



THE AMERICAN LAW INSTITUTE

# MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES

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*Council Draft No. 10*

(December 13, 2019)

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## SUBJECTS COVERED

**ARTICLE 213** Part I – Grading: General  
Part II – Grading: Comments to Sections 213.1-213.7; 213.9  
Part III – Sections 213.8; 213.12A-213.12J  
Part IV – Section 213.11 (for discussion only)

**APPENDIX A** Pertinent 1962 Code Provisions

**APPENDIX B** Proposed Black Letter of Article 213

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

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Sexual Assault and Related Offenses**

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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. Law 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.

## **PROJECT STATUS AT A GLANCE**

Section 213.0(6)(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(6)(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 the black letter and commentary to Sections 213.8, 213.11, and 213.12 can be found in Preliminary Draft No. 10 (2019) and Council Draft No. 9 (2019). The most recent earlier versions of the material on grading can be found in the Reporters' Memoranda to Preliminary Draft No. 10 (2019) and Council Draft No. 9 (2019).



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

### **Council Draft No. 10**

Stephen J. Schulhofer, *Reporter*  
Erin Murphy, *Associate Reporter*

December 10, 2019

### **REPORTERS' MEMORANDUM**

Council Draft 10 is in four parts. Part I, which ultimately will become a Section in the introductory material of the Final Draft, discusses “Grading: General Considerations.” It explains the general process that guided the selection of penalties found in Article 213.

Part II sets out the grading judgments for previously approved Sections in which grading decisions had been reserved; these judgments and the Comment/Reporters’ Notes explaining them, will be inserted at the appropriate places in the Final Draft where those Sections are presented. Appendix A to this Memorandum is a table summarizing the grade and registrability of each offense.

Part III includes two Sections presented for approval, Section 213.8 (Offenses Against Children) and Section 213.12 (Registration). With respect to Section 213.8, the age-ranges and penalties were revised in light of comments received at the October meetings, as well as through written submissions, and a new provision addressing genital fondling was added. Appendix B contains a chart that shows the entirety of the Section 213.8 scheme and attendant penalties.

Part IV presents one Section for discussion only, Section 213.11 (Procedural and Evidentiary Provisions). Although Section 213.11 was thoroughly vetted at the beginning of this project, much has happened in the past six years. In addition, the Reporters benefitted from suggestions received from several commentators who favored drafting some altogether new provisions. In order to have the time necessary to research and consider those questions, the Reporters determined that the better course was to continue discussion on Section 213.11, rather than move it forward for a vote.

Appendix A - Grading and Registration for Article 213

213.1(2) – Enhanced Aggravated Force (deadly weapon, gang rape, causing SBI)	2 <sup>nd</sup> degree felony	Registrable
213.1(1) – Aggravated force	3 <sup>rd</sup> degree felony	Registrable
213.2 – Physical force	[to be determined]	Registrable if prior conviction for felony sex offense
213.3(1) – sleeping, unconscious, drugged	3 <sup>rd</sup> degree felony	Registrable, when prior felony sex offense
213.3(2) – passing out, mental impairments	4 <sup>th</sup> degree felony	
213.3(3) – custodial abuse	5 <sup>th</sup> degree felony	
213.4 – extortion (coercive threats)	4 <sup>th</sup> degree felony	
213.5 – exploitation (deception)	5 <sup>th</sup> degree felony	
213.6 – lack of consent	5 <sup>th</sup> degree felony, or 4 <sup>th</sup> degree felony if expressed nonconsent	
213.7(1) Aggravated Offensive Sexual Contact	5 <sup>th</sup> degree felony	
213.7(2) Offensive Sexual Contact	6 months misdemeanor	
213.8(1) Sexual Assault of a Minor Younger than 12 (by actor more than 4 years older)	3 <sup>rd</sup> degree felony or 5 <sup>th</sup> degree felony	Registrable, when offender is [reserved] older
213.8(2) Sexual Assault of a Minor 12-16 Years of Age (by actor more than 5 years older)	4 <sup>th</sup> degree felony or 1 year misdemeanor	Registrable, when offender is [reserved] older
213.8(3) Incestuous Sexual Assault of a Minor	3 <sup>rd</sup> degree felony	Registrable
213.8(4) Exploitative Sexual Assault of a Minor	5 <sup>th</sup> degree felony	
213.8(5) Fondling a Minor	4 <sup>th</sup> degree felony or 5 <sup>th</sup> degree felony	
213.8(6) Offensive Sexual Contact with a Minor	5 <sup>th</sup> degree felony or 1 year misdemeanor	
213.9 Sex Trafficking	3 <sup>rd</sup> degree felony	

## Appendix B

**REMINDER:** For all offenses, 213.0(2)(f) requires the actor be 12+ years of age. Also, for any offenses that uses force or threats, causes serious bodily injury, or occurs in any condition or circumstances covered by 213.1-213.7 (including lack of consent), those offenses and their associated penalties apply.

<b>213.8</b>	<b>3D DEGREE</b>	<b>4<sup>TH</sup> DEGREE</b>	<b>5<sup>TH</sup> DEGREE</b>	<b>MISDEMEANOR</b>	<b>NO LIABILITY</b> <b>* No liability for actors under 12</b>
<b>(1) SEXUAL ASSAULT OF A CHILD UNDER 12</b>	Child under 12, actor 18 or older		Child 11, actor 15-17 Child 10, actor 14-17 Child 9, actor 13-17 Child 8 or younger, actor 12-17		Child 0-12, and actor over 12 but within 4 years (e.g. 11 & 12, 13, 14).
<b>(2)SEXUAL ASSAULT OF A YOUTH 12-15</b>		Youth 12, actor 22 or older Youth 13, actor 23 or older Youth 14, actor 24 or older Youth 15, actor 25 or older		Youth 12, actor 17-21 Youth 13, actor 18-22 Youth 14, actor 19-23 Youth 15, actor 20-24	Youth 12-15, actor 0-17. Youth 15, actor under 20 Youth 14, actor under 19 Youth 13, actor under 18
<b>(3)INCESTUOUS</b>	Minor under 18, actor 18 or older + special relationship				
<b>(4) EXPLOITATIVE</b>			Youth under 18, actor 10 or more years older + position of trust		
<b>(5) FONDLING</b>		Child under 12, actor 17 or older	Youth 12, actor 19 or older		

			Youth 13, actor 20 or older Youth 14, actor 21 or older Youth 15, actor 22 or older		
<b>(6)</b> <b>CONTACT</b> <b>WITH A MINOR</b>			Child under 12, actor 5 or more years older	Child 12-16, actor 7 or more years older	

**MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES**

**COUNCIL DRAFT NO. 10**

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## 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 the  
3 principles enumerated in the recently revised portions of the Model Penal Code pertaining to  
4 sentencing, namely subsection 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, rather  
6 than in a manner that would harmonize them with the overall scheme of punishment embodied in  
7 the 1962 Code. The revised sentencing provisions of the Model Penal Code depart meaningfully  
8 from those expressed at the time of the adoption of the 1962 Code.<sup>1</sup> As the Commentary to the  
9 revised Articles explain, the 1962 Code’s approach to sentencing was a product of its time, and  
10 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 that  
15 should apply to particular offenses, and a breadth of punishments are authorized for similar  
16 conduct across the states. Take an offense such as engaging in sexual intercourse with an adult  
17 who is unconscious. One jurisdiction punishes the offense with a maximum of five years’  
18 incarceration;<sup>2</sup> another with life without parole.<sup>3</sup> Even an offense seemingly as straightforward as  
19 using aggravated physical force to compel an adult to engage in sexual intercourse exhibits wide-  
20 ranging variations. On the low end, one jurisdiction authorizes a maximum term of eight years;<sup>4</sup>  
21 the highest is life without parole.<sup>5</sup> Looking to existing law thus offers little guidance, if guidance  
22 is measured as consensus about either the absolute or relative term appropriate for any particular  
23 infraction.

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<sup>1</sup> See, e.g., MPC:S § 1.02(2) (“reorient[ing] the foundations of sentencing law throughout the Model Penal Code” by emphasizing proportionality and eschewing indeterminate sentences).

<sup>2</sup> See, e.g., OHIO REV. CODE ANN. §§ 2907.03(A)(2), (3), 2929.14(A)(3)(A).

<sup>3</sup> See, e.g., WASH. REV. CODE ANN. §§ 9A.44.050(1)(B), (2); 9A.20.021(1)(A).

<sup>4</sup> See, e.g., CAL PENAL CODE §§ 261(A)(2), 264.

<sup>5</sup> See, e.g., GA. CODE ANN. § 16-6-1.

## Grading: General Considerations

1           Second, to the extent that a single coherent narrative emerges about current sentencing  
2 practices, it is that criminal law is excessively punitive, from the standpoint of both morality and  
3 efficiency.<sup>6</sup> Existing penal law broadly authorizes long sentences of incarceration, even for non-  
4 violent offenses. Collateral consequences impose a range of debilitating and counterintuitive  
5 restrictions that serve little purpose other than to inhibit reintegration. Affixing an appropriate  
6 penalty for the conduct proscribed by Article 213 thus demands fresh consideration of the  
7 theoretical question of the proper purposes of punishment, as well as the practical question of how  
8 best to achieve those purposes in light of contemporary knowledge about the nature and impact of  
9 terms of incarceration.

10           Such consideration does not point in a single, uncontroverted direction, whether toward  
11 leniency or severity. Although there is bipartisan consensus that American penal law generally is  
12 too harsh, not everyone agrees that this harshness is evident with specific respect to the punishment  
13 of sexual offenses. On the one hand, the punishment of those convicted of sexual offenses  
14 unquestionably exhibits signs of penal excess. Long terms of incarceration are not uncommon,<sup>7</sup>  
15 even for low-level or nominally consensual encounters. Sexual offenders often endure physical  
16 and sexual abuse during confinement.<sup>8</sup> And onerous collateral consequences often apply upon  
17 release, including public shaming through registration provisions and draconian restrictions on  
18 housing or employment.<sup>9</sup> These severe penalties also tend to be imposed in a racially

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<sup>6</sup> 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 265-266 & n.22-23 (citing evidence). But see *id.* at 264 (teasing out “strains” of this belief that may be in tension with one another).

<sup>7</sup> Danielle Kaeble, *Time Served in State Prison, 2016*, Bureau of Justice Statistics 1-2 (Nov. 2018). Data show that of persons released from prison, only those convicted of murder serve longer terms on average. 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. In contrast, 72 percent of all persons convicted for violent offenses served less than five years, and nine in 10 served less than 10. *Id.* at 34. See generally Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 448-451 (2010). See also John Pfaff, *Locked In 188* (noting that nearly half of the people in prison for violence—roughly 25% of the total population—are incarcerated for murder, manslaughter, rape or sexual assault; if all other prisoners were released, the incarceration *rate* in the United States would still be higher than almost any other European nation); A Matter of Time: The Causes and Consequences of Rising Time Served in America’s Prisons, Urban Institute 6, 13 (2017) (finding mass incarceration in part attributable to “increase in time served for violent crimes” and that 10% of the 94% of the population serving long sentences for violent crime are serving them for rape).

<sup>8</sup> Ian O’Donnell & Kimmett Edgar, *Fear in Prison*, 79(1) *Prison J.* 90-99, at 98 (1999).

<sup>9</sup> Yung, *supra* note 16, at 447-448.

## Grading: General Considerations

1 discriminatory fashion, with black defendants convicted of assaulting white victims receiving the  
2 harshest sentences.<sup>10</sup> The extremity of the sanction and the stigma that attaches to sexual offenses  
3 also may undermine reporting, prosecution, and conviction rates.<sup>11</sup>

4 On the other hand, critics have decried the criminal justice system's hesitancy when it  
5 comes to sexual violence. Acknowledging the problem of mass incarceration, they point out that  
6 only a tiny fraction of perpetrators of sexual assault are ever charged or convicted. A majority of  
7 sexual attacks still are never reported to police,<sup>12</sup> and victims who do report are often sidelined or

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<sup>10</sup> Jessica Shaw & HaeNim Lee, *Race and the Criminal Justice System Response to Sexual Assault: A Systematic Review*, 64 AM. J. COMMUNITY PSYCHOLOGY 1-2 (2019)

<https://doi.org/10.1002/ajcp.12334>.

<sup>11</sup> Callie Marie Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*, Bureau of Justice Statistics, at 3 (Aug. 2002); Lynn Langton et al., *Victimizations Not Reported to the Police, 2006-2010*, Bureau of Justice Statistics, at 4 Tbl. 1 (Aug. 2012). 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. As 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." [https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm\\_term=.xjJJGJ5V08#.ymo4W4zw0Y](https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm_term=.xjJJGJ5V08#.ymo4W4zw0Y). See also *Crime Survivors Speak: the first ever national survey of victims' views on safety & justice*, Alliance for Safety & Justice 21 (2019), at <https://allianceforsafetyandjustice.org/reports-and-surveys/> (surveying victims of violent crime (of whom 11% were sexual-assault survivors, and noting that by a margin of 2 to 1, they think that prison is more likely to make people commit more crimes than rehabilitate them, that sentences should be shorter to facilitate rehabilitation, and prefer rehabilitation to punishment). *Id.* at 12 (quoting 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.").

<sup>12</sup> Rachel E. Morgan & Barbara A. Oudekerk, *Criminal Victimization, 2018*, Bureau of Justice Statistics (Sept. 2019), at 3 (reporting increase in victimization rate of rape or sexual assault from 1.6 to 2.7 from 2015 to 2018, but decline in reporting rate from 40% in 2017 to 25% in 2018). See also Callie Marie Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*; Lynn Langton et al., *Victimizations Not Reported to the Police, 2006-2010*, Bureau of Justice Statistics (Aug. 2012) (finding that from 2006 to 2010, only 35% of rapes were reported to 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, 1980s, and 1990s. Eric P. Baumer, *Temporal Variation in the Likelihood of Police Notification by Victims of Rape, 1973-2000*, National Institute of Justice (April 12, 2004). The study used data from the National Crime Victimization Survey (1992-2000) and the National Crime Survey (1973-1991), and measured both reports by both victims and third parties. But then in the 1990s, rates declined. Kimberly Lonsway & Joanne Archambault, *The Justice Gap for Sexual Assault Cases: Future Directions for Research and Reform*, 18(2) *Violence Against Women* 145, 148 (2012). Rates 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

## Grading: General Considerations

1 dismissed.<sup>13</sup> The number of cases involving allegations of unchecked sexual harassment or assault  
2 committed by high-profile public figures points to impunity, not overzealousness.<sup>14</sup> And even  
3 those persons convicted of sexual offenses do not always receive harsh treatment; recent public  
4 outrage has focused on judges perceived to have been too lenient in sentencing sexual offenses,  
5 leading in one case to voters recalling the judge from office.<sup>15</sup>

6 In addition, recent research suggests that complaints judged incredible or dismissed by law  
7 enforcement in fact later prove to be well-founded. One set of data emerged from the study of tens  
8 of thousands of untested rape kits from unsolved cases.<sup>16</sup> A selection of police files from those kits  
9 revealed that “most cases were closed after *minimal* investigational effort,” and that “law  
10 enforcement personnel expressed negative, victim-blaming beliefs.”<sup>17</sup> Significantly, that same  
11 study evaluated the results of DNA testing from that backlog: from a sample of 1595 kits, half of  
12 those that produced a profile generated a match in the national DNA databases, and a quarter of  
13 all matches were to serial offenders.<sup>18</sup> That data also suggested that perpetrators of sexual violence  
14 tend to serially offend,<sup>19</sup> thus what may appear a difficult “he said, she said” case in an intimate  
15 offense assumes a different cast if the same person is linked to a series of similar allegations.

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media. See Rachel E. Morgan & Jennifer L. Truman, *Criminal Victimization*, 2017, Bureau of Justice Statistics 1 (Dec. 2018) (reporting that reported rapes rose from 23% in 2016 to 40% in 2017).

<sup>13</sup> 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 feminist anti-rape movement of the 1970s.” *Id.*

<sup>14</sup> See RONAN FARROW, *CATCH AND KILL: LIES, SPIES, AND A CONSPIRACY TO PROTECT PREDATORS* (Little, Brown & Co. 2019) (citing cases of Harvey Weinstein, Matt Lauer, Leslie Moonves, and Bill Cosby, among others).

<sup>15</sup> Lili Loofbourow, *Why Society Goes Easy on Rapists*, *Slate* (May 30, 2019) at <https://slate.com/news-and-politics/2019/05/sexual-assault-rape-sympathy-no-prison.html> (compiling a “list of sexual assailants who got no prison time” and discussing case of Judge Aaron Persky, who was recalled by California voters).

<sup>16</sup> Rebecca Campbell et al., *The Detroit Sexual Assault Kit (SAK) Action Research Project (ARP): Final Report* (Dec. 2015), at 3 (reporting estimated 169,000 untested kits nationwide), <https://www.ncjrs.gov/pdffiles1/nij/grants/248680.pdf#page=163>.

<sup>17</sup> *Id.* at iv, 295.

<sup>18</sup> *Id.* at 173-175. Comparable numbers were found in other jurisdictions. See *id.* at 303 (reporting rates from Los Angeles and New Orleans).

<sup>19</sup> *Id.* at 6 (citing long list of academic research also indicating that “most rapists are serial rapists”). The difficulty with recidivism data rests in large part on the use of re-arrest as a measure of recidivism. In an area with relatively low reporting and investigation rates, re-arrest 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 suggest dramatically higher rates of reoffending. Compare, e.g., David Lisak & Pual M. Miller, *Repeat Rape and*

## Grading: General Considerations

1           These contradictory intuitions about the treatment of sexual violence in our society are  
2 further complicated by evidence of historic failures to identify and prosecute sexual offenses  
3 equitably. The history of the 20th century enforcement of sexual crimes includes: the legal and  
4 extra-legal lynching of black men accused of sexual offenses against white women;<sup>20</sup> the legal  
5 sanction of spousal rape;<sup>21</sup> the enforcement of sex laws intended to punish extramarital sex and  
6 sex outside of heterosexual relationships;<sup>22</sup> the moral panic that led to a series of overturned  
7 convictions in the “day-care” cases;<sup>23</sup> and the exoneration of large numbers of persons wrongly  
8 convicted of rape, of which a significant fraction were black men wrongly identified by white  
9 women.<sup>24</sup>

10           At the same time, that history also includes the fair complaint that penal law has too long  
11 ignored the prevalence and extent of sexual violence, to the detriment of victim welfare and public  
12 safety. In one careful survey, the Department of Justice estimated that among American women  
13 aged 18 or older, there were approximately 876,000 rapes and attempted rapes annually; 15 percent  
14 of American adult women had experienced one or more completed rapes in their lifetimes, and

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*Multiple Offending Among Undetected Rapists*, 17 VIOLENCE AND VICTIMS 73, 74 (2002) (finding that “almost two-thirds of [the self-identified rapists in their study] raped more than once, and a majority also committed other acts of interpersonal violence, such as battery, child abuse, and child sexual abuse”); M. Elliott et al., *Child Sexual Abuse Prevention: What Offenders Tell Us*, 19(5) *Child Abuse & Neglect* 579, 584 (1995) (reporting data from interviews with 91 convicted child sex offenders—of whom 70% had victimized 1 to 9 minors, 23% had victimized 10-40 minors, and 7% claimed to have victimized 41 to 450 children); Ron Langevin et al., *Lifetime Sex Offender Recidivism: A 25 year follow up study*, 46(5) *Canadian J. CRIMIN. & CRIMINAL JUSTICE* 531 (2006) (showing 3 in 5 reoffenders based on criminal justice data, an 4 in 5 based on “undetected sex crimes”) with Alper & Durose, *supra* note X, at showing lower rates of re-arrest for sex offenders than other types of offenders).

<sup>20</sup> See generally Philip Dray, *At the Hands of Persons Unknown: The Lynching of Black America* (2003); Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime and the Making of Modern Urban America* 58-61 (2010).

<sup>21</sup> *Id.* at 204.

<sup>22</sup> Compare *Bowers v. Hardwick*, 478 U.S. 186 (1986), with *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>23</sup> Debbie Nathan & Michael R. Snedeker, *Satan’s Silence: Ritual Abuse and the Making of a Modern American Witch Hunt* 2-4 (1995) (describing moral panic that led to McMartin preschool case, the conviction of Kelly Michaels, and others).

<sup>24</sup> Know the Cases, Innocence Project, <http://www.innocenceproject.org/know/> (last visited Mar. 21, 2014). Further details on the sexual-assault cases were provided by Innocence Project Research Director Emily West (Nov. 26, 2012). 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 (Univ. of Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, No. 277, June 2012), available at <http://ssrn.com/abstract=2092195>; *id.* 49 n.71 (and accompanying text).

## Grading: General Considerations

1 another three percent had been victims of attempted rape.<sup>25</sup> A more recent survey by the Centers  
2 for Disease Control estimates that nearly 20 percent of adult women have been raped at some time  
3 in their lives.<sup>26</sup> Rates of violence against Native American women are so disproportionately high  
4 that they garnered special congressional attention.<sup>27</sup> Surveys also indicate that between 1.4 percent  
5 and three percent of adult men have been victims of a completed or attempted rape in their  
6 lifetimes,<sup>28</sup> with dramatically higher rates for men who have been imprisoned.<sup>29</sup> Evidence of the  
7 low recidivism rates of persons convicted of sex offenses is also a subject of dispute.<sup>30</sup>

8 In short, neither the history nor contemporary research points in a single, uniform direction  
9 as regards the effective and just punishment of sexual offenses. Nevertheless, some basic

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<sup>25</sup> U.S. Dept. of Justice, National Violence Against Women Survey (1998).

<sup>26</sup> Michele C. Black et al., The National Intimate Partner and Sexual Violence Study, Center for Disease Control and Prevention (2010) [hereinafter CDC study]. Rape was defined as completed forced penetration, attempted penetration, and alcohol or drug-facilitated completed penetration. The 2009 crime victimization study by the Bureau of Justice Statistics found that 84.3 percent of sexual-assault victims were female. 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. Jennifer L. Truman & Michael R. Rand, Crime Victimization, 2009, Bureau of Justice Statistics at 1, Tbl 1 (Oct. 2010) [hereinafter 2009 BJS Study]. A Pentagon survey released in 2013 found that in the previous year 6.1 percent of women on active duty in the military and 1.2 percent of men said they had experienced some form of sexual assault, victimization rates many times higher than those found in the general population. U.S. Dep't of Defense, Annual Report on Sexual Assault in the Military, Fiscal Year 2012, p. 2 (April 2013).

<sup>27</sup> See *United States v. Bryant*, 136 S. Ct. 1954 (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).

<sup>28</sup> According to the CDC's 2010 survey, one in 71 men in the United States has been raped at some time in their lives. CDC study, *supra* note 21. Rape was defined as completed forced penetration, attempted penetration, and alcohol or drug-facilitated completed penetration. The 2009 crime victimization study by the Bureau of Justice Statistics found that 15.7 percent were male. BJS Study at 1-2. A 2006 Justice Department survey found that three percent of adult men had been victims of completed or attempted rape in their lifetimes. See Patricia Tjaden & Nancy Theones, *Extent, Nature and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey* 7-8 (Natl. Institute of Justice 2006).

<sup>29</sup> Pat Kaufman, Prison Rape Research Explores Prevalence, Prevention, 259 *Nat'l Institutes Justice J.* 24, 24 (March 2008).

<sup>30</sup> Mariel Alper & Matthew R. Durose, *Recidivism of Sex Offenders Released from State Prison: A 9-year Follow-Up (2005-14)*, Bureau of Justice Statistics (May 2019). That report indicated that "[r]ape and sexual assault offenders were less likely than other released prisoners to be arrested," but they were "more than three times as likely as other released prisoners to be arrested for rape or sexual assault." In addition, "[h]alf of released sex offenders had a subsequent arrest that led to a conviction." *Id.* at 1. These data are contested in part because critics argue that the onerous collateral consequences imposed on persons convicted of sex offenses—which often impede the persons' ability to establish employment, housing, and social bonds—are themselves criminogenic. See generally Comment to Section 213.12.

1 guidelines can be found. The first basic precept is that, in setting the punishments for Article 213,  
2 the Institute embraces the penal philosophy articulated in recently revised Articles 6 and 7. These  
3 revised Articles set forth a comprehensive scheme driven by four central purposes in assigning  
4 punishments to individual offenses. First, punishment should be “within a range of severity  
5 proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness  
6 of offenders.”<sup>31</sup> Specifically, Section 10.02 permits imposition of a sentence of incarceration only  
7 “when necessary to incapacitate dangerous offenders,” or “when other sanctions would depreciate  
8 the seriousness of the offense.”<sup>32</sup> And the length of the sentence “shall be no longer than needed  
9 to serve the purposes for which it is imposed.”<sup>33</sup> Second, punishment should “when reasonably  
10 feasible, also serve utilitarian goals, such as offender rehabilitation, general deterrence,  
11 incapacitation of dangerous offenders, restitution to crime victims, preservation of families, and  
12 reintegration of offenders into the law-abiding society.”<sup>34</sup> Third, a principle of parsimony should  
13 apply to punishment, such that any individual sentence “should be no more severe than necessary”  
14 to achieve the first two objectives.<sup>35</sup> Last, sentences should avoid criminogenic consequences.<sup>36</sup>

15 Articles 6 and 7 disavow certain common approaches to sentencing. The Institute explicitly  
16 rejects the imposition of mandatory-minimum prison sentences for any offense.<sup>37</sup> Article 6 also  
17 rejects the general propriety of a sentence of life without parole.<sup>38</sup> Article 7 forbids a collateral  
18 consequence that permanently strips the right to vote,<sup>39</sup> and provides for relief from generally  
19 applicable collateral consequences shown to be unnecessary and unduly burdensome.<sup>40</sup> “In  
20 evaluating the total severity of punishment under this subsection, the court should consider the  
21 effects of collateral consequences likely to be applied to the offender under state and federal law,

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<sup>31</sup> MPC:S § 1.02(2)(a)(i).

<sup>32</sup> MPC:S § 10.02(2).

<sup>33</sup> MPC:S § 6.06(3). See also MPC:S § 10.02(4) (describing “Choices Among Sanctions”).

<sup>34</sup> MPC:S § 1.02(2)(a)(ii).

<sup>35</sup> MPC:S § 1.02(2)(a)(iii).

<sup>36</sup> MPC:S § 1.02(2)(a)(iv).

<sup>37</sup> MPC:S § 6.06(8) and Comment at 149.

<sup>38</sup> MPC:S § 6.06, Comment at 161. The Institute also affirmed its decision in 2009 to exclude any provision for capital punishment. MPC:S § 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 § 6.06, Comment at 161.

<sup>39</sup> MPC:S § 7.03.

<sup>40</sup> MPC:S § 7.04(2)(c).

## Grading: General Considerations

1 to the extent these can reasonably be determined.”<sup>41</sup> Ultimately, Section 6.02 commands that  
2 courts “not impose any combination of sanctions if their total severity would result in  
3 disproportionate punishment under § 1.02(2)(a)(i).”

4 The second basic precept is that, in setting the maximum terms of punishment under Article  
5 213, existing law and practice provided guidance, but was not a constraint. The values expressed  
6 in revised Section 1.02(2), in particular its commitment to proportionality and parsimony, often  
7 came into conflict with the penalties permitted by existing law, for both sexual offenses and other  
8 crimes. This presented a challenge. Article 213 could permit a sentence that replicated the excesses  
9 of existing penal law, thereby affirming the absolute and relative seriousness of sexual violence  
10 with respect to other crimes. But to do so would perpetuate the inequities, injustice, and excess of  
11 the current system. Or Article 213 could choose the path of restraint, and authorize less extreme  
12 maximums. But that approach might be misunderstood as minimizing the trauma and seriousness  
13 of sexual crimes—particularly in jurisdictions that fully embraced Article 213 but failed to lessen  
14 their harsh punishments for less serious offenses.

15 Ultimately, the penalties authorized for Article 213 were set by applying contemporary  
16 knowledge about sentencing and penal excess, and with an eye toward modeling the restraint  
17 wisely counseled in this era of mass incarceration. As a result, some sentences authorized for the  
18 sexual offenses of Article 213 may be significantly less severe than sentences permitted in the  
19 jurisdiction for other criminal conduct that can reasonably be regarded as equally serious. The  
20 intention is not to depreciate the seriousness of these sexual offenses. Rather, the authorized  
21 maximums reflect the desire to recalibrate society’s understanding of what constitutes a severe  
22 sanction. To the extent that a jurisdiction punishes equally serious conduct more severely, the  
23 penalties outlined in Article 213 should inspire reevaluation of the propriety of those severe  
24 sentences.

25 Finally, Articles 6 and 7 contemplate a wide menu of options for the disposition of  
26 convicted persons, beyond just incarceration. For instance, Article 6 authorizes economic  
27 sanctions including fines and victim restitution, suspended sentences and periods of supervision,  
28 deferred prosecution or adjudication, restorative justice, specialized courts, and specialized

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<sup>41</sup> MPC:S § 6.02(4).

## Grading: General Considerations

1 dispositions for juveniles. Article 6 also expressly embraces “experimentation” with noncarceral  
2 sanctions,<sup>42</sup> so long as such efforts adhere to the core principle of proportionality.

3         Recent research supports the use of alternative approaches,<sup>43</sup> even for serious offenses and  
4 even when the offenses occur between intimate partners.<sup>44</sup> Increasingly, feminists have called for  
5 interventions that go beyond a carceral response,<sup>45</sup> and advocates for survivors of sexual assault  
6 have sought solutions that more directly address the root causes of sexual violence and the effects  
7 of such violence on the lives of victims and survivors.<sup>46</sup> In affixing the punishment for Article 213

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<sup>42</sup> MPC:S § 1.02(2), Comment at 7.

<sup>43</sup> See Mary Koss & Mary Achilles, Restorative Justice Responses to Sexual Assault, Applied Research Forum, National Online Resource Center on Violence Against Women [http://vawnet.org/sites/default/files/materials/files/2016-09/AR\\_RestorativeJustice.pdf](http://vawnet.org/sites/default/files/materials/files/2016-09/AR_RestorativeJustice.pdf) (collecting research); Mary P. Koss, the RESTORE program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes J. Interpers. Violence (2013), at DOI: 10.1177/0886260513511537 (describing restorative justice program for misdemeanor and felony sexual assaults in Arizona and reviewing literature on restorative justice approaches to sex crimes).

<sup>44</sup> See, e.g., Linda G. Mills et al., A randomized controlled trial of restorative justice-informed treatment for domestic violence crimes, *Nature Human Behavior* (2019) <https://doi.org/10.1038/s41562-019-0724-1>. 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.” Callie Marie Rennison, Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000, Bureau of Justice Statistics, at 3 (Aug. 2002) (citing data showing 23.3% of rape and 16.8% 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.* (9.9% of attempted rape). And the closer the relationship between the offender and victim, the less likely the victim was to report the offense. *Id.*

<sup>45</sup> See Koss & Achilles, *supra* note 36, at 5 (noting that “the justice needs of survivor/victims [] in many cases are not sufficiently fulfilled through conventional justice”); Aya Gruber, *Rape, Feminism and the War on Crime*, 84 WASH. L. REV. 581 (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.”).

<sup>46</sup> See, e.g., See also Crime Survivors Speak: the first ever national survey of victims’ views on safety & justice, Alliance for Safety & Justice 21 (2019), at <https://allianceforsafetyandjustice.org/reports-and-surveys/> (reporting that survivors of violent crime, from widely divergent demographic backgrounds, support rehabilitative measures); ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS 3 (2013) (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 of the power of law as a vehicle for further social change.”).

## Grading: General Considerations

1 in terms of a maximum period of incarceration, the Institute does not suggest that noncarceral  
2 approaches are always inappropriate. As expressed by Article 6, experimentation with noncarceral  
3 responses that are effective at reducing rates of offending and at meeting the needs of victims and  
4 those directly impacted by sexual violence are welcome, so long as they adhere to the fundamental  
5 precept of proportionality.

6 In sum, just as the revision of Article 213 takes a fresh look at the proper scope of  
7 substantive liability for sexual offenses, so too does it consider anew the question of the amount  
8 of punishment that should attach to those infractions. Among the many considerations that factored  
9 into the determination of proper punishment are awareness of: the prevalence of unchecked sexual  
10 misconduct, particularly as committed against women and children; the history of fraught  
11 emotional reaction and racial prejudice often triggered by sexual offenses; the tendency to excess  
12 in American sentencing practices; the legacy of racial inequity, including in the present  
13 administration of criminal justice; emerging evidence of the inadequacy of incarceration as a  
14 solution to difficult social problems; and increasing desire for nonpenal sanctions by advocates for  
15 survivors of sexual violence.

16 With specific regard to setting absolute and relative penalties of incarceration, Article 6  
17 outlines five grades of felony and two grades of misdemeanors.<sup>47</sup> That Article chooses a  
18 determinate system of judicial discretion in setting sentences,<sup>48</sup> with contemplated maximum  
19 terms of incarceration as follows:<sup>49</sup>

20 1st-degree felony: life imprisonment

21 2nd-degree felony: 20 years

22 3rd-degree felony: 10 years

23 4th-degree felony: five years

24 5th-degree felony: three years

25 Misdemeanor: one year

26 Petty misdemeanor: six months

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<sup>47</sup> MPC:S § 6.01(1), (4).

<sup>48</sup> The Comment to Section 6.06, MPC:S § 6.06 Comment at 147-148, lists the reasons that the Institute preferred a determinate to an indeterminate approach.

<sup>49</sup> MPC:S § 6.06(6), (7).

## Grading: General Considerations

1           In embracing the frame set out by Article 6, Article 213 does not suggest a commitment to  
2 the exact term of years attached to a particular offense. Like the Sentencing revision, Article 213  
3 “[r]ecogniz[es] the inevitability—and desirability—of jurisdictional variations in a federalist  
4 system” and thus does not expect a “single, lockstep approach to be followed in all states.”<sup>50</sup> Also  
5 like the Sentencing revision, Article 213 is ultimately “agnostic as to the number of felony grades  
6 that should exist in a criminal code,” and thus acknowledges that “[m]aximum penalties  
7 necessarily will be arranged in finer increments if a code creates 10 levels of felony offenses, for  
8 instance, rather than five.”<sup>51</sup>

9           Rather, in affixing penalties to the liability provisions of Article 213, the Institute assumed  
10 the framework of Section 6.06 to express the *relative severity rank* of each offense, and  
11 approximate *absolute terms of years of maximum incarceration*, appropriate for each offense.<sup>52</sup> In  
12 a jurisdiction with a more finely graded set of punishments, Article 213’s judgments about rank  
13 and number of years—rather than the nominal degree of penalty—should be taken as instructive.  
14 Additional explanation for each particular assigned penalty can be found in the Comment to those  
15 subsections.

213.1(2) – Enhanced Aggravated Force (deadly weapon, gang rape, causing SBI)	2nd-degree felony
213.1(1) – Aggravated force	3rd-degree felony
213.2 – Physical force	[to be determined]
213.3(1) – sleeping, unconscious, drugged	3rd-degree felony
213.3(2) – passing out, mental impairments	4th-degree felony
213.3(3) – custodial abuse	5th-degree felony

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<sup>50</sup> MPC:S § 1.02(2), Comment at 5.

<sup>51</sup> MPC:S § 6.06, at 157.

<sup>52</sup> Of course, as the Commentary to Article 6 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 § 1.02(2), Comment at 4.

Grading: General Considerations

213.4 – extortion (coercive threats)	4th-degree felony
213.5 – exploitation (deception)	5th-degree felony
213.6 – lack of consent	4th- or 5th-degree felony
213.7(1) Aggravated Offensive Sexual Contact	5th-degree felony
213.7(2) Offensive Sexual Contact	6 months misdemeanor
213.8(1) Sexual Assault of a Minor Younger than 12	3rd- or 5th-degree felony
213.8(2) Sexual Assault of a Minor 12-16 Years of Age	1-year misdemeanor or 4th-degree felony
213.8(3) Incestuous Sexual Assault of a Minor	3rd-degree felony
213.8(4) Exploitative Sexual Assault of a Minor	5th-degree felony
213.8(5) Fondling a Minor	4th- or 5th-degree felony
213.8(6) Offensive Sexual Contact with a Minor	5th-degree felony or 1-year misdemeanor
213.9 Sex Trafficking	3rd-degree felony

## PART II

### GRADING OF SECTIONS PREVIOUSLY APPROVED

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 the actor causes another  
4 person to submit to or perform an act of sexual penetration or oral sex and:

5 (a) the act is without effective consent because the actor uses or explicitly or implicitly  
6 threatens to use aggravated physical force or restraint against any person; and

7 (b) the actor knows that the other person submitted to or performed the act of  
8 sexual penetration or oral sex because of the actor's use of or threat to use aggravated  
9 physical force or restraint.

10 (2) *Grading.\** Sexual Assault by Aggravated Physical Force or Restraint is a  
11 registrable offense and is a felony of the third degree, but it is a felony of the second degree  
12 if the actor violates subsection (1) of this Section and in so doing:

13 (a) knowingly uses or explicitly or implicitly threatens to use a deadly weapon  
14 that causes the other person to submit to or perform the act of sexual penetration or  
15 oral sex; or

16 (b) knowingly acts with one or more persons who engage in the act of sexual  
17 penetration or oral sex, or who assist in the use of or threat to use aggravated physical  
18 force or restraint when that act occurs; or

19 (c) recklessly causes serious bodily injury to any person.

20 (3) *Effective consent.* Effective consent is absent when the other person submitted to  
21 or performed the act of sexual penetration or oral sex because the actor used or threatened  
22 to use aggravated physical force or restraint. Submission, acquiescence, or words or conduct  
23 that would otherwise indicate consent do not constitute effective consent when occurring in

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\* Throughout Article 213, grading decisions have been deferred pending completion of a draft covering all the Article substantive offenses. Grading judgments in brackets are only suggestive place-holders; focused analysis and discussion will be devoted to the issue in due course.

\*\* For Section 213.1(1) and Section 213.2, the Reporters are considering two options. In one, Section 213.2 would be graded as a 3d-degree felony; Section 213.1(1) would carry a maximum five years higher than that applicable to a 3d-degree felony. In the other option, Section 213.2 would be graded as a 4th-degree felony; Section 213.1(1) would be graded as a 3d-degree felony.

24 **a circumstance described in subsection (1). If applicable, the actor may raise an affirmative**  
25 **defense of Permission to Use Force under Section 213.10.**

26 **Comment:**

27 \*\*\*\*\*

28 **[Comment x]. Grading.** The more serious offense under this Section, the offense of  
29 Sexual Assault by Aggravated Physical Force or Restraint under subsection (2)(b), is the gravest  
30 of the sexual offenses. Under current law, authorized sentences for state offenses comparable to  
31 Section 213.1(2)(b) range from a high of life (Florida) or life without parole (Texas, Georgia,  
32 Tennessee) to maximums (absent recidivist enhancements) of 16.5 years in Ohio and 20 years in  
33 Pennsylvania and New Jersey.<sup>1</sup> Most if not all jurisdictions classify the offense at a level below,  
34 sometimes well below that reserved for the most aggravated homicides. In the Model Penal Code  
35 framework, a comparable judgment accordingly does not support classification in the highest  
36 grading category—the first-degree felony, roughly associated with a maximum sentence of life  
37 imprisonment. Accordingly, the offense is appropriately placed just below this level, as a felony  
38 of the second degree, roughly associated with a 20-year maximum.

1 The less serious offense under this Section, the offense of Sexual Assault by Aggravated  
2 Physical Force or Restraint under subsection (2)(a), lacks the especially egregious aggravating  
3 factors required for conviction under subsection (2)(b), and therefore should be graded at the next  
4 highest level, the third-degree felony roughly associated with a 10-year maximum. That judgment,  
5 however, affords too crude a basis for distinguishing the offense from the offense just below it,  
6 Sexual Assault by Physical Force or Restraint under Section 213.2, which, as explained in the  
7 Comment to that Section, also is appropriately graded as a felony of the third degree. Accordingly,  
8 subsection (2)(a) provides that the offense under that subsection, which is more serious than the  
9 Section 213.2 offense, should be graded as a third-degree felony, with the proviso that the actor  
10 may be sentenced to an additional term of up to five years' imprisonment.

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<sup>1</sup> [TBS -- Printer deadline precluded full statutory citations.] In some states additional enhancements apply when the victim is a young child.

11 **SECTION 213.2. SEXUAL ASSAULT BY PHYSICAL FORCE OR RESTRAINT**

12 **(1) *Sexual Assault by Physical Force or Restraint.* An actor is guilty of Sexual Assault**  
13 **by Physical Force or Restraint when the actor causes another person to submit to or perform**  
14 **an act of sexual penetration or oral sex and:**

15 **(a) the act is without effective consent because the actor uses or explicitly or**  
16 **implicitly threatens to use physical force or restraint against any person; and**

17 **(b) the actor recklessly disregards the risk that the other person submitted to**  
18 **or performed the act of sexual penetration or oral sex because of the actor's use of or**  
19 **threat to use physical force or restraint.**

20 **(2) *Grading.* Sexual Assault by Physical Force or Restraint is a felony of the [\*\*]**  
21 **degree and a registrable offense when the actor has previously been convicted of a felony sex**  
22 **offense.**

23 **(3) *Effective consent.* Effective consent is absent when the other person submitted to**  
24 **or performed the act of sexual penetration or oral sex because the actor used or threatened**  
25 **to use physical force or restraint. Submission, acquiescence, or words or conduct that would**  
26 **otherwise indicate consent do not constitute effective consent when occurring in a**  
27 **circumstance described in subsection (1). If applicable, the actor may raise an affirmative**  
28 **defense of Permission to Use Force under Section 213.10.**

29 **Comment:**

30 **\*\*\*\*\***

31 **[Comment x]. *Grading.*** This offense, though less serious than the offense of Sexual  
32 Assault by Aggravated Physical Force or Restraint under Section 213.1, nonetheless involves the  
33 use of physical force to cause the victim's submission to or performance of an act of sexual  
34 penetration or oral sex, a grave offense that traditionally often would be described as rape and  
35 classified as the most serious or next-most-serious sexual offense. Under current law, authorized  
36 sentences for state offenses comparable to Section 213.2 range from a high of life (Florida) or life  
37 without parole (Georgia) to maximums (absent recidivist enhancements) of 10 years (New Jersey),  
38 13-15 years (California, North Carolina, Michigan), and 16.5 years (Ohio).<sup>2</sup>

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<sup>2</sup> [TBS -- Printer deadline precluded full statutory citations.] In some states additional enhancements apply when the victim is a young child.

39           Given the classification of Sexual Assault by *Aggravated* Physical Force or Restraint as a  
40 felony of the third degree (plus five years), the less serious offense of Sexual Assault by [non-  
41 Aggravated] Physical Force or Restraint should be placed at the third-degree felony level, but  
42 without the additional five-year enhancement. Any lower grade for this offense, such as the fourth-  
43 degree felony, roughly associated with a five-year maximum, would likely place the offense at a  
44 lower level than any that to be found in *any* American jurisdiction.

45 **SECTION 213.3. SEXUAL ASSAULT OF A VULNERABLE PERSON**

46           **(1) *Sexual Assault of an Incapacitated Person.* An actor is guilty of Sexual Assault of**  
47 **an Incapacitated Person when the actor causes another person to submit to or perform an**  
48 **act of sexual penetration or oral sex and:**

49                   **(a) the act is without effective consent because at the time of the act, the other**  
50 **person:**

51                           **(i) is sleeping, unconscious, or physically unable to communicate lack**  
52 **of consent; or**

53                           **(ii) lacks substantial capacity to appraise, control, or remember the**  
54 **person's conduct because of a substance administered to the person, without**  
55 **the person's knowledge or consent, when the actor either administered the**  
56 **incapacitating substance for the purpose of impairing the person's ability to**  
57 **appraise, control, or remember the person's conduct, or knows that it was**  
58 **surreptitiously administered by another for that purpose; and**

59                   **(b) the actor recklessly disregards the risk that the other person is in that**  
60 **condition.**

61           **Sexual Assault of an Incapacitated Person is a felony of the third degree and a**  
62 **registrable offense when the actor has previously been convicted of a felony sex offense.**

63           **(2) *Sexual Assault of an Impaired Person.* An actor is guilty of Sexual Assault of an**  
64 **Impaired Person when the actor causes another person to submit to or perform an act of**  
65 **sexual penetration or oral sex and:**

66                   **(a) the act is without effective consent because at the time of the act the other**  
67 **person:**

1                   (i) has an intellectual, developmental, or mental disability or mental  
2 illness that makes the person substantially incapable of appraising the nature  
3 of the sexual activity involved, or of understanding the right to give or  
4 withhold consent in sexual encounters, and the actor has no similarly serious  
5 disability; or

6                   (ii) is passing in and out of consciousness; or

7                   (iii) lacks substantial capacity to communicate lack of consent; and

8                   (b) the actor recklessly disregards the risk that the other person is in that  
9 condition at the time of the act.

