to allay.

13 In light of these findings, Section 213.11I creates a strong presumption against GPS
14 monitoring, limits on residency, limits on occupation and employment not required by state law,
15 and other restrictive measures applicable specifically to persons who have been convicted of a
16 sexual offense, because these measures can only impede the registrant’s prospects for reintegration
17 into society.

18 Different issues are presented when a particular sex-offender restriction is deployed on a
19 carefully targeted basis. To accommodate potentially legitimate needs, subsections (4) and (5)
20 establish a framework for approving on a case-by-case basis specific collateral consequences,
21 additional to those authorized by Sections 213.11A-213.11H. The official making that individual
22 determination is required to give careful consideration to the public-safety need for the particular
23 measure; to weigh that need against its impact on the registrant, the registrant’s family, and the
24 registrant’s prospects for rehabilitation and reintegration into society; and to ensure that any
25 measure approved is drawn as narrowly as possible to achieve the goal of public safety.

26 This standard will not open the door to routine imposition of additional collateral
27 consequences just because a particular registrant has been found guilty of a very serious offense.
28 For example, an assisted-living facility seeking to avoid hiring an employee who has a prior
29 conviction for a sexual offense does not require affirmative notification or unrestricted access to
30 registry information; ordinary background-check procedures already in place at the national and
31 state levels suffice for that purpose.³³⁰ In contrast, a registrant who has a record of prior convictions
32 for molesting young children might reasonably face a narrowly targeted restriction on living near
33 schools and play areas where young children congregate, provided that the restriction is imposed
34 only after carefully considering all the circumstances.

³²⁸ Wetterling & Wright, *supra* note 161, at 71.

³²⁹ *Id.*, at 76-77, 79.

³³⁰ See Reporters’ Note to Section 213.11H, addressing the related issue of whether organizations of this sort need access to registry information.

Section 213.11J. Relief from Registration and Other Sentencing Consequences
and Collateral Consequences

The important point is that the interests in public safety and successful rehabilitation of registrants require both that the unintended harms of additional collateral consequences be fully appreciated and that they be used sparingly, only in a narrow range of specially compelling circumstances.³³¹ Subsections (4) and (5) identify the factors that the sentencing judge or other authorized official must weigh in determining whether a particular person should incur such consequences.³³²

SECTION 213.11J. DISCRETIONARY RELIEF FROM REGISTRATION AND OTHER SENTENCING CONSEQUENCES AND COLLATERAL CONSEQUENCES

(1) *Petition for Discretionary Relief.* At any time prior to the expiration of any sentencing consequences imposed under Section 213.11(3) or any collateral consequences applicable primarily to persons convicted of a sexual offense, including the obligation to register, the obligation to comply with associated duties, restrictions on occupation or employment required by state law, collateral consequences imposed under Section 213.11(4), and additional collateral consequences imposed under Section 213.11I(4), the registrant may petition the sentencing court, or other authority authorized by law, to order relief from all or part of those consequences. If the obligation to register or other consequences arose from an out-of-state conviction, the petition may be addressed to a court of general jurisdiction or other authority of this state in the place where the person concerned is registered.

³³¹ Cf. *Doe v. Attorney General*, 686 N.E.2d 1007 (Mass. 1997) (holding Massachusetts provision linking sex-offense conviction to mandatory registration accompanied by public access and community notification to violate procedural due process in the absence of an individualized risk assessment); *State v. Bani*, 36 P.3d 1255, 1268 (Haw. 2001) (same). But see *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003) (Connecticut's mandatory registration with public access and community notification did not violate procedural due process).

³³² Statutory language is not the place to mandate specific risk-assessment parameters. The sentencing judge or other authorized official will draw on detailed protocols that are evolving and continually refined for this purpose. See, e.g., Grant Duwe, *Better Practices in the Development and Validation of Recidivism Risk Assessments: The Minnesota Sex Offender Screening Tool-4*, 30 CRIM. JUSTICE POLICY REV. 538 (2019); R. Karl Hanson, et al., *The Field Validity of Static-99/R Sex Offender Risk Assessment Tool in California*, 1 J. THREAT ASSESSMENT & MGMT. 102 (2014); R. Karl Hanson & Kelly E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 PSYCHOL. ASSESSMENT 1 (2009).

1 **(2) *Proceedings on Petition for Discretionary Relief.*** The authority to which the petition
2 is addressed may either dismiss the petition summarily, in whole or in part, or institute
3 proceedings to rule on the merits of the petition. If that authority chooses to entertain
4 submissions, hear argument, or take evidence prior to ruling on the merits of the petition, it
5 must give notice of the proceeding and an opportunity to participate in it to the prosecuting
6 attorney for the offense out of which the obligation to register or other consequence arose. If
7 the obligation to register or other consequence arose from an out-of-state conviction, notice
8 of the proceeding and an opportunity to participate in it must be addressed to the principal
9 prosecuting attorney in the jurisdiction of this state where the authority to which the petition
10 is addressed is located.

11 **(3) *Judgment on Proceedings for Discretionary Relief.*** Following proceedings for
12 discretionary relief under subsection (2), the authority to which the petition is addressed may
13 grant or deny relief, in whole or in part, from the obligation to register, any associated duties,
14 and any of the sentencing consequences or collateral consequences in question. When that
15 order terminates the registrant's obligation to register and to keep registry information
16 current, subsequent disclosure of registry information is governed by subsection (5) of this
17 Section. An order granting or denying relief following those proceedings must explain in
18 writing the reasons for granting or denying relief.

19 **(4) *Standard for Discretionary Relief.*** The authority to which the petition is addressed
20 must grant relief if it finds, after proceedings to rule on the merits pursuant to subsection
21 (2), that the **sentencing** consequence or collateral consequence in question is likely to impose
22 a substantial burden on the registrant's ability to reintegrate into law-abiding society, and
23 that public-safety considerations do not require continued imposition of the obligation, duty,
24 or consequence after due consideration of:

25 (a) the nature of the offense;

26 (b) all other circumstances of the case;

27 (c) the registrant's prior and subsequent record of criminal convictions, if any;

28 **and**

29 (d) the potential negative impacts of the burden, restriction, or government
30 action on the registrant, on the registrant's family, and on the registrant's prospects
31 for rehabilitation and reintegration into society.

1 **Relief must not be denied arbitrarily or for any punitive purpose.**

2 **(5) *Access to Registry Information after Discretionary Relief.*** When an order of
3 discretionary relief terminates the person's obligation to register and to keep registry
4 information current, all limits on access to registry information under Section 213.11H shall
5 remain in effect. Registry information recorded as of the date when discretionary relief takes
6 effect must remain available to any government law-enforcement agency seeking disclosure
7 of that information in compliance with Section 213.11H(1)(a) but must not otherwise be
8 disclosed.

9 **(6) *Notice to Other Jurisdictions Concerning Discretionary Relief.***

10 (a) When discretionary relief is granted to a person under this Section, the
11 authority granting the order of relief must, upon the person's request, give notice of
12 that order to any other jurisdiction where the person concerned is registered or where
13 information about the person has been provided pursuant to Section 213.11D(4).

14 (b) When the other jurisdiction notified is a jurisdiction of this state, the notice
15 **must specify that the other jurisdiction** must extend the same relief from registration-
16 related duties and any other sentencing consequences or collateral consequences.
17 When that order terminates the registrant's obligation to register and to keep registry
18 information current, that notice must also specify the limits on subsequent disclosure
19 of registry information applicable under subsection (5).

20 **(7) *Proceedings Subsequent to Discretionary Relief.*** An order of discretionary relief
21 granted under this Section does not preclude the authority to which the petition was
22 addressed from later revoking that order if, on the basis of the registrant's subsequent
23 conduct or any other substantial change in circumstances, the authority finds by a
24 preponderance of the evidence that public-safety considerations, weighed against the burden
25 on the registrant's ability to reintegrate into law-abiding society, no longer justify the order
26 of relief.

27 **(8) *Confidentiality.*** In any proceedings under this Section to consider whether to grant
28 or deny discretionary relief, the official responsible for making the determination must
29 insure that the identity of the registrant concerned remains confidential.

Section 213.11J. Relief from Registration and Other Sentencing Consequences
and Collateral Consequences

Comment:

Section 213.11J identifies the standards and procedures for relieving a person from the obligation to register, from the associated duties, or from any other sentencing consequences or collateral consequences. It largely follows the framework applicable generally to petitions for relief from collateral consequences, as specified in the sentencing provisions of the Model Penal Code,³³³ with additional detail pertinent to sex-offense consequences. It stipulates that when an order of relief terminates the registrant's obligation to register and to keep registry information current, access to registry information is subsequently limited, in terms specified by subsection (5).