10                  Sexual Assault of an Impaired Person is a felony of the fourth degree.

11                  (3) *Sexual Assault of a Person Subject to a State-Imposed Restriction on Liberty.* An  
12 actor is guilty of Sexual Assault of a Person Subject to a State-Imposed Restriction on Liberty  
13 when the actor, who did not have a consensual sexually intimate relationship with the other  
14 person at the time that the restriction on that person's liberty began, causes the other person  
15 to submit to or perform an act of sexual penetration or oral sex, and:

16                   (a) the act is without effective consent because at the time of the act the other  
17 person is:

18                   (i) housed in a prison, hospital, or other custodial environment in which  
19 the actor holds or purports to hold a position of authority or supervision; or

20                   (ii) in custody, on probation, on parole, in a pretrial release or pretrial  
21 diversion or treatment program, or in any other status involving state-imposed  
22 restrictions on liberty, and the actor holds or purports to hold any position of  
23 authority or supervision with respect to that person's status or compliance  
24 with those restrictions; and

25                   (b) the actor knows that the other person is an individual over whom the actor  
26 is in a position of actual or apparent authority or supervision over the restriction on  
27 the other person's liberty.

28                  Sexual Assault of a Person Subject to a State-Imposed Restriction on Liberty is a  
29 felony of the fifth degree.

30                  (4) *Absence of effective consent.* Effective consent is absent when a circumstance  
31 described in subsections (1), (2), or (3) existed at the time the other person submitted to or

1 **performed the act of sexual penetration or oral sex. Submission, acquiescence, or words or**  
2 **conduct that would otherwise indicate consent do not constitute effective consent when**  
3 **occurring under a circumstance described in these subsections.**

4 **Comment:**

5 \*\*\*\*\*

6 **[Comment x]. Grading.** As a grading matter, the 1962 Code equated sexual penetration  
7 in conditions involving the deliberate, surreptitious administration of intoxicants, or involving a  
8 sleeping or unconscious victim, with forcible penetration. Existing law is too incoherent to provide  
9 meaningful guidance,<sup>3</sup> but that judgment remains sound.

10 Arguably, the actor who surreptitiously drugs another person to gain sexual advantage  
11 merits greater punishment than one who uses aggravated physical force or who takes advantage of  
12 an unconscious person. An actor relying upon physical force to subdue another at least gives the  
13 other person the opportunity to resist the intrusion, and the other person retains full mental and  
14 cognitive control, including the capacity to recall that may later aid in the prosecution of the  
15 offender. In contrast, a surreptitiously drugged person is stripped of bodily autonomy, not just  
16 sexual autonomy, and the intoxicant's effect on memory and perception may help the offender  
17 evade accountability.<sup>4</sup> And unlike an actor who simply takes advantage of another person's  
18 unconsciousness, the actor who surreptitiously drugs another affirmatively disables that person in  
19 a manner that aggravates the actor's culpability and exposes the other person to additional harm  
20 (from the effects of the drugging).

21 But although arguments for enhanced punishment are persuasive, in absolute terms a third-  
22 degree felony provides adequate penalty to serve the purposes of punishment. Accordingly,  
23 Section 213.3(1)(a)(ii) treats surreptitious drugging as equivalent to aggravated physical force and  
24 unconsciousness, rather than authorizing a more severe penalty.

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<sup>3</sup> One jurisdiction punishes the offense with a maximum of five years' incarceration, see, e.g., Ohio Rev. Code Ann. §§ 2907.03(A)(2), (3), 2929.14(A)(3)(a), and another with life without parole, see, e.g., Wash. Rev. Code Ann. §§ 9A.44.050(1)(b), (2); 9A.20.021(1)(a).

<sup>4</sup> See, e.g., *Sera v. State*, 17 S.W.3d 61 (Ark. 2000) (describing case involving four victims known to defendant, where defendant periodically spiked their drinks with Rohypnol without their knowledge and then filmed sexual encounters, but victims had no memory of incidents).

Grading: 213.3. Sexual Assault of a Vulnerable Person

1           \* \* \* The impairments covered by subsection (2)(a)(ii) and (iii) are transient in nature;  
2 more permanent physical and mental impairments are dealt with in subsections (1)(a)(i) and  
3 (2)(a)(i). Subparagraphs (ii) and (iii) of subsection (2)(a) also apply without regard to how the  
4 incapacity came about. Although the primary set of circumstances is likely to involve intoxicated  
5 persons, these subparagraphs are equally applicable to a person who is intermittently losing  
6 consciousness or lacks substantial capacity to communicate as a result of injury or illness. Where  
7 Section 213.3(2)(a)(ii) or (iii) applies, the offense is graded as a felony of the fourth degree.

8           \* \* \* Subparagraphs (ii) and (iii) of Section 213.3(2)(a) draw upon existing law while  
9 clarifying its application. Subparagraph (ii) identifies objective, specific circumstances that  
10 indicate a degree of intoxication so severe that, even though it did not lead to unconsciousness (a  
11 condition that would support liability under Section 213.3(1)(a)(i)), and even though it did not  
12 come about involuntarily (a condition that could support liability under Section 213.3(1)(a)(ii)), it  
13 places the person in a vulnerable condition, unable to communicate lack of consent: passing in and  
14 out of consciousness. In contrast, if an actor purposefully and surreptitiously uses intoxicants to  
15 disable another person, then subsection (1)(a)(ii) applies, and in cases where intoxication, whether  
16 voluntary or involuntary, renders a person unconscious, subsection (1)(a)(i) applies. In both of  
17 those circumstances, the felony is graded as one of the third degree. But if an individual is no  
18 longer firmly and continuously conscious, neither the fact that the individual voluntarily became  
19 intoxicated nor the fact that the individual does not expressly protest can be considered a sufficient  
20 indication of consent to sexual activity. Under Section 213.3(2)(a)(ii), sexual penetration or oral  
21 sex with a person passing in and out of consciousness is a felony in the fourth degree.

22           \* \* \*

23           Section 213.3(3)(a) defines a felony of the fifth degree for persons in a vulnerable status  
24 relationship to the actor as a result of a custodial relationship. Specifically, subparagraphs(i) and  
25 (ii) of subsection (3)(a) reach abuses that call for criminal prohibition, even in the absence of  
26 overtly coercive means, because the actor holds a position of authority with a substantial degree  
27 of control over the person giving consent. Of course, when a person in authority such as a prison  
28 guard knowingly obtains sexual consent by *threatening* an inmate with physical harm or other  
29 coercive pressure, the offense may constitute Sexual Assault by Aggravated Physical Force or  
30 Restraint under Section 213.1, or Sexual Assault by Physical Force or Restraint under Section  
31 213.2, or Sexual Assault by Extortion under Section 213.4, even in the absence of any provision

1 specifically addressed to the prison setting. And if the actor engages in sexual penetration or oral  
2 sex knowing that the other person does not consent, then, even in the absence of any added force  
3 or threats, the actor is punishable under Section 213.6 for Sexual Assault in the Absence of  
4 Consent.

5 Subparagraphs (i) and (ii) go further by imposing liability whenever a correctional officer  
6 or other individual who holds power over a person's liberty engages in an act of sexual penetration  
7 or oral sex with that person, regardless of whether the person in custody expresses apparent consent  
8 and regardless of whether the actor in authority makes explicit or implicit threats. Existing law  
9 exhibits wide variation in the authorized sentence for comparable conduct, with some jurisdictions  
10 authorizing a maximum of 25 or 30 years,<sup>5</sup> others five or seven years,<sup>6</sup> others one year or four,<sup>7</sup>  
11 and some not punishing this conduct at all. Section 213.3(3) grades the offense as a felony of the  
12 fifth degree, akin to the punishment that applies under Section 213.6 when circumstances indicate  
13 consent is lacking. The two offenses are effectively equivalent: both involve acts of penetration  
14 or oral sex with a nonconsenting person, but in the absence of added aggravators such as the use  
15 of force or other explicit coercion.

16 **SECTION 213.4. SEXUAL ASSAULT BY EXTORTION**

17 **(1) *Sexual Assault by Extortion.* An actor is guilty of Sexual Assault by Extortion when**  
18 **the actor causes another person to submit to or perform an act of sexual penetration or oral**  
19 **sex and:**

20 **(a) the act is without effective consent because the actor explicitly or implicitly**  
21 **threatened:**

22 **(i) to accuse that person or anyone else of a criminal offense or of a**  
23 **failure to comply with immigration regulations; or**

24 **(ii) to take or withhold action as an official, or cause an official to take**  
25 **or withhold action, whether or not the purported official has actual authority**  
26 **to do so; or**

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<sup>5</sup> [TBS -- Printer deadline precluded full statutory citations.] Florida, Georgia, Wisconsin

<sup>6</sup> Illinois, Ohio, Missouri

<sup>7</sup> Virginia, California, Texas, Arizona

1                   (iii) to take any action or cause any consequence that would cause  
2                   submission to or performance of the act of sexual penetration or oral sex by a  
3                   person of ordinary resolution in that person’s situation under all the  
4                   circumstances; and

5                   (b) the actor recklessly disregards the risk that the other person submitted to  
6                   or performed the act because of that threat.

7                   (2) *Grading.* Sexual Assault by Extortion is a felony of the fourth degree.

8                   (3) *Effective consent.* Effective consent is absent when the other person submitted to  
9                   or performed the act of sexual penetration or oral sex because the actor explicitly or  
10                  implicitly threatened any of the actions specified in subsection (1). Submission, acquiescence,  
11                  or words or conduct that would otherwise indicate consent do not constitute effective consent  
12                  when occurring in a circumstance described in subsection (1). If applicable, the actor may  
13                  raise an affirmative defense of Permission to Use Force under Section 213.10.

14 **Comment:**

15                  \*\*\*\*\*

16                  [**Comment x]. Grading.** This offense, though less serious than the offense of Sexual  
17                  Assault by Physical Force or Restraint under Section 213.2, nonetheless involves the serious  
18                  threats of harm that cause the victim’s submission to or performance of an act of sexual penetration  
19                  or 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 10  
21                  to 15 years (California, Michigan, New Jersey) and five years (Ohio).<sup>8</sup> At the other end of the  
22                  spectrum, however, a number of states (e.g., Massachusetts, New York, Virginia) have not yet  
23                  revised their codes to reach sexual assault by nonphysical threats; in those states conduct  
24                  comparable to that covered by Section 213.4 is not punishable at all.

25                  Given the classification of Sexual Assault by *Physical* Force or Restraint as a felony of the  
26                  third degree, the less serious offense of Sexual Assault by [*non-*]Physical Force or Restraint should  
27                  be placed at the next lowest level, that of the fourth-degree felony.

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<sup>8</sup> In some states additional enhancements apply when the victim is a young child.

1 **SECTION 213.5. SEXUAL ASSAULT BY EXPLOITATION**

2 **(1) An actor is guilty of Sexual Assault by Exploitation when the actor causes another**  
3 **person to submit to or perform an act of sexual penetration or oral sex and:**

4 **(a) the act is without effective consent because:**

5 **(i) the actor led the other person to believe falsely that the act had**  
6 **diagnostic, curative, or preventive medical properties; or**

7 **(ii) the actor led the other person to believe falsely that the actor was**  
8 **someone else who was personally known to that person; or**

9 **(iii) the other person was wholly or partly undressed, or in the process**  
10 **of undressing, for the purpose of receiving nonsexual professional or**  
11 **commercial services from the actor and had not given the actor explicit prior**  
12 **permission to engage in that act; and**

13 **(b) the actor recklessly disregards the risk that the other person submitted to**  
14 **or performed the act because of one or more of these circumstances.**

15 **(2) *Grading.* Sexual Assault by Exploitation is a felony of the fifth degree.**

16 **(3) *Absence of effective consent.* Effective consent is absent when the other person**  
17 **submitted to or performed the act of sexual penetration or oral sex because the actor engaged**  
18 **in any of the conduct described in subsection (1). Submission, acquiescence, or words or**  
19 **conduct that would otherwise indicate consent do not constitute effective consent when**  
20 **occurring under a circumstance described in that subsection.**

21 **Comment:**

22 **[Comment x]. *Grading.*** Section 213.5(1)(a)(i) punishes penetration and oral sex when the  
23 actor knowingly misrepresents that the act has diagnostic, curative, or preventive medical  
24 properties. Section 213.5(1)(a)(ii) punishes sexual penetration and oral sex when the actor  
25 knowingly impersonates someone personally known to the other person. Both offenses address the  
26 use of deception for the purposes of sexual gratification. The existing range of penalties for such  
27 conduct vary widely. Some jurisdictions do not punish sex by deception at all, whereas others  
28 authorize punishments in excess of 10 years for a first-time offender.<sup>9</sup> Although the use of certain

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<sup>9</sup> See, e.g., Ariz. Rev. Stat. Ann. § 13-1406 (setting maximum at 14 years, based on lack-of-consent definition that includes deception as to spouse); Tenn. Code Ann. § 39-13-503(a)(4) (punishing

## Grading: 213.5. Sexual Assault by Exploitation

1 extreme forms of deception is intolerable, it is of lesser severity than the means of obtaining sexual  
2 submission that rely upon physical violence. Accordingly, Section 213.5 grades these offenses as  
3 felonies in the fifth degree.

4 Similarly, Section 213.5(1)(a)(iii) is graded as a felony in the fifth degree. In some respects,  
5 the offense resembles the terms of the offenses of greater severity defined in Section 213.3(1)(a)(i)  
6 (unconscious persons) in which a person is sexually intruded upon in a situation in which the  
7 person has no capacity to refuse, because the sexual intrusions that occur in the commercial or  
8 professional setting tend to occur unexpectedly and without prior warning.<sup>10</sup> A person who is  
9 unexpectedly penetrated while having a massage, for instance, has no opportunity to resist or even  
10 express unwillingness prior to the act. In other respects, however, the offense is akin to the offenses  
11 defined by Section 213.3(3) (custodial relationships), in that the person is in a sense a vulnerable  
12 ward of the actor, who exploits that vulnerability for the actor's own sexual satisfaction. At the  
13 same time, the behavior covered under Section 213.3(3) will in many instances be nominally  
14 consensual; clearly nonconsensual sexual acts that occur in a custodial setting remain governed by  
15 the provisions requiring force (Sections 213.1 and 213.2), coercion (Section 213.4) or nonconsent  
16 (213.6). The availability of more serious penalties for more egregious forms of sexual intrusion in  
17 the commercial or professional setting—such as those involving force—and the difference from  
18 the offenses described in Section 213.3(1) and (2), which require that the other person's  
19 vulnerability be so extreme that it effectively forecloses the person's awareness of what is  
20 happening or ability to communicate in any way, militate in favor of a penalty more in line with  
21 that of Section 213.3(3) governing custodial abuse. Accordingly, Section 213.5(1)(a)(iii) is graded  
22 as a felony in the fifth degree.

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penetration by fraud as a Class B felony, which pursuant to § 40-35-111 carries 8 to 30 years in prison).  
Cf. Ala. Code § 13A-6-65 (punishing intercourse where consent obtained by fraud as a misdemeanor).

<sup>10</sup> See Reporters' Note *infra*.

1 **SECTION 213.6. SEXUAL ASSAULT IN THE ABSENCE OF CONSENT**

2 **(1) An actor is guilty of Sexual Assault in the Absence of Consent if the actor causes**  
3 **another person to submit to or perform an act of sexual penetration or oral sex and**

4 **(a) the other person does not consent to that act; and**

5 **(b) the actor recklessly disregards the risk that the other person does not**  
6 **consent to that act.**

7 **(2) Grading. Sexual Assault in the Absence of Consent under subsection (1) is a felony**  
8 **of the fifth degree, except that it is a felony of the fourth degree when:**

9 **(a) the offense under subsection (1) occurs in disregard of the other person’s**  
10 **expressed unwillingness, or is so sudden or unexpected that the other person has no**  
11 **adequate opportunity to express unwillingness before the act occurs; and**

12 **(b) the actor recklessly disregards the risk that a circumstance described in**  
13 **subsection (2)(a) existed at the time of the act of sexual penetration or oral sex.**

14 **(3) If applicable, the actor may raise an affirmative defense of Permission to Use Force**  
15 **under Section 213.10.**

16 **Comment:**

**REPORTERS’ NOTES**

17 \*\*\*\*\*

18 [Note x]. *Grading – current law.* Current law as of July 2018 reflects a consensus that  
19 sexual penetration or oral sex without consent calls for significant criminal sanctions. But there is  
20 little agreement about the appropriate degree of punishment. Two-thirds of jurisdictions have  
21 offenses roughly analogous to Section 213.6, and their authorized punishments vary widely, with  
22 differences that cannot always be attributed to differences in how their key element—the absence  
23 of consent—is defined. For three jurisdictions that impose liability only in the stark situation where  
24 nonconsent takes the form of expressed unwillingness, this especially culpable nonconsent offense  
25 carries a statutory maximum of 50 years in one, 10 years in another, and five years in the third.<sup>11</sup>  
26 Among 12 jurisdictions that treat absence of consent as sufficient but do not define consent, three  
27 impose a felony penalty of at least 20 years,<sup>12</sup> one imposes a five-year penalty, and one a two-year

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<sup>11</sup> 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).

<sup>12</sup> These jurisdictions include Louisiana (25 years), Mississippi (40 years), and Tennessee (30 years). See, e.g., LA. REV. STAT. ANN. § 14:43(B) (2018) (“not more than twenty-five years”). See generally “Current State of the Law -- Consent-Only Offenses” (July 2018).

1 felony penalty,<sup>13</sup> and seven impose misdemeanor penalties of up to a year.<sup>14</sup> Finally, of 24  
2 jurisdictions that impose liability analogous to Section 213.6 and also define consent as either  
3 affirmative consent or contextual consent, five permit maximum sentences ranging from 20 years  
4 to life,<sup>15</sup> six permit maximums of 10 to 15 years,<sup>16</sup> three permit maximums of five to seven years,<sup>17</sup>  
5 and two permit maximums of 18 months to two years;<sup>18</sup> the remaining eight states in this group of  
6 24 all punish the offense as a misdemeanor, with penalties ranging from 90 days to a year.<sup>19</sup>

7 In sum, of the 24 jurisdictions that treat penetration in the absence of consent as sufficient,  
8 while also defining the required consent in terms equivalent to or more specific than that of Section  
9 213.0(6)(d), over half (14) punish that offense with at least five years of imprisonment. The  
10 jurisdictions that impose only misdemeanor sanctions for penetration without consent do so in part  
11 because their statutes also apply to misconduct considerably less aggravated than the behavior that  
12 Section 213.6 covers. These statutes may, for example, have a single offense applicable to sexual  
13 penetration, oral sex, and less serious forms of sexual contact; punish penetration or oral sex only  
14 in the absence of affirmative consent; permit punishment on a strict-liability or negligence basis;  
15 or impose liability even when several of these less aggravating circumstances are present.

16 [Note x]. **Grading – policy considerations.** Setting the proper penalty for the offense  
17 defined by Section 213.6 requires exceptional care. On the one hand, this offense must fit into an  
18 existing body of criminal law, and the penalty must be sensible relative to nonsexual offenses  
19 graded at higher or lower levels. On the other hand, existing punishment levels for many violent  
20 and nonviolent offenses in the United States are rightly criticized as too harsh.<sup>20</sup> A penalty that  
21 appears proportionate to sanctions for other crimes may be unduly severe in absolute terms. For  
22 sex offenses in particular, many states authorize high maximum penalties that are difficult to justify

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<sup>13</sup> 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 (Ct. App. Mass. 2008).

<sup>14</sup> These jurisdictions are Georgia, Idaho, Maryland, Ohio, North Dakota, and South Dakota.

<sup>15</sup> These jurisdictions are Nevada (life), New Hampshire (20 years), Utah (life), Vermont (life), and the UCMJ (30 years).

<sup>16</sup> These states are Florida (15 years), Hawaii (10 years), Oklahoma (10 years), Pennsylvania (10 years), New Jersey (10 years), and Wisconsin (10 years).

<sup>17</sup> These states are Maine (5 years), Missouri (7 years), and Oregon (5 years).

<sup>18</sup> These jurisdictions are Colorado (18 months) and the federal system (2 years).

<sup>19</sup> 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).

<sup>20</sup> 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](https://archive.org/stream/325931-dcom5/325931-dcom5_djvu.txt).

1 in terms of the traditional penological goals of deterrence, incapacitation, rehabilitation, and  
2 retribution.<sup>21</sup>

3 Mindful of these considerations, Section 213.6 grades the offense no higher than a fourth-  
4 degree felony and authorizes imprisonment for up to five years. More severe sanctions are  
5 authorized, of course, on proof of one or more of the aggravating circumstances found in other  
6 Sections of Article 213. Cases in which the actor deployed aggravated physical force or restraint,  
7 for example, trigger the higher penalties authorized under Section 213.1.<sup>22</sup>

8 In the absence of aggravating circumstances beyond the absence of consent, Section 213.6  
9 provides a separate offense punishable as a felony of either the fourth or the fifth degree, with  
10 potential prison sentences of up to five and three years respectively. That judgment reflects both  
11 the seriousness of the sexual acts within the scope of Section 213.6 and the availability of more  
12 stringent sanctions under other provisions of Article 213 when the penetration or oral sex occurs  
13 through force, threats, coercion, or exploitation of the other person's vulnerability.

14 Regardless of aggravating circumstances, an actor who engages in an act of sexual  
15 penetration or oral sex with another person, while aware of a substantial, unjustifiable risk of that  
16 person's unwillingness, culpably inflicts grievous personal injury. That act warrants felony  
17 punishment; lesser sanctions would understate the seriousness of the wrongdoing. A coherent  
18 grading structure should not classify this offense as a misdemeanor, because it is significantly more  
19 serious than unlawful sexual contact short of penetration, an offense for which misdemeanor  
20 penalties are appropriate.<sup>23</sup> When an encounter involves sexual penetration or oral sex without  
21 consent, Section 213.6 classifies the offense as a felony of the fifth degree. If the actor commits  
22 this act when the other person has clearly expressed unwillingness or when the other person did  
23 not have an adequate opportunity to do so, the disregard for the other person's bodily autonomy  
24 and emotional well-being is even more stark, and the act warrants an even more substantial  
25 sanction; Section 213.6 accordingly classifies such cases as felonies of the fourth degree.

## 26 SECTION 213.7. OFFENSIVE SEXUAL CONTACT

27 **(1) *Aggravated Offensive Sexual Contact.* An actor is guilty of Aggravated Offensive**  
28 **Sexual Contact when:**

29 **(a) the actor causes another person to submit to or perform an act of sexual**  
30 **contact; and**

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

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<sup>21</sup> See supra notes 34-35 (citing jurisdictions that authorize imprisonment in excess of 10 years for nonconsensual penetration, without requiring proof of aggravating factors).

<sup>22</sup> See supra note 29.

<sup>23</sup> See 1962 Model Penal Code § 213.4 (grading "sexual assault," the offense of unlawful sexual contact short of penetration, as a misdemeanor); Section 213.7 (grading "offensive sexual contact" . . .).

1           (i) the actor knowingly uses or explicitly or implicitly threatens to use  
2 physical force or restraint against any person; and knows that the other person  
3 submitted to or performed the act of sexual contact because of that use or  
4 threat; or

5           (ii) the other person lacks substantial capacity to appraise, control, or  
6 remember that person's conduct because of a substance administered to the  
7 person, without the person's knowledge or consent, when the actor either  
8 administered the incapacitating substance for the purpose of impairing the  
9 person's ability to appraise, control, or remember the person's conduct, or  
10 knows that it was surreptitiously administered by another for that purpose.

11 **Aggravated Offensive Sexual Contact is a felony of the fifth degree.**

12 **(2) *Offensive Sexual Contact.* An actor is guilty of Offensive Sexual Contact when:**

13           (a) the actor knowingly causes another person to submit to or perform an act  
14 of sexual contact, and

15           (b) the actor knows or recklessly disregards that the other person did not  
16 consent to that act; or

17           (c) that act is without effective consent because:

18               (i) the actor knows or recklessly disregards that the other person is  
19 unaware that such act is occurring; or

20               (ii) the act occurs under circumstances as defined by Section 213.2,  
21 involving the use of physical force;

22               (iii) the act occurs under circumstances as defined by Section 213.3,  
23 other than Section 213.3(1)(a)(ii), involving vulnerable persons; or

24               (iv) the act occurs under circumstances as defined by Section 213.4,  
25 involving extortion; or

26               (v) the act occurs under circumstances as defined by Section 213.5,  
27 involving exploitation.

28 **Offensive Sexual Contact is a petty misdemeanor.**

29 **(3) *Absence of effective consent.* Effective consent is absent when the other person**  
30 **submitted to or performed an act of sexual contact under any of the circumstances described**  
31 **in subsections (1) or (2)(c). Submission, acquiescence, or words or conduct that would**

1 otherwise indicate consent do not constitute effective consent when occurring under a  
2 circumstance described in those subsections. If applicable, an actor charged with a violation  
3 of subsection (1)(b)(i), (2)(b), or (2)(c)(ii), (iii), or (iv) may raise an affirmative defense of  
4 Permission to Use Force under Section 213.10.

5 **Comment:**

6 \*\*\*\*\*

7 [Comment x]. **Grading.** Section 213.7 imposes a two-tiered liability scheme that punishes  
8 unwanted sexual contact either as a fourth-degree felony or a misdemeanor, depending on the  
9 circumstances. Sexual contact is defined in Section 213.0(2)(c), and involves less intimate and  
10 intrusive sexual touching than sexual penetration or oral sex.

11 \* \* \*

12 A good deal of unwanted sexual contact may involve low levels of force or restraint. For  
13 example, an aggressor might grab an arm or piece of clothing as a means of temporary restraint.  
14 However, such actions rarely significantly impede a person's ability to move freely or inflict more  
15 than minor physical injury or pain. When such an act is done for the purpose of imposing sexual  
16 contact on an unwilling individual, it merits punishment, but not at the level of a fifth-degree  
17 felony. Instead, such situations are covered by Section 213.7(2), which prohibits the petty  
18 misdemeanor of Offensive Sexual Contact.

19 However, when an action rises to such a level that it causes meaningful physical pain or  
20 more than negligible physical harm, Section 213.7(1) applies. The added trauma to the victim and  
21 the added culpability of the actor suffice to take the offense out of mere misdemeanor behavior  
22 and bring it within the domain of Aggravated Offensive Sexual Contact, a felony of the fifth  
23 degree, even when the injury does not rise to the level of *serious* bodily injury.

24 \* \* \*The second aggravating factor is found in Section 213.7(1)(b), which covers contact  
25 after surreptitious administration of intoxicants. It parallels the provision in Section 213.3(1)(a)(ii)  
26 that applies to acts of sexual penetration or oral sex under identical circumstances. Secretly  
27 drugging another person for the purpose of engaging in unwanted sexual contact merits heightened  
28 punishment because the actor does not simply exploit an existing vulnerability. Instead, the actor  
29 creates the vulnerability for the purpose of exploiting it, and in the process risks causing the other  
30 person added physical harm. Surreptitiously drugging another person for the purpose of engaging  
31 in sexual contact with that person is akin to engaging in such acts by force, in that in both cases

1 the actor subdues the will of the other person by putting the other person at risk for bodily harm  
2 beyond the sexual affront.<sup>24</sup> Moreover, the added deviance of creating a vulnerability that may  
3 also help the accused's acts go undetected merits additional punishment. In a two-tier system the  
4 result is to elevate that condition for purposes of punishment in Section 213.7(1), even though  
5 actors who exploit existing vulnerabilities do not receive this heightened punishment.

### REPORTERS' NOTES

6 \*\*\*\*\*

7 **[Note x]. Grading.**

8 Contemporary law embraces a broad range of maximum penalties for violations of sexual-  
9 contact statutes, as it does for sexual-penetration statutes.<sup>25</sup> However, there are several points of  
10 consensus. First, there is broad consensus that the baseline sexual-contact offense, which punishes  
11 contact with an adult that is offensive or without that person's consent, is in almost all cases graded  
12 as a low-level misdemeanor.<sup>26</sup> Second, forcible-touching offenses, and contact with vulnerable  
13 persons (such as the mentally impaired), are typically graded as felonies,<sup>27</sup> at times carrying quite  
14 severe penalties.<sup>28</sup>

15 In keeping with existing law, Section 213.7 grades the basic sexual-contact offense as a  
16 petty misdemeanor. However, Section 213.7 generally departs from existing law in two respects.  
17 Section 213.7(1) grades the forcible-contact offenses as a fifth-degree felony (carrying a three-  
18 year maximum), as opposed to the prevalent state legislation that typically supports a more severe  
19 penalty. And Section 213.7(2)(b) grades sexual contact with certain vulnerable persons—such as  
20 those unaware, unconscious, mentally impaired, or impermissibly coerced into contact—as a  
21 misdemeanor rather than a felony.

22 The determination to authorize a less severe penalty than found in existing state law, even  
23 in aggravated circumstances or for sexual contact in situations involving vulnerable or coerced

---

<sup>24</sup> See Comment to Section 213.3(1)(b).

<sup>25</sup> See Reporters' Note to Section 213.6.

<sup>26</sup> But see, e.g., ARIZ. REV. STAT. ANN. § 13-1404 (2015) (punishing sexual contact without consent as a Class 5 felony); supra note 26 (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 penalty lower than 364 days or a year, according to the law governing the applicable misdemeanors, which prescribes 60- to 90-day penalties.

<sup>27</sup> See, e.g., R.I. GEN. LAWS § 11-37-4.

<sup>28</sup> 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. §§ 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).

1 victims, reflects a judgment that more serious sanctions are not appropriate. Sexual contact under  
2 aggravating circumstances typically causes harm that is less severe than that of the more intimate  
3 acts of sexual penetration and oral sex. Therefore, grading the basic contact offense with greater  
4 severity than the lowest-level penetration offense would seem illogical. In addition, many  
5 situations of Aggravated Offensive Sexual Contact are also likely to authorize added nonsexual  
6 charges—such as counts for threats, possession of an unlawful weapon, aggravated assault, and so  
7 on. These added offenses ensure adequate flexibility in sentencing for situations that warrant  
8 punishment beyond the three-year statutory maximum. And to the extent that the sexual contact in  
9 fact occurred in a situation in which the defendant intended a more serious intrusion, the crime of  
10 attempt ensures a more fitting penalty.

11 Similarly, instances of unwanted sexual contact under circumstances without those  
12 aggravating conditions, while worthy of punishment, should not rise to the felony level. Again, the  
13 harm to the victim and culpability of the actor in an incident involving sexual contact, in the  
14 absence of aggravating factors, is almost always less severe than that of an act of sexual penetration  
15 or oral sex. A misdemeanor conviction for a sexual offense carries a six-month term of  
16 imprisonment. To elevate such contact to a felony, authorizing a term of incarceration akin to  
17 actors who penetrate others without consent, would collapse important differences in culpability  
18 and open the door to unnecessarily harsh, uneven, and potentially discriminatory exercises of  
19 charging and sentencing discretion.

## 20 SECTION 213.9. SEX TRAFFICKING

21 **(1) *Sex Trafficking.* An actor is guilty of Sex Trafficking if the actor knowingly**  
22 **recruits, entices, transports, transfers, harbors, provides, isolates, or maintains a person by**  
23 **any means with the purpose of facilitating a commercial sex act involving that person when:**

24 **(a) coercion is being or will be used to cause the person to submit to or perform**  
25 **a commercial sex act, which therefore will be without effective consent; and the actor**  
26 **knows that coercion is being or will be used to cause the person to submit to or**  
27 **perform that commercial sex act; or**

28 **(b) the person is younger than 18 years of age and is being or will be caused to**  
29 **submit to or perform a commercial sex act; and the actor recklessly disregards the**  
30 **risk that the person is younger than 18 years of age and is being or will be caused to**  
31 **submit to or perform the commercial sex act.**

32 **(2) *Definitions.* For purposes of Section 213.9(1):**

33 **(a) “Coercion” means:**

34 **(i) using or threatening to use physical force or restraint on any person;**

1           (ii) taking, destroying, or threatening to take or destroy the person’s  
2 money, credit or debit card, passport, driver’s license, immigration document,  
3 or other government-issued identification document, including a document  
4 issued by a foreign government, or any travel document pertaining to the  
5 person;

6           (iii) restricting or threatening to restrict the person’s access to a  
7 substance that is a controlled substance under the federal Controlled  
8 Substance Act, 21 U.S.C. § 801 et seq.;

9           (iv) administering or withholding a controlled substance in  
10 circumstances that impair the person’s physical or mental ability to avoid,  
11 evade, or flee from the actor;

12           (v) using any scheme, plan, deception, misrepresentation, or pattern of  
13 behavior for the purpose of causing the person to believe that failing to submit  
14 to or perform a commercial sex act would result in physical, psychological,  
15 financial, or reputational harm to anyone that is sufficiently serious to cause a  
16 reasonable person of the same background, in the same circumstances, and in  
17 the same physical and mental condition as that person, to submit to or perform  
18 a commercial sex act in order to avoid incurring that harm; or

19           (vi) any combination of these circumstances.

20           (b) “Commercial Sex Act” means any act of sexual penetration, oral sex, or  
21 sexual contact performed in exchange, or the expectation of exchange, for money,  
22 property, services, or any other thing of value given to or received by any person.

23           (3) *Grading.* Sex Trafficking is a felony of the [*third*] degree, [*reserving question*  
24 *whether this is a registrable offense*].

25           (4) *Effective consent.* Effective consent is absent when coercion is being or will be used  
26 to cause a person to submit to or perform a commercial sex act, or when the person is less  
27 than 18 years of age. Submission, acquiescence, or words or conduct that would otherwise  
28 indicate consent do not constitute effective consent when occurring under any of those  
29 circumstances. If applicable, the actor may raise an affirmative defense of Permission to Use  
30 Force under Section 213.10.

1 **Comment:**

2 \*\*\*\*\*

3 **[Comment x]. Grading.** Sex Trafficking is typically an exceptionally grave offense,  
4 involving the exploitation of particularly vulnerable victims, often in connection with organized  
5 crime networks encompassing dozens of victims and numerous individual acts of sexual abuse.  
6 Under current law, authorized sentences for state offenses comparable to Section 213.9 range from  
7 a high of life (Florida, Massachusetts, Missouri) and 99 years (Texas) to maximums (absent  
8 recidivist enhancements) of 16.5 years (Ohio) and 10 to 12 years (Indiana, Maryland, North  
9 Carolina, Virginia).<sup>29</sup>

10 The wide range of these authorized maximums in part reflects the fact that the offense is  
11 defined in extraordinarily broad terms; it can potentially reach a single instance of transporting or  
12 providing support to a psychologically coerced adult or a 17-year-old minor. To be sure, such  
13 conduct is unquestionably blameworthy and deserving of significant punishment. Yet at the less  
14 serious end of the spectrum of culpability, we cannot always rely on sentencing discretion to  
15 choose an appropriately measured sentence well under the authorized maximum, especially when  
16 that maximum is quite high.

17 Accordingly, the grading of this unusually heterogenous offense requires exceptional care.  
18 Moreover, an important consideration in setting an appropriate maximum is the recognition that  
19 the most egregious instances of the offense, those that typically come to mind when picturing sex  
20 traffickers, involve multiple victims and multiple instances of trafficking activity. In such cases,  
21 consecutive sentences are an appropriate way to reflect the seriousness of offense conduct that  
22 spans many distinct episodes of abuse. Mindful of these considerations, Section 213.9 classifies  
23 Sex Trafficking as a felony of the third degree.

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<sup>29</sup> [TBS -- Printer deadline precluded full statutory citations.] In some states additional enhancements apply when the victim is a young child.

1 **SECTION 213.8. SEXUAL OFFENSES INVOLVING MINORS**

2 **(1) *Sexual Assault of a Minor Younger than 12.* An actor is guilty of Sexual Assault of**  
3 **a Minor Younger than 12 when:**

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

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

7 **(i) the minor is younger than 12 years of age; and**

8 **(ii) the actor is more than four years older than the minor; and**

9 **(c) the actor recklessly disregards the risk that the minor is younger than the**  
10 **age of 12.**

11 **If the actor is younger than 18 years of age at the time of the offense, then the offense**  
12 **is a felony of the fifth degree. If the actor is 18 years of age or older, then the offense is a**  
13 **felony of the third degree, and a registrable offense when the actor is [reserved] or more years**  
14 **older.**

15 **(2) *Sexual Assault of a Minor 12 to 16 Years of Age.* An actor is guilty of Sexual Assault**  
16 **of a Minor 12 to 16 Years of Age when:**

17 **(a) the actor knowingly causes a minor to submit to or perform an act of sexual**  
18 **penetration or oral sex; and**

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

20 **(i) the minor is at least 12 but younger than 16 years of age; and**

21 **(ii) the actor is more than five years older than the minor and is not the**  
22 **legal spouse of the minor; and**

23 **(c) the actor knows or recklessly disregards the risk that the minor is younger**  
24 **than 16 years of age.**

25 **If the actor is fewer than 10 years older than the minor at the time of the offense, then**  
26 **the offense is a misdemeanor. If the actor is 10 or more years older than the minor at the**  
27 **time of the offense, the offense is a felony of the fourth degree, and is a registrable offense**  
28 **when the actor is [reserved] or more years older.**

29 **(3) *Incestuous Sexual Assault of a Minor.* An actor is guilty of Incestuous Sexual**  
30 **Assault of a Minor when:**

1           **(a) the actor knowingly causes a minor to submit to or perform an act of sexual**  
2 **penetration or oral sex; and**

3           **(b) the actor is a person 18 years of age or older, and the minor is younger than**  
4 **18 years of age; and**

5           **(c) the act is without effective consent because the actor is:**

6                   **(i) a parent or grandparent of the other person, including biological,**  
7 **step, adoptive, and foster parents or grandparents; or**

8                   **(ii) a person who, at the time of the offense, is the legal spouse, domestic**  
9 **partner, or sexual partner of a person described by subparagraph (i); or**

10                   **(iii) a legal guardian or de facto parent of the minor, who resides**  
11 **intermittently or permanently in the same dwelling as the minor.**

12           **Incestuous Sexual Assault of a Minor is a felony of the third degree, and a registrable**  
13 **offense.**

14           **(4) *Exploitative Sexual Assault of a Minor.* An actor is guilty of Exploitative Sexual**  
15 **Assault of a Minor when:**

16           **(a) the actor causes a minor to submit to or perform an act of sexual**  
17 **penetration or oral sex; and**

18           **(b) the minor is younger than 18 years of age; and**

19           **(c) the actor is more than 10 years older than the minor and is not the legal**  
20 **spouse of the minor; and**

21           **(d) the act is without effective consent because the actor is in a position of trust**  
22 **to the minor, or holds an authoritative or supervisory role over the minor, including**  
23 **as a teacher, educational or religious counselor, mental-health treatment provider,**  
24 **school administrator, extracurricular instructor, or coach.**

25           **Exploitative Sexual Assault of a Minor is a felony of the fifth degree.**

26           **(5) *Fondling a Minor.* An actor is guilty of Fondling a Minor when:**

27           **(a) the actor knowingly causes a minor to submit to or perform an act of**  
28 **fondling or masturbatory contact with the genitalia of any person, for the purpose of**  
29 **sexual arousal, sexual gratification, sexual humiliation, or sexual degradation of any**  
30 **person; and**

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

1 (i) the minor is younger than 12 years of age and the actor is more than  
2 four years older than the minor; or

3 (ii) the minor is least 12 years of age but younger than 16 years of age  
4 and the actor is more than seven years older than and not the legal  
5 spouse of the minor; and

6 (c) the actor recklessly disregards the risk that the circumstances described in  
7 subsection (b) exist.

8 Fondling a Minor is a felony of the fourth degree if the minor is younger than 12 years  
9 of age, and a felony of the fifth degree if the minor is 12 years of age or older.

10 (6) *Offensive Sexual Contact with a Minor.* An actor is guilty of Offensive Sexual  
11 Contact with a minor when:

12 (a) the actor knowingly causes a minor to submit to or perform

13 (i) an act of sexual contact; or

14 (ii) an act involving the touching of the mouth, lips, or tongue of any  
15 person, to any body part or object, for the purpose of sexual arousal, sexual  
16 gratification, sexual humiliation, or sexual degradation of any person; and

17 (b) the act is without effective consent because

18 (i) the minor is younger than 12 years of age, and the actor is more than  
19 five years older than the minor; or

20 (ii) the minor is at least 12 years of age but younger than 16 years of  
21 age, and the actor is more than seven years older than the youth and is not the  
22 legal spouse of the youth; and

23 (c) the actor knows or recklessly disregards the risk that the circumstances  
24 described in subsection (b) exist.

25 *Offensive Sexual Contact with a Minor* is a felony in the fifth degree when at the time  
26 of the act the minor is younger than 12 years of age, and a misdemeanor when the minor is  
27 12 to 16 years of age.

28 (7) *Absence of effective consent.* Effective consent is absent when the circumstances  
29 described in subsections (1) through (7) exist at the time the child submitted to or performed  
30 the act. Submission, acquiescence, or words or conduct that would otherwise indicate consent

1 **do not constitute effective consent when occurring under the circumstances described in that**  
2 **subsection.**

3 **Comment:**

4 Sections 213.1 through 213.7 apply without regard to the age of the complainant. An adult  
5 who engages in acts of sexual penetration, oral sex, or sexual contact without consent, who engages  
6 in acts of sexual penetration, oral sex, or sexual contact when the other person is vulnerable, or  
7 who uses force, coercion, or exploitation to obtain sexual submission is punishable whether the  
8 other person is an adult or a minor.

9 But the particular vulnerability of minors, who are frequent targets of sexual abuse and  
10 exploitation,<sup>1</sup> requires articulation of additional proscriptions. The classic framework of force and  
11 consent is poorly suited to regulating sexual activity with children and youth. Young children may  
12 willingly submit to inappropriate sexual activity even in the absence of any threat or force, simply  
13 because the actor is a trusted family member or authoritative adult.<sup>2</sup> Older youths may have the  
14 capacity to consent to sexual behavior with age-appropriate peers, but are susceptible to  
15 manipulation or exploitation by family members or other authority figures.<sup>3</sup>

16 The 1962 Code and every current U.S. jurisdiction penalize sexual activity with minors on  
17 the basis of chronological age alone, without further inquiry into the presence or absence of  
18 consent, force, coercion, or added vulnerability. The use of chronological age as a means of  
19 discerning different degrees of sexual sophistication at times creates artificial and imperfect  
20 distinctions, but it is the universal approach for want of better alternatives. As the 1962 Code

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<sup>1</sup> 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. See, e.g., David Finkelhor, *The Lifetime Prevalence of Child Sexual Abuse and Sexual Assault Assessed in Late Adolescence*, 55 J. OF ADOLESCENT HEALTH 329, 329 (2013) (collecting and reporting data). When these data are parsed to focus only on sexual acts perpetrated by adults against youths and children, rather than peer to peer, the rate is reported as one in nine for girls and one in 53 for boys. See *id.* Such abuse often has lasting and serious consequence. See, e.g., Tamara Blakemore, *The Impacts of Institutional Child Sexual Abuse: A Rapid Review of the Evidence*, 74 CHILD ABUSE & NEGLECT 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 Reporters’ Note.

<sup>2</sup> Megan E. Giroux et al., *Differences in Child Sexual Abuse Cases Involving Child Versus Adolescent Complainants*, 79 CHILD ABUSE & NEGLECT 224 (2018) (separating data regarding children under 12 from youth 12-17, and describing differences).

<sup>3</sup> Giroux, *supra* note 2, at 230 (noting that older adolescents are more likely to be the victims of sexual abuse and other differences).

1 recognized, although “chronological age is only a rough estimate of the group of persons sought  
2 to be protected in this section, administrative considerations compel use of this crude index rather  
3 than a legal test which would call for expert, contradictory, and often inconclusive testimony on  
4 the issue of puberty.”<sup>4</sup> An age-based approach also has longstanding pedigree, despite its  
5 shortcomings. As noted in the commentary to the 1962 Model Penal Code, “[a]n early English  
6 statute extended felony sanctions to intercourse with a female under the age of 10 with or without  
7 her consent.”<sup>5</sup>

8 *Age-gap requirements.* Many early codes, including those in place during the drafting of  
9 the 1962 Model Penal Code, referred only to the age of the complainant in setting liability,  
10 disregarding the age of the actor. But that approach gave rise to numerous objections. The 1962  
11 Code particularly criticized an age-based approach with respect to older girls (the 1962 Code  
12 protected female complainants against male actors only), observing that it had the undesirable  
13 effect of penalizing young men for consensual sexual experimentation among contemporaries.<sup>6</sup>  
14 Focusing on the age of the complainant alone also fails to account for the differing degree of  
15 culpability when the same conduct is engaged in by an immature versus a mature actor. In this  
16 respect, the age of the actor is an important consideration for social condemnation, even for  
17 complainants too young to consent. A misguided, curious youth who intrudes sexually on a young  
18 child may deserve punishment, but not at the same level as a mature adult who has specifically  
19 targeted children for sexual gratification.

20 The actual scope of liability for complainant-age-only statutes has also widened as  
21 procedural and jurisdictional rules have changed. A statute that appears to punish without regard  
22 to the age of the actor may have not actually had that effect in an era in which minors were not  
23 eligible for criminal punishment. For instance, the 1962 Code punished a man who engaged in  
24 “sexual intercourse” with a girl under 10,<sup>7</sup> and “deviate sexual intercourse” with a girl or boy under  
25 10, as second-degree felonies,<sup>8</sup> equivalent to forcible rape. That language on its face would seem  
26 to impose serious liability for an actor as young as 11 who engages in nominally consensual

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<sup>4</sup> 1962 Code, Comment at 328-329.

<sup>5</sup> 1962 Code, Comment at 276 (citing 18 Eliz. Ch. 7, § 4; 4 W. Blackstone, Commentaries at \*212).

<sup>6</sup> 1962 Code, Comment at 327.

<sup>7</sup> 1962 Code § 213.1(1)(d).

<sup>8</sup> 1962 Code § 213.2(1)(d).

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1 activity with a nine-year-old complainant. But the Comments to the 1962 Code explain that, in  
2 fact, other provisions constrained the availability of punishment for youthful actors.<sup>9</sup> Specifically,  
3 Section 4.10 of the Model Penal Code, in deference to the “widespread adoption of juvenile  
4 court[s]” at the time of the Code’s passage, barred criminal conviction for actors under 16, and  
5 presumed actors as old as 16 or 17 would also be handled in juvenile proceedings absent explicit  
6 waiver.<sup>10</sup> Thus, as practical matter, criminal conviction required at least a six-year age gap between  
7 a complainant and an actor, even if a delinquency finding presumably could attach to an 11-year-  
8 old actor with a nine-year-old complainant.<sup>11</sup>

9 Section 213.3 of the 1962 Code, titled “Corruption of Minors and Seduction” expressly  
10 imposed an age gap in its provisions. It punished, as a felony in the third degree, “sexual  
11 intercourse” or “deviate sexual intercourse” between a male four or more years older than a female  
12 complainant who was under the age of 16.<sup>12</sup> Complainants 16 years of age or older attained the  
13 “age of consent,” and could engage in consensual sexual activity with any person. Conversely, 10-  
14 to 15-year-old complainants could lawfully consent to sexual activity with peers who were fewer  
15 than four years older. A 14-year-old was thus liable for sexual activity with a complainant of 10,  
16 but not 11, 12, or 13. And a 19-year-old was liable for sexual activity with complainants aged 10  
17 to 15.

18 Like the 1962 Code, existing law generally embraces the view that the age of the actor is  
19 as important as that of the complainant; only a minority of jurisdictions penalize sexual activity  
20 solely with reference to the complainant’s age, even for the class of very young complainants.<sup>13</sup>  
21 Rather, most statutes take a tiered approach to liability that punishes sexual behavior on the basis  
22 of the ages of the complainant and of the actor,<sup>14</sup> excluding liability in most cases of peer sexual

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<sup>9</sup> Many jurisdictions followed the common law approach that precluded liability for actors under the age of 14. 1962 Code, Comment at 339.

<sup>10</sup> 1962 Code, Comment at 340. See also Reporters’ Note.

<sup>11</sup> 1962 Code Comment at 340-341.

<sup>12</sup> 1962 Code § 213.3(1)(a). That section also penalized an actor who was a “guardian or otherwise responsible for the general welfare” of a complainant under the age of 21. 1962 Code § 213.3(1)(b).

<sup>13</sup> See Reporters’ Note; Lesley Y. Garfield Tenzer, *#MeToo, Statutory Rape Laws, and the Persistence of Gender Stereotypes*, 2019 UTAH L. REV. 117, 122 (counting 34 states that impose age differentials, and 16 that impose age thresholds without regard to the actor’s age).

<sup>14</sup> See, e.g., Cal. Penal Code § 261.5(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

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1 activity, imposing moderate liability for young people acting out sexually in an impermissible  
2 manner, and reserving the most severe penalties for adults who sexually impose on very young  
3 children.<sup>15</sup> In contrast to the 1962 Code, however, a significant number of states set an older age  
4 of consent. Roughly five states set the age at 17, and another 10 or so at 18.<sup>16</sup> In fact, all five of  
5 the most populous states set a general age of consent at 17 or 18, although the specific terms of  
6 those statutes vary.<sup>17</sup>

7 In keeping with the dominant pattern, Section 213.8 proscribes sexual activity with  
8 reference to the age of the complainant and of the actor, without any additional evidence of actual  
9 or effective consent, force, or coercion. In effect, Section 213.8 declares certain complainants  
10 incapable of providing effective consent solely as a result of their age and their age relative to the

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misdemeanor or a felony”); N.C.G.S.A. § 14-27.24(a) (“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.”); T. C. A. § 39-13-506 (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 Reporters’ Note.

<sup>15</sup> See Catherine L. Carpenter, *On Statutory Rape*, 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 Reporters’ Note.

<sup>16</sup> See generally <https://www.ageofconsent.net/states>.

<sup>17</sup> See, e.g. Cal. Penal Code § 261.5 (“(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....”); Tex. Penal Code § 22.011(a)(2) (defining child as a person younger than 17 and penalizing acts of penetration as a second degree felony, but allowing an affirmative defense for actors within three years of age of complainants 14 or older); N.Y. Penal Law § 130.25(2) (defining a class E felony—a 4-year maximum—as when an actor “twenty-one years old or more, he or she engages in sexual intercourse with another person less than seventeen years old”); Fla. Stat. § 794.05 (defining a second degree felony for an actor 24 years or older to engage in sexual activity with a person 16 or 17); 720 Ill. Stat. § 5/11-1.50 (defining as a misdemeanor 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.”).

1 actor, and/or the actor’s special authority over them.<sup>18</sup> Consistent with the 1962 Code, Section  
2 213.8 also sets a general age of consent of 16.

3 **Calculating Ages.** Given that liability under many states’ statutory-rape laws hinges not  
4 just on the age of the victim, but on the difference in age between the victim and the perpetrator,  
5 the question of how to calculate age has arisen repeatedly. In the absence of clear statutory  
6 direction, at least four approaches have emerged in case law for calculating a statutory age gap.

7 The first approach, probably closest to our colloquial sense but widely rejected by the  
8 courts, would treat age “in whole integers of years.”<sup>19</sup> Under this whole-years approach, sometimes  
9 called the “Birthday Rule,” an individual is considered only as old as she was on her last birthday:  
10 an individual is deemed 19 years old, that is, until she turns 20. In other words, a complainant aged  
11 15 years, two months, and eight days would be considered 15, just as a defendant aged 19 years,  
12 seven months, and five days would be considered only 19, making the statutory difference between  
13 their ages exactly four years (and hence not *more* than the four years often required by statute).

14 A still more extreme version of a whole-integers approach involves a “calendar year”  
15 calculation, according to which the age gap is measured by the number of whole calendar years  
16 separating the defendant’s and victim’s years of birth.<sup>20</sup> On this approach, an actor born on January  
17 2, 1990, would be considered only four years older than a victim born on December 28, 1995,  
18 despite being nearly six years older in fact, because only four calendar years separate their years  
19 of birth (1991, 1992, 1993, 1994).<sup>21</sup> As with the whole-years approach, the only courts that have  
20 considered this “calendar year” interpretation have rejected its results as “absurd.”<sup>22</sup>

21 At the other extreme is an approach measuring the difference in age down to the exact hour  
22 of birth.<sup>23</sup> So far it appears that only one court has accepted this hourly interpretation, and then

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<sup>18</sup> Importantly, it is the age of the minor that is of consequence; emancipated minors are protected by Article 213 unless a judicial emancipation order or other statute requires otherwise. RESTATEMENT OF THE LAW, CHILDREN & THE LAW § 4.10 and Comment *k* (Council Draft No. 4 2019).

<sup>19</sup> State v. Faulk, 683 S.E.2d 265, 267 (N.C. Ct. App. 2009).

<sup>20</sup> See People v. Costner, 870 N.W.2d 582 (Mich. Ct. App. 2015) (where defendant made this argument); State v. Jason B., 729 A.2d 760 (Conn. 1998) (apparently the same).

<sup>21</sup> Id. at 231 n.3.

<sup>22</sup> Id. at 231-232; *Jason B.*, 729 A.2d at 769.

<sup>23</sup> Commonwealth of Pennsylvania v. Price, 189 A.3d 423, 431 (Pa. Super. Ct. 2018) (setting aside twin brothers’ convictions under Pennsylvania’s statutory rape law requiring at least a four-year age gap

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1 only under the rule of lenity, to resolve the ambiguity created by the “unique” circumstances of  
2 that case.<sup>24</sup> That court also did not confront the conflict between its approach and the longstanding  
3 common law rule “that fractions of a day are not considered when computing time.”<sup>25</sup>

4 Nearly all courts to consider the issue reject these three approaches and instead adopt a  
5 method nicknamed the “days-and-months approach.”<sup>26</sup> According to this approach, what matters  
6 is “a calculation of *time*, not of *age*.”<sup>27</sup> And “common sense dictates that in comparing the relative  
7 ages of individuals, the difference in their ages is determined by reference to their respective *birth*  
8 *dates*,” measured, that is, to the day.<sup>28</sup>

9 The “days and month” approach is the most widely adopted, and most logical. It is the  
10 approach envisioned in drafting Article 213. Thus, a statutory provision requiring a difference of  
11 four years between perpetrator and victim will “mean four years and zero days.” Or, put another  
12 way, an actor aged 19 years, seven months, and 10 days who engages sexually with a minor aged  
13 15 years, five months, and five days, would be considered four years, two months, and five days

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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).

<sup>24</sup> *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 Sex Offender Registration and Notification Act, 42 U.S.C. § 16901 et seq., 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 [the Act] on the theory that, by hours or minutes, the offender was ‘more than 4 years older’”).

<sup>25</sup> See, e.g., *State v. Yager*, 908 N.E.2d 462, 464 (Ohio Ct. App. 2009) (relying on *Greulich v. Monnin*, 50 N.E.2d 310 (Ohio 1943)); accord *Com v. Iafrate*, 594 A.2d 293 (Pa. 1991) (noting that “[s]ince as early as 1908 courts of [the] Commonwealth [of Pennsylvania] have adhered to” the same computational rule, though also holding the rule inapplicable for “determining juvenile court jurisdiction”); *Mason v. Bd. of Educ. of Baltimore Cty.*, 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.”).

<sup>26</sup> *United States v. Doutt*, 926 F.3d 244, 247 (6th Cir. 2019).

<sup>27</sup> *Faulk*, 683 S.E.2d at 267.

<sup>28</sup> *State v. Marcel*, 67 So.3d 1223, 1225 (Fla.D.Ct.App.3d 2011) (quoting *State v. Jason B.*, 729 A.2d 760, 767 (Conn. 1998)) (emphasis added); accord *People v. Costner*, 870 N.W.2d 582 (Mich. Ct. App. 2015) (adopting that interpretation of Michigan’s sex-offender registry); *State v. Parmley*, 785 N.W.2d 655, 662 (Wis. Ct. App. 2010) (same for Wisconsin’s registry); see also *United States v. Doutt*, 926 F.3d 244, 247 (6th Cir. 2019) (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. Brown*, 740 F.3d 145 (3d Cir. 2014) (applying the same approach to the Sex Offender Registration and Notification Act (“SORNA”) while declining to reach the hourly interpretation, as an “extreme hypothetical[]”); *United States v. Black*, 773 F.3d 1113 (10th Cir. 2014) (adopting the same reading of SORNA).

1 older than the minor. If the statute imposed liability for a gap of more than four years, then the  
2 actor (at 19) is more than four years older than the complainant (aged 15).

3 *Mens rea.* Historically, statutory rape has been defined as a strict-liability offense.<sup>29</sup> Even  
4 as of the drafting of the 1962 Code, that rule “continue[d] today in a large number of states.”<sup>30</sup>  
5 Today, strict liability persists in a majority of jurisdictions.<sup>31</sup> As a result, a defendant proven to  
6 have engaged in prohibited sexual conduct with a person under the specified age could mount no  
7 defense of mistake as to the age, no matter how reasonable or justified.

8 Despite misgivings, the 1962 Code followed this practice in part, denying any defense of  
9 mistake as regards complainants under 10 years old, on the grounds of “extreme youth and that in  
10 any event any proposed change on this point would encounter political resistance.”<sup>32</sup> But the Code  
11 recognized the imperative to allow a defense of mistake for older complainants, expressly  
12 providing a defense of “reasonable belief” for offenses involving complainants 11 years or older.<sup>33</sup>  
13 This “compromise solution” proved “extremely influential”; as of the publication of the  
14 commentaries in the 1980s, “a majority of jurisdictions [had] abandoned the traditional rule of  
15 strict liability for higher ages.”<sup>34</sup> Current law offers no additional guidance; many jurisdictions  
16 continue to endorse strict liability, while others require proof of mens rea or permit an affirmative  
17 defense of mistake.<sup>35</sup>

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<sup>29</sup> See 1962 Code, Comment to § 213.6, at 418. See also Reporters’ Note.

<sup>30</sup> 1962 Code, Comment to § 213.6, at 418.

<sup>31</sup> Roughly two-thirds of states impose strict liability for statutory rape, allowing no mistake of age defense. See, e.g., *Pritchard v. State*, 842 A.2d 1244 (Del. 2004) (table) (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”). See also Reporters’ Note.

<sup>32</sup> 1962 Code, Comment to § 213.6 at 416.

<sup>33</sup> 1962 Code, Section 213.6 Comment at 416 (“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.”)

<sup>34</sup> 1962 Code, Comment to § 213.6 at 417.

<sup>35</sup> See Reporters’ Note.

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1           The imposition of strict liability has historically been justified on two grounds. First, when  
2 the age of consent is set at an age as young as 10, as in the 1962 Code, “no credible error of  
3 perception would be sufficient to recharacterize a child of such tender years as an appropriate  
4 subject of sexual gratification.”<sup>36</sup> Second, the common law tended to view child sexual abuse as a  
5 harm primarily perpetrated by sexually aggressive men upon young, sheltered females. In this  
6 view, the simple act of a grown man being alone with a young girl was obviously wrongful. Thus  
7 the greater wrong of engaging in sexual activity was justifiably punished without proof of further  
8 mens rea—reasoning typified by the archetypal case *Regina v. Prince*.<sup>37</sup> Finally, scholars have  
9 argued that mens rea requirements place too high a burden on prosecutors pursuing cases as serious  
10 as allegations of child sexual abuse, even given a general preference to impose liability only upon  
11 actors proven to have had a culpable mindset.

12           But none of those premises withstands scrutiny today. First, contemporary law typically  
13 does not rest on a single absolute age of consent.<sup>38</sup> Rather, the law sets forth tiers of liability that  
14 recognize that in modern society even very young children may engage in sexual activity with  
15 peers that, while perhaps not socially desirable, should not be presumptively criminalized. As such,  
16 the range of “credible error” is actually much greater. Although few nine-year-olds could be  
17 mistaken for 18, there might be a 15-year-old who could reasonably be perceived to be of age.  
18 Secondly, a tiered liability structure, imposed without proof of mens rea, could have the effect of  
19 criminalizing a young person who reasonably, but erroneously, believed a sexual partner to be a  
20 peer. A girl of 11 who appears or represents herself to be 13 may be a clearly inappropriate sexual  
21 partner to a man of 40, but not so clearly to a youth of 16. Strict liability is thus a poor fit for a  
22 contemporary era in which sexual exploration is more common among youth, and for a system of  
23 liability attuned to the age of both the complainant and the actor.

24           Second, empirical evidence has proven that the perpetrators of child sexual abuse  
25 overwhelmingly are persons known to the complainant, such as family members, teachers, or  
26 clergy.<sup>39</sup> The specter of a stranger seducing a young girl and luring her from her home may endure,

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<sup>36</sup> 1962 Code, Comment to § 213.6, at 419.

<sup>37</sup> 2 Cr. Cas. Res. 154 (1875) (denying mistake defense on a “lesser legal wrong/lesser moral wrong” theory, as taking the complainant from her parents’ legal custody was itself illegal).

<sup>38</sup> See Reporters’ Note.

<sup>39</sup> Editorial, *Sexual Abuse and Assault in Children and Teens: Time to Prioritize Prevention*, 55 J. ADOLESCENT HEALTH 312 (2014) (“Strangers were the least commonly reported perpetrator; most

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1 but evidence suggests it is a rare occurrence. In its place is the reality: the vast majority of those  
2 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 such  
8 evidence is unlikely to leave children unprotected. Moreover, for cases involving authority figures  
9 expressly covered by Section 213.8—namely 213.8(3), involving actors who are parental figures,  
10 and Section 213.8(4), involving actors in trust roles of other kinds—the age threshold is set high  
11 enough that *mens rea* is unlikely to play any significant role. Prosecutors are unlikely to have  
12 trouble proving that a coach, teacher, or youth pastor was unaware of a substantial risk that the  
13 complainant was under 18.

14 Second, for stranger cases, which statistically are most likely to occur with older youth  
15 complainants, there is no longer the sense that sexual misconduct inexorably requires an initial  
16 wrongful act that enables the actor to gain proximity to the complainant. In contemporary society,  
17 minors may come into regular, lawful contact with older adults. As a result, an adult actor may  
18 encounter a minor in places in which the actor has engaged in no wrongful act of accessing the  
19 complainant, and in which the actor has little reason to suspect the youth is not age-appropriate. A  
20 15-year-old who looks mature and uses a fake identification to enter a 21-and-above club, for  
21 instance, may actively misrepresent his or her age to a 21-year-old patron. If the patron engages in  
22 what the patron believes to be consensual sexual activity, and a factfinder believes that the patron  
23 had an objectively reasonable basis to believe that the complainant was age-appropriate, then it

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commonly, the acts were by an acquaintance of the child.”). One study showed that 27 percent of sexual offenders against minors were family members of the victims; for victims under 12, a third to a half were family members. For complainants aged 12 to 17, the offender was more likely to be an acquaintance than a stranger. Overall, only seven percent of offenders against minors were strangers—ranging from 3.1 percent for complainants under six to 9.8 percent for complainants 12 to 17. Howard N. Snyder, *Sexual assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics*, at 10 & tbl 6 (2000). In one study, 74 percent of adolescents (aged 12-17) surveyed who stated they had been sexually assaulted reported that the assailant was someone they knew. Almost two-thirds of assaults occurred within the complainant’s home (30.5%) or neighborhood (23.8%) or school (15.4%). *Youth Victimization: Prevalence and Impacts*, U.S. Dep’t of Justice, Office of Justice Programs (2003), at 5, available at <https://www.ncjrs.gov/pdffiles1/nij/194972.pdf>.

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1 would be unjust to impose liability on the patron. Even the contemporary analog to the common  
2 law concern—for instance, an adult stranger who engages in an internet relationship with a teen  
3 and arranges to meet the youth for a sexual encounter—may blur the lines of wrongfulness, as  
4 consenting adults regularly do meet and develop relationships online. It is better left to a factfinder  
5 to judge whether an actor credibly believed the complainant to be of age, especially since evidence  
6 of the actor’s mental state may be more readily available given that the relationship will likely  
7 have a strong digital record.

8 In this respect, imposing a mens rea requirement does not eliminate liability so much as  
9 ensure that it is appropriately calibrated. And importantly, an actor who plausibly claims not to  
10 have known that the youth was below one age threshold, but nevertheless engages in behavior that  
11 would be culpable at the threshold that the actor believed, is still punishable.<sup>40</sup> For instance, an  
12 adult defendant who claims to have believed that a very young complainant was in fact slightly  
13 older—for example that an 11-year-old was actually 13—will still be punishable. That is because  
14 the actor will in essence be admitting to one crime (attempted sexual penetration of a minor 12-  
15 15) as a defense to another (sexual penetration of a child under 12).

16 In this way, the most troubling application of mens rea arguably involves older actors who  
17 engage in nominally consensual activity with older youths who are not quite at the age of consent,  
18 but close. For instance, imagine a 15¾-year-old who willingly becomes sexually involved with a  
19 middle-aged actor who deliberately seeks out and preys upon young persons. Under the 1962  
20 Code, which provided a defense of reasonable mistake, as well as under Section 213.8, which  
21 requires proof of a culpable mens rea, the actor may escape liability by claiming a reasonable belief  
22 that the complainant was 16 and therefore at the age of consent. Assuming no qualifying additional  
23 relationship (either parental, as required by Section 213.8(3) or a position of trust or authority, as  
24 in Section 213.8(4)), the actor would thus face no criminal liability, because the prosecution cannot  
25 prove the necessary mens rea for the completed offense, and the attempted act is not a crime.

26 But although relationships between older teens and adults may be ill-advised and socially  
27 undesirable, in the absence of other coercive elements they should not be criminally penalized. In  
28 the words of the Commentary to the 1962 Code, “the penal law does not try to enforce all aspects  
29 of community morality, and any thoroughgoing attempt to do so would extend the prospect of

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<sup>40</sup> See Illustration 6.

1 criminal sanctions far into the sphere of Individual liberty and create a regime too demanding for  
2 all save the best among us.”<sup>41</sup> And while the lack of liability in certain specific cases may be  
3 unsatisfying, imposition of a mens rea requirement has the further salutary effect of blunting the  
4 effect of the age cutoffs that serve as the necessary scaffold for the tiers of liability. The  
5 complainant who is 15¾ years old is more plausibly 16 than, say, a 12-year-old, and yet a strict-  
6 liability approach to age thresholds would treat actors in both situations equivalently, even if there  
7 were good reason to believe the former capable of lawful consent. Mens rea helps to soften the  
8 impact of age cutoffs by recognizing that, although chronological age is the defining element of  
9 liability, it is not unassailable.

10 Another added, but underappreciated, dimension of imposing a mens rea requirement arises  
11 with regard to actors with cognitive disabilities.<sup>42</sup> Such persons may have cognitive capacities that  
12 render them less sophisticated judges of age, as well as more likely to perceive a person  
13 significantly younger as a peer. If a cognitively typical 15-year-old becomes willingly sexually  
14 involved with a 22-year-old with cognitive deficits—deficits that make the 22-year-old a *de facto*  
15 intellectual, emotional, or social peer of the 15-year-old, whom the actor believed to be age-  
16 appropriate—then it seems arbitrary to punish the 22-year-old. Mens rea also ensures that aiders  
17 and abettors are held responsible only for assisting in acts that the aider and abettor had reason to  
18 believe unlawful.<sup>43</sup>

19 Indeed, the judicial decisions that uphold strict liability sound in rationales that no longer  
20 pass muster today. For instance, in *Owens v. State*,<sup>44</sup> the Maryland Supreme Court upheld strict  
21 liability on the grounds that there was no constitutional right to engage in extramarital sexual  
22 activity, and that jurisdictions have laws against bigamy and fornication.<sup>45</sup> But *Lawrence v. Texas*

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<sup>41</sup> 1962 Code, Comment to § 213.6 at 415.

<sup>42</sup> Carpenter, *supra* note 14, at 344 (describing case of Raymond Garnett, a 20-year-old cognitively disabled man convicted of statutory rape of a 13-year-old, precluded from arguing that he reasonably believed her to be 16); Elizabeth Nevins, *Incomprehensible Crimes: Defendants with Mental Retardation Charged with Statutory Rape*, 85 N.Y.U. L. Rev. 1067, 1129 (2010).

<sup>43</sup> *United States v. Encarnacion-Ruiz*, 787 F.3d 581, 596 (1st Cir. 2015) (applying *Rosemond v. United States*, 134 S. Ct. 1240 (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).

<sup>44</sup> 724 A.2d 43 (Md. 1999).

<sup>45</sup> 724 A.2d at 683-684.

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1 has since affirmed a constitutional right to private consensual sexual activity outside of marriage,<sup>46</sup>  
2 and most jurisdictions have either wiped adultery and fornication statutes from their books or do  
3 not enforce them in part because they are likely unconstitutional.<sup>47</sup>

4 The Supreme Court has also increasingly underscored the importance of imposing a *mens*  
5 *rea* requirement as regards criminal offenses, observing the “basic principle that wrongdoing must  
6 be conscious to be criminal.”<sup>48</sup> In *United States v. X-Citement Video*,<sup>49</sup> the Supreme Court applied  
7 this principle directly to an offense involving the sexual exploitation of children. In that case, the  
8 Court held that a defendant could not be convicted of possessing child pornography in the absence  
9 of evidence that the defendant knew the images contained children.

10 For these reasons, Section 213.8 extends the “compromise position” adopted by the 1962  
11 Code to require proof of a culpable mental state for all statutory offenses. It also reaches beyond  
12 existing law and the 1962 Code to impose this requirement as an element of the offense, requiring  
13 proof beyond a reasonable doubt by the prosecution, rather than as an affirmative defense.  
14 Specifically, the offenses defined in Section 213.8 all require proof of at least the actor’s  
15 recklessness as to the complainant’s age. The actor is culpable if the actor was aware of, and  
16 consciously disregarded, a *substantial and unjustifiable risk* that the complainant was beneath the  
17 relevant age threshold.

18 **Grading.** The breadth of interests protected by statutory-rape laws is reflected in the range  
19 of punishments imposed for their violation. At one extreme, an adult who sexually abuses a young  
20 child merits the most serious of punishments. Such offenses are difficult to detect, the harm caused

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<sup>46</sup> See 539 U.S. 558 (2003). Cf. Arnold H. Loewy, *Statutory Rape in a Post Lawrence v. Texas World*, 58 S.M.U. 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.”).

<sup>47</sup> 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, 434 (2018) (noting that adultery was penalized as a capital offense in puritan New England; now only 20 states have adultery laws on the books, and they are rarely enforced); see also *Lawrence*, 539 U.S. 558 (2003) (Scalia, J., dissenting) (noting that “State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation...,” but that the majority had overruled *Bowers*).

<sup>48</sup> *Elonis v. United States*, 135 S. Ct. 2001 (2015) (internal quotation omitted).

<sup>49</sup> *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994). But cf. *United States v. Price*, 921 F.3d 777 (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).

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1 to the victim is often lasting and severe, and the community opprobrium is high. At the other  
2 extreme, an adult who engages in a nominally consensual, if exploitative, sexual relationship with  
3 an older teen violates community norms and is a worthy target of deterrence, but is a less  
4 appropriate subject for extreme penalties. The constellation of scenarios covered by statutory rape  
5 laws complicates the imposition of punishment just as it complicates the line-drawing exercise for  
6 substantive liability.

7         Grading of the offenses described in Section 213.8 is guided by several key principles.  
8 First, at their core, statutory-offense statutes are ineffective consent statutes. That is, if the act  
9 involves force, coercion, exploitation, a victim vulnerable for reasons other than age, or evident  
10 nonconsent, then the serious penalties prescribed for those offenses apply. Section 213.8 applies  
11 to situations where such added circumstances are absent.

12         But, of course, the absence of these aggravators carries different meaning in different  
13 contexts. Grown adults who sexually abuse small children may have no need to use force or  
14 coercion to obtain sexual submission. But inquiring into that child's consent to the sexual act—or  
15 requiring proof of nonconsent—is absurd. A young child cannot be construed as even nominally  
16 consenting to a parent's sexual advances or the advances of a trusted, much older adult. Moreover,  
17 the state's interest is at its apex when it comes to protecting young children from inappropriate  
18 sexual interest on the part of adults. It is therefore apt to analogize sexual acts between adults and  
19 young children as akin to sexual acts done by force or coercion; the age differential stands in place  
20 of overt physical or psychological domination. The same logic extends to sexual acts between  
21 parents and those *in loco parentis* and those in their care. In such situations, consent is inapposite,  
22 even as regards an older minor. A minor cannot reasonably be said to consent to sexual activity  
23 when that activity is with a parental figure or guardian. The state's interest in protecting the youth  
24 from exploitation within the family structure and in maintaining the integrity and security of the  
25 family as a place of development and maturation justifies imposition of high penalties for those  
26 who exploit their special access to a vulnerable minor.

27         In contrast, sexual activity engaged in willingly by older minors of considerable maturity,  
28 even if ill-advised, do not warrant as draconian a response. Unlike young children, who may not  
29 even possess the autonomy and maturity to understand their capacity to consent or to withhold  
30 consent from any sexual overtures, older minors have more developed understandings of their  
31 sexuality. Acts with older minors that lack consent as defined by Section 213.0(2)(d) are more

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1 readily punishable under Section 213.6 or other Sections of Article 213. The application of Section  
2 213.8 as regards older minors, therefore, is likely to extend to situations in which the youth  
3 engaged with apparent willingness (excepting the provisions of Section 213.8(3) and (4)).  
4 Although the state maintains an interest in discouraging and deterring such acts, as discussed in  
5 the Sections regarding the imposition of substantive liability, the necessary degree of deterrence  
6 and harm prevention for such nominally consensual encounters merits a much less serious penalty.

7 Lastly, as with defining the scope of substantive liability, assessing the proper penalty  
8 requires attentiveness not just to the age of the complainant, but also the age of the actor. Many  
9 states now overtly recognize that peers may engage in sexual exploration, even at tender years,  
10 and thus decline to punish such activity when committed by minors against others of the same  
11 approximate age.<sup>50</sup> A minor who engages in inappropriate sexual activity with a much younger  
12 child may cause as serious a harm to that child as would an adult actor, but the state's interest in  
13 punishment in each case differs. While the need to protect young children from the sexual advances  
14 of older minors justifies proscribing such behavior, the associated penalty should aim less for  
15 retribution and more for deterrence and rehabilitation given the plasticity of the youth's mind and  
16 the youth's own sexual immaturity.<sup>51</sup>

17 Current law recognizes these considerations in affixing penalties, even as there exists very  
18 little consensus as to the appropriate penalties for any particular offense. At the broadest level, as  
19 one scholar observed, often “the classification of the crime as a misdemeanor or felony will depend  
20 on the relative age of the victim and perpetrator.”<sup>52</sup> For instance, “some states . . . have applied less  
21 serious punishment when committed by a perpetrator whose age differential is less than three or  
22 four years from the victim or when both perpetrator and victim are below the recognized age of  
23 consent. The resulting classifications affect the grading of the offense and punishment of the  
24 perpetrator.”<sup>53</sup> Jurisdictions also draw both substantive and grading distinctions, foreclosing

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<sup>50</sup> Carpenter, *supra* note 15, at 340-341.

<sup>51</sup> Chelsea Leach et al., *Testing the sexually abused-sexual abuser hypothesis: A prospective longitudinal birth cohort study*, 51 CHILD ABUSE & NEGLECT 144 (2016) (reporting lack of correlation between sexual-abuse history and later sexually abusive behavior in prospective study, but noting studies of sexual offenders show rates around 70 percent for a history of abuse—suggesting that most maltreated children do not become abusive, but that most abusive adults were maltreated). See also Reporters' Note.

<sup>52</sup> Carpenter, *supra* note 15, at 339.

<sup>53</sup> Carpenter, *supra* note 15, at 340-341. See also Reporters' Note.

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1 liability altogether for actors within peer range, and grading actors just outside that range with  
2 lesser severity than those much older.<sup>54</sup> Section 213.8 follows this pattern, and imposes tiers of  
3 liability based on the age of the complainant, the age of the perpetrator, and the difference in ages  
4 between them. It reserves the most severe penalties for adults who sexually engage young children,  
5 and for parental figures who abuse their roles. But it departs from current law in prescribing  
6 significantly less severe penalties for adults who engage in nominally consensual activity with  
7 older minors, as well as for minors who engage in sexual behavior with age-inappropriate children.

8 In sum, Section 213.8(1) addresses complainants under the age of 12 and imposes two tiers  
9 of liability based on the age of the actor. Section 213.8(2) addresses complainants aged 12 to 15  
10 and imposes two tiers of liability likewise based on the age gap between the actor and complainant.  
11 Section 213.8(3) penalizes sexual acts committed by parents and grandparents, with a broad  
12 definition of those roles meant to encompass all those who functionally or formally assume a  
13 parental role. Section 213.8(4) prohibits sexual activity when the actor is in a role of trust or  
14 authority, even where the complainant is otherwise beyond the age of consent. Section 213.8(5)  
15 imposes two tiers of heightened punishment for acts of sexual contact—namely, fondling of  
16 genitals, that is especially intrusive in nature, and Section 213.8(6) imposes punishment for sexual  
17 contact with minors short of sexual penetration, oral sex, or fondling.

### 18 ***1. Sexual Assault of a Minor Younger than 12 – Section 213.8(1).***

19 The judgment that all sexual penetration with a young child should be treated as rape, even  
20 in the presence of nominal consent, was first given statutory expression during the reign of  
21 Elizabeth I.<sup>55</sup> The offense has been known colloquially as “statutory” rape ever since.

22 Originally, the law equated this form of sexual penetration with forcible rape only when  
23 the child was younger than 10 years old<sup>56</sup> and female.<sup>57</sup> Intercourse with an older child was not  
24 considered a crime unless the strict requirements of force and resistance had been met. Sexual  
25 abuse of young boys by men was covered by general laws prohibiting “sodomy” or “deviate sexual  
26 intercourse”; but “seduction of young boys and male adolescents by older females” was considered

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<sup>54</sup> See Reporters’ Note.

<sup>55</sup> 18 Eliz. Ch. 7, § 4 (1576).

<sup>56</sup> BLACKSTONE, note 5, at \*212.

<sup>57</sup> 1962 Code, Commentaries at 334 (“Traditionally, the law of rape punished only male aggression against females.”).

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1 “neither to be the serious problem of the other forms of sexual conduct, absent force, nor likely to  
2 have the same adverse effects on the victim”<sup>58</sup> and thus not regulated.

3 By the mid-20th century, all American jurisdictions had raised the age of consent from 10,  
4 though in many instances only by one or two years.<sup>59</sup> At the extreme, some states raised the age  
5 of consent to 17 or even 18.<sup>60</sup> Jurisdictions also began to draft gender-neutral statutes,<sup>61</sup> addressed  
6 to a broader spectrum of sexual imposition than simply vaginal intercourse, applicable without  
7 regard to the gender of the complainant.

8 All states now punish intercourse with young children, but in the case of intercourse with  
9 older minors (e.g., those above the age of puberty) few jurisdictions treat such conduct as  
10 equivalent in seriousness to intercourse with a young child. Instead, most states follow one of three  
11 intermediate approaches—either treating intercourse with an older minor as a crime only when the  
12 perpetrator is significantly older; treating all intercourse with an older minor as a prohibited but  
13 less serious offense; or combining the first two approaches by grading the seriousness of  
14 intercourse with an older minor on the basis of the age of both the victim and the perpetrator.<sup>62</sup>

15 These gradations reflect contemporary views that distinguish between sex with minors who  
16 are too young to consent at all, and sex with minors who may lawfully consent to peers. It also  
17 reflects the current sensibility that draws meaningful distinction between what might popularly be  
18 called “child sexual abuse” and “statutory rape.” Many jurisdictions treat the former as among the  
19 most serious offenses in the penal code, because any suggestion of consent is untenable. In

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<sup>58</sup> 1962 Code Commentaries at 338-339.

<sup>59</sup> MODEL PENAL CODE AND COMMENTARIES, PART II, §§ 210.0 to 213.6 (1980), § 213.1, COMMENT 6, AT 324-325.

<sup>60</sup> See, e.g., CAL. PENAL CODE § 261.5 (setting age of consent at 18); N.Y. PENAL LAW § 130.05(3)(a) (setting age of consent at 17). See also Reporters’ Note.

<sup>61</sup> 1962 Code Comment at 334-365. 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. 454 (1981). As of the 2000s, every state in the country now has gender-neutral laws. Garfield Tenzer, *supra* note 13, at 136.

<sup>62</sup> See, e.g., CAL. PENAL CODE § 261.5 (one-year maximum when the victim is less than three years younger than the perpetrator; four-year maximum when the age difference is greater than three years); N.Y. PENAL LAW §§ 130.20-130.35 (treating the offense as first-degree rape (with a 25-year maximum prison sentence) when the victim is under 13; 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).

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1 contrast, the latter is viewed with greater leniency, as the minor has reached sufficient maturity to  
2 consent in some circumstances, even if not to a partner of much greater years.

3         The difficulty lies in the need of the law to draw a precise line between these two situations.  
4 Determining where to draw that line requires attention to the age of both the complainant and the  
5 actor, as well as the rationales that animate the distinction. Generally speaking, contemporary age-  
6 based restrictions on sexual activity find justification in three related objectives: the desire to  
7 protect minors from a potentially intense emotional involvement for which they are not yet  
8 prepared; the protection of minors from unwanted intimacy, intimidation, or sexual exploitation;  
9 and the prevention of pregnancy. But the degree to which these purposes are implicated varies  
10 considerably on the basis of the age of complainants and perpetrators. Young children generally  
11 lack the maturity and independence to give meaningful consent to sexual intercourse, and society,  
12 with good reason, considers sexual interest in them on the part of older minors and adults as  
13 unacceptable and dangerous. Older minors may have the capacity to consent to peers, yet require  
14 protection from predatory adults. The oldest minors may have the legal right to consent to almost  
15 any person of their choosing—even if such a decision is viewed as unwise—and yet still merit  
16 protection from adult actors who exploit special relationships, such as a sexually abusive parent.

17         The choice of specific age cutoffs for each of these thresholds—the age below which sexual  
18 behavior is presumptively unacceptable; the age at which peer exploration is to be tolerated even  
19 if not desired; and a final “age of consent” at which a person gains nearly full legal authority to  
20 consent to sexual partners, is inherently arbitrary in two respects. It is arbitrary because persons of  
21 the same age may nonetheless possess widely disparate degrees of maturity and sexual  
22 sophistication. It is also arbitrary because picking one single age involves an intuitive judgment  
23 about the right age at which the right degree of the characteristics necessary to support culpability  
24 are shared to hold the entire group responsible.

25         The 1962 Code proceeded on the premise that, in 1962, the age of 12 represented the  
26 median age for onset of puberty, but nonetheless rejected that age as the dividing line because by  
27 definition half of the younger children *would* have reached puberty. The Institute therefore chose  
28 instead to set the dividing line at the age of 10, explaining that “it would be illogical to set the age  
29 limit so high [i.e., at 12] that half the individuals in the class defined would fall outside the rationale

1 for its definition.”<sup>63</sup> Sexual intercourse with a 10- or 11-year-old child was therefore treated as a  
2 criminal offense only at a lesser level of severity and even then only when the actor was at least  
3 16 years old.<sup>64</sup>

4         It now seems clear that this judgment—treating sexual intercourse with a child as the most  
5 serious form of rape only when the victim was under 10—gives inadequate weight to the gravity  
6 and frequency of sexual abuse of very young children by adults. To be sure, the medical evidence  
7 suggests that the median age for onset of puberty is now lower than it was at the time of the 1962  
8 Code.<sup>65</sup> As a result, it seems safe to conclude that today many children aged 10 and 11 will have  
9 reached puberty. Nonetheless, the number of 10- and 11-year-olds who remain pre-pubescent is  
10 undoubtedly substantial.<sup>66</sup> Moreover, while puberty may be viewed as an important milestone for  
11 judging the propriety of criminalizing sexual activities among peers, it has little bearing on the  
12 propriety of adult sexual interest as regards young children. A post-pubescent 11-year-old is no  
13 more an appropriate sexual partner for an actor 20 years older than a pre-pubescent 11-year-old.  
14 Indeed, fewer than one percent of girls and two percent of boys aged 11 years or younger report  
15 having had sex; only five percent of girls and 10 percent of boys 14 years and younger have had  
16 sex.<sup>67</sup> Moreover, 62 percent of girls who had sex by their 10th birthday describe the sex as

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<sup>63</sup> MODEL PENAL CODE AND COMMENTARIES, PART II, §§ 210.0 to 213.6 (1980), § 213.1, COMMENT 6, at 329. In cases involving children under 10, the actor would nonetheless have to be at least 16 to be held criminally responsible. See 1962 Code § 4.10 (setting age of criminal responsibility at 16); see also 1962 Code § 213.1 Comment at 331 (“Section 213.1 by setting 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.”). See also Reporters’ Note.

<sup>64</sup> See MPC 1962, Section 213.3(1)(a).

<sup>65</sup> 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) (reporting 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); P.A. Lee et al., *Age of Puberty: Data from the United States of America*, 109 APMIS 81 (2001). See also Elizabeth Weil, *Puberty Before Age 10: A New “Normal”?*, N.Y. TIMES, Mar. 30, 2012. The age of puberty has also decreased for boys, and is 9-10 for genital development and 10-11 for pubic hair. M.E. Herman-Giddens et al., *Secondary sexual characteristics in boys: data from the Pediatric Research in Office Settings Network*, 130(5) PEDIATRICS 1058 (2012), at <https://www.ncbi.nlm.nih.gov/pubmed/23085608>.

<sup>66</sup> Herman-Giddens, supra note 65, at 505.

<sup>67</sup> Lawrence B. Finer & Jesse M. Philbin, *Sexual Initiation, Contraceptive Use, and Pregnancy among Adolescents*, 131(5) PEDIATRICS 886, 888 (2013) (measuring rates of heterosexual vaginal intercourse).

1 nonconsensual, as compared with 50 percent of those who had sex by 11 and 23 percent of those  
2 who had sex by 12.<sup>68</sup> The extraordinary gravity of exposing young children to sexual experience  
3 must weigh heavily in any judgment about the age below which sexual penetration by a person  
4 outside the complainant’s peer group should be treated as presumptively unacceptable and  
5 dangerous.

6 But just as there is greater appreciation of the dangers of sexual abuse of young children  
7 by adults, there is also greater awareness and tolerance of sexual behavior among peers. Minors of  
8 all ages are increasingly exposed to sexual content from an early age, through social media, games,  
9 access to the internet, or popular entertainment.<sup>69</sup> As a result, even very young children may  
10 engage in exploratory sexual behaviors with peer.<sup>70</sup> Such developmentally ordinary acts are not  
11 the proper subject of the criminal law.

12 The goal, therefore, is to prevent sexual exploitation of minors without imposing  
13 unjustifiably harsh punishments upon minors engaged in sexual exploration, whether age-  
14 appropriate or not. Although hard lines can create abrupt breaks in liability, they are necessary to  
15 ensure that equally arbitrary liability does not attach. For instance, if two same-aged minor  
16 participants in nominally consensual activity, then in the absence of a statutory scheme that  
17 requires age gaps, a prosecutor could choose to treat one as a “victim” and one as a “perpetrator.”  
18 Where the alleged conduct involves force, coercion, or other indicia of lack of consent, such  
19 distinctions are defensible. But when age peers both fall within the protected class, and both are  
20 engaging in the sexual behavior willingly, any designation of “victim” and “accused” is

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<sup>68</sup> Id. at 888.

<sup>69</sup> 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 generally Rebecca L. Collins et al., *Sexual Media and Childhood Well-being and Health*, 140 PEDIATRICS S162 (2017); see also id. S164 (reporting that 42% of 10- to 17-year-olds have seen pornography online, although only 27% report intentionally viewing it, as compared to 54% of 15- to 18-year-old boys and 17% of 15- to 18-year-old girls).

<sup>70</sup> 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 (i.e., nonabusive) behavior.”). See also § 213.0(2)(f), Comment – actor over 12.

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1 unprincipled.<sup>71</sup> Similarly, without differentiating on the basis of age gaps, a minor who engages in  
2 sexually inappropriate behavior would be equated to a mature adult.

3 For these reasons, Section 213.8(1) rejects the 1962 Code's choice of age 10 as the critical  
4 demarcation and instead, in accord with the approach currently common in American law,<sup>72</sup> sets  
5 12 as the pertinent threshold. In order to provide a safe harbor for peer-to-peer, nominally  
6 consensual activity, Section 213.8(1) makes explicit that the actor must be more than four years  
7 older than the child. Moreover, this element works in tandem with Section 213.0(2)(f), which  
8 makes clear that an actor must be a person more than 12 years of age. Thus, a 12½-year-old actor  
9 may be held responsible only for sexual acts with a complainant younger than 8½ years of age; if  
10 the 12½-year-old engages in nominally consensual sexual activity with a 10-year-old, there is no  
11 grounds for liability. It is also important to note that, applying Section 4.10, cases involving actors  
12 under the age of 16—if adjudicated formally at all—are expected to be handled by juvenile courts  
13 rather than by an adult criminal conviction.