Subsection (6) aims to ensure that discretionary relief is communicated to all jurisdictions where a person is registered or where information about the person has been provided pursuant to Section 213.11D(4). When the other jurisdiction notified is a jurisdiction of this state, it must extend similar relief, including the limits on access to registry information specified in subsection (5) and Section 213.11H.

In deciding whether to grant discretionary relief, the sentencing judge or other official authorized to make the determination is instructed to consider all the circumstances of the case, including the nature of the offense; the registrant's prior and subsequent criminal record; and the potential negative impacts of the consequence in question on the registrant, on the registrant's family, and on the registrant's prospects for rehabilitation and reintegration into society.

Under subsection (8), the official responsible for determining whether to grant or deny discretionary relief must insure that the identity of the registrant concerned remains confidential.

REPORTERS' NOTES

Federal SORNA makes no provision for early relief from registration and its associated duties and restrictions, apart from affording registrants convicted of the least serious sexual offenses who maintain a "clean" record for at least 10 years a limited opportunity for early relief, with longer minimum periods for offenses classified at higher tiers of seriousness.³³⁴ More than half the states provide some opportunity for early termination of registration requirements, though in almost all cases the opportunity is limited to persons convicted of the least serious sexual

³³³ See *MPCS Statutory Text*, supra note 1, Section 7.04(2) & (3).

³³⁴ See text at note 228, supra.

Section 213.11J. Relief from Registration and Other Sentencing Consequences
and Collateral Consequences

1 offenses.³³⁵ Many states endorse criteria for relief similar to those specified in Section 213.11J,
2 but some offer even greater detail. Washington, for example, breaks down the general categories
3 of relevant circumstances into 12 factors and adds that the court may also take into account “[a]ny
4 other factors the court may consider relevant.”³³⁶

5 For discretionary relief, Section 213.11J draws on the early relief provisions of Model
6 Penal Code: Sentencing, Article 7 (“MPCS”), with additional provisions relevant to sex-offense
7 consequences, and with several adjustments to align these relief provisions with implementation
8 details and policy considerations specific to this context.³³⁷

9 (a) MPCS directs that petitions for relief be addressed to the sentencing court, and this is a
10 common approach among jurisdictions that authorize early relief from sex-offense registry
11 obligations.³³⁸ However, many jurisdictions take a different approach. In some, petitions for relief
12 must be addressed to a court in the jurisdiction where the registrant resides.³³⁹ In some states, the
13 sentencing court acts on the advice on a board of experts,³⁴⁰ elsewhere the final decision is
14 entrusted to an independent risk-assessment board.³⁴¹ In the context of the sexual offenses, it is
15 important to allow for local flexibility in this regard. Section 213.11J endorses that approach.

16 (b) MPCS imposes a daunting burden of proof: an offender subject to collateral
17 consequences can obtain relief only by demonstrating by clear and convincing evidence that the
18 criteria for relief are satisfied. The effect is to create a strong presumption in favor of sustaining a

³³⁵ See “Relief from Sex Offender Registration Obligations,” <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex-offender-registration-obligations/>.

³³⁶ WASH. REV. CODE ANN. § 9A.44.142 (2019).

³³⁷ The collateral-consequence provisions of MPCS were not intended to apply without exception to the unique circumstances of sex-offense collateral consequences. See MODEL PENAL CODE: SENTENCING, Section 7.06(4) (AM. L. INST., Official Statutory Text, May 24, 2017) (stating that “[a] certificate of restoration of rights removes all mandatory collateral consequences . . . , except as provided by Article 213.”) See also MODEL PENAL CODE: SENTENCING Section 7.06 Comment *d* (AM. L. INST., Proposed Final Draft, April 10, 2017) (stating that the Section 7.06 provisions concerning relief from collateral consequences are subject to an exception: “for individuals convicted of sexual offenses, the restrictions on relief set forth in Article 213 apply.”)

³³⁸ E.g., See, e.g., FLA. STAT. ANN. § 943.0435(11)(a)(2); GA. CODE ANN. § 42-1-19; MICH. COMP. LAWS ANN. § 28.728c(4); N.Y. CORRECT. LAW § 168-o.

³³⁹ E.g., CAL. PENAL CODE § 290.5 (*effective July 1, 2021*) (petition to court in county in which offender resides); OHIO REV. CODE ANN. § 2950.15 (same).

³⁴⁰ E.g., 42 PA. STAT. AND CONS. STAT. ANN. § 9799.15(a.2) (sentencing court acts on report of State Sexual Offenders Assessment Board); TEX. CODE CRIM. PROC. ANN. art. 62.404 (sentencing court acts on basis of individual risk assessment conducted by the state’s Council on Sex Offender Treatment).

³⁴¹ E.g., MD. CODE REGS. 12.06.01.14 (decision by Sex Offender Registry Unit); 803 MASS. CODE REGS. 1.30 (petition to Sex Offender Registry Board).

Section 213.11J. Relief from Registration and Other Sentencing Consequences
and Collateral Consequences

1 mandatory collateral consequence that by definition was not initially attuned to the situation of the
2 individual offender. This high hurdle has drawn criticism as unduly difficult to meet with respect
3 to collateral consequences generally.³⁴² It is especially inappropriate in the context of sex-offense
4 sentencing consequences and collateral consequences, because these duties and restrictions carry
5 no **strong presumption** that they are likely to be sufficiently justified in the first place for the
6 individual registrant. To the contrary, the case for most of the sex-offense consequences in
7 question here is mixed at best, particularly with the passage of time since the registrant's initial
8 registration. Accordingly, for sex-offense consequences, the appropriate burden of proof is not a
9 matter that can be suitably constrained in advance. Subsections (3) and (4) of Section 213.11J do
10 not specify a particular burden of proof and instead leave this decision to the sound discretion of
11 the decisionmaking authority.

12 (c) **MPCS** sets stiff criteria for granting relief. The offender must show that the
13 consequence in question is (i) not substantially related to the elements and facts of the conviction
14 offense; (ii) likely to impose a substantial burden on the offender's ability to reintegrate into
15 society; *and* (iii) not required by public-safety considerations. In the context of sexual offenses, it
16 will too often be impossible to demonstrate that all three of these criteria are met. Except in rare
17 instances, the sex-offense consequences at issue here will be intrinsically related to the elements
18 and facts of the underlying sexual offense, making the first essential criterion beyond reach in most
19 cases, even when the balance of public-safety considerations and adverse impacts on the registrant
20 clearly warrant relief. Accordingly, Section 213.11J(4) requires that when the decisionmaking
21 authority chooses to rule on the merits of a petition for relief, that decisionmaker must grant relief
22 simply on the basis of a finding that (1) the consequence in question is likely to impose a substantial
23 burden on the registrant's ability to reintegrate into law-abiding society and that (2) public-safety
24 considerations do not require its continued imposition.

25 (d) MPCS permits the decisionmaking authority to deny relief without making any specific
26 finding that the evidence and the relevant criteria warrant that result. And when the decisionmaking
27 authority does grant relief, MPCS does not expressly require that the necessary findings be
28 explained in writing. Section 213.11J(2) specifies that when the decisionmaking authority
29 institutes proceedings to rule on the merits of a petition for relief, an order granting *or denying*
30 relief at the conclusion of those proceedings must explain in writing the reasons for granting or
31 denying relief.

³⁴² See Nora V. Demleitner, *Structuring Relief for Sex Offenders from Registration and Notification Requirements: Learning from Foreign Jurisdictions and from the Model Penal Code: Sentencing*, 30 FED. SENT. RPTR. 317, 321-323 (2018).

PERTINENT MODEL PENAL CODE PROVISIONS*

** Pertinent provisions of the 1962 Model Penal Code are reproduced below, numbered as they appear in that Code. These provisions of the 1962 Code are reproduced verbatim, except that the gendered language used in the 1962 Code has been replaced by gender-neutral terms used in the other parts 1962 Code, such as “the person” or “the actor.”*

1.12 Proof Beyond a Reasonable Doubt; Affirmative Defenses; Burden of Proving Fact When Not an Element of an Offense; Presumptions

(1) No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed.

(2) Subsection (1) of this Section does not:

(a) require the disproof of an affirmative defense unless and until there is evidence supporting such defense; or

(b) apply to any defense that the Code or another statute plainly requires the defendant to prove by a preponderance of evidence.

1.13 General Definitions

In this Code, unless a different meaning plainly is required:

(5) “conduct” means an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions;

(6) “actor” includes, where relevant, a person guilty of an omission;

(9) “element of an offense” means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as

(a) is included in the description of the forbidden conduct in the definition of the offense; or

(b) establishes the required kind of culpability; or

(c) negatives an excuse or justification for such conduct; or

- (d) negatives a defense under the statute of limitations; or
 - (e) establishes jurisdiction or venue;
- (10) “material element of an offense” means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue, or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct;
- (11) “purposely” has the meaning specified in Section 2.02 and equivalent terms such as “with purpose,” “designed” or “with design” have the same meaning;
- (12) “intentionally” or “with intent” means purposely;
- (13) “knowingly” has the meaning specified in Section 2.02 and equivalent terms such as “knowing” or “with knowledge” have the same meaning;
- (14) “recklessly” has the meaning specified in Section 2.02 and equivalent terms such as “recklessness” or “with recklessness” have the same meaning;
- (15) “negligently” has the meaning specified in Section 2.02 and equivalent terms such as “negligence” or “with negligence” have the same meaning;
- (16) “reasonably believes” or “reasonable belief” designates a belief that the actor is not reckless or negligent in holding.