14 In addition, Section 213.8(1) defines two tiers of punishment based on the age of the actor.  
15 Although all sexual acts against young children by persons older than 12, and more than four years  
16 older than the complainant, merit condemnation, the degree of condemnation varies according to  
17 the relative ages of the parties. A minor who engages in inappropriate sexual conduct with a young  
18 child may be acting out that person's own experiences of sexual abuse,<sup>73</sup> or engaging in misguided  
19 but non-malicious sexual exploration. Older minors who are themselves within the range of  
20 puberty may be juggling their own understandings of the proper bounds of sexual activity, and  
21 have both less experience and capacity controlling sexual impulses. They are also still within the  
22 period of maturation and sexual development, and therefore have a greater capacity for  
23 rehabilitation.<sup>74</sup> An older minor's motivations may derive from a constellation of factors ranging  
24 from purely exploitative sexual abuse to sexual curiosity to a misguided romance. Although such

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<sup>71</sup> See, e.g., *In re D.B.*, 950 N.E.2d 528 (2011). But see *United States v. JDT*, 762 F.3d 984, 996-99 (9th Cir. 2014).

<sup>72</sup> See U.S. DEPT. OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, STATE LEGISLATORS' HANDBOOK FOR STATUTORY RAPE ISSUES (2000). See also Reporters' Note.

<sup>73</sup> See Reporters' Note.

<sup>74</sup> See Reporters' Note.

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1 behavior deserves both deterrence and condemnation, it is not equivalent to the same acts of  
2 misconduct committed by a sexually mature adult against a young child.

3 Section 213.8(1) acknowledges this distinction by defining the offense as a fifth-degree  
4 felony when committed by an actor younger than 18 years (functionally, 12 to 18 years old given  
5 Section 213.0(2)(f)). When the actor is 18 or older, and the complainant under 12, then the act is  
6 punishable as a third-degree felony.

7 In essence, adult actors who abuse small children are treated as akin to those who obtain  
8 sexual submission by use of force. In contrast, older minors who engage in prohibited sexual acts  
9 with young children, while proper subjects of deterrence and punishment, are treated much less  
10 harshly, as such acts are not fairly equated to abuse of a young child by an adult. Actors younger  
11 than 12 who engage in intimate sexual activity with young children may be worthy subjects of  
12 state interest. But in the absence of an allegation that the conduct involved aggravated physical  
13 force,<sup>75</sup> such interest should stem from abuse and neglect, mental-health and community-based  
14 systems, rather than juvenile or criminal justice courts.<sup>76</sup>

### 15 **Illustrations:**

16 1. Complainant, who is nine years and 10 months old, lives next door to Accused,  
17 who is 32 years old. Accused knows that Complainant is under 12 years old, and that  
18 Accused is more than four years older. Complainant's parent is friendly with Accused, and  
19 on occasion relies on Accused to provide backup child care. One day, Accused and  
20 Complainant are sitting on Accused's couch playing video games when Accused says, "let  
21 me show you something that feels really good." Accused removes Complainant's shorts  
22 and performs an act of oral sex on Complainant. Based on these facts, Accused could be  
23 found guilty of a violation of Section 213.8(1). Accused caused Complainant to submit to

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<sup>75</sup> Section 213.0(2)(f) expressly exempts charges under Section 213.1 or 213.7(1) from the requirement that an actor be more than 12 years of age.

<sup>76</sup> See THE GROWTH OF INCARCERATION IN THE UNITED STATES, NATIONAL RESEARCH COUNCIL 323- (Jeremy Travis, Bruce Western, and Steve Redburn, eds. 2014) (noting that "[p]rinciples 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."); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (New York: Oxford University Press. 2007) (critiquing the resort to penal sanctions to address all social ills).

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1 an act of oral sex. Because Accused is over 18, the offense is punishable as a third-degree  
2 felony.

3 2. Same facts as in Illustration 1, except that Accused is a 17-year-old teen. Accused  
4 knows that Complainant is under 12, and Accused is more than four years older. The  
5 offense is punishable as a fifth-degree felony.

6 3. Same facts as in Illustration 1, except that Accused is a 15-year-old teen. The act  
7 is punishable as a fifth-degree felony, but under Section 4.10 is intended for adjudication  
8 in juvenile court.

9 4. Same facts as in Illustration 1, except that Accused is 13 years and six days old.  
10 The act is not punishable under Section 213.8(1), because the nine-year-old complainant is  
11 within four years of the age of the actor, and there must be more than a four-year age gap.  
12 Such incidents are left to the social-welfare system and other nonpunitive responses.

13 Section 213.8(1) requires that the actor know or recklessly disregard a risk that the  
14 Complainant is under the age of 12. Therefore, an actor who reasonably believed the Complainant  
15 to be older than 12 is relieved of liability under this subsection, even though the actor may be liable  
16 for an offense under a different subsection. Of course, an actor may assert a belief that a  
17 Complainant was 12 years or older, but the jury can reject that assertion if the factfinder thinks  
18 that the evidence proves beyond a reasonable doubt that the actor was aware of a substantial and  
19 unjustifiable risk that the Complainant was in fact under 12.

### 20 **Illustrations:**

21 5. Accused, a 16-year-old student, is attending a middle-school sporting event when  
22 Accused encounters Complainant, who is 11 years and 10 months old. Complainant, who  
23 is tall and looks much older than 11, tells Accused that Complainant is 13 and a student at  
24 the school. Accused and Complainant go to a secluded area under the stadium to talk and  
25 engage in sexual activity, but they are interrupted by Complainant's sibling, who finds  
26 them and yells at Accused, "Complainant is only 11! What are you doing!?" Complainant's  
27 sibling reports the incident to the police. Based on these facts, a jury could not find Accused  
28 guilty under Section 213.8(1). Although Accused is more than four years older than  
29 Complainant, and Complainant is under 12, Accused reasonably believed Complainant's  
30 claim to be 13 in light of Complainant's statement, appearance, and the location where they

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1 met. Therefore, Accused neither knew nor recklessly disregarded a substantial and  
2 unjustifiable risk that Complainant was younger than 12. Accused is also not guilty of any  
3 offense under Section 213.8(2), because under the facts as Accused reasonably believed  
4 them, Complainant was only three years younger than Accused. Section 213.8(2) allows a  
5 minor aged 12 to 15 to consent to another person whose age is within four years of the  
6 minor's own age.

7 6. Same facts as in Illustration 5, except that Accused is 36. For the reasons given  
8 in Illustration 5, Accused cannot be found guilty of a violation of Section 213.8(1).  
9 However, a jury could find Accused guilty of an attempted violation of Section 213.8(2).  
10 Accused believed Complainant to be 13, and at 36, Accused is more than five years older  
11 than Complainant, and Complainant is under 16. Applying the Model Penal Code's  
12 framework for attempt, as described by Section 5.01, Accused had the purpose to commit  
13 a violation of Section 213.8(2). Accused did not actually violate Section 213.8(2), because  
14 Complainant was in fact younger than Accused believed, nor Section 213.8(1), because  
15 Accused lacked the requisite culpable mental state. But Accused did attempt a violation of  
16 Section 213.8(2).

17 It is important to underscore that the liability provided in Section 213.8 does not relieve  
18 liability under Sections 213.1 through 213.6 for actors who engage in overtly nonconsensual sexual  
19 activity with children. In such cases, the prosecution may elect to pursue more serious punishment  
20 if any of the aggravating factors of force, coercion, vulnerability, extortion, exploitation, or lack  
21 of consent are present.

### 22 **Illustrations:**

23 7. Accused is the 16-year-old friend of Complainant's sibling. Accused knows that  
24 Complainant is 10 years old. Late one night when Accused is spending the night,  
25 Complainant wakes up and finds Accused in Complainant's room, standing over  
26 Complainant's bed. Complainant, startled, says, "What are you doing here?" Accused  
27 silently climbs on top of Complainant and begins to remove Complainant's pajamas.  
28 Complainant struggles to get free and cries out, saying, "Stop! What are you doing?!", but  
29 Accused presses down against Complainant to prevent Complainant's escape, and puts a  
30 hand over Complainant's mouth to stifle Complainant's protests. Accused sexually

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1 penetrates Complainant, who later reports the incident. Based on these facts, Accused may  
2 be found guilty of a violation of Section 213.8(1), because Accused is more than four years  
3 older than Complainant, whom Accused knows to be only 10 years old. But a jury may  
4 also find Accused guilty of a violation of Section 213.2, since Accused knowingly used  
5 physical force or restraint to cause Complainant to submit to an act of sexual penetration,  
6 or of Section 213.6, since Accused knowingly engaged in an act of sexual penetration  
7 without Complainant's consent.

8 8. Same facts as in Illustration 7, except that Accused is 13 and Complainant is 13.  
9 There is no basis for liability under Section 213.8(1), because Complainant is over 12 years  
10 of age, nor is there liability under Section 213.8(2), because Accused and Complainant are  
11 the same age. But a factfinder may properly find that Accused committed a violation of  
12 Section 213.2 (sex by force) or Section 213.6 (sex without consent). Accused is over the  
13 age of 12, as required by Section 213.0(2)(f), and the act of holding Complainant down,  
14 covering Complainant's mouth, and ignoring Complainant's protests and efforts to break  
15 free provide a basis for which the factfinder could find force and lack of consent.

16 9. Same facts as in Illustration 7, except that Accused is 11 years old and  
17 Complainant is five years old. These facts do not support a finding of any criminal offense.  
18 Under Section 213.0(2)(f), an accused must be over 12 to be held criminally liable for any  
19 offense other than specified violations of Section 213.1 or 213.7(1). Rather, this  
20 undesirable conduct is more appropriately and productively managed outside of the penal  
21 or juvenile justice systems.

### 22 ***2. Sexual Assault of a Minor 12 to 15 Years of Age – Section 213.8(2).***

23 The 1962 Code imposed liability as a third-degree felony for actors who engaged in “sexual  
24 intercourse” or “deviate sexual intercourse” with a person under the age of 16, if the actor was four  
25 or more years older.<sup>77</sup> The 1962 Code set the general age of consent at 16; thus adolescents 16  
26 years or more had the capacity to give valid consent, regardless of the age of their partner unless  
27 the actor was a guardian or “otherwise responsible for [the Complainant's] welfare.”<sup>78</sup>

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<sup>77</sup> 1962 Code § 213.3(1)(a).

<sup>78</sup> 1962 Code § 213.3(1)(b) (that offense was graded as a misdemeanor).

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1           Section 213.8(2) carries over the sensibility that 16 is the appropriate age of consent, in the  
2 absence of incest or an abuse of power. It also largely mirrors the substantive provisions of the  
3 1962 Code by requiring an age gap before the imposition of liability, although it sets that gap as  
4 more than five years, rather than four years or more. The decision to increase the gap from four to  
5 five years for this older class of complainants is consistent with, although not dominant in, existing  
6 law.<sup>79</sup> It also mirrors typical structures of American socialization, such as the educational system.  
7 A four-year age gap exposes an 18-year-and-two-months-old to criminal liability for engaging in  
8 consensual sexual activity with a 14-year-and-one-month-old— even though the two are  
9 respectively a senior and freshman in high school.

10           In the era when the 1962 Code was drafted, sexual activity by adolescents under 18 was  
11 widely disapproved, both in principle and in light of the undeniable risk of pregnancy entailed in  
12 such encounters. The Institute nonetheless judged that sexual experimentation among adolescents  
13 was so widespread that it could not be viewed as *per se* aberrational, victimizing, or exceptionally  
14 dangerous to an extent warranting deterrence through criminal sanctions:

15                   [T]he spectre of imposition of felony sanctions on a boy of 17 who  
16                   engages in sexual intercourse with a willing and socially mature girl  
17                   of like age . . . reflects an extravagant use of the penal law to bolster  
18                   community norms about consensual behavior, and it ignores social  
19                   reality in assuming that sex among teenagers is necessarily a  
20                   deviation from prevailing standards of conduct.<sup>80</sup>

21           On the basis of this assessment, the Institute concluded that the principal concern with respect to  
22 adolescents was not to condemn sexual experimentation as such but only to protect them from  
23 exploitation and victimization at the hands of significantly more mature individuals.

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<sup>79</sup> See, e.g., Haw. Stat. § 707-732 (penalizing sexual penetration of a person 14-16 years of age by a person five or more years older as a class C felony); Ky. Stat. § 510.090 (penalizing oral and anal penetration by an actor 21 or older with a person 16 or younger; by an actor 10 years older than a person 16 or 17); 17-a Me. Rev. Stat. Ann. § 254 (penalizing sexual acts as a class D crime when with a 14- or 16-year-old where the other person is five years older). Cf. Mass. Stat. 265 § 23A (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 12 to 16). See also Cal. Penal Code § 286, 287 (punishing anal penetration and oral sex of any person under 18 as a misdemeanor, but elevating offense to a low felony where complainant under 16 and actor over 21, and as a three-to-eight-year offense where complainant under 14 and actor more than 10 years older).

<sup>80</sup> MODEL PENAL CODE AND COMMENTARIES, PART II, §§ 210.0 to 213.6 (1980), § 213.1, COMMENT 6, at 326.

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1           The social facts underlying this 1962 assessment certainly are no less applicable today, and  
2 jurisdictions have widely followed the Code’s recommendation to criminalize adolescent sexual  
3 activity only when there is a substantial age difference between the parties.<sup>81</sup> Youths aged 12 to  
4 15 typically have attained sufficient maturity that the law deems them capable of consent in certain  
5 situations—specifically, with age-appropriate peers. But the law also deems it worthy to protect  
6 such young persons from potentially predatory relationships, even if those relationships are  
7 nominally consensual. Accordingly, Section 213.8(2) criminalizes nominally consensual sexual  
8 acts by 12-year-olds with those 17 and older at one extreme, and 15-year-olds with persons 20  
9 years old or older at the other extreme. It contains a marriage exception because, in some  
10 jurisdictions, persons aged 12 to 15 may in fact be lawfully married; thus, marriage exceptions are  
11 commonly found in statutes that define liability solely with reference to the age of the parties.<sup>82</sup>  
12 Although ample policy reasons counsel against permitting minors to marry,<sup>83</sup> in a state that has  
13 permitted a minor to do so,<sup>84</sup> it would be anomalous for the criminal law to penalize sexual  
14 intimacy between spouses.<sup>85</sup>

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<sup>81</sup> See MODEL PENAL CODE AND COMMENTARIES, PART II, §§ 210.0 to 213.6 (1980), § 213.1, COMMENT 8(b), at 341 & n.181. See also Carpenter, *supra* note 15 (collecting and analyzing contemporary state laws governing statutory rape); Annot., 46 A.L.R. 5th 499 (2005).

<sup>82</sup> See, e.g., Colo. Rev. Stat. Ann. § 18-3-402 (“not the spouse of the victim”); Me. Stat. tit. 17-A § 253 (“not the actor’s spouse”).

<sup>83</sup> See, e.g., Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. REV. 1817, 1844-50 (2012) (surveying adverse effects of early marriage, and noting that 80% of marriages entered into by those in the mid-teens end in divorce); Pamela E. Beaste, *Marital Rights for Teens: Judicial Intervention that Properly Balances Privacy and Protection*, 1009 UTAH L. REV. 625, 627 (citing studies that show early marriages are less stable).

<sup>84</sup> See Beaste, *supra* note 82, at 628-29 (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).

<sup>85</sup> 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 449 (Utah 1949) (affirming conviction of adult man for consensual intercourse with 17-year-old legally married to another man, stating that “the 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”).

1 **Illustration:**

2 10. Complainant, who is 14, enjoys multi-player online video games that include  
3 chats amongst the players. Complainant meets another player online, Accused, and begins  
4 a friendship. Complainant tells Accused that Complainant is 14, and Accused admits to  
5 being 58. One day, Complainant confesses in the chat to having developed a “crush” on  
6 Accused, and Accused expresses reciprocal feelings. Complainant and Accused agree to  
7 meet at a nearby hotel for a sexual encounter involving sexual penetration and oral sex.  
8 The encounter occurs as planned, but afterwards Complainant’s parents learn of the event  
9 and report it to the police. These facts, if proven beyond a reasonable doubt, permit a  
10 finding that Accused violated Section 213.8(2). Accused knows that Complainant is 14,  
11 that Accused is 58, and that there are more than five years between them. Complainant’s  
12 consent to the encounter is irrelevant.

13 Notably, Section 213.8(2) may also apply in cases in which a minor’s response to the  
14 unwanted sexual overtures of an older person are ambiguous—such as frozen immobility, tacit  
15 compliance, or other ambiguous conduct on the part of the minor. While such responses may, in  
16 the context of the circumstances, satisfy the requirement of the element of lack of consent under  
17 Section 213.6, it is also possible that such proof could be viewed as ambiguous, or fail to satisfy  
18 the factfinder beyond a reasonable doubt. In addition, even if the factfinder viewed the evidence  
19 as establishing the minor’s lack of consent, it might still fail to meet the requirements of Section  
20 213.6 because the actor can credibly claim lack of awareness that the minor was not consenting  
21 (even if a reasonable person would have known). The purpose of Section 213.8(2) is to render  
22 proof of consent (or its absence) irrelevant to the actor’s liability, based on a legislative judgment  
23 that the age difference precludes the minor from being able to offer effective consent.

24 **Illustration:**

25 11. Complainant, who is 15, is spending the night at an uncle’s home during a  
26 family holiday. Complainant is asleep in the guest room when Uncle, who is 46, enters and  
27 slips quietly into the bed. Complainant wakes and says, “What are you doing in here?”  
28 Uncle puts a finger over his lips and says, “Sssh.” Uncle then removes Complainant’s  
29 pajamas and engages in an act of sexual penetration as Complainant lies passively. The  
30 next day, Complainant reports the incident. Uncle contends that the Complainant, to whom

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1 he is related by marriage, had been flirting with him throughout the holiday and had invited  
2 him to Complainant’s bedroom that night. Complainant denies Uncle’s evidence, and  
3 although Complainant admits that Complainant never protested the sexual act, states that  
4 the act was wholly uninvited.

5 If the factfinders believe Complainant, they may find Uncle guilty of a violation of  
6 Section 213.6, which prohibits sex without consent. Even though Complainant did not  
7 protest or resist the act in any way, Section 213.0(4) expressly states that resistance is not  
8 required to find lack of consent. The circumstances of the act—including Complainant’s  
9 young age, the age gap between Complainant and the actor, the fact that the actor and  
10 Complainant are related, and the actor’s furtive and secretive approach, may permit the  
11 factfinder to conclude both the act was without consent and that the actor was aware of a  
12 substantial risk of such.

13 But even if the factfinder determines that the evidence does not meet the  
14 requirement of proof beyond a reasonable doubt of lack of consent, Section 213.8(2)  
15 permits the actor to be held guilty on the basis of the Complainant’s age and the actor’s  
16 age. Complainant is 15 years of age, and Uncle is more than five years older. Because  
17 Uncle is in fact more than 10 years older, the offense would be punishable as a fourth-  
18 degree felony.

19 Section 213.8(2) departs from the 1962 Code in affixing punishment at different levels  
20 based on the age of the actor.<sup>86</sup> The 1962 Code punished all violations of its provision as a third-

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<sup>86</sup> 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” 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 12-16, creating a 13-year gap. Neb. Rev. Stat. § 28-319.01; see also *id.* 28-320.01 (defining second- and third-degree sexual assault of a child as an actor at least 19 and complainant under 14); Ga. Code Ann. § 16-6-3 (defining statutory rape as sex with a person younger than 16, and punishing actors 18 or younger and within four years of a 14-16-year-old complainant with a misdemeanor; actors 21 or older with 10 to 20 years; and all other actors with one to 20 years); Ga. Code Ann. § 16-6-4 (punishing child molestation with five to 20 years, except that an actor 18 or younger and within four years of a complainant 14-16 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 § 254; Md. Code Ann., Crim. Law § 3-308. See generally Rape and Sexual Assault Analyses and Laws, at 111-21 (Aequitas 2014). Ten-year gaps more commonly found in statutes that apply to older youths. See, e.g., Del. Code Ann. Tit. 11, § 770, 771, 772 (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

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1 degree felony—a quite serious offense. Given its terms, therefore, an 18-year-old high school  
2 student who had a consensual sexual relationship with a 13-year-old was exposed to the same  
3 degree of liability as a 56-year-old adult in the same sexual relationship.

4 Section 213.8(2), in contrast, treats sexual relationships with older minors very differently  
5 on the basis of the actor's age. An actor within 10 years of the minor may be making ill-advised  
6 choices, or exploiting the immaturity of the other person for the actor's sexual benefit. But the  
7 minor complainant retains far greater agency and autonomy when dealing with a slightly older  
8 peer as compared to a fully mature adult. Moreover, although the actor bears responsibility for  
9 seeking an inappropriately young sexual partner, the degree of deviance suggested by such  
10 selection increases markedly as the gap between the complainant and actor likewise widens.

11 Accordingly, Section 213.8(2) punishes violations of its terms by actors within 10 years of  
12 the complainant as a misdemeanor, while violations by actors 10 or more years older than the  
13 complainant are a fourth-degree felony. Given these terms, the more serious tier of liability may  
14 begin for actors aged 22 (in the case of 12-year-old complainants) and for actors aged 25 in the  
15 case of 15-year-old complainants. The step down a degree in both punishments (fourth- and fifth-  
16 degree felonies), as compared to that for actors who engage sexually with those under 12 (third-  
17 and fourth-degree felonies), reflects both the added sexual maturity of complainants who are older  
18 minors, and thus are more likely to have willingly engaged in the sexual activity and the diminished  
19 culpability of an actor who engages in an encounter that at least carries the patina of willingness.  
20 It also pays heed to the inherent arbitrariness of age-based statutes, which by necessity create  
21 abrupt breaks in liability. Under the terms of Section 213.8, for instance, a 20<sup>3</sup>/<sub>4</sub>-year-old who has  
22 consensual sex with a 15<sup>1</sup>/<sub>2</sub>-year-old is liable for a misdemeanor, while a 50-year-old who has  
23 consensual sex with a 16-year-old is not liable for any offense.

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when the complainant is 14-16 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 over 18).

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. Ann. § 18-3-402(1)(e) (punishing sexual penetration when the complainant is at least 15 but under 17, and the actor is 10 years older, but not punishing acts between a complainant 15-17 and an actor within 10 years); id. § 403(1)(d) (punishing sexual penetration when the complainant is less than 15 years of age and the actor is four or more years older).

1 **Illustrations:**

2 12. Complainant, a 15-year-old sophomore in high school, attends a party at the  
3 college fraternity of Complainant's brother. Complainant gets into a long conversation with  
4 Accused, a 22-year-old senior, during which Complainant confesses to being 15. Accused  
5 invites Complainant up to Accused's room, where the two engage in mutually desired  
6 sexual activity, including sexual penetration. When Complainant returns home at the end  
7 of the weekend, Accused and Complainant begin an email correspondence. Complainant's  
8 parents find the correspondence and report the relationship to the local authorities. Based  
9 on these facts, Accused could be found guilty of a violation of Section 213.8(2).  
10 Complainant is between 12 and 16 years of age, and Accused is more than five years older;  
11 Complainant's nominal consent is irrelevant. This evidence also does not seem to support  
12 liability under any other provision of Article 213, as the acts of sexual penetration were  
13 consensual. Because the actor is within 10 years of the Complainant's age, the offense is  
14 punishable as a misdemeanor.

15 13. Same as in Illustration 12, except that Accused is a 43-year-old professor.  
16 Accused may be found guilty of a violation of Section 213.8(2). Because Accused is more  
17 than 10 years older than Complainant, the offense is punishable as a fourth-degree felony.

18 **3. Incestuous Sexual Assault of a Minor – Section 213.8(3).**

19 Sexual abuse of minors is a pervasive problem in our society,<sup>87</sup> and in a significant number  
20 of cases the abuser is a close relative or associate of the victim.<sup>88</sup> In cases involving family  
21 members, sexual penetration may be part of a pattern of abuse that began when a child was  
22 younger, but even if the victim is on the cusp of adulthood, the state maintains a proper role in

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<sup>87</sup> Howard N. Snyder, Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics, National Center for Juvenile Justice/Bureau of Justice Statistics (July 2000). (“[C]rimes against juvenile victims are the large majority (67%) 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, 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. Id.

<sup>88</sup> 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. Almost all offenders were male, and 23 percent of offenders were under the age of 18. Id.

1 protecting minors from exploitation by caregivers responsible for their well-being. The strong  
2 taboo against incest in contemporary society, along with the inherently exploitative nature of a  
3 sexually intimate relationship between a minor and a person closely connected to the minor’s care,  
4 whether by blood or association, leads every jurisdiction to adopt statutes prohibiting child  
5 molestation and abuse.

6 The 1962 Code recognized the problem of incestuous sexual abuse in several ways. Section  
7 230.2 defined the crime of incest, a felony of the third degree as:

8 **Section 230.2. Incest.** A person is guilty of incest, a felony of the third degree, if he  
9 knowingly marries or cohabits or has sexual intercourse with an ancestor or descendant, a  
10 brother or sister of the whole or half blood [or an uncle, aunt, nephew or niece of the whole  
11 blood]. “Cohabit” means to live together under the representation or appearance of being  
12 married. The relationships referred to herein include blood relationships without regard to  
13 legitimacy, and relationship of parent and child by adoption.<sup>89</sup>

14 Notably, this provision is deliberately limited to blood relationships, except for the  
15 inclusion of adoptive parents. The comment further explains that the use of brackets for select first  
16 degree relatives “reflect[ed] uncertainty as to whether they should be added.”<sup>90</sup> The purpose of the  
17 provision was given as “protection of the integrity of the family unit,” a justification which stands  
18 today.<sup>91</sup> However, Section 230.2 is both over and under inclusive in light of that goal. It is  
19 overinclusive because it proscribes punishment for first degree relatives outside the nuclear  
20 familial unit, regardless of the age of those individuals or the closeness of their emotional  
21 connection to one another. It is underinclusive because Section 230.2 excluded sexual acts with a  
22 stepchild or stepsiblings, on the ground that “it was thought inappropriate to enforce a permanent  
23 bar on marriage between steprelations.”<sup>92</sup> It also does not prohibit “deviate sexual intercourse”; as  
24 a result, the prohibition on incest covers only acts of vaginal penetration. But the modern family  
25 unit is defined far more by cohabitation and acts of caregiving than by biology, and acts of oral

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<sup>89</sup> 1962 Code § 230.2.

<sup>90</sup> 1962 Code Article 230, Comment.

<sup>91</sup> 1962 Code Article 230, Comment.

<sup>92</sup> 1962 Code § 213.3, Comment at 387 (describing 230.2).

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1 sex or anal penetration surely disrupt family harmony as significantly as do acts of vaginal  
2 penetration.

3 In this respect, the critical function of the incest provision was less to prohibit sexual abuse  
4 of children within a family unit than to prevent the formation of consanguineous marital or  
5 reproductive units.<sup>93</sup> Although that may be a laudable goal, it is excessive to proscribe as a third  
6 degree felony the sexual conduct among consenting adults with no familial emotional association.  
7 It likewise is unacceptable not to heighten the punishment for actors who prey upon minors in their  
8 care, simply because the actor lacks an actual blood relation.

9 Instead, the primary regulatory provision for sexual abuse of children within the family  
10 structure in the 1962 Code was its provisions governing sexual acts with children under 10 or  
11 youths under 16, both of which apply to a broader range of sexual acts, and without any added  
12 proof of familial or other relationship.<sup>94</sup> The only relationship-based provision of Article 213,  
13 punished as “Corruption of Minors” in Section 213.3(1)(b), applies to acts of “sexual intercourse”  
14 or “deviate sexual intercourse” with a person under the age of 21, where the actor was a “guardian  
15 or otherwise responsible for the general supervision of [the complainant’s] welfare.”<sup>95</sup> The  
16 Comment to that Section explained that the “principal function of Section 213.3(1)(b) is to repress  
17 [sexual relationships between a father and stepdaughter] where the child is less than 21 years old  
18 and where the stepfather has been appointed guardian or stands in loco parentis.”<sup>96</sup> The provision  
19 also applied to others, such as “probation officers, camp supervisors, and the like.”<sup>97</sup> Significantly,  
20 however, the 1962 Code did not view such these acts as serious violations. Section 213.3(1)(b)  
21 was graded as a misdemeanor, and an accused could defend the charge by proving by a

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<sup>93</sup> See, e.g., *Raines v. Com.*, 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. Com.*, No. 2004-CA-002639-MR, 2007 WL 288280, at \*2 (Ky. Ct. App. Feb. 2, 2007); *Com. v. White*, 341 Pa. Super. 261, 267 (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.”).

<sup>94</sup> 1962 Code § 213.1(1)(d) (sexual intercourse with females under 10, second-degree felony); § 213.2(1)(d) (deviate sexual intercourse with any person under 10, second-degree felony), and 213.3(1)(a) (sexual intercourse or deviate sexual intercourse with a person under 16 years of age, by one four years older or more; third-degree felony).

<sup>95</sup> 1962 Code § 213.3(1)(b).

<sup>96</sup> 1962 Code § 213.3(1)(b), Comment at 387.

<sup>97</sup> *Id.*

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1 preponderance of the evidence that “the victim had, prior to the time of the offense charged,  
2 engaged promiscuously in sexual relations with others.”<sup>98</sup>

3 In the time since the drafting of the 1962 Code, the abuse of children—of all ages—by  
4 those ostensibly charged with their care has emerged as a pressing social issue.<sup>99</sup> Sexual abuse of  
5 children is now viewed as a serious crime worthy of particular attention when the perpetrators are  
6 those most closely connected to the minor. Accordingly, Section 213.8(3) penalizes as a third-  
7 degree felony acts of sexual penetration of and oral sex with persons younger than 18 years old,  
8 when the actor is a parent, grandparent, guardian, or one who otherwise stands *in loco parentis* to  
9 the child. This Section is meant to supersede the flawed liability described in Section 230.2.

10 Section 213.8(3) has several critical components. First, Section 213.8(3) expands the  
11 category of minors protected under Section 213.8 all the way to legal adulthood (the age of 18) in  
12 cases in which the actor engaging the minor sexually is one who serves a parental role in the  
13 minor’s life. Second, Section 213.8(3) permits liability to attach without regard to any inquiry into  
14 force, consent, or willingness; consent is deemed irrelevant because the special relationship  
15 between guardian and minor prohibits the minor from offering any form of authentic consent. Of  
16 course, a parent who acts with force, while a minor is asleep or unconscious, or in any of the other  
17 circumstances proscribed by Sections 213.1 through 213.6 may also be held liable under those  
18 provisions. Third, Section 213.8(3) authorizes a serious penalty—a third-degree felony—even  
19 when the complainant is an older minor otherwise capable of freely consenting to sexual activity.  
20 For parental figures who sexually intrude upon a child under 12 years of age, the sanction is thus  
21 equivalent to those available under Section 213.8(1). But for parental figures who intrude on  
22 complainants 12 to 16 years of age, the punishment is raised from a fourth-degree felony to a third-  
23 degree felony. And for minors aged 16 to 18, exploitative parental figures become eligible for  
24 serious criminal sanction, as a third-degree felony, even though sexual conduct would be lawful if  
25 committed with a minor the same age who was not the offspring or ward of the actor. Fourth,  
26 Section 213.8(1) requires proof that the actor know both the age and the actor’s relationship to the  
27 minor. Although a *mens rea* requirement may seem absurd, given that the vast majority of actors  
28 will obviously easily be proved to know both the minor’s age and their relationship to the minor,

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<sup>98</sup> 1962 Code § 213.6(3).

<sup>99</sup> See Reporters’ Note.

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1 it is necessary given rates of assisted reproduction, which raise the real possibility of unknown  
2 biological connections.<sup>100</sup>

3 The terms of Section 213.8(3) and the severity of the authorized punishment reflect the  
4 judgment that sexual overtures toward a minor by a guardian or parental figure constitute an  
5 extreme breach of trust, inflict an especially egregious form of harm, and cause a particularly  
6 profound and lasting impact.<sup>101</sup> The punishment further underscores that sexual intimacy between  
7 parental figures and minors in their care, regardless of age, is uniformly forbidden. Such acts are  
8 treated as akin to sexual intimacy with very young children or to sex by force. The core of the  
9 violation proscribed by Section 213.8(3) is thus not as much animated by concerns of age or  
10 consanguinity as it is based on the breach to a singular relationship of trust and dependence.<sup>102</sup>

11 A parental figure who makes sexual advances on a minor sends conflicting signals about  
12 the role and function of the parent in the minor's life. Apart from continued strong social taboos  
13 against sex between children and their caregivers, the guardian role is shaped by the adult's  
14 provision of shelter, food, educational opportunity, social and emotional development, and other  
15 basic needs of the minor. For young minors, the addition of a requirement that the minor gratify  
16 the adult sexually confounds these other roles, and presents a confusing and intolerable conflict  
17 between the minor's interest and that of the adult. Even older minors may confront the impossible  
18 choice between breaking the familial bond, and all that true independence entails, and acceding to

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<sup>100</sup> See, e.g., Tabitha Freeman et al., *Sperm donors limited: psychosocial aspects of genetic connections and the regulation of offspring numbers*, at 166-72, in *REGULATING REPRODUCTIVE DONATION* (Susan Golombok, et al., eds. Cambridge Univ. Press 2016); 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”).

<sup>101</sup> See generally Reporters' Note. 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(3).

<sup>102</sup> For instance, in *Commonwealth v. Rahim*, 441 Mass. 273, 277-278 (2004), the Supreme Judicial Court of Massachusetts was forced to dismiss six indictments against a defendant who had raped his 15-year-old stepdaughter, due to the plain language of the statute ignoring non-blood relationships, regardless of the emotional or psychological connection between stepparent and child. Id. at 286 (“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 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. Kentucky*, 484 S.W.3d 295 (Ky. 2016) (holding that incest statute applied to stepparent and stepchild relationship).

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1 the adult’s sexual desires. Sexual abuse by a parental figure contorts the developmental process by  
2 corrupting the minor’s natural evolution toward maturity and independence, which includes  
3 gradual development of intimate social and sexual relationships with appropriate partners.

4 For this reason, Section 213.8(3) takes a broad view of the scope of figures characterized  
5 by a parental role, in three ways. First, Section 213.3(c) includes persons related by biology,  
6 marriage, adoption, or legal status as a foster parent.<sup>103</sup> Second, it includes persons who may not  
7 directly parent, but whose relationship to the parent justifies equivalent treatment. And third, it  
8 includes persons who, although not a formal parent, serve *in loco parentis* to the child.

9 The inclusion of a person who, “at the time of the offense, is the legal spouse, domestic  
10 partner, or sexual partner” of a parent or grandparent to the child is deliberately meant to extend  
11 coverage to persons who are engaged in intimate personal relationships with the parents and  
12 grandparents of the child, even if they do not directly parent the child themselves. A common  
13 scenario for abuse involves sexual overtures by the boyfriend of the minor’s parent, who may not  
14 directly serve a parenting function but nonetheless stands in a special relationship to the child as a  
15 result of the relationship to the parent. In the case of younger minors, the actor is likely old enough  
16 that the serious punishments under Section 213.8(1) apply. But for older minors aged 12-16, the  
17 available punishment is much diminished, since many such encounters are nominally consensual.  
18 And for a minor aged 16-18 there would be no liability at all for a parent’s sexual partner, in the  
19 absence of special provision.

20 The critical relationship captured by the subsection depends less upon the actor and the  
21 parent or grandparent having recently engaged in sexual intimacy than upon the relationship being  
22 one in which such sexual intimacy is presumed to occur. Indeed, an actor may claim to have turned  
23 to the minor for sexual gratification precisely because the partner is no longer satisfying the actor  
24 sexually, but so long as the boyfriend remains in a relationship of a sexual character, the subsection  
25 provision is met. One state’s code provides that “[t]he following factors may be considered in  
26 determining whether a relationship is currently or was previously a sexual or romantic  
27 relationship” for purposes of a similar provision, and lists the type and length of relationship, the  
28 “frequency of the interaction between the two persons” and the length of time since the relationship

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<sup>103</sup> 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 § 25.02 (defining a third-degree felony for knowingly engaging in acts of intercourse blood, step, or adoptive relations).

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1 has terminated as factors.<sup>104</sup> Section 213.8(3) applies only to ongoing relationships; if the  
2 relationship has terminated, then the protections of 213.8(1), (2), or other provisions of Article 213  
3 apply. Otherwise, the factors listed provide helpful guidance in determining the existence of a  
4 sexual partnership. In colloquial terms, this subsection is meant to cover individuals who would  
5 be identified as a common-law spouse or a boyfriend or girlfriend; it excludes best friends or  
6 roommates who do not hold themselves out as in a relationship with the characteristics of an  
7 intimate sexual partnership.

8         The aggravation of the punishment for adults who engage with minors aged 12 to 16, and  
9 extension of liability to actors who engage with minors 16 to 18, reflects the special gravity of this  
10 kind of misconduct and the need to condemn and deter sexual overtures by figures in a parental  
11 role. Even minors otherwise past the age of consent, when presented with sexual demands by a  
12 parent's paramour, face emotional turmoil akin to that stirred up when the behavior is undertaken  
13 by a parent. The minor may accede as a result of fear of rupturing cherished relationships, losing  
14 critical support or shelter, confusing familial roles, or causing pain to loved ones. A parent's  
15 romantic partner also benefits from special access to the minor; because such persons may  
16 frequently spend the night or be given opportunities to be alone with the minor, there is an  
17 enhanced ability of such persons to engage in inappropriate sexual activity undetected. And  
18 coverage is especially important for older minors, past the age of puberty, who may be especially  
19 vulnerable to sexual advances. These concerns are not diminished simply because the adult figure  
20 does not directly parent the child.

21         The inclusion of "legal and de facto guardians" likewise intends to expressly permit  
22 liability for persons who, while not a formal parent of the child, serve in a parental role. In family  
23 law, the terms "legal guardian" and "de facto parent" are well-defined concept that apply to  
24 determine when persons otherwise not formally "parents" of a child may nonetheless assert  
25 parental rights.<sup>105</sup> Typically, the test for a de facto parent typically requires proof of the exercise  
26 of continuous parental authority over a child, for instance, that that the person live with the minor  
27 for a significant period, assume the obligations of parenthood without expectation of

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<sup>104</sup> Ariz. Rev. Stat. Ann. § 13-1401(B).

<sup>105</sup> See RESTATEMENT OF THE LAW, CHILDREN AND THE LAW, § 1.82, at 63 (Tentative Draft No. 2, 2019) ("[A] majority of states now recognize the rights of de facto parents to seek contact and responsibility for a child."). See also Unif. Parentage Act § 609(d) (Unif. Law Comm'n 2017); Unif. Nonparent Custody and Visitation Act § 4 (Uniform L. Comm. 2018).

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1 compensation, develop a parental bond with the minor, and have done so with the parent's  
2 encouragement or consent.<sup>106</sup>

3 The term “de facto guardian” is not intended to include temporary guardians or those who  
4 have exercised care over a child intermittently or for compensation, such as a nanny, a parent  
5 hosting a sleepover, a teacher, religious figure, or a coach. Although those persons may share equal  
6 authority over the minor as a parent in such situations, the bond is of an entirely different character.  
7 A minor in such a situation retains a safe space of retreat from such encounters, or to report the  
8 threat, in contrast to a minor who is experiencing sexual attacks within his or her own home or  
9 family. Extricating the victim from a situation of abuse involving a more transient figure typically  
10 poses less longstanding emotional, financial, and psychological harm. It is generally much easier  
11 never to see a coach or teacher again than it is to accuse and renounce a member of one's own  
12 family.<sup>107</sup>

13 For the same reasons, Section 213.8(3) is restricted to parents, grandparents, their romantic  
14 partners, or those legally or functionally *in loco parentis*. It does not apply to other relatives, such  
15 as aunts, uncles, cousins, or siblings, unless they live in the same household and play a significant  
16 parental role.<sup>108</sup> Although the taboo on incest typically extends to include these categories, the  
17 specific reasons to elevate the punishment for the crime when a parental figure is involved are  
18 absent. Siblings, cousins, and nieces and nephews typically do not have the same power or  
19 emotional influence over a minor as do family members that are more senior. While some of these  
20 persons may be of an age or in a position akin to that of a parental figure, generally speaking they  
21 are more akin to peers. Moreover, inclusion of more distant relatives raises difficult problems of  
22 line-drawing; in many families, some aunts and uncles are younger than their nieces or nephews.

23 Relationships that do not involve the direct guardianship role do not consistently raise the  
24 same degree of tension between the complainant's status within the family, need for protection,

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<sup>106</sup> RESTATEMENT OF THE LAW, CHILDREN AND THE LAW, § 1.82 (Tentative Draft No. 2, 2019).

<sup>107</sup> See *supra*, Comment to Section 213.5(4), for more discussion of authority figures.

<sup>108</sup> Most jurisdictions extend the prohibition on incest to guardians, grandparents, aunts and uncles, and many also include siblings, nieces and nephews. See, e.g., Ark. Code Ann. § 5-14-103(a)(4); N.Y. Penal Law § 255.25-27. Other states simply proscribe 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, or for persons “such person's guardian or otherwise responsible for the general supervision of such person's welfare,” Conn. Gen. Stat. Ann. §53A-71(a)(4).

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1 and vulnerable proximity versus the actor’s sexual demands. For this reason, the revised Code also  
2 rejects the liability described in Section 230.2. Instead, sexual overtures by such persons are  
3 governed by Sections 213.8(1) and (2). Only when such persons satisfy the criteria set out in (3)  
4 does that provision apply.

5 Section 213.8(3) departs from the 1962 Code in setting the upper age threshold at 18, rather  
6 than 21. As the 1962 Code explained, “[T]he higher age reflects the realistic assumption that a  
7 much older child may be subject to imposition and domination by one who occupies a position of  
8 authority and control. Moreover, the guardian or person similarly situated bears a special  
9 responsibility for guidance of his ward. Betrayal of that obligation by sexual intimacy is decidedly  
10 wrongful even if the child is old enough to take care of himself in most situations.”<sup>109</sup> Although  
11 that rationale still holds true, the age of 18 is widely recognized as the age of legal emancipation.  
12 In contemporary society, roughly half of those aged 18 to 24 live outside their childhood homes.<sup>110</sup>  
13 Approximately 40 percent of 18- to 24-year-olds are enrolled in some form of higher education,<sup>111</sup>  
14 and roughly 72 percent of those aged 16 to 20 who are not in school are in the workforce.<sup>112</sup> As a  
15 young person reaches full adulthood, the rationales justifying greater protection fade. And  
16 although the restrictions of Section 213.8(3) may leave a gap in protection for minors aged 16 to  
17 18, when the actor imposes sexually but not in a way that invokes the protections of Sections 213.1  
18 through 213.6, and is not in a position of trust as defined in Section 213.8(3) or (4), such a gap is  
19 preferable to the risk of overbreadth. Including persons above the age of 18 runs the risk of  
20 criminalizing relationships that, although distasteful and against community sentiment,  
21 nonetheless cannot be described as unambiguously nonconsensual. Moreover, in cases in which  
22 the complainant is still vulnerable, and the sexual activity is unwanted, the provisions of Section  
23 213.6 may serve to fill the gap so long as the factfinder concludes the actor was aware of a  
24 substantial risk that the other person was unwilling.

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<sup>109</sup> 1962 Code § 213.3, Comment at 388.

<sup>110</sup> <https://www.census.gov/data/tables/2017/demo/families/cps-2017.html>

<sup>111</sup> <http://www.higheredinfo.org/dbrowser/index.php?measure=104>.

<sup>112</sup> <https://www.childtrends.org/indicators/youth-employment>.

1 **Illustrations:**

2 14. Complainant, who is 16, lives with Complainant’s mother. Complainant’s  
3 mother’s boyfriend, Accused, occasionally spends the night at Complainant’s home.  
4 Accused also has a longstanding sexual relationship with Complainant’s mother, and at the  
5 time of the incident called the mother his “bae.” Witnesses testify that based on their  
6 observations of the relationship and Accused and Complainant’s mother’s statements, they  
7 believed Accused and Complainant’s mother to be dating. One day, Accused enters  
8 Complainant’s room late in the evening and climbs into bed with Complainant. Accused  
9 tells Complainant that he is going to show Complainant “about being a man” and removes  
10 Complainant’s pants. Complainant nervously says, “Okay...” and then Accused engages  
11 in an act of anal penetration. Complainant admits the incident, but claims that Complainant  
12 had been flirting with him for the past year and that Accused has not engaged in sexual  
13 activity with Complainant’s mother for at least six months. Accused argues that  
14 Complainant is 16, which is past the age of consent. Based on this evidence, a factfinder  
15 could find Accused guilty of a violation of Section 213.8(3). Accused knew that  
16 Complainant is under 18, and the factfinder could conclude that Accused knew himself to  
17 be the sexual partner of Complainant’s parent. The offense is punishable as a third-degree  
18 felony. Section 213.8(3) makes any question of Complainant’s willingness irrelevant.

19 15. Same facts as in Illustration 14, except that Accused, Complainant’s uncle, lives  
20 in the same home as Complainant and regularly acts as a guardian, such as by cooking  
21 meals for Complainant, taking Complainant to school or athletic events, and enforcing  
22 Complainant’s curfew. Based on these facts, Accused could be found guilty of a violation  
23 of Section 213.8(3). The factfinder could conclude beyond a reasonable doubt that  
24 Complainant is under the age of 18 and Accused resides with Complainant as a de facto  
25 parent.

26 16. Same facts as in Illustration 14, except that Accused is Complainant’s uncle,  
27 whom complainant sees a couple of times a year on holidays. Based on these facts, Accused  
28 is not liable under Section 213.8(2), because Accused is not in a parental or guardianship  
29 role towards the Complainant, nor in a sexual relationship with Complainant’s parents or  
30 grandparents. Accused is also not liable under Section 213.8(1) or Section 213.8(2),  
31 because Complainant is over 16 years old. Accused is only liable if the evidence proves

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1           guilt beyond a reasonable doubt under another provision of Article 213, such as Section  
2           213.6, which prohibits sexual penetration without consent. However, if a jury believes that  
3           Accused did not know or recklessly disregard that Complainant was unwilling—for  
4           instance, if Accused argues that Accused believed that Complainant assented—then  
5           Accused cannot be found guilty.

6           17. Complainant, who is 25 years old, was adopted at a young age. After several  
7           years tracking down Complainant’s biological parents, Complainant locates Complainant’s  
8           biological father, Accused. The two become close, and then begin a consensual sexual  
9           relationship. Based on these facts, there is no violation of Section 213.8(3). Section  
10          213.8(3) prohibits sexual intercourse between a minor and a parent, but because the  
11          Complainant is over 18, the statute does not apply.

12          18. Accused is Complainant’s 16-year-old son. Accused has a severe mental illness  
13          and has become increasingly belligerent and violent. One day, Accused enters  
14          Complainant’s bedroom, wakes Complainant, and then engages in an act of sexual  
15          penetration as Complainant sobs, stunned. Based on these facts, Accused is not guilty of a  
16          violation of Section 213.8(3). Accused, the actor, is not a parent of Complainant;  
17          Complainant is the parent of Accused. Accused might, however, be found guilty of another  
18          offense under Article 213, such as Section 213.6.

### 19          ***4. Exploitative Sexual Assault of a Minor – Section 213.8(4).***

20          One circumstance that warrants special consideration is that of authority figures who  
21          engage in sexual activity with older minors. Most mature authority figures involved with a minor  
22          younger than 16 will be punishable under Section 213.8(2), without regard to the actor’s status as  
23          an authority figure, in light of the 10-year age gap; an authority figure involved with a minor  
24          younger than 12 will be punishable by Section 213.8(1). But the question remains whether the law  
25          should also provide a punishment for authority figures who sexually engage with 16- and 17-year-  
26          olds who nominally consent to the acts.

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1           The 1962 Code punished such acts by authority figures in Section 213.3(1)(b) as a  
2 misdemeanor, as discussed in the Comment to Section 213.8(3). In existing law, statutes  
3 prescribing special penalties for actors in positions of authority to a child are common.<sup>113</sup>

4           Arguments might be made against penalizing such behavior. Sixteen-year-old adolescents  
5 in contemporary society are—as a general matter—sufficiently mature and sufficiently aware of  
6 the implications of sexual penetration to be able to exercise autonomous, if not always wise,  
7 judgment. But as research underscores both the extent to which older actors exploit their positions  
8 of trust for sexual gratification, and the lasting individual and social impact those actions have,  
9 continued protection remain appropriate.<sup>114</sup> Moreover, awareness of the frequency of and harm  
10 caused by sexual abuse of young people by authority figures such as clergy, staff at group or foster-  
11 care homes, or athletic coaches has led to increased efforts to deter and penalize such conduct.

### 12 **Illustrations:**

13           19. 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 Complainant  
16 from behind, saying, “You’re my favorite player.” Complainant tries to wriggle from  
17 Accused’s grasp, saying, “That’s not true” in a playful voice, but Accused says, “You know  
18 it’s true. And aren’t I your favorite coach?” Again, Complainant laughs nervously, saying,  
19 “You know you are!” while trying to return to cleaning. Instead, Accused says “show me”  
20 and begins to kiss Complainant. Complainant, stunned, does not speak or resist.  
21 Complainant then follows Accused to the bedroom, where at Accused’s urging  
22 Complainant engages in an act of oral sex. Accused later testifies that Accused believed  
23 Complainant had a “crush” and that the sexual act was consensual; Complainant testifies  
24 that Complainant was unwilling. Based on these facts, Accused could be found guilty of a  
25 violation of Section 213.8(4). Accused knew that Complainant is under 18 years of age,

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<sup>113</sup> See, e.g., N.J. Stat. Ann. § 2c:14- 2(2)(b) (“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) (including “athletic manager who is an adult” along with babysitter, coach, religious leader, scout leader, etc.); Colo. Rev. Stat. Ann. §18-3-405.3 (position of trust).

<sup>114</sup> Tamara Blakemore, *The Impacts of Institutional Child Sexual Abuse: A Rapid Review of the Evidence*, 74 *Child Abuse & Neglect* 35 (2017) (noting dearth of concrete evidence about prevalence, but collating rates related to abuse within religious institutions and assessing rates and impacts).

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1 that Accused is more than 10 years older than Complainant, and that Accused is in a  
2 position of trust and supervisory role. The offense is punishable as a fifth-degree felony.  
3 Accused cannot be found guilty of a violation of Section 213.8(2), because Complainant is  
4 not younger than 16 years old.

5 20. Same facts as in Illustration 19, except that Complainant is 15 years old. For  
6 the reasons given in Illustration 20, Accused can be found guilty of Section 213.8(4). But  
7 Accused may also be found guilty of a violation of Section 213.8(2). Accused knows that  
8 Complainant is between 12 and 16, and that Accused is 32. Because Accused is more than  
9 10 years older, the offense is graded as a fourth-degree felony.

10 21. Same facts as in Illustration 19, except that Complainant is 15 and Accused is  
11 19 years old. Accused cannot be found guilty under Section 213.8(2), because, even though  
12 Complainant is between 12 and 16 years old, Accused is not more than five years older  
13 than Complainant. Nor can Accused be found guilty under Section 213.8(4), because even  
14 though Complainant is under 18, and Accused is in a position of authority, Accused is not  
15 more than 10 years older.

16 Finally, extending liability in these situations to cover complainants until age 21, as did the  
17 1962 Code, seems excessive. As noted above, even though persons aged 18 to 21 are susceptible  
18 to abuse or intimidation, the probable independence and autonomy of such persons in most aspects  
19 of their lives counsels against criminalizing consensual sexual encounters,<sup>115</sup> however ill-advised.  
20 To the extent that such encounters are coercive or nonconsensual, Sections 213.4 and 213.6 serve  
21 as adequate protection against excessive forms of influence.

### 22 ***5. Fondling the Genitals of a Minor – Section 213.8(5).***

23 Section 213.8 departs from the 1962 Code, but is consistent with existing law, in expanding  
24 the scope of covered behavior with minors that is eligible for heightened punishment. The 1962  
25 Code reserved its most serious penalties for vaginal or anal penetration and oral sex, as does most  
26 existing law. Section 213.0(2)(a) and (b) and Sections 213.1 through 213.6 follow that pattern, by  
27 imposing penalties for acts of penetration or oral sex involving force, coercion, or other conditions  
28 indicating lack of consent without regard to the age of the complainant.

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<sup>115</sup> See text and accompanying footnotes, Comment § 213.8(4), nn.103-106.

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1           A “grab” of genitalia is most likely to be punished less severely under provisions covering  
2 “sexual contact.”<sup>116</sup> Technically, some “grabs” of female genitalia may meet the definition of  
3 “sexual penetration,” which is satisfied if there is any penetration “however slight” of the vulva.<sup>117</sup>  
4 In contrast, even a prolonged touching of male genitalia may only ever constitute “sexual contact.”  
5 This disparity occurs because, as the Comment to Section 213.0(2)(a) explains, universal and  
6 longstanding practice has shown that the only workable penetration standard is one that defines  
7 the necessary amount of penetration as “however slight.”<sup>118</sup> And this standard is essential in order  
8 to adequately penalize common, serious forms of sexual abuse, including acts of object and digital  
9 penetration.

10           The exclusion of fondling male genitalia from the category of most serious offenses is  
11 justified when drawn with respect to the offenses described in Sections 213.1 through 213.6, which  
12 primarily target adult complainants.<sup>119</sup> First, fondling the genitals of adults, although serious, is a  
13 less serious intrusion than an act involving penetration. A “grab” of genitalia—whether male or  
14 female—is an incursion on autonomy akin to other unwanted touches of intimate parts, as opposed  
15 to an act involving penetration. In addition, complaints involving fondling or unwanted  
16 masturbation of adult males are not significant in number.

17           But whereas unwanted, prolonged masturbation of the genitalia of adult males is an  
18 uncommon occurrence adequately deterred and condemned by proscriptions governing unwanted  
19 sexual contact, the unwanted fondling of the genitalia of male children or youths by adults is sadly  
20 all too frequent.<sup>120</sup> The consequences of such contact are also more serious for a minor than for an

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<sup>116</sup> See § 213.0(2)(c) & Comment.

<sup>117</sup> See § 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.

<sup>118</sup> See § 213.0(2)(a) Comment & Reporters’ Note.

<sup>119</sup> 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. See Reporters’ Note.

<sup>120</sup> One study found that the majority of victims of child sexual assault were 12 to 17 years of age; specifically, 14 percent of child sexual assault victims were 0-5, 20.1 percent were 6-11, and 32.8 percent were 12-17. The most common charge in all reported cases was forcible fondling—it was the most serious charge in 45 percent of all sexual assault reported to law enforcement in 1991-96. Howard N. Snyder,

1 adult, as the minor is likely still in the process of sexual development and less likely to have  
2 engaged in any form of intimate touching.<sup>121</sup> An adult who masturbates a boy or young man, like  
3 an adult who masturbates a young girl or woman, takes advantage of the minor’s youth and  
4 inexperience, and causes potential damage to the minor’s emotional and sexual development.

5 Similarly, although fondling and masturbation of female genitalia is likely to meet the  
6 technical criterion of “sexual penetration,” such liability may be undesirable or difficult to  
7 establish for several reasons. First, the severe penalties for acts of penetration may feel excessive  
8 when the allegations involve groping, including groping over the clothing. But punishing such acts  
9 at the low level of ordinary contact offenses may also be insufficient. Second, even if the  
10 prosecutor attempts to prove that the fondling meets the standard of “sexual penetration,” there  
11 may be problems of proving that penetration, given that young children often lack sophisticated  
12 understandings of their genitalia and thus may have trouble explaining the nature and extent of the  
13 touch to the factfinder. In sum, there are several reasons to elevate the punishment for acts of  
14 fondling or masturbation beyond the ordinary contact offenses, as regards the genitalia of children.

15 **Illustrations:**

16 22. Complainant, who is 10 years old, is in the bathroom of the public library when  
17 another patron, who is 42, approaches and tells Complainant to enter one of the stalls.  
18 Complainant initially refuses, but then the patron says, “Trust me—I have a great surprise  
19 for you!” Complainant agrees and enters the stall. The patron puts a hand inside of  
20 Complainant’s pants and masturbates complainant for several minutes. After the patron  
21 leaves, Complainant tells the library staff what happened. Based on these facts, the

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Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics, National Center for Juvenile Justice/Bureau of Justice Statistics, at 2 (July 2000).

<sup>121</sup> Editorial, *Sexual Abuse and Assault in Children and Teens: Time to Prioritize Prevention*, 55 J. ADOLESCENT HEALTH 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. Penetration should not be viewed as the sole marker of severity of abuse or predictor of long-term outcomes for the survivors.”).

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1 factfinder could find the actor guilty of a violation of Section 213.8(5)(b)(i) and punishable  
2 for a fourth-degree felony.

3 23. Same as in Illustration 22, except that the minor is 13 year old. Based on these  
4 facts, the factfinder could find the actor guilty of a violation of Section 213.8(5)(b)(i) and  
5 punishable for a fifth-degree felony.

6 Lastly, Section 213.8 mirrors the language of Sections 213.1 through 213.5 in covering  
7 actors who “cause [the complainant] to submit to or perform” the prohibited acts in circumstances  
8 that render even apparent consent ineffective. Specifically, Section 213.8 addresses the  
9 circumstances of the ages of the parties involved and their relationship. Because consent is  
10 ineffective in these circumstances, it is irrelevant to the determination of the actor’s culpability.  
11 As Section 213.8(7) makes explicit, effective consent is lacking whenever the actor engages in a  
12 prohibited sexual act in circumstances as described in subsections (1) through (6).

### 13 **Illustration:**

14 24. Same facts as in Illustration 22, except that instead of masturbating  
15 Complainant, Accused removes Accused’s own shorts and places Complainant’s hand on  
16 Accused’s penis and causes Complainant to masturbate Accused. Based on these facts,  
17 Accused could not be found guilty of a violation of Section 213.8(1). Section 213.8(1)(b)  
18 includes touches of a child’s unclothed or clothed penis, but it does not include touches by  
19 a child to the penis of an adult. Rather, such conduct is covered by Section 213.8(5), which  
20 covers acts of fondling. The factfinder could conclude that the actor knowingly caused the  
21 minor to fondle the actor’s genitals, and thus violated 213.8(5).

22 For the reasons given in the Comments to Section 213.8(1) and (2), this provision follows  
23 the pattern of imposing liability separately for minors younger than 12 and those ages 12 to 16. It  
24 also follows the pattern of providing for an age gap. In the case of minors younger than 12, the gap  
25 is five years; for minors 12 to 16, it is seven years. Slightly more generous gaps are warranted  
26 given the nature of the conduct, which is more akin to sexual contact than penetration in terms of  
27 the probability that peers engage in consensual exploratory behavior with one another.

1 **Illustration:**

2           25. Complainant, who is 11½, is at a birthday party with Accused, who has just  
3 turned 13. Complainant and Accused are playing a game in which each person draws a  
4 name from a hat, and then spends seven minutes in a closet in the dark with that person.  
5 Complainant draws Accused’s name, they both enter the closet, and nervously laugh as the  
6 door is closed. After a few moments, Complainant begins to kiss Accused, who  
7 reciprocates. Accused reaches down and begins to masturbate Complainant over  
8 Complainant’s clothes and Complainant fondles Accused’s breasts. Complainant’s parents  
9 suddenly open the door and observe the behavior, and report the incident to police. Based  
10 on these facts, Accused cannot be found guilty of any offense. Although Complainant is  
11 younger than 12 years of age, Accused is within four years of age of Complainant.

12           The penalties that attach to a violation of Section 213.8(5) reflect the seriousness of the  
13 offense relative to acts of sexual penetration or oral sex at one extreme, and acts of sexual contact  
14 at the other. Specifically, Section 213.8(5) provides that the offense is a felony of the fourth degree  
15 if the complainant is under 12 years of age, and a felony of the fifth degree if the complainant is  
16 aged 12 to 16. Thus, generally speaking, the offense is one step up from the one-year misdemeanor  
17 applicable to acts of sexual contact, and one step down from acts of penetration or oral sex.

18           **6. Offensive Sexual Contact with a Minor – Section 213.8(6)**

19           Section 213.8 sets out a separate provision for contact offenses involving children. As with  
20 the penetration offenses, the general provisions of Article 213 governing sexual contact, defined  
21 in Section 213.7, apply equally to sexual contact with minors. Section 213.7(1) defines as a felony  
22 of the fifth degree the actor’s use of physical force or surreptitious impairment to engage in  
23 unwanted sexual contact. As a felony punishable by multiple years’ imprisonment, this provision  
24 adequately protects complainants who are children. However, although the use of force or  
25 surreptitious intoxicants is not unheard of as regards child complainants, it is far from common.  
26 Rather, adults often engage in inappropriate sexual contact with children using only their inherent  
27 authority, physical dominance, or special relationship with the child to secure sexual  
28 submission.<sup>122</sup>

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<sup>122</sup> World Health Organization, Child Sexual Abuse, at 76, available at [https://www.who.int/violence\\_injury\\_prevention/resources/publications/en/guidelines\\_chap7.pdf](https://www.who.int/violence_injury_prevention/resources/publications/en/guidelines_chap7.pdf)

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1           Section 213.7(2) punishes sexual contact as a misdemeanor when it occurs without the  
2 consent of the other person, and in specified circumstances that mirror those found in the  
3 provisions governing penetration and oral sex. This subsection arguably could apply to many  
4 instances of sexual contact between an adult and a minor. Under the definition of consent provided  
5 in Section 213.0(2)(d), a factfinder may infer lack of consent from the context of all the  
6 circumstances, even in the absence of resistance. For cases with very young children, such as those  
7 under eight years of age, the simple fact of the child’s age might thus provide evidence of lack of  
8 consent.

9           At the same time, however, an inquiry into consent is misplaced when it comes to minors  
10 engaging in sexual activity with those much older. Very young children lack the independence and  
11 autonomy necessary to engage in meaningful consent, particularly as regards an adult. A six-year-  
12 old cannot “consent” to the sexual approaches of a person much older, and a factfinding process  
13 that invites such inquiries brings disrepute to the law. And while older minors may have the  
14 capacity to consent to peers, questions of consent are likewise misguided when the actor is deemed  
15 too old to be an appropriate partner. A minor, whether as young as eight or as old as 15, may  
16 explicitly welcome the sexual advances of an adored adult out of genuine loyalty or affection, but  
17 penal law rightly ensures that such requests are subject to criminal liability.

18           For these reasons, sexual contact with children is a common form of an aggravated-contact  
19 offense, and is punishable in every jurisdiction. At the same time, wide variation exists in the age  
20 required to trigger a particular punishment, in the tiers and thresholds for different degrees of  
21 punishments; and for the absolute punishments imposed. The cutoffs for jurisdictions with age  
22 distinctions for liability tend to hover around the ages of 12 and 15; less than a dozen jurisdictions  
23 have provisions that cover 16- and 17-year-olds.<sup>123</sup> A small handful of jurisdictions have a single  
24 unitary scheme. Jurisdictions also vary markedly in the punishments authorized.<sup>124</sup>

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(describing “features 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”).

<sup>123</sup> See Reporters’ Note.

<sup>124</sup> Nearly every jurisdiction punishes contact with 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 generally Reporters’ Note.

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1           Section 213.8(6) imposes liability for sexual contact with minors, based solely on the age  
2 of the actor and the complainant rather than the presence or absence of nominal consent. Statutory  
3 liability for certain contact with minors achieves three objectives. First, as with the other offenses  
4 defined in Section 213.8, it protects minors from sexual exploitation without requiring additional  
5 proof of force, coercion, the absence of consent, or a particular vulnerability on the part of the  
6 complainant. Second, Section 213.8(6) widens the definition of prohibited behavior to include  
7 touches of the lips, mouth, or tongue. Although such conduct was deliberately omitted from the  
8 definition of sexual contact applicable to the general contact offenses, primarily out of concern for  
9 overbreadth,<sup>125</sup> it is appropriately included in a provision aimed at protecting children. Third, the  
10 penalties found in Section 213.7 are at the lowest end of the spectrum, in keeping with the behavior  
11 addressed, which involves unwanted sexual contact. But the same behavior, when engaged in by  
12 an adult against a child, deserves a slightly more serious penalty. Each of these objectives is  
13 addressed in turn below.

14           ***Age-based liability.*** It is beyond question that the acts of sexual penetration and oral sex  
15 covered by Sections 213.8(1) through 213.8(4) rank among the most emotionally powerful and  
16 intimate behaviors in which human beings can engage. But it is equally true that even lesser forms  
17 of intimacy, like those defined as “sexual contact,” can hold deep significance even if they also  
18 carry far fewer emotional and physiological risks. Many adults still recall with emotional  
19 tenderness their “firsts,” starting with a first kiss. Protecting children by ensuring that such rites of  
20 passage are not corrupted by exploitative older actors is a critical intention of this subsection.

21           At the same time, the central challenge in setting out age-based thresholds of liability is  
22 even more acute in the context of contact offenses than for the more intimate sexual acts covered  
23 by the preceding subsections. Sexual penetration and oral sex are behaviors engaged in only by  
24 those nearing adulthood, both statistically and as a matter of social acceptance, and always with  
25 clear sexual intention. But the kinds of sexual contact covered by Section 213.8(6) occur—again,  
26 both statistically and as a matter of social custom—at much younger ages, and even without any  
27 sexual overtones at all. A pat on the bottom or kiss is a common and welcome behavior commonly  
28 bestowed upon minors by parents, beloved relatives, or affectionate friends. Similarly, engaging  
29 in the kinds of sexual contact covered by Section 213.8(6) is considered a rite of passage during

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<sup>125</sup> See Comment to 213.7(2)(c).

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1 youth and puberty, and is an expected feature of sexual exploration as one matures. Even very  
2 young children, motivated by a pure sense of sexual curiosity, may voluntarily undertake behavior  
3 that technically meets the definition of sexual contact. It may not be ideal that very young children  
4 “play doctor,” but as long as such activity is nominally consensual and engaged in with age-  
5 appropriate partners, it is not a proper subject for penal law.

6 For the same reason, Section 213.0(2)(f) applies to these sections, and thus an actor must  
7 be over 12 years of age in order to be chargeable with any contact offenses other than those  
8 involving use of a weapon or serious bodily injury. Those under 12 are generally not competent to  
9 make sexually autonomous choices, and thus should not be held criminally responsible for their  
10 own actions. A child as young as eight might kiss or agree to “show me yours if I show you mine”  
11 with another, without liability of any kind. Even less innocent behavior by actors under 12, for  
12 instance a playground bully who forcibly grabs another child and touches the child intimately,  
13 should be handled outside of the penal law, either privately or within the educational or abuse and  
14 neglect system, as appropriate.

15 Yet the penal law can and should address an older, more sexually sophisticated actor who  
16 abuses young children, or seeks to exploit the sexual curiosity of a child. Young children are also  
17 often more likely to be trusting of those their senior, and less assertive in enforcing physical  
18 boundaries. Exploitation of such innocence for purposes of sexual gratification of an older,  
19 sexually sophisticated actor deserves serious penalty. The difficulty is in striking the right balance  
20 between leaving undisturbed ordinary sexual exploration among age peers, while proscribing  
21 sexually exploitative and predatory behavior.

22 Section 213.8(6)(b) sets out provisions of liability for sexual contact that roughly mirror  
23 those of Section 213.8(1) and (2). Both provisions require that the actor knows or is reckless in  
24 disregarding the risk that the youth is under the specified age, as clearly stated in Section  
25 213.8(6)(c).

26 Consistent with the dominant trends in existing law, Section 213.8(6) prohibits sexual  
27 contact with minors under 12 when the actor is five or more years older. As with Section 213.8(1),  
28 this provision must be read consonant with both Section 213.0(2)(f), which defines an “actor” as  
29 a person more than 12 years of age, and with Section 4.10 of the 1962 Code, which precludes a  
30 person under 16 years of age from prosecution in criminal court, and presumes that those 16 and  
31 17 will be handled in juvenile courts. Criminal liability under Section 213.8(5) thus, at the lowest

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1 threshold, attaches to a child 12 years and one day old who engages in proscribed sexual contact  
2 with a child aged seven or younger.

3 Section 213.8(6) also prohibits sexual contact with minors aged 12 to 16 years old, when  
4 the actor is seven or more years older than the youth and not the youth's legal spouse. The added  
5 age gap, while imperfect, is important to protect against unnecessary overbreadth in a population  
6 that may engage in sexually curious behavior that, while ill-advised, ultimately is not worthy of  
7 penal sanction. The forms of sexual contact covered by Section 213.8(6) are primarily superficial:  
8 kisses, gropes of the breasts or buttocks. Although some more disturbing forms of contact are also  
9 included, such as simulated fellatio with an object, most of the behavior proscribed under the  
10 contact provisions are less intrusive in nature. Gropes, grabs, and other nonconsensual sexual  
11 contact remain covered by the provisions of Section 213.7(2), regardless of the age of the  
12 complainant. Section 213.8(6) applies primarily when the conduct is welcome and wanted.  
13 Because the complainant must be younger than 16, all sexual touches of youths aged 12 to 15 by  
14 actors 19 or older will be penalized. But to further criminalize nominally consensual acts by minors  
15 who have themselves barely reached the age of sexual maturity, as regards the least intrusive forms  
16 of sexual contact, is excessive.

### 17 **Illustrations:**

18 26. Complainant, who is 15 years old, is shopping at the local mall when Accused,  
19 who is 17 and knows Complainant from school, sees Complainant enter an elevator alone.  
20 Accused follows. Once inside, Accused turns and grabs Complainant. Accused pulls  
21 Complainant closer, pressing Accused's lips against Complainant's and moving Accused's  
22 hands to Complainant's buttocks. Complainant struggles and finally pushes Accused away,  
23 fleeing once the doors to the elevator open. Based on these facts, the factfinder cannot find  
24 Accused guilty of any offense under Section 213.8(6). Although Complainant is younger  
25 than 16 years of age, Complainant is not more than seven years older than Accused.  
26 Accused may, however, be found liable for a violation of 213.7(2)(b). Accused grabbed  
27 the buttocks of Complainant, which meets the definition of "sexual contact," and the  
28 factfinder may determine that Accused knew or recklessly disregarded the risk that  
29 Complainant did not consent.

30 27. Same as in Illustration 26, except that when Accused grabs Complainant,  
31 Complainant reciprocates with enthusiasm. Based on these facts, Accused is not liable for

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1 any offense. Accused is not liable under Section 213.8(6) for the reason given in Illustration  
2 26. Nor is Accused liable under Section 213.7, because Complainant’s actions indicate  
3 willingness.

4 Although Section 213.8 contains no subsection for sexual contact by persons in authority  
5 or parental figures, in parallel to Section 213.8(3) and (4), such provisions are largely superfluous.  
6 The terms of Section 213.8(6) ensure that actors in positions of trust—whether family members,  
7 teachers, coaches, or the like—are likely to be punished if the child is under 12 or 16, so long as  
8 the actor is significantly older than the child or youth. The principles motivating special liability  
9 for the more intimate sexual acts covered by Section 213.8(3) and (4) are not as persuasive as  
10 regards lesser forms of sexual contact. First, there is less need to provide for an enhanced  
11 punishment simply on the basis of the special position of the actor vis-à-vis the complainant,  
12 because the intrusion is not as severe. Second, there is less need to extend coverage to complainants  
13 aged 16 and 17, because the acts covered by the sexual-contact statute are both more common and  
14 more familiar to persons in that age group than those involving penetration and oral sex.

15 Finally, to the extent that the complainant of any age is in a legal form of detention or  
16 supervision by the actor, the general proscription on such relationships, found in Section  
17 213.7(2)(b)(iii) as referencing Section 213.3(3), applies. Such protection is especially important  
18 given increasing awareness of the incidence and effects of abuse of children in official custody.<sup>126</sup>

### 19 ***Prohibited behaviors.***

20 Section 213.8 expands the scope of prohibited conduct beyond that of Section 213.7.  
21 Section 213.7 applies only to “sexual contact,” which is defined by Section 213.0(2)(c) as limited  
22 to contact with intimate parts such as the genitalia, anus, groin, buttocks, inner thigh, or breast. It  
23 specifically excludes touches to the mouth, lips, or tongue, for reasons explained in the Comment  
24 to Section 213.0(2)(c).

25 Section 213.8(6)(a)(ii), however, includes not just “sexual contact” but also “act[s]  
26 involving the touching of the mouth, lips, or tongue of any person, to any body part or object, for  
27 the purpose of sexual arousal, sexual gratification, sexual humiliation, or sexual degradation of  
28 any party.” The inclusion of the mouth, lips, and tongue is necessary to ensure that this lesser, but

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<sup>126</sup> See, e.g., Tamara Blakemore, *The Impacts of Institutional Child Sexual Abuse: A Rapid Review of the Evidence*, 74 CHILD ABUSE & NEGLECT 35 (2017).

1 still egregious, form of child exploitation does not go unpunished. Research suggests that more  
2 serious forms of child sexual abuse are often preceded by a “grooming” period in which a potential  
3 actor secures the trust of and access to a child. There is considerable debate in the literature about  
4 the precise contours of “grooming” behavior, the frequency with which actors employ it, and the  
5 ability of outsiders to distinguish between grooming and innocent acts of affection.<sup>127</sup> But there is  
6 a general consensus that actors often “gradually increase physical contact in order to desensitize  
7 the child to touch” or engage the child in “educational” acts intended to remove the child’s fear of  
8 greater intimacy.<sup>128</sup> Of course, adults may kiss a child or teen for innocuous reasons. Thus, to  
9 constitute covered contact, the contact must be proven to be for a sexual purpose.

10 **Illustrations:**

11 28.<sup>129</sup> When Complainant was 13 years old, the 43-year-old boyfriend of  
12 Complainant’s mother moved into their home. From the beginning, Boyfriend showered  
13 the Complainant with affection and attention, but over time the behavior became more  
14 physical. Boyfriend started to stroke Complainant’s hair, kiss Complainant on the lips at  
15 night, and occasionally interrupt Complainant when Complainant was bathing or getting  
16 dressed. Based on these facts alone, the factfinder could not find Boyfriend guilty under  
17 Section 213.8. Although Complainant is 13 and Boyfriend is more than seven years older,  
18 Boyfriend’s acts are not clearly covered by either 213.8(6)(a)(i) or (ii). Although the  
19 prosecution might claim that the kisses involve touches to the mouth, as under  
20 213.8(6)(a)(ii), there is insufficient evidence to establish beyond a reasonable doubt that  
21 the purpose of the kiss was sexual and not innocent affection. Stroking a child’s hair or  
22 interrupting the child in the bathroom or while dressing, without more, are common acts  
23 within a household that do not necessarily connote a sexual intention.

24 29. Same facts as in Illustration 28, except that eventually, Boyfriend starts entering  
25 Complainant’s room in the middle of the night and caressing Complainant’s breasts and  
26 buttocks. The factfinder now has sufficient evidence to find a violation of Section 213.8(6).

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<sup>127</sup> <https://www.tandfonline.com/doi/full/10.1080/01639625.2016.1197656>

<sup>128</sup> Id.

<sup>129</sup> Facts loosely drawn from [https://us.sagepub.com/sites/default/files/upm-binaries/86300\\_Chapter\\_4\\_%281%29.pdf](https://us.sagepub.com/sites/default/files/upm-binaries/86300_Chapter_4_%281%29.pdf).

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1 The caresses constitute “sexual contact” under Section 213.8(6)(a)(i), because they involve  
2 touches to intimate areas for a sexual purpose. Moreover, such caresses appear to have no  
3 purpose other than sexual gratification.

4 30.<sup>130</sup> Complainant is nine years old and the defendant is a 28-year-old teacher in  
5 Complainant’s class. Complainant often stays after school in Teacher’s class, because  
6 Complainant’s guardian frequently gets caught at work and Teacher had offered to watch  
7 Complainant until the guardian is able to arrive. Over time, Teacher gradually began raising  
8 sexually explicit topics with Complainant, and then started showing Complainant images  
9 and videos of acts of oral sex. One day, Teacher says, “You should try it out—doesn’t it  
10 look fun?” and tells Complainant to open Complainant’s mouth. Teacher inserts several  
11 fingers into Complainant’s mouth, and instructs Complainant to treat it “like a popsicle.”  
12 Complainant complies, but later alerts the principal. Based on this evidence, the factfinder  
13 could find a violation of Section 213.8(6). Complainant is under 12, as Teacher knows, and  
14 Teacher is more than five years older. The factfinder could conclude that the touch between  
15 Teacher’s fingers and Complainant’s mouth was for a sexual purpose, as required by  
16 Section 213.8(6)(a)(ii).

17 31. Same facts as in Illustration 30, except that Complainant is 17. These facts do  
18 not support liability under Section 213.8 or any other provision of Article 213. Complainant  
19 is not under 16, and thus does not fall within the class protected by Section 213.8(6).  
20 Similarly, Section 213.8(4), which applies to exploitative acts by those in authority, only  
21 address acts of sexual penetration or oral sex. And the act of inserting fingers into another  
22 person’s mouth does not meet the definition of “sexual contact” described in Section  
23 213.0(2)(c); thus there can be no liability under Section 213.7. If the act was not  
24 consensual, Complainant may be subject to prosecution under ordinary assault-and-battery  
25 law.

26 **Penalty.** Section 213.8(6) aims to allow for consensual contact among peers, and even  
27 allow young teenagers to push the boundaries of suitable partners as regards consensual contact.  
28 At the same time, this section wholly forecloses sexual contact when an actor is significantly older

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<sup>130</sup> Facts loosely drawn from *McGregor v. State*, 2014 WL 1999305 (Tex. Ct. App. 2014) (unpublished opinion).

1 than a complainant. Given that the behavior proscribed constitutes the most superficial form of  
2 sexual contact, the most important component of Section 213.8(6) is to define when such contact  
3 is and is not legally tolerable. The associated penalty—a misdemeanor or fifth-degree felony based  
4 on the age of the complainant—reflects the lesser degree of harm inflicted by contact as compared  
5 to fondling of genitals, sexual penetration, or oral sex. It also captures the sense that older  
6 complainants likely perceived the encounter as consensual, even if legally impermissible, whereas  
7 younger complainants lack any such capacity to even nominally consent.

8 Misdemeanor penalties for contact offenses with children are evident in existing law,  
9 although in a minority of jurisdiction and chiefly for contact with an adolescent complainant.<sup>131</sup>  
10 At the same time, the majority of provisions punish sexual contact with adolescents as a low-level  
11 felony,<sup>132</sup> and there is also support for far more extreme sanctions.<sup>133</sup> At the same time, a precise

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<sup>131</sup> See, e.g., Iowa Stat. § 709.12 (defining misdemeanor offense for sexual contact by actors 18 or older with a child, as well as providing juvenile court jurisdiction for actors 16 or 17 when contact occurs with a child five or more years younger); Mich. Stat. §§ 750.520c, 520e (defining misdemeanor offense for contact between complainant 13-16 and actor five or more years older; contact with person younger than 13 punishable by 15 years); N.H. Rev. Stat. Ann. §§ 632-A:3, A:4 (defining misdemeanor offense of contact with a person 13-16 and the actor is five or more years older, and as a seven-year felony where complainant under 13); N.Y. Penal Law § 130.55, 130.60, 130.65 (defining misdemeanor for contact with a person 14-17 where actor is five or more years older and for when the person is younger than 14 years of age, and defining seven-year felony when complainant younger than 11 or younger than 13 and the actor is 21 or older); Ohio Stat. § 2907.06 (defining misdemeanor for contact by an actor 18 or older with a complainant 13-16, where the actor is four or more years older); S.D. Cod. L. § 22-22-7, 22-22-7.3 (defining misdemeanor offense for contact with complainant 13-16 by actor five years older, or by touches by actors younger than 16 of complainants younger than 16; and generally as a 10- or 15-year felony for touches of complainants younger than 16); Utah Code Ann. § 76-5-401.1 (defining misdemeanor for contact with a person 14 to 16 by actor four or more years older); Va. Code Ann. § 18.2-67.4:2 (punishing sexual contact by an adult with a child 13 to 15 as a misdemeanor).

<sup>132</sup> Ga. Code Ann. § 16-6-22.1 (punishing sexual battery of a minor younger than 16 as a five-year felony); Haw. Rev. Stat. Ann. § 707-733 (defining five-year felony sexual-contact offense of knowing sexual contact with a person younger than 14, or with a person 14-16 when the actor is five or more years older); Neb. Stat. § 28-320.01 (defining three-year felony for sexual contact with a complainant 14 or younger by an actor 19 or older); N.C. Stat. § 14-202.1 (defining four-year felony for contact by an actor at least 16 with a minor younger than 16, where the actor is five years older); 18 Pa. Con. Stat. Ann. § 3126 (defining five-year contact offense for actors with a complainant younger than 13, or two-year offense for actors four or more years older than a complainant 13-16).

<sup>133</sup> See, e.g., La. Rev. Stat. § 81 (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. Crim. L. § 3-307 (punishing a 10-year felony of sexual contact with a complainant under 14 where the actor is four years older); Va. Stat. § 18.2-67.3 (punishing contact with a person younger than 13 with up to 20 years' imprisonment); Rev. Code. Wash. Ann. § 9A.44.083 (defining life offense for contact with a complainant under 12 and the actor is three or more years older, 10-year offense where complainant is 12-14 and actor

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1 sense of the actual degree of liability is at times difficult to discern because some of those  
2 provisions cover acts of both penetration and contact.<sup>134</sup> Existing law exhibits both the practice of  
3 setting a single penalty applicable to several age-based thresholds,<sup>135</sup> and for providing for harsher  
4 penalties based on the age of the actor who engages in contact with same-aged complainants.<sup>136</sup>  
5 Also, many jurisdictions have multiple options for different degrees of liability for essentially  
6 identical conduct,<sup>137</sup> which leads to uncertainty in how actual sentencing practices likely unfold.

7         The penalties applicable to Section 213.8(6) reflect the judgment that sexual contact with  
8 minors of any age, by actors significant older, merits serious punishment. At the same time, Section  
9 213.8(6) distinguishes between the degree of punishment appropriate as both a deterrent and  
10 retributive matter when the minor is a willing participant in the encounter as opposed to a minor  
11 too young to comprehend or consent to even the most superficial sexual acts. The punishment also

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is three or more years older; and five-year offense where complainant is 14-16 and actor four or more years older).

<sup>134</sup> See, e.g., Ill. Stat. Chap. 720 § 5/11-1.60 (punishing sexual penetration and contact in single scheme with three to seven years' imprisonment, as applied to acts with a complainant under 13 by an actor 17 or older; contact or penetration by an actor younger than 17 with a complainant younger than nine; contact or penetration by with a complainant 13-17 by an actor more than five years older); Wisc. Stat. Ann. § 948.02(1)(e) (defining 60-year offense for intercourse or contact with a complainant younger than 13); id. § 948.02(2) (defining 40-year felony for contact or intercourse with a complainant younger than 16, unless the complainant is 15 or older for intercourse, or 15 for contact, and the actor is not yet 19, then the offense is a misdemeanor).

<sup>135</sup> See, e.g., 18 Pa. Con. Stat. Ann. § 3126 (defining two misdemeanor contact offenses for actors with a complainant younger than 13, or four or more years older than a complainant 13-16); Ill. Stat. Chap. 720 § 5/11-1.60 (punishing sexual penetration and contact in single scheme with three to seven years' imprisonment, as applied to contact with a complainant under 13 by an actor 17 or older; contact or penetration by an actor younger than 17 with a complainant younger than nine; contact or penetration by with a complainant 13-17 by an actor more than five years older).

<sup>136</sup> See, e.g., Ky. Stat. § 510.120 (defining misdemeanor of sexual contact by person 18 to 21 where complainant younger than 16, allowing defense for actors within five years of a complainant 14 or older); Ky. Stat. § 510.110 (defining felony offense for contact by an actor 21 or older where the complainant is younger than 16, or by any actor with a child younger than 12); W.Va. Code Ann. § 61-8B-9, 61-8B-7 (defining misdemeanor offense of sexual contact with complainant younger than 16 by actor four or more years older; five-year felony for contact with complainant younger than 12 by actor 14 or more years old; and 25-year felony for contact with complainant younger than 12 by actor 18 or older).

<sup>137</sup> See, e.g., D.C. Code § 22-3010.01 (authorizing six-month penalty for sexual contact with a person younger than 18 by a person 18 or older, when the minor is more than four years younger). But see id. § 22-3009 (authorizing 10-year penalty for any person who engages in sexual contact with a person younger than 16, where the actor is more than 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 reflects the structure of Section 213.8, which departs from the dominant approach in existing law  
2 by separating out the most intimate forms of sexual contact, fondling of genitals, for enhanced  
3 punishment. Accordingly, actors who engage in illicit sexual contact with adolescents 12 to 16  
4 years of age are punishable by one year in prison, whereas actors who engage in sexual contact  
5 with complainants younger than 12 are punishable with up to three years' imprisonment.

6 **7. *Absence of effective consent – Section 213.8(7).***

7 Section 213.8(7), like the parallel provisions found in Sections 213.1(3), 213.2(3),  
8 213.3(4), 213.4(3), 213.5(2), 213.7(3), underscores that consent is absent when the circumstances  
9 of the subsection are proved. Any nominal consent or willingness on the part of the complainant  
10 is irrelevant to the actor's liability.

11 **REPORTERS' NOTES**

12 **1. *Sexual victimization of minors***

13 Robust data regarding the sexual victimization of minors has only recently been collected,  
14 analyzed, and published.<sup>138</sup> As with studies of adult sexual offenses, studies of offenses against  
15 children often are subject to various criticisms, including how offenses are defined and  
16 categorized, and the enduring problem of under-reporting. Nonetheless, some general conclusions  
17 may be drawn from the data that does exist.

18 First, persons under 18 are common targets of sexual abuse. One review of incident  
19 reporting data showed that juveniles comprise 66 percent of all sex crime victims.<sup>139</sup> Another study  
20 confirms that “crimes against juvenile victims are the large majority (67%) of sexual assaults  
21 handled by law enforcement agencies.”<sup>140</sup> According to one review, among all victims of  
22 completed or attempted rape, roughly a third to one-half were first victimized while under the age  
23 of 18.<sup>141</sup> For female victims of sexual violence, 42.2 percent experienced a completed rape by age

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<sup>138</sup> See David Finkelhor & Anne Shattuck, *Characteristics of Crimes against Juveniles, Crimes Against Children Research Center* (Durham, N.H. 2012) (“Statistics on crimes against children have not been 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.”)

<sup>139</sup> Finkelhor & Shattuck, *supra* note 138, at 2 (by comparison, juveniles are 2-16% of victims for typical non-sex offenses).

<sup>140</sup> Howard N. Snyder, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics*, National Center for Juvenile Justice/Bureau of Justice Statistics (July 2000).

<sup>141</sup> Black, M.C., Basile, K.C., Breiding, M.J., Smith, S.G., Walters, M.L., Merrick, M.T., Chen, J., & Stevens, M.R. (2011). *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, at 25.

1 18—29.9 percent between 11 and 17 and 12.3 percent before age 10.<sup>142</sup> For male victims, 27.8  
2 percent experienced a completed rape before age 10.<sup>143</sup>

3 The pattern of sexual victimization varies for juveniles by age and gender. The majority of  
4 victims are female, but child victims tend to include slightly more males than in the adult  
5 context.<sup>144</sup> For obvious reasons, 98 percent and 99 percent of statutory-rape victims are juveniles,  
6 as are 87 percent and 93 percent of incest victims.<sup>145</sup> But juveniles also make up significant  
7 proportions of victims of other sexual offenses. Juveniles are 73 percent of female victims of  
8 forcible fondling, 63 percent of female victims of sexual assault with an object, 62 percent of  
9 victims of forcible sodomy, 46 percent of victims of forcible rape, and 63 percent of all female  
10 victims of sex offenses. Male juveniles are 86 percent of male victims of forcible fondling, 76  
11 percent of male victims of sexual assault with an object, 78 percent of male victims of forcible  
12 sodomy, 75 percent of male victims of forcible rape, and 84 percent of all male victims of sex  
13 offenses.<sup>146</sup>

14 That survey also found that, although most juvenile sex offense victims are 12 or over,  
15 there are significant rates of victimization for those younger than 12.<sup>147</sup> For instance, 46 percent  
16 of all juvenile victims of forcible sexual offenses are under 12;<sup>148</sup> roughly a quarter of forcible  
17 fondling, sexual assault with an object, and sodomy victims were under six, and another quarter to  
18 a third in each category were six to 11 years old.<sup>149</sup> Nearly two-thirds of victims of incest are under  
19 12.<sup>150</sup>

20 In addition, the vast majority of perpetrators of sexual crimes against juveniles are persons  
21 known to the juvenile.<sup>151</sup> Roughly 33 percent are family members, and another 58 percent are

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<sup>142</sup> Id.

<sup>143</sup> Id.

<sup>144</sup> 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. Id.

<sup>145</sup> Finkelhor & Shattuck, *supra* note 138, at 2 (reporting figures for females, and males, respectively).

<sup>146</sup> Finkelhor & Shattuck, *supra* note 138, at 3.

<sup>147</sup> See, e.g., Howard N. Snyder, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics*, Bureau of Justice Statistics (2000) (reporting that 14% of child sexual assault victims were 0-5; 20.1% were 6-11; 32.8% were 12-17); *id.* (reporting that forcible fondling the most common charge – 45% of all sexual assault reported to LE in 1991-96).