2.02 General Requirements of Culpability

(1) *Minimum Requirements of Culpability.* Except as provided in Section 2.05, a person is not guilty of an offense unless the person acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

(2) *Kinds of Culpability Defined.*

(a) **Purposely.**

A person acts purposely with respect to a material element of an offense when:

- (i) if the element involves the nature of the person’s conduct or a result thereof, it is the person’s conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, the person is aware of the existence of such circumstances or the person believes or hopes that

they exist.

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of the person's conduct or the attendant circumstances, the person is aware that the person's conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of the person's conduct, the person is aware that it is practically certain that the person's conduct will cause such a result.

(c) Recklessly.

A person acts recklessly with respect to a material element of an offense when the person consciously disregards a substantial and unjustifiable risk that the material element exists or will result from the person's conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the actor, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) Negligently.

A person acts negligently with respect to a material element of an offense when the person should be aware of a substantial and unjustifiable risk that the material element exists or will result from the person's conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of the actor's conduct and the circumstances known to the actor, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

(3) *Culpability Required Unless Otherwise Provided.* When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.

(4) *Prescribed Culpability Requirement Applies to All Material Elements.* When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of

an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

(5) *Substitutes for Negligence, Recklessness and Knowledge.* When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

2.03 Causal Relationship Between Conduct and Result; Divergence Between Result Designed or Contemplated and Actual Result or Between Probable and Actual Result

(1) Conduct is the cause of a result when:

- (a) it is an antecedent but for which the result in question would not have occurred; and**
- (b) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.**

(2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:

- (a) the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused; or**
- (b) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just]^{*} bearing on the actor's liability or on the gravity of the actor's offense.**

(3) When recklessly or negligently causing a particular result is an element of an offense,

^{*} The commentary at p.261 n.16 explains: "The word 'just' is in brackets because of disagreement within the Institute over whether it is wise to put undefined questions of justice to the jury...."

the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which the actor should be aware unless:

(a) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused;
or

(b) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of the actor's offense.

(4) When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor's conduct.

2.12 De Minimis Infractions

The Court shall dismiss a prosecution if, with regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:

(a) was within a customary license or tolerance, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or

(b) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or

(c) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.

The Court shall not dismiss a prosecution under subsection (3) of this Section without filing a written statement of its reasons.

210.0 Definitions

(2) “bodily injury” means physical pain, illness or any impairment of physical condition;

(3) “serious bodily injury” means 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;

(4) “deadly weapon” means any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.

ARTICLE 213

BLACK LETTER

SECTION 213.0. GENERAL PRINCIPLES OF LIABILITY; DEFINITIONS

(1) This Article is governed by Part I of the 1962 Model Penal Code, including the definitions given in Section 210.0, except that:

(a) Section 2.11 (the definition of “consent”) does not apply to this article.

(b) Subsection (2) of Section 2.08 (Intoxication) does not apply to this article. Instead, the general provisions of the criminal law and rules of evidence of the jurisdiction govern the materiality of the actor’s intoxication in determining the actor’s culpability for an offense.

(2) Definitions

In this Article, unless a different definition is plainly required:

(a) “Sexual penetration” means an act involving penetration, however slight, of the anus or genitalia by an object or a body part, except when done for legitimate medical, hygienic, or law-enforcement purposes.*

(b) “Oral sex” means a touching of the anus or genitalia of one person by the mouth or tongue of another person.*

(c) “Sexual contact” means any of the following acts, when the actor’s purpose is the sexual arousal, sexual gratification, sexual humiliation, or sexual degradation of any person:

(i) touching the clothed or unclothed genitalia, anus, groin, breast, buttocks, or inner thigh of any person with any body part or object; or

* Approved by the membership, May 2017.

(ii) touching any body part of any person with the clothed or unclothed genitalia, anus, groin, breast, buttocks, or inner thigh of any person; or

(iii) touching any clothed or unclothed body part of any person with the ejaculate of any person.

The touching described in paragraph (c) includes the actor touching another person, another person touching the actor or a third party, or another person touching that person's own body. It does not include the actor touching the actor's own body.

(d) "Fondling" means prolonged contact with or manipulation of the genitals, when the actor's purpose is the sexual arousal, sexual gratification, sexual humiliation, or sexual degradation of any person. Fondling requires more than a transient grope or grab. "To fondle" means to engage in fondling.

(e) "Consent"^{**}

(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.

(ii) Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.

(iii) Neither verbal nor physical resistance is required to establish that consent is lacking, but their absence may be considered, in the context of all the circumstances, in determining the issue of consent.

(iv) Notwithstanding subsection (2)(e)(ii) of this Section, consent is ineffective when given by a person incompetent to consent or under circumstances precluding the free exercise of consent, as provided in Sections 213.1, 213.2, 213.3, 213.4, 213.5, 213.7, 213.8, and 213.9.

(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

^{**} Approved by the membership, May 2016.

consent or the revocation or withdrawal of previous consent. Lack of consent or revocation or withdrawal of consent may be overridden by subsequent consent given prior to the act of sexual penetration, oral sex, or sexual contact.

(f) Force.

(i) “Physical force or restraint” means a physical act or physical restraint that inflicts more than negligible physical harm, pain, or discomfort or that significantly restricts a person’s ability to move freely. More than negligible physical harm includes but is not limited to a burn, black eye, or bloody nose, and more than negligible pain or discomfort includes but is not limited to the pain or discomfort resulting from a kick, punch, or slap on the face.

(ii) “Aggravated physical force or restraint” means a physical act or physical restraint that inflicts or is capable of inflicting death, serious bodily injury, or extreme physical pain, or that confines another for a substantial period in a place of isolation other than under color of law.

(g) “Actor” means a person more than 12 years old, except that “actor” includes a person younger than 12 when the charge is Sexual Assault by Aggravated Physical Force or Restraint (Section 213.1). “Actor” includes, where relevant, a person guilty of an omission.

(h) “Registrable offense”

(i) “Registrable offense” means an offense that makes a convicted person eligible for or subject to any of the collateral consequences specified in Section 213.11.

(ii) No offense is a registrable offense under any provision of law unless it is specifically so designated in this Article or is committed in another jurisdiction, is a registrable offense in that jurisdiction, and would be a registrable offense in this jurisdiction if it had been committed in this jurisdiction.

SECTION 213.1 SEXUAL ASSAULT BY AGGRAVATED PHYSICAL FORCE OR RESTRAINT

(1) *Sexual Assault by Aggravated Physical Force or Restraint.* An actor is guilty of Sexual Assault by Aggravated Physical Force or Restraint when:

- (a)** the actor causes another person to submit to or perform an act of sexual penetration or oral sex; and
- (b)** the act is without effective consent because:
 - (i)** the actor uses or explicitly or implicitly threatens to use aggravated physical force or restraint against anyone; and
 - (ii)** the actor's use of or threat to use aggravated physical force or restraint causes the other person to submit to or perform the act of sexual penetration or oral sex; and
- (c)** the actor knows that the circumstances described in paragraphs (a) and (b) are present.

(2) *Grading.* Sexual Assault by Aggravated Physical Force or Restraint is a registrable offense. It is a felony of the third degree [*10-year maximum*], except that (1) the maximum term of imprisonment is five years greater than that otherwise applicable to a felony of the third degree; and (2) it is a felony of the second degree [*20-year maximum*] if the actor violates subsection (1) of this Section and in so doing:

- (a)** knowingly uses or explicitly or implicitly threatens to use a deadly weapon and knows that this act causes the other person to submit to or perform the act of sexual penetration or oral sex; or
- (b)** knowingly acts with one or more persons who:
 - (i)** also engage in an act or acts of sexual penetration or oral sex with the same victim at the same place at a time contemporaneous with the actor's violation of this Section; or
 - (ii)** assist in the use of or threat to use aggravated physical force or restraint when the actor's act of sexual penetration or oral sex occurs; or
- (c)** causes serious bodily injury to any person, and is aware of, yet recklessly disregards, the risk of causing such injury.

(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the

other person submitted to or performed the act of sexual penetration or oral sex under the circumstances described in subsection(1)(b). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a circumstance described in that subsection. If applicable, the actor may raise an affirmative defense of Explicit Prior Permission according to the terms of Section 213.10.