<sup>148</sup> Finkelhor & Shattuck, *supra* note 138, at 1.

<sup>149</sup> Finkelhor & Shattuck, *supra* note 138, at 5.

<sup>150</sup> Finkelhor & Shattuck, *supra* note 138, at 5.

<sup>151</sup> In one study, 74 percent of adolescents (aged 12-17) surveyed stated they had been sexually assaulted reported that the assailant was someone they knew. Almost two-thirds of assaults occurred within the complainant's home (30.5%) or neighborhood (23.8%) or school (15.4%). *Youth Victimization: Prevalence and Implications*, National Institute of Justice (2003). See also David Finkelhor et al., *The Lifetime Prevalence of Child Sexual Abuse and Sexual Assault Assessed in Late Adolescence*, 55(3) *J. Adolescent Health* 329 (2014) (reporting that 70% of sexual assaults reported to police occurred in the residence of the victim, that 27% of all offenders were family members, that family members constitute

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1 acquaintances. Only four percent are identified as strangers.<sup>152</sup> Another study found that 14 percent  
2 of offenders were strangers to the victim; for victims under six, just three percent of offenders were  
3 strangers, and for victims six to 12, just five percent were strangers.

4 The majority of perpetrators of sexual offenses against juveniles are adults (roughly 64%),  
5 but a significant minority are themselves juveniles (36%).<sup>153</sup> Almost all offenders were male, and  
6 23 percent of offenders were under the age of 18.<sup>154</sup> The vast majority of incidents involved no  
7 weapon; a firearm was involved in only two percent of sexual assault victimization of minors.<sup>155</sup>  
8 Sexual offenses against minors are more likely to result in arrest than those against adults, but rates  
9 are comparable.<sup>156</sup>

10 The deleterious effects of sexual victimization on the growth and well-being of a minor is  
11 self-apparent, but studies confirm significant increases in mental health issues,<sup>157</sup> likelihood of  
12 developing substance abuse problems,<sup>158</sup> and delinquent acts.<sup>159</sup> Studies suggest that victims of  
13 child sexual abuse are more likely to undertake sex work, have difficulty forming interpersonal  
14 relationships, engage in compulsive behaviors, and have various physical and chronic health

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49% of offenders of children under six and 42% of children six to 11); id. (finding only 24% of victims 12-17 and roughly 7% were strangers).

<sup>152</sup> Finkelhor & Shattuck, *supra* note 138, at 5 (reporting that the relationship was unknown in 5% of cases, and reporting data for forcible offenses as well as statutory rape and incest). 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.

<sup>153</sup> Finkelhor & Shattuck, *supra* note 138, at 6.

<sup>154</sup> Id. See also Melissa Sickmund and Charles Puzzanchera (eds.), National Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 Annual Report* 46 (2014) ([www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf](http://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf)); David Finkelhor, Richard Ormrod, and Mark Chaffin, *Juveniles Who Commit Sex Offenses against Minors*, *Juvenile Justice Bulletin*, December 2009 (OJJDP) ([www.ncjrs.gov/pdffiles1/ojjdp/227763.pdf](http://www.ncjrs.gov/pdffiles1/ojjdp/227763.pdf)); OJJDP, *Statistical Briefing Book, Sexual Assault Offender Age Profiles by Victim Age*, [www.ojjdp.gov/ojstatbb/victims/qa02401.asp?qaDate=2016](http://www.ojjdp.gov/ojstatbb/victims/qa02401.asp?qaDate=2016).

<sup>155</sup> Howard N. Snyder, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics*, National Center for Juvenile Justice/Bureau of Justice Statistics, at 6 (July 2000) (indicating that 93% of cases had information about most serious weapon, and in 77% of those, no weapon other than hands, feet, or fists were used). Violence and threats are more likely to be present with regard to older adolescent victims. Giroux, *supra* note 2, at 228 tbl 1.

<sup>156</sup> Howard N. Snyder, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics*, National Center for Juvenile Justice/Bureau of Justice Statistics, at 11 (July 2000) (showing 29% of juvenile victim cases resulted in an arrest, whereas 22% 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 six to 17 did. Id.

<sup>157</sup> Youth Victimization, at 9 (reporting “fivefold increase in the prevalence rate of PTSD” among juvenile victims of sexual offenses).

<sup>158</sup> Id. at 10 (reporting four- to five-fold increase).

<sup>159</sup> Id. at 10 (reporting three- to five-time higher rates).

1 problems.<sup>160</sup> In sum, “victimization by sexual assault is clearly associated with dramatic increases  
2 in the rates of each negative outcome among both boys and girls.”<sup>161</sup>

### 3 **2. Minors who commit sexual offenses**

4 Section 213.0(2)(f) defines actor as a person more than 12 years of age. Section 4.10 of the  
5 1962 Model Penal Code set the age of criminal responsibility at 16, and assumed that most  
6 minors—even those as old as 17—would have allegations of their misconduct adjudicated by  
7 juvenile courts.<sup>162</sup> Existing law shows far greater tolerance for treating minors more like adults.  
8 The 1990s ushered in a period of harsh treatment of all persons alleged to have engaged in criminal  
9 activity, including juveniles.<sup>163</sup> This trend had two prongs. First, courts and legislators increasingly  
10 allowed young persons accused of misbehavior to be transferred for disposition in criminal court,  
11 rather than adjudicated in a juvenile court proceeding. Second, courts and legislators increasingly  
12 exposed even very young minors to legal responsibility for their actions, whether in juvenile or  
13 adult court.

14 In the case of sexual offenses, the consequence of these trends laws is particularly  
15 important. Because statutory rape liability is predicated only upon a showing of age, and does not  
16 involve any proof of non-consent or force, expanded nets of liability made it possible for a young  
17 person to engage in technically illicit behavior, even if both parties considered the activity  
18 consensual sexual conduct with a peer. Courts thus had to decide whether a prosecutor may pursue  
19 charges against only one of two parties to a *consensual* encounter, even when both are within the  
20 age range of the protected class. Courts have also had to determine whether prosecutors may charge  
21 even very young minors who engage in clearly nonconsensual activity (for instance, a nine-year-  
22 old who digitally penetrates a four-year-old), given that these “perpetrators” are so young that the  
23 law deems them incapable of consenting to sex themselves (and thus they are arguably a “victim”  
24 of their own crime).

25 Many courts have met the first challenge—involving nominally consensual sex between  
26 two underage participants—by refusing to apply statutory rape laws to actors within the protected  
27 age class.<sup>164</sup> But some courts have signaled greater willingness to apply statutory rape laws to  
28 situations in which the allegations involve nonconsensual sex, even if both parties are within the  
29 protected class.<sup>165</sup> In order to determine the proper treatment of sexual offenses committed by

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<sup>160</sup> Nor Shafrin Ahmad & Rohany Nasir, Emotional Reactions and Behavior of Incest Victims, 5  
Procedua Social & Behavioral Science 1023 (2010) (citing studies on incest and other child sexual abuse  
victims).

<sup>161</sup> *Id.* at 10.

<sup>162</sup> 1962 Code, Comment at 340.

<sup>163</sup> Elizabeth Scott & Laurence Steinberg, Rethinking Juvenile Justice 88-99 (2008).

<sup>164</sup> See, e.g., Wilbur W., 95 N.E.3d at 270-271 (collecting cases); *In the Interest of B.A.M.*, 806  
A.2d 893 (Pa. Super. Ct. 2002) (setting aside adjudications because both boys were “willing participants”);  
*State ex rel. Z.C.*, 165 P.3d 1206 (Utah 2007) (setting aside delinquency adjudication of 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”).

<sup>165</sup> *State v. Colton M.*, 875 N.W.2d 642, 649 (Wis. Ct. App. 2015)

1 minors against other minors, it is helpful to identify distinctions between adult and juvenile  
2 actors.<sup>166</sup>

3 Importantly, “[v]ery few juveniles of any age commit sex offenses.”<sup>167</sup> And an even  
4 smaller number of juveniles younger than age 12 commit sexual offenses—roughly one in eight  
5 of all juvenile offenders (who themselves are only 1/4 of all perpetrators of sexual offenses).<sup>168</sup>  
6 The offending rate rises around age 12 and then plateaus at 14; thus 38 percent of juvenile sex  
7 offenders are 12 to 14, and 46 percent are 15 to 17.<sup>169</sup> Notably, “teenage sex offenders are  
8 predominantly male (more than 90 percent), whereas a [more] significant number of preteen  
9 offenders are female.”<sup>170</sup> Juvenile sex offenders are also much “more likely than adult offenders  
10 to commit illegal sexual behavior in groups.”<sup>171</sup>

11 There is no single profile of the juvenile sexual offender. Rather, these juveniles exhibit a  
12 range of backgrounds, motivations, and social functioning. As one review of the literature  
13 explained,

14 Some juvenile sex offenders appear primarily motivated by sexual curiosity. Others have  
15 longstanding patterns of violating the rights of others. Some offenses occur in conjunction  
16 with serious mental health problems. Some of the offending behavior is compulsive, but it  
17 more often appears impulsive or reflects poor judgment.<sup>172</sup>

18 However, “[a]mong preteen children with sexual behavior problems, a history of sexual abuse is  
19 particular prevalent.”<sup>173</sup> In other words, a significant number of minors, and especially younger  
20 minors, who perpetrate sex crimes are themselves victims of sex crimes.

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<sup>166</sup> 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, C]hildren 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.” David Finkelhor, Richard Ormrod & Mark Chaffin, *Juveniles who commit sexual offenses against minors*, *Juvenile Justice Bulletin*, Office of Justice Programs, at 5 (Dec. 2009).

<sup>167</sup> Finkelhor & Chaffin, *supra* note 166, at 8.

<sup>168</sup> *Id.* at 2, 5. One scholar reports that, in 2012, 40 minors under 10 and 461 minors between 11 and 16 were adjudicated for statutory rape. Godsoe, *supra* note X, at 205.

<sup>169</sup> Finkelhor & Chaffin, *supra* note 166, at 4.

<sup>170</sup> *Id.* at 2 (estimating that females are 7% of all juvenile offenders).

<sup>171</sup> *Id.* at 9.

<sup>172</sup> *Id.* at 3.

<sup>173</sup> *Id.* at 3. See also Chelsea Leach, Anna Stewart & Stephen Smallbone, *Testing the sexually abused-sexual abuser hypothesis: A prospective longitudinal birth cohort study*, 51 *CHILD ABUSE & NEGLECT* 144, 145 (2016) (citing studies).

1 That said, the vast majority of abused children do not grow up to abuse others.<sup>174</sup> Moreover,  
2 although popular imagination holds that juvenile sexual offenders are likely to continue to commit  
3 sexual offenses into adulthood, the research does not bear that out. “Multiple short- and long-term  
4 clinical follow-up studies of juvenile sex offenders consistently demonstrate that a large majority  
5 (about 85-95 percent) of sex-offending youths have no arrests or reports for future sex crimes.”<sup>175</sup>  
6 In the words of one scholar,

7 Important motivational, behavioral, and prognostic differences between juvenile sex  
8 offenders and adult sex offenders and has overestimated the role of deviant sexual  
9 preferences in juvenile sex crimes. More recent models emphasize the diversity of juvenile  
10 sex offenders, their favorable prognosis suggested by low sex-offense recidivism rates, and  
11 the commonalities between juvenile sex offending and other juvenile delinquency.<sup>176</sup>

12 Empirical studies also suggest a high degree of variation in prevalence and reporting rates,  
13 suggesting that communities show “real variation in community approaches to juvenile sex  
14 offending.” That is, “[i]n some communities, officials handle juvenile sex offense cases more  
15 within the child protection system than within the criminal justice system,” whereas others “have  
16 clearly made this problem a law enforcement priority.”<sup>177</sup>

17 Both statutory and case law support this intuition. Many jurisdictions have statutes that,  
18 like Section 4.10 of the Model Penal Code, foreclose criminal liability under a certain age.<sup>178</sup> And,  
19 in many jurisdictions, courts have found the application of a statutory-rape provision  
20 unconstitutional when used to prosecute an actor who is himself or herself younger than the age  
21 threshold.<sup>179</sup> Similarly, the Restatement on Children and the Law sets a standard for adjudicative  
22 competency in juvenile justice proceedings;<sup>180</sup> another standard sets 10 as the minimum age for  
23 delinquency, as a “juvenile under the age of 10 is unlikely to be sufficiently competent to

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<sup>174</sup> Chelsea Leach, Anna Stewart & Stephen Smallbone, *Testing the sexually abused-sexual abuser hypothesis: A prospective longitudinal birth cohort study*, 51 CHILD ABUSE & NEGLECT 144, 144 (2016) (finding that “proportionally very few of these sexually abused boys (3%) went on to become sexual offenders”).

<sup>175</sup> Finkelhor & Chaffin, *supra* note 166, at 3. Those that are rearrested tend to be arrested for other, nonsexual crimes. *Id.*

<sup>176</sup> *Id.* at 3.

<sup>177</sup> *Id.* at 10.

<sup>178</sup> See 1962 Code § 4.10 (setting age at 16 for criminal liability); see also Comment to Section 213.0(2)(f).

<sup>179</sup> See, e.g., *In re D.B.*, 950 N.E.2d 528 (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, 996-99 (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 statute applied to all children under 12).

<sup>180</sup> RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 15.30, at 219-222 (Tentative Draft No. 2, AM. LAW INST. 2019). *Id.* 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.”); *id.* at 225 (recognizing that such understanding might vary according to the complexity of the case).

1 participate in a delinquency proceeding.”<sup>181</sup> Indeed, research has shown that significant numbers  
2 of minors under 16 fail “performed as poorly on standard competence measures as adults found  
3 incompetent to stand trial.”<sup>182</sup>

4 The particular context of sexual offenses, and the relationship between sexual acts and the  
5 adolescent maturation process, counsels in favor of setting a slightly higher threshold for criminal  
6 accountability for all but the most serious sexual offenses.<sup>183</sup> It also supports structuring penal  
7 liability to account for the steep increases in cognitive capacity, sexual sophistication, impulse  
8 control, and personal restraint that occur during adolescence, as well as for the capacity for reform  
9 and correction of maladapted behaviors that manifest before a person has reached adulthood.

10 Finally, it is important to observe that, when a statutory offense applies to sexual activity  
11 that the parties understood to be consensual, concerns about bias in enforcement may arise. Both  
12 scholars and litigants and scholars have observed that prosecutorial discretion in labeling “victims”  
13 and “offenders” to a consensual encounter between peers often seems guided primarily by intuition  
14 rather than principled distinction. Some of those biases are even formally inscribed in law. For  
15 example, Texas provides affirmative defense for sexual contact with a minor under 17 for actors  
16 who are not more than three years older, but only if the actor is the opposite sex.<sup>184</sup>

17 In a comprehensive article, one scholar notes that overbroad statutory rape provisions invite  
18 exercises of discretion that “imposes mainstream morals on a small group of offenders selected for  
19 illegitimate reasons.”<sup>185</sup> This discretion starts with the way in which these complaints enter the  
20 system: “[p]arents tend to report most often, and, concomitantly, prosecutions proceed most often,  
21 against minors who do not conform to gender and sexual or other norms.”<sup>186</sup> Specifically, minors  
22 are disproportionately prosecuted for same-sex consensual sexual activity; the designation of  
23 offender and victim “reinforces aggressive male and passive female gender roles”;<sup>187</sup> “atypical”  
24 experimentation is more likely to be punished;<sup>188</sup> and young men of color are more likely to be

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<sup>181</sup> RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 15.10 (Tentative Draft No. 2, AM. LAW INST. 2019).

<sup>182</sup> RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 15.30, at 222 (Tentative Draft No. 2, AM. LAW INST. 2019) (citing studies that show that 35% of 11- to 13-year-olds and 20% of 14- and 15-year-olds fail competence standards); *id.* at 240-241 (reviewing studies); Thomas Grisso, Laurence Steinberg, Jennifer Woolard, Elizabeth Cauffman, Elizabeth Scott, Sandra Graham, Fran Lexcen, N. Dickon Reppucci & Robert 37 Schwartz, *Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ 38 Capacities as Trial Defendants*, 27 L. AND HUMAN BEHAV. 333 (2003). Section 15.10 of the Restatement on Children and the Law sets 10 as the minimum age for delinquency jurisdiction. *Id.* (citing § 15.10, Minimum Age of Delinquency Jurisdiction).

<sup>183</sup> See Comment to § 213.0(2)(f).

<sup>184</sup> Tex. Penal Code § 21.11(b)(1) (“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).

<sup>185</sup> Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, 183 (2017).

<sup>186</sup> Godsoe, *supra* note 185, at 217.

<sup>187</sup> Godsoe, *supra* note 185, at 218.

<sup>188</sup> Godsoe, *supra* note 185, at 230-231.

1 targeted for prosecution in interracial relationships.<sup>189</sup> In one especially prominent case, a 17-year-  
 2 old Black boy was convicted and sentenced to 10 years in prison for engaging in consensual oral  
 3 sex with a 15-year-old white girl; after public backlash, he was released early.<sup>190</sup>

4 Litigants have also presented courts with such challenges. For instance, in Commonwealth  
 5 v. Bernardo B., the Supreme Judicial Court granted a discovery request, having found that the  
 6 minor met the threshold showing for a selective prosecution claim.<sup>191</sup> The minor was a 14-year-  
 7 old entering 9th grade; two complainants were 12 and a third was about to turn 12, all entering 6th  
 8 grade. The record supported a finding that the sexual activity was consensual—“all of the children  
 9 mutually agreed to it, and [] all were under the age of consent.” The activity came to light when  
 10 the boy’s father found suggestive messages on his son’s cell phone, and alerted the girl’s mother.  
 11 The mother of the girl then notified the police, which led to the charges. The boy’s counsel sought  
 12 discovery to prove that the state chose to prosecute boys, and treat girls as victims, when underage  
 13 participants engaged in consensual sexual activity, and 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 in a manner that minimizes the  
 16 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, reveal a  
 20 body of law that defies any coherent logic. Jurisdictions exhibit marked variation in the structure  
 21 of their schemes, the ages for liability, the use of defenses versus elements in defining applicable  
 22 age 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 difficulty  
 24 of this examination is that many statutory regimes reproduce or separately define offenses for  
 25 minor complainants that parallel force, coercion, or other nonconsent provisions. Thus, in  
 26 assessing the state of the law for the purposes of Section 213.8, it is imperative to separate out the  
 27 provisions of liability that apply on the basis of age alone.

28 This Note attempts to provide only a rough sketch, using illustrative examples, of the range  
 29 of existing regimes. Generally speaking, nearly all statutory schemes for penetration offenses  
 30 distinguish between sexual acts with pre-pubescent complainants and post-pubescent  
 31 complainants. The most common pre-pubescent threshold age is 12, although some jurisdictions  
 32 set the age at 13 and at least one chose 11. The post-pubescent threshold typically ranges from 12-  
 33 16, although some jurisdictions narrow the range to 11-15, 13-17, 14-17, or even 16-18. A handful  
 34 of states impose liability for all sexual acts under a certain age, even as high as 17 or 18, although  
 35 they may diminish the punishment or provide an affirmative defense for actors who are peers  
 36 within a few years.<sup>192</sup> The penalty ranges for penetration offenses vary markedly. Generally, the

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<sup>189</sup> Godsoe, *supra* note 185, at 226-227 (citing data showing Black and Latino youths are disproportionately represented).

<sup>190</sup> Godsoe, *supra* note 185, at 226-227 (citing the case of Genarlow Wilson). See also Michele Goodwin, *Law’s Limits: Regulating Statutory Rape Law*, 2013 Wis. L. Rev. 481, 495-499 (describing racialized history and enduring racial taint of statutory rape).

<sup>191</sup> *Com. v. Bernardo B.*, 900 N.E.2d 834 (Mass. 2009).

<sup>192</sup> See, e.g., Tex. Penal Code § 22.011(a)(2), (c)(1) (defining offense of knowing penetration of a child, defined as a person younger than 17 years of age); *id.* § 22.011(e) (providing affirmative defense

## Section 213.8. Sexual Offenses Involving Minors

1 most severe penalties apply to young complainants with older actors, whereas misdemeanor  
2 liability may apply when complainants are older.<sup>193</sup>

3 As regards contact offenses, jurisdictions vary widely. Just under half of states distinguish  
4 between pre-and post-pubescent complainants. Many states impose age gaps of varying lengths,  
5 ranging from three to 10 years. Many states have minimum age requirements for the actor,  
6 regardless of any age gap. And penalty clauses vary even more dramatically. Selected portions of  
7 state schemes are offered as illustrations below.

8 Colorado has a general sexual assault provision that punishes sexual penetration of a person  
9 younger than 15 where the actor is four years older, or 15 to 17 where the actor is at least 10 years  
10 older.<sup>194</sup> The under 15 offense is punishable by up to six years in prison; the 15-17 offense is a  
11 misdemeanor.<sup>195</sup> The state punishes sexual contact with a minor under 15, where the actor is four  
12 or more years older, with up to six years in prison;<sup>196</sup> and with a child under 18 as a  
13 misdemeanor.<sup>197</sup> Colorado courts have upheld strict liability for age-based offenses.<sup>198</sup>

14 Pennsylvania punishes sexual penetration with a complainant younger than 13 as a 40-year  
15 felony.<sup>199</sup> It punishes intercourse with a complainant young younger than 16, where the actor is 11  
16 or more years older, as a 20-year felony, and where the actor is four to 11 years older as a 10-year  
17 felony.<sup>200</sup> Sexual contact with a complainant under 13 is punishable as a first-degree misdemeanor,  
18 and contact with a complainant younger than 16 by an actor more than four years older as a second-  
19 degree misdemeanor.<sup>201</sup>

20 Montana provides that persons younger than 16 are generally incapable of consent.<sup>202</sup> It  
21 then penalizes sexual intercourse with a person younger than 16.<sup>203</sup> If the actor is 18 or older, and

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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).

<sup>193</sup> See, e.g, 720 Ill. Stat. § 5/11-1.50 (defining as a misdemeanor 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.”).

<sup>194</sup> Colo. Rev. Stat. § 18-3-402(1)(d), (e).

<sup>195</sup> Colo. Rev. Stat. § 18-3-402(2), (3).

<sup>196</sup> Colo. Rev. Stat. § 18-3-405(1).

<sup>197</sup> Colo. Rev. Stat. § 18-3-404(g)(1.5).

<sup>198</sup> *People v. Salazar*, 920 P.2d 893, 895 (Colo. App. 1996).

<sup>199</sup> 18 Pa. Con. Stat. Ann. § 3121 (intercourse); *id.* § 3123(b), (d)(1) (oral and anal sex).

<sup>200</sup> 18 Pa. Con. Stat. Ann. § 3122.1 (defining both 20- and 10-year felonies); 3125(a)(7), (a)(8), (c) (defining ten year felony).

<sup>201</sup> 18 Pa. Con. Stat. Ann. § 3126 (a)(7), (a)(8), (b). A first-degree misdemeanor is a five-year maximum, and a second-degree misdemeanor carries a two-year maximum penalty. 18 Pa. Con. Stat. Ann. § 1104(1), (2).

<sup>202</sup> Mont. Code Ann. § 45.5-501(b)(iv).

<sup>203</sup> Mont. Code Ann. § 45-5-503(1). The base offense is punishable by up to 20 years in prison. *Id.* § 45-5-503(2).

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1 the complainant 12 or younger, the offense is a 100-year felony.<sup>204</sup> If the complainant is at least  
2 14 and the actor is 18 or younger, then the offense is a five-year felony.<sup>205</sup> The statutory scheme  
3 also penalizes sexual contact with a person younger than 14 by an actor is three or more years  
4 older, as a six-month misdemeanor.<sup>206</sup> The scheme also punishes incest with life imprisonment,  
5 which includes siblings, ancestors, descendants of the whole or half-blood, and stepchildren, as  
6 well as adoptive relationships.<sup>207</sup> Consent is a defense to incest but only for sexual relationships  
7 with stepchildren; it is ineffective if the child is younger than 18 and the stepparent is four or more  
8 years older.<sup>208</sup> Montana permits a defense of reasonable mistake for statutory cases that depend on  
9 the victim being younger than 16, but forecloses it if the complainant is younger than 14.<sup>209</sup>

10 Delaware provides that generally children under 16 cannot consent to a person more than  
11 four years older, and that children under 12 cannot consent at all.<sup>210</sup> Generally there is no mistake  
12 of age defense, but an actor within four years of a complainant aged 12-16 may offer a defense of  
13 the complainant's consent.<sup>211</sup> The most serious statutory offense permits a life maximum for  
14 intercourse with a complainant under 12 by an actor 18 or older.<sup>212</sup> Next is a 25-year felony for  
15 sexual penetration of a complainant under 12 by an actor 18 or older,<sup>213</sup> as well as for intercourse  
16 between a complainant not yet 16 with an actor 10 years older, or a complainant not yet 14 with  
17 an actor 19 or older;<sup>214</sup> then a 15-year felony for intercourse or penetration of a complainant under  
18 16, or intercourse with a complainant not yet 18 and an actor 30 years older.<sup>215</sup> Two contact  
19 offenses apply to either persons under 13 (an eight-year felony), or persons under 18 (a three-year  
20 felony).<sup>216</sup> Incest is a misdemeanor, handled in family court.<sup>217</sup>

21 Finally, Utah has a complex and dense scheme, which includes a specific provision titled  
22 “unlawful adolescent sexual activity.”<sup>218</sup> That provision is a catch-all that appears to effectively

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<sup>204</sup> Mont. Code Ann. § 45-5-503(4)(a)

<sup>205</sup> Mont. Code Ann. § 45-5-503(5).

<sup>206</sup> Mont. Code Ann. § 45-5-502.

<sup>207</sup> Mont. Code Ann. § 45-5-507(1).

<sup>208</sup> Mont. Code Ann. § 45-5-507(2). There is also a defense for actors under 18 where the other person is four or more years older than the actor.

<sup>209</sup> Mont. Code Ann. § 45-5-511(1).

<sup>210</sup> Del. Stat. Tit. 11 § 761(1).

<sup>211</sup> Del. Stat. Tit. 11 § 762(a). An offense that applies to complainants under 14 also permits a mistake of age defense that the actor thought the complainant was 16. Del. Stat. Tit. 11 § 777.

<sup>212</sup> Del. Stat. Tit. 11 § 773(5).

<sup>213</sup> Del. Stat. Tit. 11 § 772.

<sup>214</sup> Del. Stat. Tit. 11 § 771(a)(1).

<sup>215</sup> Del. Stat. Tit. 11 § 770.

<sup>216</sup> Del. Stat. Tit. 11 §§ 768, 769.

<sup>217</sup> Del. Stat. Tit. 11 § 766.

<sup>218</sup> Utah Code Ann. § 76-5-401.3.

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1 govern sexual activity between nominally consenting persons aged 12 to 18.<sup>219</sup> It then has an eight-  
2 part penalty scheme, ranging from punishment of an adolescent 17 years of age who engages  
3 sexually with a 12- or 13-year-old with a five-year felony, to punishment of an adolescent 14 years  
4 of age with a 13-year-old with a 90-day misdemeanor.<sup>220</sup>

5 Generally speaking, state schemes also contain a wide array of specialty offenses, such as  
6 continuous abuse provisions, provisions for recidivist sex offenders, and an array of exploitation,  
7 enticing, and indecency provisions. Many states have provisions specifically tailored to situations  
8 in which the actor is in a position of trust.<sup>221</sup>

9 Every state has also has at least one statute specifically addressing sexual contact with a  
10 minor. Many states have multiple overlapping provisions. With specific regard to fondling, a  
11 handful of states single out fondling for special treatment, although others fold it into general  
12 contact offenses,<sup>222</sup> and one specifically includes it in the definition of penetration.<sup>223</sup>

### 13 *a. Mens Rea*

14 Roughly two-thirds of states do not require proof of mens rea for statutory rape.<sup>224</sup>  
15 However, roughly 19 states allow for a mistake of age defense to at least a charge of statutory rape

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<sup>219</sup> Utah Code Ann. § 76-5-401.3(1)(b) (defining application of provision to “sexual activity between adolescents under circumstances not amounting to rape, sodomy, sexual abuse, etc.).

<sup>220</sup> Utah Code Ann. § 76-5-401.3(2).

<sup>221</sup> See, e.g., Ark. Code Ann. § 5-14-124; Colo. Rev. Stat. § 18-3-405.3; 720 Ill. Stat. § 5/11-1.20.

<sup>222</sup> See, e.g., Ind. Stat. § 35-42-4-3 (defining a level 4 felony for actors with complainants under 14 and “performs or submits to any fondling or touching...with intent to arouse or satisfy the sexual desires of either the child or the older person”; Miss Code Ann. § 97-5-23 (defining a two to fifteen year offense of fondling as a sexual purpose and to “handle, touch or rub with hands or any part of his or her body or any member thereof, or with any object” any child under 16); Kansas Stat. Ann. § 21-5506 (“Indecent Liberties with a Child” under 14 is “any lewd fondling or touching of the person of either the child or the offender” done with sexual purpose, and is a level 5 felony); Ga Code Ann. § 16-6-4 (defining child molestation as “any immoral or indecent act to or in the presence of or with any child under the age of 16” when done with sexual intent); Iowa Code Ann. § 709.8 (defining a class c felony for actors 16 or older who “fondle or touch the pubes or genitals of a child” or have the child fondle the actor’s genitals).

<sup>223</sup> See, e.g., Ariz. Stat. § 13-1401(4) (defining “sexual intercourse” to include “masturbatory contact with the penis or vulva”); id. § 13-1401(3) (defining “sexual contact” as including “fondling or manipulating any part of the genitals, anus or female breast). See also Ohio Stat. § 2907.05(B) (specifically proscribing touches of a child’s genitalia).

<sup>224</sup> See Ala.Code § 13A-6-62 (explaining in commentary that “the defendant’s mistaken belief as to the victim’s age or mental deficiency is no defense” under Alabama law); State v. Blake, 777 A.2d 709, 713 (Conn. Ct. App. 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, 842 A.2d 1244 (Del. Feb. 4, 2004) (table) (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”); DC ST § 22-3011 (“Neither mistake of age nor consent is a defense to a prosecution under” the District’s statutory rape provisions.); Hodge v. State, 866 So. 2d 1270, 1273 (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

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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 (Ga. 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); K.S.A. 21-5204 (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.”); *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, 632 (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, 393–394 (Mass. Ct. App. 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 ... [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.) (citation omitted); *Elder v. State*, 367 P.3d 766 (Table) (Nev. 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 (N.H. 2007) (declining to overrule the New Hampshire Supreme Court’s earlier decision in *Goodrow v. Perrin*, 403 A.2d 864 (N.H. 1979) upholding the state’s law “making statutory rape a strict liability crime”); N.J. Stat. Ann. § 2C:14-5(c) (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.”); *People v. Dozier*, 72 A.D.2d 478, 485 (N.Y. App. Div. 1st 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, 764 (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, “when 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.”); *State v. Jones*, 804 N.W.2d 409, 416-417 (S.D. 2011) (explaining that under South Dakota case law, “in 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”); *Fleming v. State*, 455 S.W.3d 577, 582-583 (Tex. Crim. App. 2014) (upholding Texas’ statutory rape provision, over

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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”); U.C.A. 1953 § 76-2-304.5 (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. Searles*, 621 A.2d 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, 502 (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, 815-16 (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 Wisconsin law, Wis. Stat. § 939.43(2)).

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1 involving an older complainant;<sup>225</sup> and three states permit the defense of reasonable mistake of  
2 age for any sexual offense involving a minor.<sup>226</sup> Conversely, only a handful of states either impose

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<sup>225</sup> See Ariz. Rev. Stat. Ann. § 13–1407(A) (“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 (providing, for certain sexual offenses defined by Arkansas law, 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. Ann. § 18–1–503.5 (providing 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,” that “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 (“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 §§ 253, 254 (providing “a defense to a prosecution under” certain offenses “that the actor reasonably believed the other person is at least 16 years of age”); Minn. Stat. Ann. § 609.344 (providing, 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,” that “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 (“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 (“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.”); *Perez v. State*, 803 P.2d 249 (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, “the same is not true of victims thirteen to sixteen years of age,” who do enjoy a “defense of mistake of fact”); N.D. Cent. Code § 12.1–20–01 (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 (“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. Ann. § 3102 (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”); Tenn. Code Ann. § 39–11–502 (providing a mistake-of-age defense for statutory rape, but ruling out that defense on a charge of rape of a minor who is under 13 years old); Wash. Rev. Code Ann. § 9A.44.030 (providing for certain statutorily defined ages that “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 (“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 (providing, when “criminality of conduct [for certain sexual offenses] depends on a victim being under sixteen (16) years of age,” that “it is an affirmative defense that

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1 a mens rea requirement, or allow for such a defense.<sup>227</sup> In two jurisdictions, courts have even  
2 imposed strict liability notwithstanding statutory language that suggests a mens rea is required.<sup>228</sup>

3 The traditional justifications for strict liability involve protecting children from  
4 exploitation and the inherent wrongfulness of sexual conduct with young persons. Until recently  
5 history, the drive to protect children from exploitation was expressly framed as the need to protect

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the actor reasonably believed that the victim was sixteen (16) years of age or older,” but when the victim is “under twelve (12) years or under fourteen (14) years,” that “it is no 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.”). See also *People v. Soto*, 245 P.3d 410, 422 n.11 (Cal. 2011) (explaining that in *People v. Hernandez*, 393 P.2d 673 (Cal. 1964), the court “recognize[d] 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).

<sup>226</sup> See Alaska Stat. § 11.41.445(b) (providing as 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”); *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) “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”); Ky. Rev. Stat. Ann. § 510.030 (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).

<sup>227</sup> See, e.g., Ohio Rev. Code Ann. § 2907.04(A) (“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 § 2907.04(A) “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”); see also Ohio Rev. Code Ann. § 2907.02 (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).

<sup>228</sup> See Colo. Rev. Stat. § 18–3–405(1) (“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 (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.* 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, 1190–91 (10th Cir. 2015) (quoting Colo. Rev. Stat. § 18–3–402(1)(e)). The same is true of Arizona’s statutory rape law as well. Compare A.R.S. § 13–1405(A) (“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, 267–268 (Ariz. Ct. App. 2011) (holding 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 the chastity of young girls prior to marriage.<sup>229</sup> 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.<sup>230</sup> Viewed this way, statutory  
 4 rape is effectively almost regulatory in nature, and thus strict liability was appropriate for social  
 5 welfare purposes.<sup>231</sup>

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 only  
 10 girls, let alone girls’ chastity, but instead “serves to protect young people from being coerced by  
 11 the power of an older, more mature person.”<sup>232</sup> On this theory, courts have consistently placed the  
 12 burden on the adult to ensure that a sexual partner to ascertain the age of a partner.<sup>233</sup>

13 Similarly, statutory-rape laws are predicated on the idea that sexual activity with obviously  
 14 underage persons is inherently wrongful. In the traditional formulation, the mere ability to access  
 15 a minor supported an inference of wrongfulness – there was simply no legitimate circumstance in

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<sup>229</sup> Russel L. Christopher and Kathryn H. Christopher, *The Paradox of Statutory Rape*, [hereafter *Paradox*] 87 IND. L.J. 505, 509 (2012) (relating this history). “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 n.10 (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.* (quoting *People v. Verdegreen*, 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 190, at 493 (“[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.”).

<sup>230</sup> Christopher and Christopher, *supra* note 229, 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.”).

<sup>231</sup> Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 317 (2003) (describing the so-called public welfare-offense model of statutory rape); CAROLYN E. COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES* 11 (2004).

<sup>232</sup> *Fleming*, 455 S.W.3d at 582. But see Goodwin, *supra* note 190, at 499 (arguing that statutory rape in the mid-century remained motivated by racial and class concerns, citing data that 75% of statutory rape complaints in California in 1963 were against black men, raised by welfare case workers); *id.* at 505 (citing instances in which the laws are applied to peers, undermining claim that statutory rape laws target pedophiles).

<sup>233</sup> *Fleming*, 455 S.W.3d at 582. It “places 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.” *Fleming*, 455 S.W.3d 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.”).

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1 which a man should be off alone with a young woman.<sup>234</sup> Similarly, in an era with strong  
2 prohibitions on sexual relations outside of marriage, the act itself is wrongful; the age is only an  
3 aggravating factor.<sup>235</sup> In the contemporary version, it is 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.”<sup>236</sup>

9 But neither rationale withstands scrutiny in a modern statutory scheme, for two reasons.  
10 First, many statutory rape schemes apply to complainants much older than the obviously pre-  
11 pubescent victims envisioned in the original rationale. A minor who is sixteen may indeed be  
12 readily and fairly mistaken for a person of legal age. Second, many statutory rape schemes apply  
13 without regard to the age of the actor.<sup>237</sup> Thus, it is hardly the case that the only perpetrators of the  
14 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 was  
17 illicit because the minor was between 12 and 16 and the actor was four or more years older.<sup>238</sup> The  
18 defendant was 25, and the complainant was 14; they met on a dating website where the defendant  
19 claimed to be 19 and the complainant’s profile listed her age as 19 but she later claimed to be 16.  
20 The court’s reasoning was based primarily upon a textual analysis of the statutes and their  
21 interoperability. But the court also noted that reading out any requirement of mens rea led to  
22 “absurdity,” citing an example of a 15-year-old convincingly posing as a 21-year-old.<sup>239</sup>

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<sup>234</sup> See, e.g., *Garnett v. State*, 632 A.2d 797, 812 (Md. 1993) (Bell, J., dissenting) (noting that *Prince* idea of “lesser wrong” is founded in notion that taking a “daughter, even one over 16, from her father’s household” is a wrong—which no longer holds true today).

<sup>235</sup> Cf. *Collins*, 691 So. 2d at 923 (citing *Ransom*, 942 F.2d at 776) (“[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.”)

<sup>236</sup> Ohio Rev. Code Ann. § 2907.02. The House Report accompanying the federal sexual abuse statute, 18 U.S.C. § 2241(c), likewise explains that the statutory rape provision there was included because there is simply “no credible error of perception 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. 594, 99th Cong., 2d Sess., reprinted in 1986 U.S. Code Cong. & Admin. News at 6195–6196).

<sup>237</sup> See e.g., *In the Interest of B.A.M.*, 806 A.2d 893 (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 (Utah 2007) (vacating 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”).

<sup>238</sup> *United States v. Murphy*, 942 F.3d 73 (2d Cir. 2019) (interpreting 18 U.S.C. § 2243(b) and § 2243(a)).

<sup>239</sup> *Id.* at 80.

1       **4. Grading**

2       The grading scheme of Section 213.8 proceeds from several basic premises, which are  
3 supported by existing law and social scientific research, but not always embodied in state codes  
4 punishing statutory offenses.

5       First, the grading scheme sharply distinguishes between the punishment authorized for  
6 actors who victimize young minors (those under 12), and actors who victimize older minors, aged  
7 12 to 16. This distinction is well supported in existing law, which views actors who victimize very  
8 young minors as worthy of serious punishment. It also reflects the intuition that, for teenage  
9 complainants, the existence of offenses punishing sexual activity by means of force, coercion,  
10 exploitation, deception, or lack of consent serve as a backstop of liability that ensures the  
11 availability of severe punishments for actors who use those illicit means to obtain the minor's  
12 sexual submission. As a result, the punishments prescribed for older complainants reflect the  
13 judgment both that the encounter between the complainant and actor is more akin to sex by  
14 exploitation, rather than force. A complainant who did not at least nominally consent to the  
15 encounter, whether expressly or circumstantially, is likely to have redress through other provisions  
16 of Article 213.

17       And while technically the same provisions apply equally to complainants under 12,  
18 experience teaches that the dynamic with younger complainants differs from that of older  
19 complainants. The probability of even nominal consent fades, as a young child is incapable of  
20 understanding, much less consenting, to sexual intimacy. Moreover, use of force, coercion, or other  
21 nonconsensual tactics to secure submission is less necessary in the case of very young children.<sup>240</sup>  
22 The same is true for instances of incest, where the familial bond makes any notion of meaningful  
23 consent or willingness moot. As a result, sexual encounters with young children are better punished  
24 at a level akin to offenses involving force or coercion, rather than just non-consent.

25       Second, the grading scheme distinguishes between actors who themselves are minors;  
26 actors who are young adults engaging in behavior with inappropriate but nominally consenting  
27 partners; and actors who are mature adults. This distinction is less well supported in existing law,  
28 although there are clear traces. More commonly, statutes either preclude liability for peer-range  
29 actors, either on their face or by providing for an affirmative defense, or by dramatically reduce  
30 the punishment when the actor is also a minor. Relatively few statutes draw finer distinctions, such  
31 as by diminishing punishment for actors within a certain age range of the complainant.<sup>241</sup> Instead,  
32 schemes tend to either permit or preclude liability, not tier liability according to the width of the  
33 age gap.

34       Section 213 rejects this approach, choosing instead to calibrate punishment more finely  
35 according to the degree of deviance suggested by the behavior. Although a 12-year-old minor who  
36 sexually abuses a six-year-old child, or a 16-year-old who abuses a 10-year-old, may be a worthy  
37 subject of state interest via the juvenile justice system, the authorized punishment for those

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<sup>240</sup> That said, although the use the 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 subsections of Article 213. M. Elliott et al., *Child Sexual Abuse Prevention: What Offenders Tell Us*, 19(5) CHILD ABUSE & NEGLECT 579, 581 (1995), tbl 1 (reporting data from interviews with child sex offenders, 44% of whom use "coercion and persuasion," and 19% of whom used physical force).

<sup>241</sup> See, e.g., Ga. Stat. § 16-6-2(d) (punishing oral or anal sex between a person 13 to 16 as a misdemeanor when the actor is 18 or younger and no more than four years older as a misdemeanor).

1 offenses should not treat the minor actor’s culpability as equivalent to an adult actor three times  
2 older. An adult who has reached full maturity is distinguishable from a pre-teen or teenager in  
3 cognitive, social, and especially sexual development. An adult is also likely less amenable to re-  
4 integrative rehabilitation. Lastly, far greater degree of deviance is suggested by an adult’s interest  
5 in, and willingness to impose upon, a minor with little to no sexual experience than by the same  
6 actions done by a minor close in age and with similar relative inexperience.

7 This distinction is supported by social scientific research into juvenile development, as well  
8 as by recent case law embracing that research. In a series of recent cases, the Supreme Court has  
9 recognized that the maximum sentences for juveniles who commit crimes—even older juveniles—  
10 should take into account the cognitive and emotional immaturity of the juvenile mind as compared  
11 to adults who engage in the same antisocial behaviors.<sup>242</sup> A significant body of research shows  
12 that minors do not suddenly acquire adult cognitive capacities at the age of 18, but rather that an  
13 adolescent’s impulse control, decisionmaking ability, and reasoning are still in development until  
14 the early 20s, when clear physiological shifts occur.<sup>243</sup> In other words, “[t]here is now  
15 incontrovertible evidence that adolescence is a period of significant changes in brain structure and  
16 function.”<sup>244</sup> And in particular, changes during puberty and early adolescence involve “the density  
17 and distribution of dopamine receptors,” which in turn “plays a critical role in how humans  
18 experience pleasure” and “have important implications for sensation-seeking”— specifically  
19 including sexual pleasure.<sup>245</sup> In fact, a distinct body of research has explored the relationship  
20 between risky sexual behavior—such as unprotected sex—and adolescent’s neural and cognitive  
21 capacities.<sup>246</sup>

22 The grading structure of Section 213.8 takes both the legal and scientific developments in  
23 our understanding of juvenile misconduct into account in setting maximum punishments. For this

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<sup>242</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

<sup>243</sup> See, e.g., Alexandra Cohen, Kaitlyn Breiner, Laurence Steinberg, Richard Bonnie, Elizabeth Scott, Kim Taylor-Thompson, & B.J. Casey, *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-emotional Contexts*, 4 *PSYCHOLOGICAL SCIENCE* 549 (2016) (citing studies showing “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”).

<sup>244</sup> Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy*, *Issues in Sci. & Tech.* 67 (Spring 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.”).

<sup>245</sup> Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy*, *Issues in Sci. & Tech.* 67 (Spring 2012) (noting that the general band of full maturity runs from 15 at the low end to 22 at the high end).

<sup>246</sup> See, e.g., Sarah W. Feldstein Ewing, *Developmental Cognitive Neuroscience of Adolescent Sexual Risk and Alcohol Use*, 20 *AIDS Behav.* S97-108 (2016) (observing “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 reason, minors below the age of 18 are treated with substantially more leniency than are adults  
2 who engage in identical behavior. Section 213.8 also treats young adults – actors under the age of  
3 25, with considerable more leniency when the offense involves sexual behavior with a complainant  
4 twelve or older.