SECTION 213.2 SEXUAL ASSAULT BY PHYSICAL FORCE OR RESTRAINT

(1) *Sexual Assault by Physical Force or Restraint.* An actor is guilty of Sexual Assault by Physical Force or Restraint when:

(a) the actor causes another person to submit to or perform an act of sexual penetration or oral sex; and

(b) the act is without effective consent because:

(i) the actor uses or explicitly or implicitly threatens to use physical force or restraint against anyone; and

(ii) the actor's use of or threat to use physical force or restraint causes the other person to submit to or perform the act of sexual penetration or oral sex; and

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (a) and (b) are present.

(2) *Grading.* Sexual Assault by Physical Force or Restraint is a felony of the third degree [*10-year maximum*]. It is a registrable offense when the actor has previously been convicted of a felony sex offense.

(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the other person submitted to or performed the act of sexual penetration or oral sex under the circumstances described in subsection (1)(b). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a circumstance described in that subsection. If applicable, the actor may raise an affirmative defense of Explicit Prior Permission according to the terms of Section 213.10.

SECTION 213.3 SEXUAL ASSAULT OF AN INCAPACITATED, VULNERABLE, OR LEGALLY RESTRICTED PERSON

(1) *Sexual Assault of an Incapacitated Person.* An actor is guilty of Sexual Assault of an Incapacitated Person when:

(a) the actor causes another person to submit to or perform an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act, the other person:

(i) is sleeping, unconscious, or physically unable to communicate lack of consent; or

(ii) lacks substantial capacity to appraise, control, or remember the person's own sexual conduct or that of anyone else because of a substance administered to that person, without that person's knowledge or consent; and the actor administered the incapacitating substance for the purpose of causing that incapacity or knows that it was surreptitiously administered by another for that purpose; and

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (a) and (b) are present.

Sexual Assault of an Incapacitated Person is a felony of the third degree [*10-year maximum*]. It is a registrable offense when the actor has previously been convicted of a felony sex offense.

(2) *Sexual Assault of a Vulnerable Person.* An actor is guilty of Sexual Assault of a Vulnerable Person when:

(a) the actor causes another person to submit to or perform an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act, the other person:

(i) has an intellectual, developmental, or mental disability, or a mental illness, that makes the person substantially incapable of appraising the nature of the sexual activity involved, or of understanding the right to give or withhold consent in sexual encounters, and the actor has no

similarly serious disability; or

(ii) is passing in and out of consciousness; or

(iii) lacks substantial capacity to communicate lack of consent; or

(iv) is wholly or partly undressed, or in the process of undressing, for the purpose of receiving nonsexual professional or commercial services from the actor and has not given the actor explicit prior permission to engage in that act; and

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (a) and (b) are present.

Sexual Assault of a Vulnerable Person is a felony of the fourth degree [*five-year maximum*].

(3) *Sexual Assault of a Legally Restricted Person.* An actor is guilty of Sexual Assault of Legally Restricted Person when:

(a) the actor, who did not have a consensual sexually intimate relationship with the other person at the time that a state-imposed restriction on that person's liberty began, causes the other person to submit to or perform an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act, the other person is:

(i) in custody, incarcerated, on probation, on parole, under civil commitment, in a pretrial release or pretrial diversion or treatment program, or in any other status involving a state-imposed restriction on liberty; and

(ii) the actor is in a position of actual or apparent authority or supervision over the restriction on the other person's liberty; and

(c) the actor knows that the circumstances described in paragraphs (a) and (b) are present.

Sexual Assault of a Legally Restricted Person is a felony of the fifth degree [*three-year maximum*].

(4) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when a condition or circumstance described in subsections (1)(b), (2)(b), or (3)(b) existed at the time

the other person submitted to or performed the act of sexual penetration or oral sex. Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a condition or circumstance described in these subsections.

SECTION 213.4. SEXUAL ASSAULT BY EXTORTION

(1) *Sexual Assault by Extortion.* An actor is guilty of Sexual Assault by Extortion when:

(a) the actor causes another person to submit to or perform an act of sexual penetration or oral sex; and

(b) the act is without effective consent because the actor explicitly or implicitly threatened:

(i) to accuse that person or anyone else of a criminal offense or of a failure to comply with immigration regulations; or

(ii) to take or withhold action as an official, or cause an official to take or withhold action, whether or not the purported official has actual authority to do so; or

(iii) to take any action or cause any consequence that would cause submission to or performance of the act of sexual penetration or oral sex by someone of ordinary resolution in that person's situation under all the circumstances; and

(iv) the actor's threat causes the other person to submit to or perform the act of sexual penetration or oral sex; and

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (a) and (b) are present.

(2) *Grading.* Sexual Assault by Extortion is a felony of the fourth degree [*five-year maximum*].

(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the other person submitted to or performed the act of sexual penetration or oral sex because of a threat described in subsection (1)(b). Submission, acquiescence, or words or conduct

that would otherwise indicate consent do not constitute effective consent when occurring in a circumstance described in that paragraph. If applicable, the actor may raise an affirmative defense of Explicit Prior Permission under Section 213.10.

SECTION 213.5 SEXUAL ASSAULT BY PROHIBITED DECEPTION

(1) An actor is guilty of Sexual Assault by Prohibited Deception when:

(a) the actor causes another person to submit to or perform an act of sexual penetration or oral sex; and

(b) the act is without effective consent because:

(i) the actor caused the other person to believe falsely that the act had diagnostic, curative, or preventive medical properties; or

(ii) the actor caused the other person to believe falsely that the actor was someone else who was personally known to that person; and

(iii) the actor's deception causes the other person to submit to or perform the act of sexual penetration or oral sex; and

(c) the actor knows that the circumstances described in paragraphs (a) and (b) are present.

(2) *Grading.* Sexual Assault by Prohibited Deception is a felony of the fifth degree [three-year maximum].

(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the other person submitted to or performed the act of sexual penetration or oral sex because of a circumstance described in subsection (1)(b). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring under a circumstance described in that paragraph.

SECTION 213.6. SEXUAL ASSAULT IN THE ABSENCE OF CONSENT

(1) An actor is guilty of Sexual Assault in the Absence of Consent when:

(a) the actor causes another person to submit to or perform an act of sexual penetration or oral sex; and

(b) the other person does not consent to that act; and

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (a) and (b) are present.

(2) *Grading.* Sexual Assault in the Absence of Consent is a felony of the fifth degree [*three-year maximum*], except that it is a felony of the fourth degree [*five-year maximum*] when:

(a) the other person has, by words or actions, expressly communicated unwillingness to submit to or perform the act, or the act is so sudden or unexpected that the other person has no adequate opportunity to express unwillingness before the act occurs; and

(b) the actor is aware of, yet recklessly disregards, the risk that a circumstance described in paragraph (a) existed at the time of the act of sexual penetration or oral sex.

(3) If applicable, the actor may raise an affirmative defense of Explicit Prior Permission under Section 213.10.

SECTION 213.7. OFFENSIVE SEXUAL CONTACT BY PHYSICAL FORCE OR RESTRAINT OR SURREPTITIOUS INCAPACITATION; OFFENSIVE SEXUAL CONTACT

(1) *Offensive Sexual Contact by Physical Force or Restraint or by Surreptitious Incapacitation.* An actor is guilty of Offensive Sexual Contact by Physical Force or Restraint or by Surreptitious Incapacitation when:

(a) the actor knowingly causes another person to submit to or perform an act of sexual contact with any person; and

(b) the act is without effective consent because:

(i) the actor uses or explicitly or implicitly threatens to use physical force or restraint against anyone, and that conduct causes the other person to submit to or perform the act of sexual contact; or

(ii) at the time of the act of sexual contact the other person lacks substantial capacity to appraise, control, or remember the person's own sexual conduct or that of anyone else because of a substance administered to that person, without that person's knowledge or consent; and the actor

administered the incapacitating substance for the purpose of causing that incapacity or knows that it was surreptitiously administered by another for that purpose; and

(c) the actor is aware of, yet recklessly disregards, the risk that a circumstance described in paragraph (b) is present, and that the other person submitted to or performed the act of sexual contact because of a circumstance described in paragraph (b).

Offensive Sexual Contact by Physical Force or Restraint or by Surreptitious Incapacitation is a felony of the fifth degree [*three-year maximum*].

(2) *Offensive Sexual Contact.* An actor is guilty of Offensive Sexual Contact when:

(a) the actor knowingly causes another person to submit to or perform an act of sexual contact with anyone; and

(b) the other person did not consent to that act, and the actor is aware of, yet recklessly disregards, the risk that the other person did not consent to that act; or

(c) that act is without effective consent because:

(i) the other person is unaware that such act is occurring, or is physically unable to communicate lack of consent at the time of the act; and the actor is aware of, yet recklessly disregards, the risk that the other person is in that condition at the time of the act; or

(ii) the act would be an offense as defined by Section 213.3(2) or (3), involving vulnerable or legally restricted persons, had the act been one of sexual penetration or oral sex; or

(iii) the act would be an offense as defined by Section 213.4, involving extortion, had the act been one of sexual penetration or oral sex; or

(iv) the act would be an offense as defined by Section 213.5, involving prohibited deception, had the act been one of sexual penetration or oral sex.