5 Lastly, in affixing penalties, even for the most egregious offenses defined by Article 213.8  
6 such as abuse of young children by adults, and abuse of minors by parental figures, the scheme  
7 embraces the principles and the overall grading objectives of Articles 6 and 7. That is, like many  
8 of the provisions of Article 213, Section 213.8 imposes a maximum authorized term of  
9 incarceration drawn from the lower end, or even below, the severity spectrum found in existing  
10 law. In so doing, Article 213 does not intend to minimize or dismiss the serious harms caused by  
11 child sexual abuse. The provisions of Article 213 governing adult sexual imposition on minors,  
12 especially those very young or in a child–caregiver relationship with the actor, are among the most  
13 serious crimes defined in a criminal code. Setting a maximum sentence that, by current standards,  
14 may appear more lenient in no way intends to express disagreement with the sentiment that these  
15 offenses are among the most serious offenses that a person can commit.

16 Rather, the maximum penalties authorized in Article 213 follow the philosophy of the grading  
17 of offenses throughout Article 213. They harmonize with the penalties for offenses of analogous  
18 severity in other provisions of the Article. And, like those provisions, the authorized sentence terms  
19 reflect the sentiment that greater weight should be given to the profundity of the deprivations  
20 experienced by a person serving a sentence of incarceration. In other words, although the sense  
21 that these crimes deserve severe punishment has not changed, what *constitutes a severe*  
22 *punishment* has. The harsh penal approaches of recent decades—characterized by casual  
23 dismissals a sentence of a year imprisoned as inconsequential—have more recently given way to  
24 deeper understanding of the many costs imposed by imprisonment on the actor, the actor’s family  
25 and community, and all of society.<sup>247</sup>

26 The resulting scheme therefore authorizes punishments equivalent to the most serious  
27 forms of aggravated forcible rape for adult actors who engage in sex with minors under 12 or  
28 parental figures who abuse their children and wards, and the next most serious level of punishment  
29 for adult actors who engage sexually with minors 12-16. The scheme penalizes, but at much  
30 reduced levels, young adults and minors who engage in sexual activity with inappropriately young  
31 partners – punishing teenagers who sexual abuse young children as felons, but with low-level  
32 sentences, and young adults who engage with teenagers as misdemeanants.

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<sup>247</sup> See generally JEREMY TRAVIS, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 3-7 (detailing increasing harshness of penal sanctions and the costs to communities and society, specifically noting the “incremental deterrent effect of increases in lengthy prison sentences is modest at best”); id. at 6 (“Incarceration is strongly correlated with negative social and economic outcomes for former prisoners and their families.”); 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).

1 **SECTION 213.11. PROCEDURAL AND EVIDENTIARY PRINCIPLES APPLICABLE TO ARTICLE**  
2 **213**

3 **(1) *Sexual Activity of the Complainant***

4 **(a) *General Rule***

5 **(i) In a prosecution under this Article, notwithstanding any other**  
6 **provision of law, reputation or opinion evidence regarding the sexual history**  
7 **of the complainant is not admissible, unless constitutionally required.**

8 **(ii) Specific instances of the complainant’s sexual history with persons**  
9 **other than the accused that are otherwise admissible according to generally**  
10 **applicable rules of evidence are inadmissible except as provided in subsection**  
11 **(1)(b).**

12 **(iii) Specialized rules of court shall establish procedures for**  
13 **determining, prior to trial whenever possible, the admissibility of evidence**  
14 **covered by this Section.**

15 **(iv) For purposes of this Section, “sexual history” shall mean any**  
16 **behavior, condition, or expression related to human sexuality, or allegations**  
17 **thereof, whether voluntary or involuntary, including but not limited to**  
18 **evidence and allegations relating to sexual intimacy, contact, and orientation;**  
19 **use of pornography; sexual fantasies and dreams; use of contraceptives; habits**  
20 **of dress; and marital and partnership history or status. “Sexual history” shall**  
21 **not include any allegedly false accusation of a sexual offense.**

22 **(b) *Exceptions.* Evidence of specific instances of a complainant’s sexual history**  
23 **shall not be inadmissible under subsection (1)(a):**

24 **(i) when offered to prove that the defendant was not the source of**  
25 **physical evidence, pregnancy, infection, or injury in the present case; or**

26 **(ii) when offered to impeach admitted evidence by specific**  
27 **contradiction or prior inconsistency; or**

28 **(iii) when offered to prove the complainant’s bias or motive to fabricate**  
29 **a material fact; or**

30 **(iv) when offered to counter evidence or argument by the prosecution**  
31 **that a complainant has an unexpected, specific kind of precocious sexual**

1           **knowledge given the age or cognitive capacity of the complainant, and thus the**  
2           **allegation is more likely to be true; or when the prosecutor makes such**  
3           **a suggestion or argument, regardless of the complainant’s age or cognitive**  
4           **capacity; or**

5                   **(v) when offered to rebut or provide an alternative explanation for**  
6                   **evidence, argument, or other specific circumstances apparent to the trier of**  
7                   **fact which suggest that the defendant’s defense is highly implausible; or**

8                   **(vi) when the exclusion of such evidence would deprive the defendant**  
9                   **of the meaningful opportunity to present a complete defense or would**  
10                  **otherwise violate the Constitution.**

11           ***(2) Prior Sexual History of the Defendant***

12           **Evidence of the sexual history of the defendant is not admissible to prove the**  
13           **character of the defendant in order to show action in conformity therewith. It may, however,**  
14           **be admissible for other purposes, such as for impeachment or bias, or as proof of motive,**  
15           **opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or**  
16           **accident.**

17           ***(3) Testimony Outside of the Courtroom***

18                   **(a) Testimony of an alleged victim of the defendant may be taken outside**  
19                   **the courtroom in accordance with the procedures specified in subsection (3)(b) if,**  
20                   **at the request of any party, the court finds on the record, after a hearing based**  
21                   **on evidence that includes the testimony of a medical or psychological expert who**  
22                   **has examined the alleged victim, that**

23                           **(i) the alleged victim is less than 12 years of age at the time of trial, or**  
24                           **has a documented developmental delay to the extent that his or her emotional**  
25                           **or cognitive capacity is no greater than that of a child aged 12;**

26                           **(ii) the alleged victim will suffer serious emotional distress if required**  
27                           **to testify in the presence of the defendant;**

28                           **(iii) such distress will impair the alleged victim’s ability to**  
29                           **communicate, or will render the victim incapable of testifying; and**

30                           **(iv) the procedure is necessary to, and will significantly, mitigate that**  
31                           **distress.**

1           **(b) After making the findings required by subsection (3)(a), the court may**  
2 **order that the testimony of an alleged victim be taken outside the courtroom and**  
3 **outside the physical presence of the judge, the defendant, and the jury, provided that**  
4 **all of the following conditions are met:**

5                   **(i) The testimony is taken during the proceeding.**

6                   **(ii) The testimony is taken via a method of communication that allows**  
7 **the defendant, judge, and jury to hear and see clearly the witness and counsel**  
8 **for prosecution and defense.**

9                   **(iii) Counsel for the defense is present in the room in which the alleged**  
10 **victim testifies and has the opportunity to cross-examine the alleged victim in**  
11 **the usual way; or, in the event that the defendant elects to proceed *pro se*, then**  
12 **the court has appointed standby counsel prior to the commencement of trial,**  
13 **who shall be present.**

14                   **(iv) The room in which the alleged victim testifies contains no person**  
15 **other than the witness, counsel for the prosecution, counsel or standby counsel**  
16 **for the defense, the operators of the technical equipment, any essential court**  
17 **personnel, and no more than one person who the court finds contributes to the**  
18 **well-being of the alleged victim.**

19                   **(v) During the testimony, the defendant, judge, and jury shall remain**  
20 **in the courtroom.**

21                   **(vi) The defendant shall be provided with a confidential and**  
22 **nondisruptive means of instantaneous communication with defense counsel.**

23 **(4) *Initial Complaint***

24           **(a) In a prosecution under this Article, and to the extent consistent with the**  
25 **constitutional right of confrontation, the prosecution may introduce in its case-in-**  
26 **chief evidence that shows the time and place where the complaint was first made to**  
27 **another person, along with evidence tending to establish the reasons for any delay,**  
28 **provided that such evidence is not substantially more prejudicial than probative. The**  
29 **court shall take care to circumscribe the admissible testimony to avoid reference to**  
30 **the details alleged in the complaint, including by limiting the testimony of a witness**  
31 **and by limiting the number of witnesses produced.**

1           **(b) Evidence of reports, or lack of reports, to other persons is inadmissible,**  
2           **unless deemed admissible by generally applicable rules of evidence, or unless offered**  
3           **to rebut an express or implied argument concerning the failure of the complainant to**  
4           **make a report.**

5 **Comment:**

6 **1. Rescission of the Current Procedural Provisions.**

7           Section 213.6 of the 1962 Code contained five provisions applicable to the entire Article  
8 213. They provide for: (1) no defense of mistake in cases with a victim under age 10, and a  
9 reasonable-belief defense if the victim is over age 10; (2) a marital-rape exclusion; (3) a defense  
10 to corruption of minors and statutory sexual-contact offenses if the victim was sexually  
11 promiscuous; (4) a requirement of prompt complaint; and (5) a corroboration requirement paired  
12 with a cautionary jury instruction.

13           Revised Section 213.11 strikes these five provisions in their entirety, and replaces them  
14 with provisions that address contemporary practice and empirical findings generally applicable to  
15 procedural and evidentiary issues for sexual offenses. The treatment of mistake of fact as to the  
16 age of a minor complainant is discussed in the Comment to Section 213.8, which defines the  
17 relevant substantive offenses. The remaining provisions are rescinded, as explained below. Section  
18 213.11, as revised, addresses (1) issues of evidentiary admissibility and (2) special considerations  
19 relating to the presentation of the testimony of child victims.

20           ***a. Victim Sexual History (§ 213.6(3) of the 1962 Code).***

21           The common law historically considered any prior sexual experience of a sexual-assault  
22 complainant to be highly relevant evidence tending to disprove the complaint.<sup>1</sup> Admissible  
23 evidence included not only any prior sexual relationship between the defendant and the  
24 complainant, but also proof of the complainant’s prior sexual experiences with any other person.<sup>2</sup>  
25 As a practical matter, therefore, traditional rape law in effect imposed hurdles such that women  
26 without pristine sexual histories could rarely succeed in prosecutions of their attackers.

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<sup>1</sup> See generally Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51 (2002).

<sup>2</sup> See, e.g., *State v. Johnson*, 133 N.W. 115, 116 (Iowa 1911) (“[I]t is also true that prosecutrix’s general reputation for chastity, as well as her previous voluntary sexual relations with the defendant, may and should have been considered as substantive proof of the fact that whatever the act done it was with the consent of the prosecutrix.”).

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1           Section 213.6(3) as it now stands in essence codifies this approach, but seeks to cabin it to  
2 some extent by allowing a defense on the basis of the “sexual promiscuity” of the complainant.  
3 For reasons discussed more fully below,<sup>3</sup> which address the “rape shield” laws passed in the last  
4 quarter of the 20th century that sharply curtailed this practice, the revised Article 213 does not  
5 include this provision.

6           ***b. Prompt Complaint, Corroboration, and Cautionary Instructions (§ 213.6(4) and***  
7           ***§ 213.6(5) of the 1962 Code).***

8           The prompt-complaint, corroboration, and cautionary-instruction practices are interrelated.  
9 This trio of requirements raised hurdles to the successful prosecution of rape claims by imposing  
10 burdens on the sexual-assault complainant. They emerged from a cultural and legal landscape in  
11 which the chief concern was the protection of chaste white women, and that sought safeguards  
12 against the perceived likelihood that women would lodge a false complaint.<sup>4</sup>

13           [In many jurisdictions, if a woman failed to complain promptly, she would be  
14 forgiven if she had evidence corroborating the rape. If a woman suffered a rape that  
15 produced no corroborative evidence, a prompt complaint itself might serve as the  
16 necessary legal corroboration. A judge was frequently required to issue cautionary  
17 instructions in a rape case unless the complainant proffered corroborative evidence  
18 of the offense.<sup>5</sup>

19           The Commentaries to the MPC described the prompt-complaint requirement as “an innovation in  
20 the law,” expressed an intention to “continue the traditional corroboration requirement, although  
21 in a much-relaxed form,”<sup>6</sup> and felt continued need to warn the jury of “emotional involvement of  
22 the witness and the difficulty of determining the truth with respect to alleged sexual activities  
23 carried out in private.”<sup>7</sup>

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<sup>3</sup> See Comment to § 213.11(1) & Reporters’ Note.

<sup>4</sup> Race played a critical and integral part of the story of rape law in the United States, both in that sexual assaults against women of color were historically ignored, and in that false accusations of sexual assault by white women against black males legitimated white-male violence. See generally SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1993).

<sup>5</sup> See generally Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 954 (2004) (internal citations omitted).

<sup>6</sup> MODEL PENAL CODE Article 213, Introductory Note, at 273.

<sup>7</sup> MODEL PENAL CODE § 213.6(5).

1           *i. Prompt Complaint*

2           The underlying logic of the prompt-complaint rule was that legitimate victims would  
3 naturally tend to raise a “hue and cry” immediately after the commission of the offense. Delay,  
4 therefore, could only mean that a victim had opportunistically determined to raise a false allegation  
5 as a result of some ill motive. Accordingly, the rule initially served as a severe statute of limitations  
6 that barred prosecution entirely if a victim failed to promptly allege sexual assault. In the 19th  
7 century, this hard rule softened somewhat to allow the prosecution to proceed, but to admit  
8 evidence that the complainant failed to promptly report the offense as a legitimate attack on the  
9 veracity of the rape claim.

10           Prompt-complaint rules slowly began to erode in the 1980s, as legislators awakened to the  
11 reality that “rape’s uniqueness comes not in the disproportionate numbers of false complaints, but  
12 in the disproportionate numbers of cases that are never reported at all.”<sup>8</sup> A wide variety of  
13 circumstances may delay a complainant in filing a report—for example, victims may feel shame  
14 or embarrassment about the incident, may worry that they will not be believed, may fear reprisal  
15 from the offender, may doubt that the offender will be apprehended or punished, or (particularly  
16 in the case of intimate assaults) may initially wish to protect the offender. Today, the great weight  
17 of legislative and scholarly authority now disfavors these requirements, on thoroughly convincing  
18 grounds.<sup>9</sup> The revised Article 213 therefore does not include the 1962 Code’s prompt-complaint  
19 provision.

20           However, it bears mention that rejection of the prompt-complaint rule occurred in tandem  
21 with increasing acceptance of an evidentiary exception for prompt complaints made by the  
22 complainant to private persons. This “fresh complaint” rule admits evidence that the complainant  
23 reported the sexual assault to another person, even when the complainant did not report it promptly  
24 to the police. The fresh-complaint exception reflects a preconception similar to that which  
25 underlies the old prompt-complaint requirement—that a truthful sexual-assault victim will report  
26 the incident to another person promptly after the offense occurs, behavior that presumably is seen

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<sup>8</sup> Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1140 (1986).

<sup>9</sup> See Reporters’ Note.

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1 as less likely in the case of an untruthful complainant. The fresh-complaint exception is discussed  
2 below.<sup>10</sup>

3 *ii. Corroboration*

4 Contrary to the prompt-complaint rule, which originated in English common law, the  
5 corroboration rule first appeared in the United States.<sup>11</sup> New York was the first jurisdiction to  
6 introduce the requirement by statute<sup>12</sup> and Georgia was the first to do so judicially.<sup>13</sup> The purpose  
7 of the requirement was “to protect the defendant from an ‘untruthful, dishonest, or vicious  
8 complainant.’”<sup>14</sup> Accordingly, the law demanded corroborating evidence that attested to the  
9 veracity of the complaint (such as torn clothes or physical injuries).

10 The majority of jurisdictions have wholly eliminated their corroboration requirements, and  
11 those that have retained a requirement state it in terms that effectively reinforce the generally  
12 applicable standard for reasonable doubt. Given the lack of support for a corroboration  
13 requirement, the inequity of imposing such a requirement only for sexual offenses, and the absence  
14 of empirical evidence supporting its need, revised Article 213 does not include this provision.

15 *iii. Cautionary Instructions*

16 Distrust of rape complainants has long pervaded legal authorities, who in turn explicitly  
17 encouraged like skepticism among the jury. In the 17th century, English jurist Lord Hale cautioned  
18 that rape “is an accusation easily to be made and hard to be proved, and harder to be defended by  
19 the party accused, tho never so innocent.”<sup>15</sup> The cautionary instruction that often bears his name,

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<sup>10</sup> See Comment to § 213.11(4) and Reporters’ Note.

<sup>11</sup> MODEL PENAL CODE Commentaries § 213.6, at 422 (citing 7 J. WIGMORE, EVIDENCE § 2061, at 342 (3d ed. 1940)).

<sup>12</sup> An Act to amend the Penal Code, ch. 663, 1886 N.Y. Laws 109th Sess. 953 (1886).

<sup>13</sup> *Davis v. State*, 48 S.E. 180, 181-182 (Ga. 1904) (“The law is well established, since the time of Lord Hale, that a man shall not be convicted of rape on the testimony of the woman alone, unless there are some concurrent circumstances which tend to corroborate her evidence.”).

<sup>14</sup> *Anderson*, supra note 5, at 957 (citing *People v. Yannucci*, 15 N.Y.S.2d 865, 866 (N.Y. App. Div. 1939), rev’d on other grounds, 29 N.E.2d 185 (1940)).

<sup>15</sup> 1 M. HALE, PLEAS OF THE CROWN 635 (1680). One student note in 1967 confidently begins, “[s]urely the simplest, and perhaps the most important, reason not to permit conviction for rape on the uncorroborated word of the prosecutrix is that that word is very often false. False accusations of sex crimes in general, and rape in particular, are generally believed to be much more frequent than untrue charges of other crimes.” Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1138 (1967) (citation omitted).

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1 or the “Lord Hale instruction,” warns the jury of the difficulty of defending against allegations of  
2 rape or instructs the jury to take special care to find guilt beyond a reasonable doubt based on the  
3 testimony of a complaining witness. Like the prompt-report and corroboration requirements,  
4 cautionary instructions have been eliminated in most jurisdictions, by either judicial decision<sup>16</sup> or  
5 legislation.<sup>17</sup>

6 Revised Article 213 eliminates the traditional cautionary instruction. In general, two  
7 rationales supported the practice. First, cautionary instructions are intended to offset concerns that  
8 assault complainants are particularly untrustworthy or likely to falsify their allegations.  
9 Specifically, authorities worried that a complainant would falsify charges “either because she  
10 feared the stigma of having consented to intercourse or because she was pregnant and needed an  
11 acceptable explanation for her condition.”<sup>18</sup> Yet social conditions have changed so dramatically  
12 that both intercourse outside of marriage and pregnancy out of wedlock no longer invoke the same  
13 level of societal opprobrium. At the same time, lodging a sexual-assault complaint exposes a  
14 complainant to scrutiny and skepticism; the premise of the instruction, that rape is “an accusation  
15 easily to be made”<sup>19</sup> is contradicted by data suggesting large numbers of self-identified victims  
16 fail to make an accusation.<sup>20</sup>

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<sup>16</sup> In *Hardin v. State*, 840 A.2d 1217, 1222-1224 (Del. 2003), the Supreme Court of Delaware presents a historical account of the rise and fall of the cautionary-instruction requirement, and jurisdictions that have done away with the requirement through judicial opinion have followed these arguments.

<sup>17</sup> See, e.g., COLO. REV. STAT. ANN. § 18-3-408 (West 2012) (“[T]he jury shall not be instructed to examine with caution the testimony of the victim solely because of the nature of the charge, nor shall the jury be instructed that such a charge is easy to make but difficult to defend against, nor shall any similar instruction be given....”). See also IOWA CODE ANN. § 709.6 (West 2012); MD. CODE, CRIM. LAW, § 3-320 (West 2012); MINN. STAT. ANN. § 609.347(5) (West 2012); NEV. REV. STAT. ANN. § 175.186(2) (West 2012); 18 PA. CONS. STAT. ANN. § 3106 (West 2012). South Dakota recently repealed its statutory ban on cautionary instructions, S.D. CODIFIED LAWS § 23A-22-15.1, apparently as a result of the decision by the South Dakota Supreme Court to adopt the federal rape shield rules, rather than as a statement intending to approve of cautionary instructions. Supreme Court of the State of South Dakota, *In the Matter of the Adoption of a New Rule Relating to Federal Rules of Evidence 412: Rule 10-13*, available at <http://www.sdjudicial.com/Uploads/sc/rules/Rule10-13.pdf> (Mar. 2011). The repeal included no expression of any intent to reintroduce cautionary instructions.

<sup>18</sup> STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 18* (1998).

<sup>19</sup> 1 MATTHEW HALE, *PLEAS OF THE CROWN* 635 (1680).

<sup>20</sup> Rachel E. Morgan & Barbara A. Oudekerk, *Criminal Victimization*, 2018, Bureau of Justice Statistics, at 7 tbl. 5 (Sept. 2019) (reporting data from victimization survey that suggests 60-75% of rape and sexual assault go unreported). Surveys of the reasons why sexual offense victims consistently show that fear of reprisal is among the most commonly cited reasons for failing to report. See, e.g., Michael

1           Second, cautionary instructions arose in part out of concern for “the difficulty of  
2 determining the truth with respect to alleged sexual activities carried out in private.”<sup>21</sup> In other  
3 words, because the intimate nature of the conduct rendered third-party witnesses unlikely, added  
4 care was warranted. But sexual offenses are not uniquely likely to occur outside the presence of a  
5 third party. One recent study found that there were no third-party witnesses in 78.3 percent of rape  
6 cases, as compared to 51.9 percent of robbery cases or 95.3 percent of burglary cases.<sup>22</sup> Yet  
7 historically no special instructions have been given regarding the testimony of complainants in  
8 those cases; instead, jurors are entrusted with the task of assessing credibility according to general  
9 principles.

10           Given the strong disincentives to file a legitimate complaint, as well as the lack of  
11 substantial difference in the rate of witness observation of sexual versus other offenses, it cannot  
12 be considered justifiable to impose a cautionary instruction solely because the complaint alleges  
13 sexual assault.

14 **2. Sexual History of the Complainant -- § 213.11(1).**

15           Contemporary rape shield laws respond to a variety of concerns about the treatment of rape  
16 victims in the judicial system. First, the common law in effect distinguished degrees of sexual  
17 assault based on the chastity of the victim, a practice that critics contended unfairly diverted focus  
18 away from the acts of the assailant and onto the character and life of the victim.<sup>23</sup> Second,  
19 compelling descriptions of harassment and humiliation of rape victims in the judicial process  
20 fueled the perception that criminal prosecution of the assailant paradoxically resulted in further  
21 victimization of the complainant.<sup>24</sup> As a result, “[l]egislatures began to impose rape shield laws to

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Planty & Lynn Langton, *Female Victims of Sexual Violence, 1994-2010*, Bureau of Justice Statistics, at 7 (2013); Callie Marie Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*, Bureau of Justice Statistics, at 3 (Aug. 2002).

<sup>21</sup> MODEL PENAL CODE § 213.6(5).

<sup>22</sup> Joseph Peterson, et al., *The Role and Impact of Forensic Evidence in the Criminal Justice Process* at 62, 92, & 109 (National Institute of Justice, 2010).

<sup>23</sup> See generally Anderson, *supra* note 1 (providing historical analysis of the chastity requirement from biblical texts through present day).

<sup>24</sup> See, e.g., Vivian Berger, *Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 12 (1977) (describing the experiences of the “victim on trial”); Susan Griffin, *Rape: The All-American Crime*, 10 RAMPARTS MAGAZINE 26-35 (Sept. 1971) (reporting iconic description of abusive experience of victim in San Francisco rape trial).

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1 restrict rape defendants from admitting evidence of complainants’ private sexual lives. By the early  
2 1980s, almost every jurisdiction in [the United States] had passed some form of rape shield law.”<sup>25</sup>

3 Today, all 50 states have adopted “rape shield” laws.<sup>26</sup> Although the federal statute,  
4 embodied in Federal Rule of Evidence 412, followed rather than led the way, it was nonetheless  
5 copied by many jurisdictions. In general, rape shield statutes provide for (1) the general  
6 inadmissibility of evidence of a complaining witness’s prior sexual history, (2) subject to a list of  
7 exceptions that allow admission, (3) with judicial control of admissibility determinations after a  
8 hearing held *in camera*.<sup>27</sup> All 50 states, plus the federal system and the District of Columbia, have  
9 a rape shield law with at least one of these three features; the majority have all three.

10 Rape shield laws represent a policy choice to declare a class of volatile evidence—that  
11 relating to the sexual history and behavior of the complainant—generally off limits at trial.  
12 Conventionally, much of this evidence would be admissible under evidentiary rules that set a low  
13 threshold for relevance, usually defined to require only that proffered evidence have “any tendency  
14 to make a fact more or less probable than it would be without the evidence.”<sup>28</sup> Even though  
15 evidentiary codes typically provide for the exclusion of evidence that is substantially more  
16 prejudicial than probative,<sup>29</sup> rape shield laws emerged in response to concern that judicial rulings  
17 seeking to strike this balance often seemed to give inadequate weight to the tendency of jurors to  
18 erroneously or even maliciously overvalue inflammatory facts related to a person’s prior sexual  
19 history, manner of dress, or personal sexual proclivities.

20 Contemporary rape shield statutes have been subject to both criticism and praise. Attacks  
21 come both from those who question the need for any special protection for a victim’s sexual  
22 history,<sup>30</sup> and from those who think the law ought to protect a victim’s sexual history to a greater

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<sup>25</sup> Anderson, *supra* note 1, at 80 (citations omitted).

<sup>26</sup> See generally Reporters’ Note.

<sup>27</sup> See generally Reporters’ Note.

<sup>28</sup> FED. R. EVID. 401.

<sup>29</sup> See, e.g., FED. R. EVID. 403.

<sup>30</sup> See, e.g., I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 874-875 (2013) (“[R]ape shield rules have not just tipped the scales [in favor of protecting victims]. They have tipped them too far. . . . [I]t is time . . . to critically reexamine rape shield rules in toto and to determine whether their advantages in fact outweigh their disadvantages. . . . It is entirely possible that upon critical examination, we will discover that [these] rules do more harm than good [or that] they have run their course and are no longer necessary.”); Cristina Carmody Tilley, *A Feminist Repudiation of the Rape Shield Laws*, 51 DRAKE

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1 extent than it already does.<sup>31</sup> The social stigma attached to sexual activity outside of marriage has  
2 no doubt dissipated to a considerable degree since rape shield statutes were first enacted in the  
3 1970s. Yet continuing evidence of enduring stereotypes and biases, along with pervasive  
4 underreporting and victims' continuing apprehensions about mistreatment in the judicial process,  
5 all support the ongoing need for some rape shield protections.<sup>32</sup>

6 At the same time, although legislators intended rape shield rules “to protect rape victims  
7 from the degrading and embarrassing disclosure of intimate details about their private lives,” to  
8 encourage reporting of sexual assaults, and to prevent wasting time on distractive collateral and  
9 irrelevant matters,”<sup>33</sup> only some of those aims can be viewed as legitimate reasons to exclude  
10 evidence pertinent to a particular case. Absent a strongly grounded privilege, relevant evidence  
11 should never be excluded when its probative value outweighs its prejudicial effect. Moreover,  
12 prejudice in this context carries a narrower meaning than in common usage. It requires an impact  
13 harmful to the accuracy or efficiency of the factfinding process;<sup>34</sup> evidence that embarrasses a  
14 witness or discloses private information cannot, for those reasons alone, be considered

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L. REV. 45 (2002) (arguing that “the laws have obscured, and even blocked, feminists’ stated long-term education goal by aborting a potentially edifying national dialog on female sexuality and the role of women in society”).

<sup>31</sup> See, e.g., Anderson, *supra* note 1, at 55-56 (arguing that exceptions for prior sexual activity with the defendant and when exclusion would violate the defendant’s constitutional rights “routinely gut the protection” rape shield statutes purport to offer); Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461 (2012) (criticizing admission of pattern evidence).

<sup>32</sup> For example, in a 2011 report investigating pervasive policing failures of the New Orleans Police Department [“NOPD”], the Justice Department concluded that “NOPD has systemically misclassified large numbers of possible sexual assaults, resulting in a sweeping failure to properly investigate many potential cases of rape, attempted rape, and other sex crimes.” U.S. Department of Justice, Civil Rights Division, Investigation of the New Orleans Police Department xi (Mar. 16, 2011). Moreover, police paperwork “was replete with stereotypical assumptions and judgments about sex crimes and victims of sex crimes, including misguided commentary about the victims’ perceived credibility, sexual history, or delay in contacting the police.” *Id.*

<sup>33</sup> *United States v. Torres*, 937 F.2d 1469, 1472 (9th Cir. 1991) (quoting 124 Cong. Rec. H. 11944 (daily ed. Oct. 10, 1978) (statement of Rep. Mann)). In *Torres*, the defendant was charged with assaulting a nine-year-old girl, and sought to introduce evidence that six months after the alleged incident, the girl’s sisters caught her in her bedroom with a 17-year-old boy and her panties down. The court upheld the exclusion of the evidence against the defendant’s claims that it was probative of an alternative source of traces of semen found on her underwear, as well as of a motive to misidentify him.

<sup>34</sup> Such prejudicial effects, as defined by the federal rules, are defined as “unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” FED. R. EVID. 403.

1 prejudicial.<sup>35</sup> Indeed, the Supreme Court has repeatedly held that the constitutional right to  
2 confrontation outweighs a witness’s interest to “testify free from embarrassment and with his [or  
3 her] reputation unblemished.”<sup>36</sup> Thus, to the extent that an obligation to testify causes a witness  
4 distress or even thwarts a policy goal to encourage greater reporting of sexual assault, those  
5 concerns must be considered secondary to the imperative to admit probative, even if  
6 uncomfortable, evidence.<sup>37</sup>

7 This understanding is manifest in an opinion by the Supreme Court that addressed the  
8 substantive scope of rape shield statutes. As the Supreme Court has declared: “Whether rooted  
9 directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or  
10 Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants  
11 ‘a meaningful opportunity to present a complete defense.’”<sup>38</sup> In *Olden v. Kentucky*, the Supreme  
12 Court held that rape shield statutes must yield to questioning probative of bias.<sup>39</sup> The trial court

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<sup>35</sup> See, e.g., *Davis v. Alaska*, 415 U.S. 308 (1974) (reversing due to trial court’s refusal to allow bias and impeachment cross based on juvenile witness’s criminal record); *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (“[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby ‘to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.’”); *United States v. Abel*, 469 U.S. 45, 54-55 (1984) (affirming cross-examination for bias where “precautions did not prevent all prejudice to respondent from [the witness’s] testimony, but they did, in our opinion, ensure that the admission of this highly probative evidence did not unduly prejudice respondent”) (emphasis omitted). See also *Alford v. United States*, 282 U.S. 687, 694 (1931) (“But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked.”).

<sup>36</sup> *Davis*, 415 U.S. at 320.

<sup>37</sup> See *id.* (“The State’s policy interest in protecting the confidentiality of a juvenile offender’s record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.”). See also *State v. Hudlow*, 659 P.2d 514, 521 (Wash. 1983) (“The issue is not whether evidence is prejudicial in the sense that it is detrimental to someone involved in the trial. Rather, the question is whether the evidence will arouse the jury’s emotions of prejudice, hostility, or sympathy. Arguments that sexual history evidence is inadmissible because of its prejudicial impact on the rape victim miss the point. Adverse psychological effects suffered by crime victims, although regrettable, are not grounds for excluding probative evidence.”); *Anderson*, *supra* note 1, at 159 (2002) (noting, in connection with proposal for a tightly restrictive rape shield law, that “[t]he governmental interest underlying the [proposed law] . . . is not protecting the sexual privacy of rape victims. It is, instead, furthering the truth-seeking process.”)

<sup>38</sup> *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)) (citations omitted).

<sup>39</sup> 488 U.S. 227 (1988) (*per curiam*). The Supreme Court has directly ruled on a rape shield statute only on one other occasion. In *Michigan v. Lucas*, 500 U.S. 145 (1991), the Court upheld a rape shield

1 had prevented the defendant from cross-examining the complainant about the fact that at the time  
2 of the encounter in question, she had been cohabiting with a different man, a boyfriend who had  
3 seen her leave the defendant’s vehicle immediately after the alleged incident. The defendant sought  
4 to introduce the evidence: (1) to support his claim that she had fabricated the rape in order to  
5 explain her association with the accused and (2) to impeach her testimony during direct  
6 examination that she lived with her mother.<sup>40</sup> Finding that exclusion of the evidence violated the  
7 Confrontation Clause, the Court reversed.

8         Following this reasoning, some might think that a constitutional exception by itself affords  
9 all appropriate flexibility, and that no further exceptions ought to be endorsed by legislatures. But  
10 this analysis is too simple, and no American jurisdiction follows that path for two distinct reasons.  
11 First, judges invoke constitutional mandates sparingly and rightly hesitate to hold state legislation  
12 unconstitutional in situations where a statute’s terms clearly apply. Yet there is little doubt that  
13 accurate factfinding is often best served by admitting much relevant evidence even when not  
14 constitutionally required. And relatedly, the Supreme Court’s jurisprudence itself invites state  
15 policy judgments about the relative importance of accuracy and other trial-process values; it  
16 presupposes that state rules of evidence will embody considered judgments about that balance,  
17 rather than a categorical exclusion of all evidence not constitutionally required.<sup>41</sup> Perhaps in part  
18 for these reasons, the six jurisdictions that rely entirely on judicial discretion to admit protected  
19 evidence nonetheless impose a threshold for admissibility that is less demanding than the  
20 constitutional standard.

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requirement that notice to introduce covered evidence must be filed within 10 days of arraignment (or risk exclusion of evidence), finding that the requirement did not *per se* violate the Constitution, but noting that it might be “overly restrictive.” *Id.* at 151.

<sup>40</sup> *Olden*, 488 U.S. at 229-230. The Kentucky Court of Appeals upheld the exclusion, but on different grounds. That court found the evidence to be outside of the rape shield statute, but excluded it as prejudicial since the relationship was interracial. *Id.* at 232. The Supreme Court held that “[s]peculation as to the effect of jurors’ racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of [the complainant’s] testimony.” *Id.*

<sup>41</sup> See, e.g., *Michigan v. Lukas*, 500 U.S. 145 (1991) (upholding exclusion under rape shield of relevant defense evidence, when defendant had failed to comply with reasonable requirement to provide advance notice of the intention to proffer such evidence). See also *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (“[T]he right to present relevant testimony . . . ‘may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.’ We have explained, for example, that ‘trial judges retain wide latitude’ to limit reasonably a criminal defendant’s right to cross-examine a witness ‘based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.’”).

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1           A second reason is arguably more important, because it does not depend on contested value  
2 judgments about the relative weight of defense and prosecution interests. Even if one were  
3 determined to close all windows to the admission of defense evidence unless constitutionally  
4 required, the meaning of that requirement is almost entirely indeterminate. In only one context has  
5 the Supreme Court consistently given ascertainable content to the concept of “a meaningful  
6 opportunity to present a complete defense”—specifically its holding that a witness’s right to  
7 privacy must yield to a defendant’s need to cross-examine for purposes of establishing bias or a  
8 motive to fabricate the accusation.<sup>42</sup> In all other respects, judges are left entirely at large in  
9 attempting to determine what kinds of evidence are necessary, under what circumstances, to permit  
10 “a meaningful opportunity to present a complete defense.” Legislatures accordingly have  
11 uniformly acknowledged that sound judicial administration requires statutes to identify conditions  
12 that warrant a departure from the principles of rape shield exclusion.

13           Consider, for example, the problem of defense evidence offered to provide an alternative  
14 explanation for apparently incriminating physical evidence, such as a complainant’s pregnancy,  
15 disease, or physical injury. Absent a specific statutory exception for these situations, courts would  
16 be left to determine on an ad hoc basis whether the opportunity to present the alternative  
17 explanation was, under all the circumstances, essential for a fair trial. No doubt courts ordinarily  
18 would have little difficulty answering that question in the affirmative even without express  
19 statutory authority to do so,<sup>43</sup> but virtually all states nonetheless provide an exception for this  
20 circumstance in order to obviate the need for open-ended, fact-specific application of constitutional  
21 doctrine in each case. Often, moreover, the application of the constitutional test will be far from  
22 straightforward.<sup>44</sup> In short, the constitutional exception, important though it is, cannot obviate the

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<sup>42</sup> *Davis v. Alaska*, 415 U.S. 308 (1974); *Olden v. Kentucky*, 488 U.S. 227 (1988).

<sup>43</sup> For example, in *Neeley v. Commonwealth*, 437 S.E.2d 721 (Va. Ct. App. 1993), the defendant sought to provide an alternative explanation for pubic hair similar to his own that was found on the victim. The state rape shield provision’s exception for evidence probative of “semen, pregnancy, disease, or physical injury” was too narrow to apply in these circumstances, and the trial judge excluded the defendant’s offer to prove that the pubic hair matched that of the complainant’s boyfriend. *Id.* at 724. The Virginia Court of Appeals reversed, holding that exclusion of the evidence under the circumstances was unconstitutional. At the end of the day, the constitutional exception sufficed to overturn the unfair trial in *Neeley*, even in the absence of any other statutory exception. But sound judicial administration is better served by statutory drafting sufficient to anticipate and resolve recurring situations of this kind.

<sup>44</sup> See Reporters’ Note, *infra*.

1 need for legislative care in delineating the circumstances in which other exceptions from rape  
2 shield exclusion are warranted.

3 In this light, a well-crafted rape shield statute properly functions to channel a court's  
4 analysis of the probative and prejudicial worth of evidence with a goal of enhancing the accuracy  
5 of the factfinding process and excluding evidence that can distract jurors or prey on their  
6 unfounded stereotypes and presuppositions, while also ensuring the admission of evidence—even  
7 if embarrassing or sensitive in nature—that fairly calls into question the veracity of the  
8 complainant's claim. Crafting a statute that strikes the proper balance between admission and  
9 exclusion of this kind of evidence is undeniably difficult. Current American law exhibits broad  
10 consensus on a general presumption of exclusion, subject to a range of exceptions, some of which  
11 are more widely accepted than others. Ultimately, rape shield statutes should exclude only that  
12 which —through prejudicial means—compromises the integrity of the factfinding process.

13 *a. Presumptive Exclusion of Sexual-History Evidence.* Section 213.11(1)(a)(i) and (ii)  
14 embodies the core component of a rape shield statute: namely, the general statement of exclusion  
15 of evidence of a complainant's prior sexual history.

16 Section 213.11(1)(a)(i) and (ii) distinguishes between reputation and opinion evidence on  
17 the one hand and evidence concerning specific instances of behavior on the other. This distinction  
18 is familiar in contemporary evidence law.<sup>45</sup> Subsection (1)(a)(i) sets forth a general bar on all  
19 opinion and reputation testimony related to the prior sexual history of the complainant. The  
20 seriousness and intimate nature of the harm involved in sexual-assault cases supports the  
21 conclusion that general opinion or reputation is a poor basis upon which to encourage a defendant  
22 to make judgments about sexual availability. Similarly, opinion or reputation evidence regarding  
23 sexual history is a weak basis upon which a jury might rest its assessment of veracity of a  
24 complaint.

25 **Illustration:**

26 1. An employee alleges an act of sexual assault by the employee's boss. The boss  
27 claims that the sex was consensual and that the employee fabricated the charge in order to  
28 win a civil judgment for harassment. In the opinion of one worker, the employee is a flirt.

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<sup>45</sup> See, e.g., Fed. R. Evid. 405 (methods of proving character); Fed. R. Evid. 608 (character for truthfulness).

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1 Another worker reports that the employee has a reputation for sleeping with superiors.  
2 Though perhaps technically relevant, such evidence is too weakly probative to justify  
3 admission. To the extent that opinion or reputation evidence might be essential to the  
4 presentation of a defense under the unusual circumstances of a particular case, the  
5 “constitutionally required” clause of Section 213.11(1)(a)(i) and the safety-valve clause of  
6 Section 213.11(1)(b)(vi) ensure its admissibility.

7 With respect to evidence of specific instances of sexual history, Section 213.11(1)(a)(ii)  
8 proscribes introduction of specific acts or aspects of sexual history by the complainant with  
9 persons other than the defendant subject to the specific exceptions of Section 213.11(1)(b). Sexual  
10 history with the defendant is not excluded by this Section, but rather is subject to the ordinary rules  
11 of evidence, including the rule that admissibility requires that the proffered evidence meet a  
12 threshold showing of relevance and not be unduly prejudicial.

### 13 **Illustrations:**

14 2. Same facts as Illustration 1, except that another worker reports that the worker  
15 saw the employee and the boss engage in consensual sexual activity. This specific instance  
16 of conduct has significant relevance to the question whether the employee had consented  
17 on the occasion in question, and its admissibility turns on the general rules of evidence and  
18 the application of Section 213.11(1)(a)(ii). Those rules state that Section 213.11(1) does  
19 not make a specific instance of sexual history with the accused inadmissible, so such  
20 evidence should be admitted if otherwise admissible under the general rules of evidence.

21 3. Same facts as Illustration 1, except that a different worker reports that the worker  
22 saw the employee engage in consensual sexual activity with a different supervisor.  
23 According to Section 213.11(1)(a)(ii), this specific instance of sexual conduct with a  
24 person other than the accused, even if otherwise admissible under the general rules of  
25 evidence, is inadmissible unless it meets one of the exceptions given in Section  
26 213.11(1)(b).

27 The most salient risk of admitting evidence of sexual activity with the defendant is that  
28 jurors will erroneously assume that consent to sexual activity with the defendant on an earlier

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1 occasion presumptively establishes consent to future encounters.<sup>46</sup> Another concern might be that  
2 jurors will consider the complainant promiscuous, or less worthy of belief, because of evidence of  
3 prior consensual activity with the defendant. As to the former concern, although prior consent  
4 clearly does not prove future consent, it nonetheless will often be probative that a complainant and  
5 defendant have previously been intimate. The existence of sexual history between the parties may  
6 shed light on questions of identity, consent, and reasonableness of mistake. An encounter between  
7 two people who have never engaged in any form of sexual intimacy is necessarily of a different  
8 character than one between those who have been intimate in the past. In neither situation is any  
9 material element conclusively proven—a person may immediately consent to a one-night stand  
10 with a stranger but decline sexual relations with a longstanding intimate partner. Yet a jury must  
11 have the opportunity, in judging the totality of the circumstances, to know which kind of situation  
12 is presented. To the extent that prior intimacy clouds any contested issue, a court may exclude such  
13 evidence under general principles, when such evidence is substantially more prejudicial than  
14 probative. In the context of currently prevailing mores with respect to sexually active adults,  
15 however, such concerns normally will be more appropriately addressed by argument of counsel  
16 and/or contextually specific jury instructions.

17 ***b. Procedures for Ruling on Admissibility – Section 213.11(1)(a)(iii).*** Like most  
18 contemporary rape shield statutes, Section 213.11(1)(a)(iii) specifies that rulings on admissibility  
19 of sexual-history evidence must when possible be made prior to trial and according to specialized  
20 rules, such as those that accord notice to the victim, provide a right of the victim to be heard, and  
21 presumptively seal the hearing. Additional details concerning such pretrial procedures—for  
22 example, the time period within which a motion to admit such evidence must be filed or the number  
23 of copies to serve—are shaped by each jurisdiction’s local practice rules. The prescribed format  
24 for proceedings tends to follow the path of the typical *in limine* motion, with several key  
25 differences. Advance notice is a common, and critical, component. Many jurisdictions give the  
26 complainant an explicit right to notice of the hearing and to attend and be heard, and provide that  
27 the transcript should be sealed.<sup>47</sup> Given the tremendous amount of local variation in pretrial

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<sup>46</sup> See text accompanying notes 231-255.

<sup>47</sup> Alabama is the only jurisdiction that does not seal the hearing. ALA. CODE § 12-21-203(d)(1) (2010).

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1 procedure, Section 213.11(1)(a)(iii) leaves for resolution on a jurisdiction-by-jurisdiction basis the  
2 precise details of the procedures to be followed in such proceedings.