Offensive Sexual Contact is a petty misdemeanor [*six-month maximum*].

(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the other person submitted to or performed the act of sexual contact under a circumstance described in subsections (1)(b) or (2)(c). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring

under a circumstance described in those subsections. If applicable, an actor charged with a violation of subsections (1)(b)(i), (2)(b), or (2)(c)(iii) may raise an affirmative defense of Explicit Prior Permission under Section 213.10.

SECTION 213.8. SEXUAL OFFENSES INVOLVING MINORS

(1) *Sexual Assault of a Minor.* An actor is guilty of Sexual Assault of a Minor when:

(a) the actor engages in an act of sexual penetration or oral sex with another person or causes another person to submit to or perform an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act:

(i) the other person is younger than 16; and

(ii) the actor is more than five years older than the other person; and

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (a) and (b) exist.

Sexual Assault of a Minor is a felony of the fifth degree [*three-year maximum*] except that it is a felony of the fourth degree [*five-year maximum*] when at the time of the act the actor is 21 or older, and it is a felony of the third degree [*10-year maximum*] and a registrable offense when at the time of the act the actor is 21 or older, the other person is younger than 12, and the actor is aware of, yet recklessly disregards, the risk that the other person is younger than 12.

(2) *Incestuous Sexual Assault of a Minor.* An actor is guilty of Incestuous Sexual Assault of a Minor when:

(a) the actor engages in an act of sexual penetration or oral sex with another person or causes another person to submit to or perform an act of sexual penetration or oral sex; and

(b) at the time of the act, the actor is 18 or older and the other person is younger than 18; and

(c) the act is without effective consent because at the time of the act the actor is:

(i) a parent or grandparent of the other person, including a biological, step, adoptive, or foster parent or grandparent; or

(ii) the legal spouse, domestic partner, or sexual partner of a person described by subparagraph (i); or

(iii) a legal guardian or de facto parent of the other person, who resides intermittently or permanently in the same dwelling as the other person; and

(d) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (a) through (c) exist.

Incestuous Sexual Assault of a Minor is a felony of the third degree [*10-year maximum*]. It is a registrable offense when at the time of the act the other person is younger than 16.

(3) *Exploitative Sexual Assault of a Minor.* An actor is guilty of Exploitative Sexual Assault of a Minor when:

(a) the actor engages in an act of sexual penetration or oral sex with another person or causes another person to submit to or perform an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act:

(i) the other person is younger than 18; and

(ii) the actor is more than five years older than the other person; and

(iii) the actor holds a formal position of authority over the other person, such as a teacher, employer, religious leader, treatment provider, administrator, or coach; and

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (a) and (b) exist.

Exploitative Sexual Assault of a Minor is a felony of the fifth degree [*three-year maximum*]. It is a defense to a prosecution under Section 213.8(3) for the actor to prove by a preponderance of the evidence that the actor's position of authority over the other person did not impair the other person's ability to form an independent judgment about whether to consent to the act of sexual penetration or oral sex.

(4) *Fondling a Minor.* An actor is guilty of Fondling a Minor when:

(a) the actor knowingly fondles another person, or knowingly causes another person to submit to or perform an act of fondling with anyone; and

(b) the act is without effective consent because at the time of the act:

(i) the other person is younger than 12 and the actor is more than five years older than the other person; or

(ii) the other person is younger than 16 and the actor is more than seven years older than the other person; and

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraph (b)(i) or (ii) exist.

Grading. Fondling a Minor is a felony of the fifth degree [*three-year maximum*], except that it is a felony of the fourth degree [*five-year maximum*] when at the time of the act the actor is 21 or older, the other person is younger than 12, and the actor is aware of, yet recklessly disregards, the risk that the other person is younger than 12.

(5) ***Aggravated Offensive Sexual Contact with a Minor.*** An actor is guilty of Aggravated Offensive Sexual Contact with a Minor when:

(a) the actor knowingly engages in an act of sexual contact with another person or causes another person to submit to or perform an act of sexual contact; and

(b) the act is without effective consent because at the time of the act:

(i) the other person is younger than 18; and

(ii) the actor is more than five years older than the other person; and

(iii) the act, had it been an act of sexual penetration or oral sex, would be an offense as defined by Section 213.1, 213.2, 213.3, 213.4, 213.5, or 213.8(2) or (3); and

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraph (b)(i) and (ii) exist.

Aggravated Offensive Sexual Contact with a Minor is a felony of the fourth degree [*five-year maximum*].

(6) ***Offensive Sexual Contact with a Minor.*** An actor is guilty of Offensive Sexual Contact with a Minor when:

(a) the actor knowingly engages in, or causes another person to submit to or perform:

(i) an act of sexual contact; or

(ii) an act involving the touching of the tongue of anyone to any body part or object, when that act is for the purpose of anyone's sexual arousal, sexual gratification, sexual humiliation, or sexual degradation; and

(b) the act is without effective consent because at the time of the act:

(i) the other person is younger than 12, and the actor is more than five years older than the other person; or

(ii) the other person is younger than 16, and the actor is more than seven years older than the other person; and

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraph (b)(i) or (ii) exist.

Offensive Sexual Contact with a Minor is a misdemeanor [*one-year maximum*], except that it is a felony of the fifth degree [*three-year maximum*] when at the time of the act the actor is 21 or older, the other person is younger than 12, and the actor is aware of, yet recklessly disregards, the risk that the other person is younger than 12.

(7) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the circumstances described in any of the subsections (1) through (6) exist at the time of the act. Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring under the circumstances described in any of those subsections.

(8) *Calculation of ages.* The age of any person described in this Section is calculated according to the "days-and-month" approach, which determines age by the day, month, and year of that person's birth, measured in whole numbers.

[(9) *Affirmative defense of marriage.* It is an affirmative defense to a charge under subsections (1), (3), (4), and (6) of this Section, and to a charge under subsection (5)(d) based on an act that would be a violation of subsection (8)(3) had it been an act of sexual penetration or oral sex, that the actor was the legal spouse of the other person at the time of the act of sexual penetration, oral sex, fondling, or sexual contact.]

SECTION 213.9. SEX TRAFFICKING

(1) *Sex Trafficking.* An actor is guilty of Sex Trafficking if the actor knowingly recruits, entices, transports, transfers, harbors, provides, isolates, or maintains a person by

any means, with the purpose of facilitating a commercial sex act involving that person when:

(a) coercion is being, or will be, used to cause the person to submit to or perform a commercial sex act, which therefore will be without effective consent; and the actor knows that coercion is being or will be used to cause the person to submit to or perform that commercial sex act; or

(b) the person is younger than 18 and is being, or will be, caused to submit to or perform a commercial sex act; and the actor is aware of, yet recklessly disregards, the risk that the person is younger than 18 and is being, or will be, caused to submit to or perform the commercial sex act.

(2) Definitions. For purposes of Section 213.9(1):

(a) “Coercion” means:

(i) using or threatening to use physical force or restraint against anyone;

(ii) taking, destroying, or threatening to take or destroy the person’s money, credit or debit card, passport, driver’s license, immigration document, or other government-issued identification document, including a document issued by a foreign government, or any travel document pertaining to the person;

(iii) restricting or threatening to restrict the person’s access to a substance that is a controlled substance under the federal Controlled Substance Act, 21 U.S.C. § 801 et seq.;

(iv) administering or withholding a controlled substance in circumstances that impair the person’s physical or mental ability to avoid, evade, or flee from the actor;

(v) using a scheme, plan, deception, misrepresentation, or pattern of behavior for the purpose of causing the person to believe that failing to submit to or perform a commercial sex act would result in physical, psychological, financial, or reputational harm to anyone that is sufficiently serious to cause someone of ordinary resolution who is of the same background, in the same circumstances, and in the same physical and mental

condition as that person, to submit to or perform a commercial sex act in order to avoid incurring that harm; or

(vi) any combination of these circumstances.

(b) “Commercial Sex Act” means any act of sexual penetration, oral sex, or sexual contact performed in exchange, or the expectation of exchange, for money, property, services, or any other thing of value given to or received by anyone.

(3) *Grading.* Sex Trafficking is a felony of the third degree [10-year maximum].

(4) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the circumstances described in subsection (1) are present. Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring under a circumstance described in that subsection. If applicable, the actor may raise an affirmative defense of Explicit Prior Permission under Section 213.10 when:

(a) a charge of Sex Trafficking is based on coercion under subsection (1)(a);
and

(b) the person giving such permission does so before that person has been subjected to trafficking under subsection (1) and before that person has been subjected to coercion under subsection (1)(a).

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).

SECTION 213.11. SENTENCING AND COLLATERAL CONSEQUENCES OF CONVICTION

(1) *Definitions.* For purposes of this Article:

(a) “sentencing consequences” are penalties, disabilities, or disadvantages that are part of the sentence imposed by the court or by an agency authorized to set the terms of parole or post-release supervision in connection with conviction of an Article 213 offense; and

(b) “collateral consequences” are penalties, disabilities, or disadvantages, however denominated, that are authorized or required by federal, state, or local law as a direct result of an individual’s conviction of an Article 213 offense but are not part of the sentence imposed by the court or by an agency authorized to set the terms of parole or post-release supervision in connection with that conviction.

(2) *General Rule.* Sentencing procedure, the authorized disposition of a person convicted of an Article 213 offense, sentencing consequences, and collateral consequences are specified in Articles 6 and 7 of this Code,* and are subject to the additional requirements of this Section.

(3) *Additional Requirements for Sentencing Consequences.* Notwithstanding any contrary provisions of law, the conditions of any suspended sentence under Section 6.02(2), any sentence to probation under Section 6.05, and any terms of parole or post-release supervision under Section 6.13 must be eligible for early relief under Section 213.11J and must not include:

(a) a condition that:

(i) imposes an obligation to register with law enforcement that carries requirements other than those authorized under Sections 213.11A-213.11G and Section 213.11J;

(ii) permits access to the person’s registry information, except as authorized under Section 213.11H; or

(iii) authorizes or permits any government official to notify a public or private entity or individual, other than a government law-enforcement agency or individual, that the person is registered with law enforcement or resides, works, or studies in the locality;

* MODEL PENAL CODE: SENTENCING, *Official Statutory Text* (May 24, 2017).

(b) a condition that restricts the person's occupation or employment, except as required by state law or authorized under paragraph (d) of this subsection; or

(c) except as authorized under paragraph (d) of this subsection, a condition that:

(i) requires the person to submit to GPS monitoring; or

(ii) restricts the person's education, Internet access, or place of residence.

(d) The court, and any agency authorized to set the terms of parole or post-release supervision, may impose a condition, not required by state law, that restricts the person's occupation or employment, or a condition specified in paragraph (c) of this subsection, only if the court or agency determines that the condition is manifestly required in the interest of public safety. That determination must be:

(i) made after due consideration of the nature of the offense; all other circumstances of the case; the person's prior record; and the potential negative impacts of the burden, restriction, requirement, or government action on the person, on the person's family, and on the person's prospects for rehabilitation and reintegration into society; and

(ii) accompanied by a written statement of the official setting the condition, explaining the need for it, the evidentiary basis for the finding of need, and the reasons why a more narrowly drawn condition would not adequately meet that need.

(e) Any condition imposed under paragraph (d) must be:

(i) drawn as narrowly as possible to achieve the goal of public safety; and

(ii) imposed only for a period not to exceed that permitted under Section 213.11F for the duties to register and keep the registration current.

(4) *Additional Requirements for Collateral Consequences that are Applicable Primarily to Persons Convicted of a Sexual Offense.* Notwithstanding any contrary provisions of law, collateral consequences applicable primarily to persons convicted of a sexual offense, including the obligation to register with law enforcement; associated duties; restrictions on occupation and employment, education, and place of residence applicable primarily to

persons convicted of a sexual offense; and other collateral consequences applicable primarily to persons convicted of a sexual offense, are authorized and their scope and implementation are delineated as follows:

(a) The person's obligation to register for law-enforcement purposes is governed by Section 213.11A.

(b) Notification of the person's obligation to register and associated duties is governed by Section 213.11B.

(c) The time of initial registration is governed by Section 213.11C.

(d) The information required upon registration is specified in Section 213.11D.

(e) The duty to keep registration current is specified in Section 213.11E.

(f) The duration of the registration requirements is specified in Section 213.11F.

(g) Penalties for failure to register are governed by Section 213.11G.

(h) Access to registry information is governed by Section 213.11H.

(i) Collateral consequences applicable primarily to persons convicted of a sexual offense, other than the obligation to register for law-enforcement purposes and restrictions on occupation and employment required by state law, are governed by Section 213.11I.

(j) Standards and procedures for relief from the obligation to register, associated duties, and other collateral consequences applicable specifically to persons convicted of a sexual offense are governed by Section 213.11J.

SECTION 213.11A. REGISTRATION FOR LAW-ENFORCEMENT PURPOSES

(1) Offenses Committed in This Jurisdiction

(a) Except as provided in subsection (3), every person convicted of an offense that is designated a registrable offense in this Article must, in addition to any other sanction imposed upon conviction, appear personally and register, at the time specified in Section 213.11C, with the law-enforcement authority designated by law in the [county] where the person resides. If the person who is required to register

under this subsection does not reside in this jurisdiction, but works in this jurisdiction, registration must be accomplished in the [county] where the person works; if the person does not reside or work in this jurisdiction but is enrolled in a program of study in this jurisdiction, registration must be accomplished in the [county] where the person studies.

(b) Notwithstanding any other provision of law, no conviction for an offense under this Article, or for any other criminal offense in this jurisdiction, will require the person convicted to register with law enforcement or other governmental authority in a registry regime applicable primarily to persons convicted of a sexual offense, unless this Article designates that offense as a registrable offense.

(2) Offenses Committed in Other Jurisdictions

(a) *Duty to register and related duties.* Every person currently obliged to register with law enforcement or other public authority in another jurisdiction, because of a sexual offense committed in that jurisdiction, who subsequently resides, works, or enrolls in a program of study in this jurisdiction, must register with the law-enforcement authority designated by law and comply with the requirements of Sections 213.11A-213.11G, provided that the offense committed in the other jurisdiction is comparable to an offense that would be registrable under this Article if committed in this jurisdiction.

(b) *Place of registration.* If the person who is obliged to register under paragraph (a) resides in this jurisdiction, registration must be accomplished in the [county] where the person resides. If the person who is obliged to register under paragraph (a) does not reside in this jurisdiction, but works in this jurisdiction, registration must be accomplished in the [county] where the person works; if the person does not reside or work in this jurisdiction but is enrolled in a program of study in this jurisdiction, registration must be accomplished in the [county] where the person studies.

(c) Determining the comparability of in-state and out-of-state offenses

(i) *Standard.* An offense committed in another jurisdiction is comparable to a registrable offense under this Article if and only if the elements of the out-of-state offense are no broader than the elements of that

registrable offense. When, regardless of the conduct underlying the out-of-state conviction, the out-of-state offense can be committed by conduct that is not sufficient to establish a registrable offense under this Article, the two offenses are not comparable.

(ii) *Procedure.* Before determining that an offense committed in another jurisdiction is comparable to a registrable offense under this Article, the authority designated to make that determination must give the person concerned notice and an opportunity to be heard on that question, either orally or in writing.

(d) Notwithstanding any other provision of law, no conviction for a sexual offense in another jurisdiction will require the offender to register with law enforcement or other governmental authority in this jurisdiction, unless that conviction currently requires the offender to register with law enforcement or other governmental authority in the jurisdiction where the offense was committed and the conviction is for an offense comparable to an offense that would be registrable under this Article if committed in this jurisdiction.

(3) *Persons under the age of 18.* No person may be subject to the obligation to register under subsection (1) of this Section, to other obligations or restrictions under this Section, or to additional collateral consequences under Section 213.11I, on the basis of a criminal conviction for an offense committed when the person was under the age of 18, or on the basis of an adjudication of delinquency based on conduct when the person was under the age of 18; provided, however, that this subsection (3) does not apply to a person convicted of a criminal offense of Sexual Assault by Aggravated Physical Force or Restraint if the person was at least 16 years old at the time of that offense.

SECTION 213.11B. NOTIFICATION OF THE OBLIGATION TO REGISTER AND ASSOCIATED DUTIES

(1) Before accepting a guilty plea, and at the time of sentencing after conviction on a guilty plea or at trial, the sentencing judge must:

(a) inform the person who is subject to registration of the registration requirement;

(b) explain the associated duties, including:

(i) the identity and location, or procedure for determining the identity and location, of the law-enforcement agency where the person must appear to register as required by Section 213.11A;

(ii) the duty to register with a law-enforcement agency in any locality where the person subsequently resides, including the possible duty to register with a law-enforcement agency or other government authority in another jurisdiction to which the person subsequently moves;

(iii) the duty to report to that office or agency periodically in person, as required by Section 213.11E(1); and

(iv) the duty to promptly notify at least one of the local jurisdictions where the person is registered of any change in the registry information pertaining to that person, as required by Section 213.11E(2);

(c) notify the person of the right to petition for relief from those duties as provided in Section 213.11J;

(d) confirm that defense counsel has explained to that person those duties and the right to petition for relief from those duties;

(e) confirm that the person understands those duties and that right;

(f) require the person to read and sign a form stating that defense counsel and the sentencing judge have explained the applicable duties and the right to petition for relief from those duties, and that the person understands those duties and that right;

(g) ensure that if the person convicted of a sexual offense cannot read or understand the language in which the form is written, the person will be informed of the pertinent information by other suitable means that the jurisdiction uses to communicate with such individuals; and

(h) satisfy all other notification requirements applicable under Model Penal Code: Sentencing, Section 7.04(1).

(2) At the time of sentencing, the convicted person shall receive a copy of the form signed pursuant to subsection (1)(f) of this Section.

(3) If the convicted person is sentenced to a custodial sanction, an appropriate

official must, shortly before the person's release from custody, again inform the person of the registration requirement, explain the associated rights and duties, including the right to petition for relief from those duties, and require the person to read and sign a form stating that those rights and duties have been explained and that the person understands those rights and duties. At the time of release from custody, the person concerned shall receive a copy of that form.

SECTION 213.11C. TIME OF INITIAL REGISTRATION

A person subject to registration must initially register:

- (a) if incarcerated after sentence is imposed, then within three business days after release; or**
- (b) if not incarcerated after sentence is imposed, then not later than five business days after being sentenced for the offense giving rise to the duty of registration.**

SECTION 213.11D. INFORMATION REQUIRED IN REGISTRATION

(1) A person subject to registration under Section 213.11A must provide the following information to the appropriate official for inclusion in the law-enforcement registry:

- (a) the name of the person (including any alias used by the person);**
- (b) the Social Security number, if any, of the person;**
- (c) the address of each place where the person resides or expects to reside;**
- (d) the name and address of any place where the person works or expects to work;**
- (e) the name and address of any place where the person is a student or expects to be a student;**
- (f) the license-plate number and a description of any vehicle owned or regularly operated by the person.**

(2) *Supplementary Information.* The local jurisdiction in which a person registers must ensure that the following information is included in the registry for that person and

kept up to date:

(a) the text of the provision of law defining the sexual offense for which the person is registered;

(b) the person's criminal history, including the date and offense designation of all convictions; and the person's parole, probation, or supervised-release status;

(c) any other information required by law.

(3) *Registrants Who Lack a Stable Residential Address.* If a person required to register lacks a stable residential address, the person must, at the time of registration, report with as much specificity as possible the principal place where the person sleeps, instead of the information required under subsection (1)(c).

(4) The local jurisdiction in which a person registers must promptly provide the information specified in subsections (1), (2), and (3) of this Section to an appropriate law-enforcement authority in every other jurisdiction in which the registrant works or expects to work and is enrolled or expects to enroll in a program of study.

(5) *Correction of Errors.* Each locality where a person registers and each locality that receives information about a registrant pursuant to subsection (4) of this Section must provide efficacious, reasonably accessible procedures for correcting erroneous registry information. Each locality where a person registers must, at the time of registration, provide the registrant instructions on how to use those procedures to seek correction of registry information that the registrant believes to be erroneous.

SECTION 213.11E. DUTY TO KEEP REGISTRATION CURRENT

(1) *Periodic Updates.* A person who is required to register under Section 213.11A must, not less frequently than once every year, appear in person in at least one jurisdiction where the person is required to register, verify the current accuracy of the information provided in compliance with Section 213.11D(1), allow the jurisdiction to take a current photograph, and report any change in the identity of other jurisdictions in which the person is required to register or in which the person works or is enrolled in a program of study.

(2) Change of Circumstances

(a) Except as provided in paragraph (b) of this subsection, a person subject to registration under Section 213.11A must, not later than five business days after each change of name and each change in the location where the person resides, works, or is enrolled in a program of study, notify at least one local jurisdiction specified in Section 213.11A of:

(i) all changes in the information that the person is required to provide under Section 213.11D, and

(ii) the identity of all other jurisdictions in which the person resides, works, or is enrolled in a program of study.

(b) Registrants who lack a stable residential address, and therefore report instead the principal place or places where they sleep, as provided in Section 213.11D(3), must confirm or update those locations once every 90 days but need not do so more often.

(c) Each jurisdiction that maintains a registry of persons who have been convicted of a sexual offense must permit registrants to notify the jurisdiction, by one or more reliable, readily accessible methods of communication of the jurisdiction's choosing, such as U.S. mail, submission of an appropriate form online, or otherwise, of any change of name, residence, employment, student status, or vehicle regularly used, and any change in the identity of all other jurisdictions in which the person resides, works, or is enrolled in a program of study.

(d) Each jurisdiction where a person registers pursuant to Section 213.11A must advise the registrant, at the time of registration, of the registrant's option to use the means of communication established under subsection (2)(c), rather than appearing personally for that purpose, if the registrant so chooses.

(3) The local jurisdiction notified of any changes pursuant to subsections (1) and (2) must promptly provide the registrant a written receipt confirming that the updated information has been provided, and must provide that information to all other jurisdictions in which the person resides, works, or is enrolled in a program of study.

SECTION 213.11F. DURATION OF REGISTRATION REQUIREMENT

(1) Subject to the provisions of subsection (3) of this Section and Section 213.11J, a person required to register must keep the registration current for a period of 15 years, beginning on the date when the registrant is released from custody after conviction for the offense giving rise to the registration requirement; or if the registrant is not sentenced to a term of incarceration, beginning on the date when the registrant was sentenced for that offense.

(2) At the expiration of that 15-year period, the duty to keep that registration current will terminate; the person who had been registered will not be subject to any further duties associated with that registration requirement; and no public or private agency other than a government law-enforcement agency shall thereafter be permitted access to the person's registry information.

(3) *Early termination.* If, during the first 10 years of the period during which a person is required to keep registration information current, the person:

(a) successfully completes any period of supervised release, probation, or parole, and satisfies any financial obligation such as a fine or restitution, other than a financial obligation that the person, despite good-faith effort, has been unable to pay; and

(b) successfully completes any required sex-offense treatment program; and

(c) is not convicted of, or facing pending charges for, any subsequent offense under this Article, or any subsequent sexual offense in another jurisdiction that would be an offense under this Article if committed in this jurisdiction; then:

the duty to keep that registry information current will terminate; the person who had been registered will not be subject to any further duties associated with that registration requirement; and subsequent access to registry information will be governed by subsection (4).

(4) *Access to Registry Information after Termination.* When the person's obligation to register and to keep registry information current terminates under subsection (2) or (3), subsequent access to registry information is limited as follows:

(a) Registry information recorded as of the date when termination takes effect may remain available to any government law-enforcement agency seeking

disclosure of that information in compliance with Section 213.11H(1)(a).

(b) Except as provided in paragraph (a), no public or private agency may thereafter be permitted access to registry information concerning the person whose obligation to register and keep registry information public has terminated.

(5) *Notice of Termination.* When a person's duty to register terminates under subsection (2) or (3), the law-enforcement agency in the local jurisdiction where the person resides must:

(a) include in its registry a notice that the person's duty to register and all duties associated with that registration requirement have terminated; and

(b) upon the person's request, notify all other jurisdictions where the person is registered and where information about the registrant has been provided pursuant to Section 213.11D(4) that the person's duty to register and all duties associated with that registration requirement have terminated and that no public or private agency other than a government law-enforcement agency shall thereafter be permitted to have access to that registry information.

(6) *Certification.* When a person's duty to register terminates under subsection (2) or (3), the law-enforcement agency in the local jurisdiction where the person resides must, upon request, provide that person a certificate attesting that person's duty to register and all duties associated with that registration requirement have terminated.

SECTION 213.11G. FAILURE TO REGISTER

(1) *Offense of Failure to Register.* A person required to register under Section 213.11A is guilty of Failure to Register, a misdemeanor, if that person knowingly fails to register as required by Sections 213.11A, 213.11C, 213.11D, and 213.11E(1), or knowingly fails to update a registration as required by Section 213.11E(2).

(2) *Affirmative Defense.* In a prosecution for Failure to Register under subsection (1) of this Section, it is an affirmative defense that:

(a) circumstances beyond the control of the accused prevented the accused from complying;

(b) the accused did not voluntarily contribute to the creation of those circumstances in reckless disregard of the requirement to comply; and

(c) after those circumstances ceased to exist, the accused complied as soon as reasonably feasible.

SECTION 213.11H. ACCESS TO REGISTRY INFORMATION

(1) Confidentiality

(a) Each law-enforcement agency with which a person is registered and each law-enforcement agency that receives information about a registrant pursuant to Section 213.11D(4) must exercise due diligence to ensure that all information about the registrant remains confidential, except that relevant information about a specific registrant must be made available to any government law-enforcement agency that requests information to aid in the investigation of a specific criminal offense.

(b) Any disclosure pursuant to paragraph (a) must include a warning that:

(i) the law-enforcement agency receiving the information must exercise due diligence to ensure that the information remains confidential;

(ii) such information may be disclosed and used as provided in paragraph (a), but otherwise must not be disclosed to any person or public or private agency;

(iii) such information may be used only for the purpose requested;

(iv) such information may not be used to injure, harass, or commit a crime against the registrant or anyone else; and

(v) any failure to comply with the confidentiality and use-limitation requirements of paragraph (b) could result in civil or criminal penalties.

(2) *Unauthorized Disclosure of Registry Information.* An actor is guilty of Unauthorized Disclosure of Registry Information if:

(a) the actor, having received registry information as provided in subsection (1), knowingly or recklessly discloses that information, or permits that information to be disclosed, to any person not authorized to receive it; or

(b) the actor obtains access to registry information by computer trespassing or otherwise in violation of law and subsequently knowingly or recklessly discloses

that information, or permits that information to be disclosed, to any other person.

Unauthorized Disclosure of Registry Information is a felony of the fourth degree [five-year maximum].

SECTION 213.11I. ADDITIONAL COLLATERAL CONSEQUENCES OF CONVICTION

(1) *Definition.* For purposes of this Section, the term “additional collateral consequence” means any collateral consequence, as defined in Section 213.11(1)(b), that is applicable primarily to persons convicted of a sexual offense, other than the obligation to register with law enforcement specified in Section 213.11A, the associated duties and restrictions specified in Sections 213.11C-213.11G, and any restriction on occupation or employment required by state law. These additional collateral consequences include any government-imposed program or restriction applicable primarily to persons convicted of a sexual offense that restricts the convicted person’s occupation or employment except as required by state law; limits the convicted person’s education, Internet access, or place of residence; uses methods such as GPS monitoring to track the person’s movements; notifies a community organization or entity or a private party that the person resides, works, or studies in the locality; or permits a public or private agency, organization, or person to access registry information, except as authorized by Section 213.11H. An “additional collateral consequence” under this Section does not include a collateral consequence that applies to persons convicted of many different offenses, such as government-imposed limits on voting, jury service, access to public benefits, and other government-imposed penalties, disabilities, and disadvantages that result from conviction of a wide variety of offenses, including but not limited to sexual offenses.

(2) *Additional Collateral Consequences Precluded for Persons Not Required to Register.* Notwithstanding any other provision of law, no person shall be subject to an additional collateral consequence, as defined in subsection (1), unless that person has been convicted of a registrable offense and is required to register with law enforcement under Section 213.11A.

(3) *Additional Collateral Consequences Precluded for Persons Required to Register.* Notwithstanding any other provision of law, a person required to register with law enforcement under Section 213.11A must not be subject to any government action notifying

a community organization or entity or a private party that the person resides, works, or studies in the locality; and must not be subject to any government action permitting a public or private agency, organization, or person to access registry information, except as authorized by Section 213.11H.

(4) Additional Collateral Consequences Available for Persons Required to Register.

Notwithstanding any other provision of law, a person required to register with law enforcement under Section 213.11A may be subject to an additional collateral consequence not specified in subsection (3), but only if an official designated by law, after affording the person notice and an opportunity to respond concerning the proposed additional collateral consequence, determines that the additional collateral consequence is manifestly required in the interest of public safety, after due consideration of:

- (a) the nature of the offense;
- (b) all other circumstances of the case;
- (c) the person's prior record; and

(d) the potential negative impacts of the burden, restriction, requirement, or government action on the person, on the person's family, and on the person's prospects for rehabilitation and reintegration into society.

(5) Limitations. The designated official who approves any additional collateral consequence pursuant to subsection (4) of this Section must determine that the additional collateral consequence:

(a) satisfies all applicable notification requirements set forth in Section 213.11B;

(b) is authorized by law;

(c) is drawn as narrowly as possible to achieve the goal of public safety;

(d) is accompanied by a written statement of the official approving the additional collateral consequence, explaining the need for it, the evidentiary basis for the finding of need, and the reasons why a more narrowly drawn restriction, disability, or government action would not adequately meet that need; and

(e) is imposed only for a period not to exceed that permitted under Section 213.11F for the duties to register and keep the registration current.

(6) Confidentiality. In any proceeding under subsection (4) to consider whether to

impose an additional collateral consequence, the official responsible for making the determination must insure that the identity of the registrant concerned remains confidential.

SECTION 213.11J. DISCRETIONARY RELIEF FROM REGISTRATION AND OTHER SENTENCING CONSEQUENCES AND COLLATERAL CONSEQUENCES

(1) *Petition for Discretionary Relief.* At any time prior to the expiration of any sentencing consequences imposed under Section 213.11(3) or any collateral consequences applicable primarily to persons convicted of a sexual offense, including the obligation to register, the obligation to comply with associated duties, restrictions on occupation or employment required by state law, collateral consequences imposed under Section 213.11(4), and additional collateral consequences imposed under Section 213.11I(4), the registrant may petition the sentencing court, or other authority authorized by law, to order relief from all or part of those consequences. If the obligation to register or other consequences arose from an out-of-state conviction, the petition may be addressed to a court of general jurisdiction or other authority of this state in the place where the person concerned is registered.

(2) *Proceedings on Petition for Discretionary Relief.* The authority to which the petition is addressed may either dismiss the petition summarily, in whole or in part, or institute proceedings to rule on the merits of the petition. If that authority chooses to entertain submissions, hear argument, or take evidence prior to ruling on the merits of the petition, it must give notice of the proceeding and an opportunity to participate in it to the prosecuting attorney for the offense out of which the obligation to register or other consequence arose. If the obligation to register or other consequence arose from an out-of-state conviction, notice of the proceeding and an opportunity to participate in it must be addressed to the principal prosecuting attorney in the jurisdiction of this state where the authority to which the petition is addressed is located.

(3) *Judgment on Proceedings for Discretionary Relief.* Following proceedings for discretionary relief under subsection (2), the authority to which the petition is addressed may grant or deny relief, in whole or in part, from the obligation to register, any associated

duties, and any of the sentencing consequences or collateral consequences in question. When that order terminates the registrant's obligation to register and to keep registry information current, subsequent disclosure of registry information is governed by subsection (5) of this Section. An order granting or denying relief following those proceedings must explain in writing the reasons for granting or denying relief.

(4) *Standard for Discretionary Relief.* The authority to which the petition is addressed must grant relief if it finds, after proceedings to rule on the merits pursuant to subsection (2), that the sentencing consequence or collateral consequence in question is likely to impose a substantial burden on the registrant's ability to reintegrate into law-abiding society, and that public-safety considerations do not require continued imposition of the obligation, duty, or consequence after due consideration of:

- (a) the nature of the offense;
- (b) all other circumstances of the case;
- (c) the registrant's prior and subsequent record of criminal convictions, if any; and
- (d) the potential negative impacts of the burden, restriction, or government action on the registrant, on the registrant's family, and on the registrant's prospects for rehabilitation and reintegration into society.

Relief must not be denied arbitrarily or for any punitive purpose.

(5) *Access to Registry Information after Discretionary Relief.* When an order of discretionary relief terminates the person's obligation to register and to keep registry information current, all limits on access to registry information under Section 213.11H shall remain in effect. Registry information recorded as of the date when discretionary relief takes effect must remain available to any government law-enforcement agency seeking disclosure of that information in compliance with Section 213.11H(1)(a) but must not otherwise be disclosed.

(6) *Notice to Other Jurisdictions Concerning Discretionary Relief.*

(a) When discretionary relief is granted to a person under this Section, the authority granting the order of relief must, upon the person's request, give notice of that order to any other jurisdiction where the person concerned is registered or where information about the person has been provided pursuant to Section

213.11D(4).

(b) When the other jurisdiction notified is a jurisdiction of this state, the notice must specify that the other jurisdiction must extend the same relief from registration-related duties and any other sentencing consequences or collateral consequences. When that order terminates the registrant's obligation to register and to keep registry information current, that notice must also specify the limits on subsequent disclosure of registry information applicable under subsection (5).

(7) *Proceedings Subsequent to Discretionary Relief.* An order of discretionary relief granted under this Section does not preclude the authority to which the petition was addressed from later revoking that order if, on the basis of the registrant's subsequent conduct or any other substantial change in circumstances, the authority finds by a preponderance of the evidence that public-safety considerations, weighed against the burden on the registrant's ability to reintegrate into law-abiding society, no longer justify the order of relief.

(8) *Confidentiality.* In any proceedings under this Section to consider whether to grant or deny discretionary relief, the official responsible for making the determination must insure that the identity of the registrant concerned remains confidential.

SECTION 213.12. PROCEDURAL AND EVIDENTIARY PRINCIPLES APPLICABLE TO ARTICLE 213

[reserved]