3 **c. Protected Sexual History.** Section 213.11(1)(a)(iv) defines “sexual history” broadly to  
4 “mean any behavior, condition, or expression related to human sexuality, or allegations thereof,  
5 whether voluntary or involuntary, including but not limited to evidence and allegations relating to  
6 sexual intimacy, contact, and orientation; use of pornography; sexual fantasies and dreams; use of  
7 contraceptives; habits of dress; and marital and partnership history or status.” The breadth of this  
8 illustrative list makes clear that “sexual history” for purposes of this provision encompasses a wide  
9 range of sexual behavior and expression; it easily extends to such evidence as sexual infections,  
10 manner of dress, and intimate physical characteristics, and it includes not just statements of fact  
11 but also allegations that pertain to human sexuality. In this respect, this definition of “sexual  
12 history” is akin to the federal standard, which likewise was expressly amended to cover all past  
13 sexual behavior or conduct, evidence that implies sexual contact (such as birth control or sexually  
14 transmitted infections), predispositions, and “sexual fantasies or dreams,” as well as “evidence that  
15 does not directly refer to sexual activity or thoughts but that . . . may have a sexual connotation for  
16 the factfinder.”<sup>48</sup>

17 By defining this category broadly, the rule presumptively excludes any proffered evidence  
18 conceivably relating to the sexual history of the complainant.<sup>49</sup> The breadth of the definition is not  
19 intended as an independent statement that such evidence otherwise *would be* relevant. Indeed, a  
20 wide swath of covered history will rarely if ever constitute relevant evidence.<sup>50</sup> But when such  
21 evidence is relevant, the broad definition ensures that its admissibility is circumscribed by the rule.

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<sup>48</sup> See Notes of the Advisory Committee to the 1994 Amendments (“Rule 412 has been revised . . . to expand the protection afforded alleged victims of sexual misconduct. Past sexual behavior connotes all activities that involve actual physical conduct, i.e. sexual intercourse or sexual contact. In addition, the word ‘behavior’ should be construed to include activities of the mind, such as fantasies or dreams. The rule has been amended to also exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. This amendment is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder.” (citations omitted)).

<sup>49</sup> Cf. *United States v. Taylor*, 640 F.3d 255, 257-259 (7th Cir. 2011) (struggling to construe “sexual history” in the context of federal trafficking statute and noting wide array of possibly included activity).

<sup>50</sup> For instance, it is unlikely that evidence of “psychological fantasy” should ever be admitted, given the lack of empirical evidence in its support. Joseph W. Critelli & Jenny M. Bivona, *Women’s Erotic Rape Fantasies: An Evaluation of Theory and Research*, 45 J. SEX RESEARCH 57, 62 (2008) (reviewing studies of rape fantasies over 30 years and concluding “[t]he empirical evidence does not support

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1 In accordance with a vote taken at the Institute’s 2014 Annual Meeting,<sup>51</sup> Section  
2 213.11(1)(a)(iv) explicitly removes from the rape shield’s presumptive exclusion any evidence of  
3 a complainant’s allegedly false prior accusation of a sexual offense. The admissibility of such  
4 matters is therefore governed by the jurisdiction’s other rules of evidence, without any extra  
5 limitations imposed by rape shield principles.

6 **d. Exceptions -- Section 213.11(1)(b).** Section 213.11(1)(b) identifies instances of sexual  
7 history with a person other than the accused that, if otherwise admissible, are not blocked by the  
8 exclusionary rule of Section 213.11(1)(a)(ii). The “otherwise admissible” clause underscores that  
9 Section 213.11(1)(b) does not enumerate independent grounds upon which evidence *is* admissible.  
10 Rather, subsection (1)(a)(ii) clarifies that Section 213.11(1)(b) serves only to lift the presumption  
11 of inadmissibility under Section 213.11(1)(a) when the evidence in question is offered for an  
12 expressly authorized purpose. Even when Section 213.11(1)(b) overturns that presumptive  
13 exclusion, however, all other requirements for admissibility remain in place under the ordinary  
14 rules of evidence, including most fundamentally ordinary rules concerning relevancy and prejudice  
15 (such as the typical rule that evidence is inadmissible when its probative value is substantially  
16 outweighed by its prejudicial effect).<sup>52</sup> In other words, when proffered evidence relates to “sexual  
17 history” as defined by Section 213.11(1)(a)(iv), it must surmount two sets of hurdles. It must be  
18 admissible under generally applicable rules of evidence. In addition, sexual-history evidence must  
19 undergo scrutiny according to the rape shield provisions. Specifically, as described above,<sup>53</sup>  
20 Section 213.11(1)(a)(i) erects a nearly insurmountable ban on such evidence when offered in the

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masochism as a general explanation of rape fantasies,” including that over 99% of women in one assessment  
“clearly state[d] that they do not want to be raped in reality, and considerable evidence supports the  
demonstrated fact that they would be repulsed and traumatized by actual rape”). Similarly, it is only a rare  
case in which a complainant’s manner of dress might be deemed relevant, as generally a complainant’s  
clothing choices can no more constitute consent to assault than a “Shoot me now” T-shirt constitute  
permission to commit homicide. At the same time, in the rare case, clothing might become relevant to the  
factual dispute in the case—say, in a contest over whether the shirt worn by the complainant had buttons to  
tear as claimed.

<sup>51</sup> The motion to strike was approved by a vote of 127 to 75, with 23 abstentions. Annual Meeting Tr. at 23. For a discussion of the debate, see Reporters’ Notes, *infra*.

<sup>52</sup> Thus, local law as to what constitutes “prejudice” governs. For instance, under the federal rules “unfair surprise” is not a legitimate basis of prejudice, whereas it is in some states. See FED. R. EVID. 403 (excluding “unfair surprise” as a basis of prejudice).

<sup>53</sup> See Commentary to Section 213.11(1)(a)(i).

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1 form of reputation or opinion, and Section 213.11(1)(a)(ii) presumptively blocks such evidence  
2 even when offered in the form of specific acts.

3 The presumptive rule of exclusion under Section 213.11(1)(a)(ii) may be overcome by a  
4 showing that the specific instance of sexual history meets the requirements of one of the Section  
5 213.11(1)(b) exceptions. Specifically, those exceptions are: (i) to prove an alternative source of  
6 physical evidence, pregnancy, infection, or injury; (ii) to impeach admitted evidence by specific  
7 contradiction or prior inconsistency; (iii) to prove bias or motive to fabricate a material fact; (iv)  
8 to explain precocious sexual knowledge; (v) to rebut evidence or other circumstances apparent to  
9 the trier of fact which suggest that the defendant's defense is highly implausible; and (vi) when  
10 the admissibility of such evidence is constitutionally required. Thus, evidence of "sexual history"  
11 is admissible only when it (1) meets the requirements of general rules of evidence, (2) takes the  
12 form of specific acts, *and* (3) qualifies for an exemption from rape shield exclusion under one of  
13 the provisions of Section 213.11(1)(b).<sup>54</sup>

14 Subparagraphs (i) and (iii) are straightforward. With respect to (i), the strong relevance of  
15 alternative explanations for physical evidence is apparent and acknowledged in all jurisdictions.<sup>55</sup>  
16 An argument might be made to limit such evidence to cases in which identity is disputed, since  
17 evidence of this kind is most likely probative when the defendant denies sexual intimacy with the  
18 complainant. However, such evidence might be relevant even when the defendant raises a defense  
19 of consent. For instance, a defendant may admit sexual contact with the complainant, but deny  
20 causing the complainant's observed injuries. In such a case, it would be proper to admit relevant  
21 evidence of another explanation for the injury, to bolster the defendant's claim of consent.<sup>56</sup> As to  
22 (iii), the Supreme Court has repeatedly held that "the exposure of a witness's motivation in  
23 testifying is a proper and important function of the constitutionally protected right of cross-

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<sup>54</sup> Of course, apart from these requirements, evidence of "sexual history" is always admissible when constitutionally required.

<sup>55</sup> See, e.g., *Neeley v. Commonwealth*, 437 S.E.2d 721 (Va. Ct. App. 1993).

<sup>56</sup> See, e.g., *Fletcher v. People*, 179 P.3d 969, 975 (Colo. 2007) (en banc) (noting that "evidence of sexual activity immediately prior to an alleged assault may be relevant to establish that someone else may have been the source of an injury" even in a case in which the defense is consent). The court in *Fletcher* added that assessing the probative value of such evidence turns in part on determining "how much time it would take for such an injury to heal," because evidence too far removed is "too remote to be probative." *Id.*

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1 examination,<sup>57</sup> and has expressly singled out the propriety of bias evidence in the rape shield  
2 context.<sup>58</sup>

3 The exceptions for inconsistencies, precocious sexual knowledge, and strongly probative  
4 evidence are more contestable. To be sure, the exclusion of such evidence may be constitutionally  
5 impermissible in many circumstances. But explicit exceptions are nonetheless warranted to  
6 underscore that evidence offered for such purposes need not overcome hurdles of constitutional  
7 stature and that trial judges need not reach constitutional issues in order to find such evidence  
8 admissible.

9 *i. Impeachment by Contradiction or Inconsistency.* The exception in Section  
10 213.11(1)(b)(ii) permits impeachment of admitted evidence by specific contradiction and by prior  
11 inconsistency. In order for evidence of a victim’s sexual history to qualify for this exception from  
12 the rule of presumptive inadmissibility, such evidence must, of course, be admissible impeachment  
13 under the generally applicable rules of evidence. Thus, it must be relevant to impeach admitted  
14 contrary evidence concerning that history. In other words, the rule does not render evidence of  
15 prior sexual history admissible and relevant in the first instance; such evidence can become  
16 relevant only as a response to previously admitted, inconsistent evidence.

17 The terms of this exception thus give the prosecutor substantial control over the  
18 introduction of evidence concerning the victim’s prior sexual history, and accord with basic  
19 precepts of adversarial fairness.

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<sup>57</sup> Delaware v. Van Arsdall, 475 U.S. 673, 678-679 (1986) (quoting *Davis*, 415 U.S. at 316-317).

<sup>58</sup> See, e.g., Olden v. Kentucky, 488 U.S. 227 (1988) (per curiam) (reversing for error in excluding evidence of complainant’s sexual relationship with man who observed her leaving defendant’s car, offered as motive to fabricate sexual assault). Accord State v. Stephen F., 188 P.3d 84 (N.M. 2008) (reversing for error in excluding evidence that juvenile complainant previously was punished for consensual sex with defendant, because such evidence was relevant to establishing motive to lie about nature of contested incident); People v. Hackett, 365 N.W.2d 120, 124-125 (Mich. 1984) (“[W]here the defendant proffers evidence of a complainant’s prior sexual conduct for the narrow purpose of showing the complaining witness’ bias, this would almost always be material and should be admitted. Moreover in certain circumstances, evidence of a complainant’s sexual conduct may also be probative of a complainant’s ulterior motive for making a false charge.”) (citations omitted).

1 **Illustration:**

2 4.<sup>59</sup> Complainant alleges that Complainant went to the grocery store to pick up a  
3 last-minute dinner item while Complainant’s child and sister waited for her at home.  
4 Complainant claimed that, while in the parking lot, Accused ordered Complainant back  
5 into the car at gunpoint, drove to a secluded location, and forced Complainant to perform  
6 an act of oral sex. Complainant and Accused then returned together to the parking lot,  
7 where Complainant alleged that Accused then took Complainant to Accused’s own truck  
8 and sexually assaulted Complainant, after which Accused eventually allowed Complainant  
9 to leave. Complainant’s sister corroborated the account by testifying that Complainant was  
10 dependable and reasonable, and would never have voluntarily accepted a ride with a  
11 stranger. Accused acknowledged the encounter but claimed consent. On cross-  
12 examination, the prosecutor suggested that Complainant’s version was “reasonable” and  
13 comported with “common sense,” while Accused’s version was “difficult to swallow and  
14 leaking like crazy.” Accused seeks to offer evidence from an incident that occurred several  
15 months earlier, in which Complainant alleged that a different person, previously a stranger,  
16 sexually assaulted Complainant after Complainant accepted a ride in that person’s car.  
17 Accused argues that the evidence shows that Complainant in fact has a “casual attitude  
18 toward strangers,” and is impulsive and reckless.

19 Section 213.11(1)(a) would ordinarily exclude evidence that a complainant had  
20 accepted rides with strangers or had engaged in sexual intimacy with strangers when  
21 offered in the government’s case-in-chief. However, the government elicited evidence  
22 from both Complainant and the sister that Complainant would never accept a ride from a  
23 stranger, and suggested that Complainant’s version was thus believable while Accused’s  
24 version was implausible. As a result, the complainant’s prior behavior is acutely relevant,  
25 and the defendant must be allowed to prove, through specific contradiction, that in fact the  
26 complainant had engaged in behavior contrary to that suggested by the prosecution.<sup>60</sup> Thus,  
27 assuming that the proposed evidence is otherwise admissible under general evidence rules,

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<sup>59</sup> Loosely based on the facts of *State v. Martin*, 44 P.3d 805 (Utah 2002).

<sup>60</sup> Impeachment by contradiction “permits courts to admit extrinsic evidence that specific testimony is false, because [it is] contradicted by other evidence.” *United States v. Castillo*, 181 F.3d 1129, 1132 (9th Cir. 1999) (noting that testimony must be elicited on direct examination for rule to apply).

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1 Section 213.11(1)(b)(ii) does not block such evidence when offered for this specific  
2 impeachment purpose.

3 To be clear: although an exception applies, ultimate admissibility is still governed—as  
4 underscored above—by the general rules of evidence, such as the rules against hearsay or the  
5 court’s obligation to balance probative value against the risk of substantial prejudice. Thus, even  
6 when the rape shield is lifted, a court must consider the totality of the evidence in the case to  
7 determine the relative balance of probative value versus the prejudicial effect of the impeaching  
8 evidence.

9 **Illustration:**

10 5.<sup>61</sup> Complainant alleges that Accused broke into Complainant’s home, forced  
11 Complainant to engage in sexual acts, fell asleep, and then demanded \$100 in the morning.  
12 Accused claims to have met Complainant at a convenience store and thereafter engaged in  
13 consensual sex. Accused seeks to introduce evidence of Complainant’s prior sexual activity  
14 in order to contradict an earlier account of the incident offered by Complainant, namely,  
15 that after the alleged attack, Complainant told a rape-crisis counselor that Complainant had  
16 not had sex for a long time, even though Complainant had in fact engaged in consensual  
17 sexual activity with a neighbor earlier that evening. Complainant later explained that  
18 Complainant made the false statement as a result of embarrassment over the relationship  
19 with the neighbor, and points to the significant amount of evidence that corroborates  
20 Complainant’s version of the incident, including serious physical injuries, torn clothing,  
21 and items stained with Complainant’s blood that were found in Accused’s gym bag.

22 The specific instance with the neighbor is presumptively barred under Section  
23 213.11(1)(a)(ii), because it is Complainant’s sexual history with a person other than  
24 Accused. However, under Section 213.11(1)(b), it is offered by Accused to show a prior  
25 inconsistency, in accordance with the exception in Section 213.11(1)(b)(iii). Thus, Section  
26 213.11(1) does not block its admission. However, the court still must find the evidence  
27 admissible under ordinary principles of evidence. Given the evidence presented, a court  
28 could find that evidence of the sexual encounter with the neighbor was only weakly

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<sup>61</sup> Loosely based on the facts of *State v. Williams*, 773 P.2d 1368 (Utah 1989).

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1 probative of whether Complainant consented to the encounter with Accused, or whether  
2 Complainant’s version of the encounter is truthful. The court could also find that its  
3 prejudicial impact would be substantial, because it would risk distracting and confusing the  
4 jury with the details of an unrelated consensual encounter. Accordingly, a court could rule  
5 the evidence inadmissible under general principles of evidence, or circumscribe its  
6 admissibility by permitted cross-examination regarding aspects of the falsehood that do not  
7 directly pertain to the prior sexual act.<sup>62</sup>

8 *ii. Precocious Sexual Knowledge.* Section 213.11(1)(b)(iv) addresses cases involving  
9 children, in which the alleged victim’s graphic descriptions of abuse may suggest “precocious  
10 sexual knowledge”<sup>63</sup> that would be unexpected in a child unless the allegations against the  
11 defendant were true. In such instances, the defendant seeks to provide an alternative explanation  
12 for how a complainant—typically a young child—acquired unexpectedly sophisticated  
13 knowledge. Such proffers typically include evidence of exposure to pornography or adult sexual  
14 materials<sup>64</sup> or evidence of prior sexual experiences (even if those experiences involved sexual  
15 abuse).<sup>65</sup> Alternatively, a defendant may wish to introduce evidence that a young child has a

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<sup>62</sup> Relatedly, if Accused argued that the complainant’s prior consensual encounter created a bias or motive to fabricate the alleged sexual assault, then evidence of that prior incident might be admissible under Section 213.11(1)(b)(iii). But if the sole probative value of the prior encounter is to call into question a complainant’s credibility, when the prior inconsistency has low probative value in light of all the evidence in the case, then testimony concerning the prior encounter is properly barred.

<sup>63</sup> This concept has also been denominated the “sexual innocence inference theory.” See, e.g., *Grant v. Demskie*, 75 F. Supp. 2d 201, 213 (S.D.N.Y. 1999). See generally Christopher B. Reid, Note, *The Sexual Innocence Inference Theory as a Basis for the Admissibility of a Child Molestation Victim’s Prior Sexual Conduct*, 91 MICH. L. REV. 827 (1993).

<sup>64</sup> See, e.g., *State v. Marks*, 262 P.3d 13 (Utah Ct. App. 2011) (finding that the confrontation clause was not violated by the exclusion of evidence that child had access to pornography, which had been offered to impeach the child’s statement to the contrary at preliminary hearing); *Howard v. Commonwealth*, 318 S.W.3d 607 (Ky. Ct. App. 2010) (finding no violation in exclusion on rape shield grounds of five-year-old’s exposure to sex toys and pornography); *Montgomery v. State*, 625 S.E.2d 529 (Ga. Ct. App. 2006) (holding viewing of pornographic movies to be irrelevant and possibly barred by state rape shield doctrine); *State v. Molen*, 231 P.3d 1047, 1062 (Idaho Ct. App. 2010) (discussing sexual-innocence inference theory). But see *People v. Mann*, 41 A.D.3d 977 (N.Y. App. Div. 2007) (seeming to agree that pornography falls outside “sexual conduct” that was presumptively inadmissible under state’s rape shield law).

<sup>65</sup> On the question whether rape shield laws cover prior *nonconsensual* sexual activity, see *People v. Parks*, 766 N.W.2d 650, 655-656 (Mich. 2009):

[N]early all states ruling on this question have read their rape shield protections as encompassing both voluntary sexual conduct and involuntary sexual conduct. Twenty other

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1 sexually transmitted infection not carried by the defendant, as a means of indirect exculpation  
2 (indirect, because the prosecutor has not alleged that the infection was caused by the defendant).<sup>66</sup>  
3 Often the defense proffers such evidence not just to explain sexual knowledge, but also to attack  
4 credibility by suggesting that a child complainant is simply confused, covering for the true  
5 perpetrator, or otherwise unbelievable.

6 Conventional rape shield statutes appear to block such evidence, since past sexual  
7 experiences—whether consensual or not—are presumptively inadmissible, and the prior  
8 experience is not, strictly speaking, offered to prove an alternative perpetrator; rather, such  
9 evidence is simply offered to provide an alternative explanation for other incriminating evidence  
10 in the case. Some rape shield statutes explicitly permit the defendant to introduce evidence of prior  
11 sexual conduct in a case alleging sexual abuse of a juvenile. In other jurisdictions, courts have  
12 varied in their treatment of such defense requests,<sup>67</sup> but “[t]he majority ... agree that the prior  
13 sexual abuse of a youthful victim is relevant to rebut the inference that the complainant could not  
14 describe the details of sexual intercourse if the defendant had not committed the acts in question.”<sup>68</sup>  
15 Indeed, “[a] number of states have held that the United States Constitution compels the admission  
16 of evidence to show an alternative basis for a child victim’s knowledge of sexual matters.”<sup>69</sup> Other  
17 courts have found the evidence admissible so long as the two incidents are sufficiently similar in

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states specifically hold that sexual abuse falls under rape shield protections. Only three states concur with [the dissenter] in denying the applicability of rape shield provisions to involuntary sexual abuse. A fourth, New Hampshire, has enacted a statute expressly limiting exclusion to consensual sexual conduct.

<sup>66</sup> See, e.g., *State v. Garrett*, 1990 WL 98222 (Ohio Ct. App. 1990) (per curiam) (upholding exclusion of evidence of four-year-old complainant’s sexually transmitted disease, where the disease was curable within several weeks and allegation had been brought months later).

<sup>67</sup> Compare *LaJoie v. Thompson*, 217 F.3d 663, 671-672 (9th Cir. 2000) (finding prior abuse admissible to explain precocious knowledge) and *State v. Budis*, 593 A.2d 784 (N.J. 1991) (same), with *Pierson v. People*, 279 P.3d 1217, 1218, 1222 (Colo. 2012) (en banc) (upholding exclusion of eight-year-old’s consensual sexual activity with cousin at time of alleged fondling by accused, despite prosecutor’s argument that complainant could have falsified claims only if she had “the most incredible imagination of any child on the face of this earth”).

<sup>68</sup> *Budis*, 593 A.2d at 791. See also *Marks*, 262 P.3d at 27 (“Utah, like most other jurisdictions, recognizes the relevance of the complainant’s past sexual conduct to rebut the sexual innocence inference in appropriate cases.”); *State v. Molen*, 231 P.3d at 1052 (“[E]vidence of an alternate source for a child’s knowledge of sexual matters may be relevant in the trial of a sexual molestation charge [, . . . depending] upon the facts of each case.”).

<sup>69</sup> *Hale v. State*, 140 S.W.3d 381, 396 (Tex. Ct. App. 2004) (citing cases).

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1 nature.<sup>70</sup> The 1999 revisions to the Uniform Rules of Evidence incorporated in its rape shield  
2 provision an exception for evidence “that a person other than the accused was the source of the  
3 alleged victim’s knowledge of sexual behavior,” with no specific age restriction.<sup>71</sup> A minority of  
4 jurisdictions, however, have categorically excluded such evidence, on the ground that it falls  
5 within the presumptive exclusion of the rape shield statute.<sup>72</sup>

6         Crafting an appropriate exception, as in the adult context, invokes competing concerns. On  
7 the one hand, it is essential that the factfinder hear relevant evidence tending to prove or disprove  
8 facts of consequence that are in issue. Moreover, child witnesses are more vulnerable to suggestion  
9 and confusion, and may not recognize the consequences of misidentifying an abuser. On the other  
10 hand, evidence of complainant’s sexual history can create confusion or trigger biases in the minds  
11 of jurors and thus may distort the accuracy of the factfinding process.

12         Prior sexual history will simply be irrelevant in many cases. Yet where such evidence *is*  
13 relevant, several factors distinguish its introduction in the juvenile context from its introduction in  
14 the adult context, and thus make its admissibility less fraught. In the adult context, the primary  
15 concerns are that a complainant’s prior sexual history is often not probative (or weakly probative)  
16 of facts at issue in the case. The fear is that such evidence will instead be used for a prejudicial  
17 purpose: to judge a complainant as either less credible (“victim sleeps around and so probably  
18 consented”) or less deserving of protection (“victim sleeps around, so got what she was asking  
19 for”).

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<sup>70</sup> See, e.g., *Commonwealth v. Ruffen*, 507 N.E.2d 684, 687-688 (Mass. 1987) (“If the victim had been sexually abused in the past in a manner *similar* to the abuse in the instant case, such evidence would be admissible at trial because it is relevant on the issue of the victim’s knowledge about sexual matters.”) (emphasis added); *Wisconsin v. Pulizzano*, 456 N.W.2d 325 (1990) (reversing conviction for exclusion of evidence, while laying out five-point test for offer of proof); *Molen*, 231 P.3d at 1052-1053 (noting that the victim’s age and the similarity of the complaints are relevant factors).

<sup>71</sup> UNIFORM R. EVID. 412(c)(2) (1999).

<sup>72</sup> In one of the most commonly cited cases, *People v. Arenda*, 330 N.W.2d 814 (Mich. 1982), the defendant was charged with molesting his eight-year-old son. He sought to question the child about sexual contact with third parties as a means of “explain[ing] the victim’s ability to describe the sexual acts that allegedly occurred and to dispel any inference that this ability resulted from experiences with defendant.” *Id.* at 817. The court upheld the exclusion, referencing the goals of privacy and protection from harassment embodied in the rape shield statute. The court’s analysis of the potential conflict with the defendant’s Sixth Amendment rights was inadequate, as it focused primarily on the rational basis of the law and the state’s interests in protecting rape victims. *Id.* at 816-817. See also *Commonwealth v. Appenzeller*, 565 A.2d 170 (Pa. Super. Ct. 1989) (en banc).

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1           But in the case of a young child, the probative value is heightened and the probability of  
2 prejudice diminished. A jury confronted with evidence that a very young child has described  
3 graphic sexual acts may infer—even without prosecutorial argument—that the only explanation  
4 for such knowledge is that the child’s allegations are true. A prosecutor may even explicitly argue  
5 that the Accused must be guilty, because “how else would a child that young have this  
6 sophisticated sexual knowledge?” Yet if an alternative explanation exists—for example, that the  
7 child learned this information from other sources or sexual activity—then evidence intended to  
8 defuse this inference is highly probative.

9           Moreover, the prejudicial effects of such evidence that arise in adult cases are less likely  
10 to occur in cases involving a young child complainant. A very young child with a sexual history  
11 must, almost by definition, have gained that experience through abuse. In that scenario, it does not  
12 seem likely that a jury will discount the child’s credibility or worthiness of protection on the basis  
13 of a prejudicial inference akin to that which can arise in the adult context. A jury is unlikely to  
14 reason that, because a five- or 10-year-old child was previously abused, the child deserved to be  
15 abused again. Similarly, where the evidence relates to childhood games engaged in consensually,  
16 such evidence seems unlikely to evoke the kind of forbidden biases that might arise with respect  
17 to an older child (for example, that the child is of unchaste character).

18           Instead, to the extent that the jury may consider such information in resolving credibility  
19 questions, the inferences drawn are likely to be relevant ones. The jury may think that a young  
20 child’s previous abuse or precocious sexual behavior raises concerns about atypical sexual  
21 development that may indicate a child prone to have uncertainty about appropriate sexual contact,  
22 incentives to fabricate, or even a motive to lie about the identity of a perpetrator. All of these  
23 inferences, however, are fair and highly relevant to the defendant’s guilt. In contrast, any adult  
24 complainant presumably has sexual knowledge, and therefore a jury is unlikely to infer from  
25 graphic testimony alone that the adult complainant’s account is true. And conversely, a jury  
26 hearing accusations made by an adult complainant is much more likely to use information about  
27 prior sexual history for impermissible purposes.

28           It is important to observe, however, that the logic of the foregoing analysis fits best with  
29 very young juvenile complainants. They are the victims for whom evidence of prior exposure to  
30 sexual activity is least likely to trigger an impermissible inference of promiscuity. They are also  
31 the class of victims for whom precocious knowledge—not otherwise explained—carries the

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1 strongest risk of improperly bolstering the complainant’s veracity. In contrast, older juvenile  
2 complainants are more likely to be, and to be perceived to be, more sexually sophisticated. As a  
3 result, for this group of complainants, the probabilities are reversed as regards the probative value  
4 and prejudicial effects of evidence relating to prior voluntary sexual behavior. Jurors are likely  
5 less inclined to perceive that precocious knowledge necessarily translates into evidence of abuse,  
6 and more likely to hold prior sexual experience against the complainant in an impermissible  
7 manner. Indeed, the prejudice may be even greater for young adults who choose to be sexually  
8 active, because social disapproval may be especially strong for promiscuity at a young age.

9 To be sure, the precise line between the age at which a complainant’s prior sexual  
10 experience shifts from being least to most prejudicial is far from certain. However, lack of certainty  
11 is not a reason to ignore the contrast in prejudicial impact or to risk admitting evidence likely to  
12 adversely impact the accuracy of the factfinding process. Simply setting an age seems too arbitrary,  
13 given that the presumption for or against admissibility would so abruptly flip. Allowing the  
14 evidence only when prosecutors explicitly raise the inference also seems unjust, given that in many  
15 cases the age of the complainant may speak for itself. At the same time, some standard is  
16 appropriate in order to provide guidance to courts.

17 For these reasons, Section 213.11(1)(b)(iv) is limited to two situations: those in which the  
18 age or cognitive capacity of the complainant raises an implicit inference; and those in which the  
19 prosecutor expressly raises the issue, regardless of the victim’s age or cognitive capacity. Thus,  
20 this subparagraph’s exception to the presumption of inadmissibility applies to *implied* inferences  
21 only in the case of very young children or the cognitively impaired, because even pre-teenagers  
22 are typically assumed to have been exposed to some measure of sexual knowledge through  
23 ordinary cultural channels. But if a prosecutor *expressly* argues that a child gained such knowledge  
24 through the conduct alleged against the defendant, then evidence of an alternative source of such  
25 knowledge is appropriate regardless of the child’s age.

26 The relevant time of inquiry is the time of the complaint and after, because that is the  
27 moment when the child’s expression of sexual knowledge occurs and when the inference might  
28 first be drawn. The age of the child at the time of the assault is less important, since a witness  
29 assaulted at a young age may make a complaint at an older age, but in such a case the jury will  
30 have no reason to assume that the simple capacity to make such allegations (in light of tender  
31 years) supports the complaint.

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1           In addition, the language of this subparagraph affords the court flexibility to make its own  
2 findings based on factors beyond chronological or cognitive age. In determining whether the  
3 inference of precocious knowledge is likely to arise, the court should consider what other evidence  
4 the jury will hear that might successfully rebut the inference, the nature of the alleged conduct, the  
5 language in which the child described it, and the capacity of the proffered evidence to rebut the  
6 inference.<sup>73</sup> For instance, evidence of a prior incident involving fondling would not, without more,  
7 be admissible to explain precocious knowledge in a child alleging more graphic abuse. Courts  
8 should take care not to overlook the potential prejudice of such evidence and to exclude or limit it  
9 accordingly. The court should also take appropriate measures to safeguard the privacy and welfare  
10 of vulnerable juvenile witnesses as to these sensitive matters, including by closing the court or  
11 sealing the record where appropriate.

12 **Illustration:**

13           6.<sup>74</sup> Complainant, an 18-year-old male with serious intellectual disabilities, lives  
14 in a residential care facility. Complainant alleges sexual assault by Accused; Accused says  
15 that the act never occurred. Complainant’s testimony at trial involves a detailed and  
16 sophisticated account of a sexual encounter that would seem unusual for a person with such  
17 a pronounced intellectual disability to recount or fabricate if it had not occurred. Although  
18 the prosecutor does not make that argument explicitly, the jury is likely to infer that such  
19 knowledge is confirmation that Accused did indeed sexually assault Complainant. Accused  
20 seeks to introduce evidence of Complainant’s prior consensual sexual activity and a prior  
21 sexual assault involving other residents at the house, in order to provide an alternative  
22 explanation for Complainant’s sexual knowledge. Section 213.11(1)(b)(iv) does not bar  
23 such evidence if otherwise ruled admissible. Given testimony depicting the graphic sexual  
24 awareness of a seemingly sheltered and cognitively impaired person, Accused’s claim

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<sup>73</sup> See, e.g., *State v. Molen*, 231 P.3d 1047, 1052 (Idaho Ct. App. 2010) (“[T]he relevance of a child’s prior exposure to sexual conduct (either as a victim or as an observer) will depend upon the facts of each case. One important factor is the age of the child when he or she reports and describes the sexual assault. That is, the probative value of evidence of a child’s alternative source of sexual knowledge will ordinarily be inversely proportional to the child’s age, for the younger the child, the stronger the likelihood of a jury inference that the child would be too sexually innocent to have fabricated the allegations against the defendant. As the victim’s age rises, the risk of such an inference will diminish and may evaporate.”).

<sup>74</sup> Loosely based on the facts of *People v. Osorio-Bahena*, 312 P.3d 247 (Colo. Ct. App. 2013).

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1 would have appeared highly implausible, unless evidence providing an alternative source  
2 for Complainant’s sexual sophistication could be introduced.<sup>75</sup>

3 *iii. Rebuttal.* Section 213.11(1)(b)(v) lifts the presumptive bar on sexual-history evidence  
4 when such evidence is “offered to rebut or provide an alternative explanation for evidence,  
5 argument, or other specific circumstances apparent to the trier of fact which suggest that the  
6 defendant’s defense is highly implausible.” This exception differs from Section 213.11(1)(b)(ii),  
7 which allows evidence offered for prior inconsistency or specific contradiction, because it applies  
8 not just to the complainant’s testimonial evidence but to any form of evidence or argument.

9 Just as rape shield aims to ensure that the biases and prejudices of jurors regarding the  
10 sexual history of a complainant do not compromise the integrity of the factfinding process, so too  
11 should such laws not overcorrect so dramatically that they permit either party to capitalize upon  
12 those biases in order to distort truth in the other direction.

13 When the evidence or argument the defendant seeks to rebut is put forward explicitly, the  
14 case for lifting the rape shield and permitting defense use of sexual-history evidence for rebuttal  
15 purposes is compelling.<sup>76</sup>

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<sup>75</sup> The relevance and probative value of such evidence obviously turns in part on Accused’s defense. For instance, if Accused concedes that the sexual act occurred, such evidence loses most if not all of its probative force. But if the presentation of evidence suggests that Complainant has no other exposure to sexual knowledge, then the evidence is highly relevant. Cf. *id.* at 252 (“[B]ecause the court excluded the evidence of an alternative source of knowledge, there was no evidence from which the jury could infer that S.S. had any experience or knowledge of sexuality or the particular kind of sexual contact he described in his testimony other than as a result of an assault by defendant.”).

<sup>76</sup> See Tuerkheimer, *supra* note 31, at 1501; Daniel D. Blinka, *Ethics, Evidence, and the Modern Adversary Trial*, 19 GEO. J. LEGAL ETHICS 1, 22-23 (2006) (“[P]arties may lose the right to exclude evidence by their ‘affirmative strategies.’ . . . The real concern . . . is that evidence that might affect outcome should not be immune from rebuttal.”). See also *Commonwealth v. Harris*, 825 N.E.2d 58 (Mass. 2005) (finding substantial risk of miscarriage of justice and ordering a new trial where “[k]nowing that the rape-shield statute had precluded the defendant from introducing any evidence of the complaining witness’s history of prostitution, the prosecutor attacked the defendant’s theory of consensual sexual intercourse with a prostitute by arguing that there was no evidence that the complaining witness was a prostitute”). As the *Harris* court observed:

Counsel may not, in closing, “exploit[ ] the absence of evidence that had been excluded at his request.” Such exploitation of absent, excluded evidence is “fundamentally unfair” and “reprehensible.” “[A] party’s success in excluding evidence from the consideration of the jury does not later give that party license to invite inferences (whether true or, as in this case, false) regarding the excluded evidence.” As illustrated by the Commonwealth’s motion in limine, the Commonwealth objected to introduction of any evidence that would link the complainant to prior acts of prostitution. Having succeeded in excluding all such

1 **Illustration:**

2 7.<sup>77</sup> Complainant alleges an act of nonconsensual sexual penetration by Accused, a  
3 man. Accused claims the act was consensual. On direct examination, Complainant testifies  
4 that that she is gay. The prosecutor argues that, in light of Complainant’s sexual orientation,  
5 Accused’s claim that the sex was consensual is implausible. Accused proffers evidence of  
6 and seeks to ask Complainant about Complainant’s acts of consensual heterosexual sexual  
7 intercourse within the past year. Assuming such evidence is otherwise admissible,  
8 including applying balancing rules for prejudice and probative value, Section 213.11(1)  
9 does not bar its admission. Although Section 211.11(1)(a)(ii) generally bars specific  
10 instances of a Complainant’s sexual history with a person other than Accused, Section  
11 213.11(1)(b)(v) carves an exception when “offered to rebut . . . evidence, argument, or

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evidence, the prosecutor could not then ask the jury to infer that the absence of such  
evidence meant that the complainant could not be a prostitute.

Id. at 72 (internal citations omitted); *State v. Calbero*, 785 P.2d 157, 161-162 (Haw. 1989) (reversing where the government elicited testimony that the complainant had “never been in that situation” and yet cross-examination to impeach that claim was precluded).

A handful of rape shield statutes codify this principle in broadly worded impeachment or rebuttal clauses. See, e.g., CAL. EVID. CODE § 1103(c)(4) (West 2014) (“If the prosecutor introduces evidence, including testimony of a witness, or the complaining witness as a witness gives testimony, and that evidence or testimony relates to the complaining witness’ sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the prosecutor or given by the complaining witness.”); KAN. STAT. ANN. § 21-5502(c) (West 2013) (“[T]he prosecutor may introduce evidence concerning any previous sexual conduct of the complaining witness, and the complaining witness may testify as to any such previous sexual conduct. If such evidence or testimony is introduced, the defendant may cross-examine the witness who gives such testimony and offer relevant evidence limited specifically to the rebuttal of such evidence or testimony introduced by the prosecutor or given by the complaining witness.”); NEV. REV. STAT. § 50.090 (“[T]he accused may not present evidence of any previous sexual conduct of the victim of the crime to challenge the victim’s credibility as a witness unless the prosecutor has presented evidence or the victim has testified concerning such conduct, or the absence of such conduct, in which case the scope of the accused’s cross-examination of the victim or rebuttal must be limited to the evidence presented by the prosecutor or victim”); TENN. R. EVID. 412(c)(2) (“Offered by the defendant on the issue of credibility of the victim, provided the prosecutor or victim has presented evidence as to the victim’s sexual behavior, and only to the extent needed to rebut the specific evidence presented by the prosecutor or victim”); VA. CODE ANN. § 18.2-67.7(A)(1) (“Evidence offered to rebut evidence of the complaining witness’s prior sexual conduct introduced by the prosecution”); WASH. REV. CODE ANN. § 9A.44.020(4) (West 2013) (“Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim’s past sexual behavior. . .”).

<sup>77</sup> Loosely based on *State v. Williams*, 487 N.E.2d 560 (Ohio 1986).

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1 other specific circumstances ... which suggest that the defendant's defense is highly  
2 implausible.”<sup>78</sup>

3 Section 213.11(1)(b)(v) lifts the rape shield exclusion to allow rebuttal of *implied* as well  
4 as express evidence and argument. To be sure, the room for debate about the applicability of this  
5 exception becomes wider when factually contestable prosecution claims are implied but not  
6 expressly stated. An exception for rebuttal of implied contentions therefore must be framed in  
7 terms of tightly bounded, objective criteria. But the possibility that such criteria may sometimes  
8 generate debatable answers cannot in itself justify a decision to foreclose any judicial inquiry into  
9 the matter at all.

10 Any effort to avoid the need for fact-based judicial assessment on issues of admissibility,  
11 whether under Sixth Amendment doctrine, rape shield principles, or otherwise, is bound to prove  
12 futile.<sup>79</sup> And the alternative of limiting such an exception to *explicit* argument and evidence would  
13 produce bizarre and potentially unconscionable results. Most obviously, an exception applicable  
14 only to express argument or evidence could be easily circumvented by government lines of  
15 questioning or argument carefully framed to suggest but never explicitly assert inaccurate facts or  
16 factually unjustified inferences.<sup>80</sup>

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<sup>78</sup> The proffered evidence does not fall under the exception for specific contradiction because evidence of a person's sexual orientation is not specifically contradicted by evidence they have engaged in sexual acts with persons outside that orientation.

<sup>79</sup> Thus, ambiguity about the scope of such an exception for rebuttal evidence would remain unavoidable, even if the exception were limited to situations involving express prosecution evidence and argument. See, e.g., Tuerkheimer, *supra* note 31, at 1502 n.230 (proposing that such an exception be limited to matters that the prosecution raises expressly, but acknowledging that this approach “leaves room for the continuing influence of [subjective and debatable] judicial deviancy conceptions”).

<sup>80</sup> For example, one court held that when the complainant testified that she had told the defendant she was a virgin, he was not entitled to introduce evidence that she had previously had sex with others. *People v. Kellar*, 571 N.Y.S.2d 144 (1991). The court explained that if the complainant had testified that she *was* a virgin at the time of the incident charged, then the defendant could have introduced that evidence. But because she testified only that she had *told* the defendant she was a virgin, he was not entitled to do so. *Id.* at 145 (“Contrary to defendant’s assertion, the victim did not testify that she was a virgin; rather, she testified that she told defendant during the attack that she was a virgin. As such, [the rape shield exception for rebuttal evidence] does not apply.”).

1 But even in the absence of strategic behavior of this sort, incriminating but factually  
2 erroneous inferences can arise from circumstances presented at trial even when those inferences  
3 are not explicitly argued or expressed.

4 **Illustration:**

5 8.<sup>81</sup> Accused, charged with rape, denies any acts of sexual penetration with  
6 Complainant, who is visibly pregnant at the time of trial. All parties know that the father  
7 is Complainant's boyfriend, not Accused. The prosecutors seek to exclude evidence of the  
8 paternity of Complainant's baby, asserting that they do not intend to argue to the jury that  
9 Accused is the father. Accused seeks to elicit that all parties agree that the father is a person  
10 other than Accused. Section 213.11(1)(b)(v) does not block Accused's evidence, assuming  
11 it otherwise admissible. Even though prosecutors do not plan to explicitly argue that the  
12 pregnancy belied the defendant's claim never to have sexually penetrated Complainant,  
13 they do not need to: In the absence of evidence providing another explanation for  
14 Complainant's condition, the pregnancy, once known to the jury, would have made the  
15 point loudly and clearly.

16 A well-crafted rape shield statute should provide criteria for dealing with such situations.  
17 Where the inference to be rebutted is highly incriminating and unquestionably implied by the

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<sup>81</sup> Loosely based on the facts of *Moore v. Duckworth*, 687 F.2d 1063 (7th Cir. 1982). At the time, Indiana's rape shield law contained no exception that would have made evidence explaining the pregnancy admissible. And because prosecutors had not formally introduced the pregnancy as evidence, the common rape shield exception for evidence offered to provide an alternative explanation for pregnancy, injury, or disease (endorsed in Section 213.11(1)(b)(i)) arguably would be inapplicable as well.

In *Sandoval v. Acevedo*, 996 F.2d 145 (7th Cir. 1993), the court, discussing its earlier ruling in *Moore*, explained its decision upholding the trial court's efforts to conceal the pregnancy as follows:

The trial judge held that the evidence [that the complainant's pregnancy was the result of consensual sex with her boyfriend] was inadmissible under the rape shield statute. We thought this an absurd interpretation of Indiana's rape shield law, but bowed to it because it was the interpretation of the state's highest court. But we added that "the absurdity of the Rape Shield Law cannot be overlooked if it denied [the defendant] a fair trial." However, as the trial judge had employed strenuous and apparently successful efforts to prevent the jury from discovering that the rape victim was pregnant, we concluded that Moore had not been unfairly harmed by the application of the rape shield law, and therefore could not obtain relief under the Constitution.

Id. at 149-150 (quoting *Moore*, 687 F.2d at 1065).

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1 circumstances, fair and accurate adjudication clearly requires affording the defendant the  
2 opportunity to introduce sexual-history evidence inconsistent with the inference. As courts  
3 addressing the issue have repeatedly recognized, the damning inference will do its work even when  
4 the prosecutor does not make it explicit, and the defendant’s opportunity to present rebuttal  
5 evidence cannot be made to turn on whether or not the prosecutor articulates the obvious. In  
6 numerous similar instances, courts confronting the problem of unstated but powerfully  
7 incriminating inferences have held that a defendant must be afforded the opportunity to rebut such  
8 inferences, even though the prosecution may not have called attention to them explicitly.<sup>82</sup>

9 At the same time, an exception that includes the opportunity to rebut both express *and*  
10 *implied* arguments for conviction cannot be so open-ended that the defense can resort to it  
11 whenever it feels that sexual-history evidence would help buttress its case. The crucial predicate  
12 for invoking the rebuttal exception with respect to implied inferences of guilt based on facially  
13 implausible scenarios must be that the fact or inference in question be powerfully incriminating  
14 and unmistakably present given the circumstances of the particular trial, and that the proffered  
15 defense evidence directly meets the implicit claim. Accordingly, the exception to rape shield  
16 afforded in Section 213.11(1)(b)(v) is applicable only in the case of defense evidence offered “to  
17 rebut or provide an alternative explanation for evidence, argument, or other specific circumstances  
18 apparent to the trier of fact which suggest that the defendant’s defense is highly implausible.”

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<sup>82</sup> E.g., *State v. Payton*, 165 P.3d 1161, 1165 (N.M. App. 2007) (“[T]he inference of guilt does not depend on whether the prosecutor expressly raises it”); *State v. Jacques*, 558 A.2d 706, 708 (Me. 1989) (“[T]he lack of sexual experience is automatically [implied] in the case without specific action by the prosecutor,” and therefore the defendant “must be permitted to rebut the inference a jury might otherwise draw that the victim was so naive sexually that she could not have fabricated the charge”); *State v. Howard*, 426 A.2d 457 (N.H. 1981) (same); *State v. Calbero*, 785 P.2d 157, 159-161 (Haw. 1989) (finding error in refusal of court to allow cross-examination, citing rape shield, when complainant testified on direct that she did not know how to handle defendant’s advances because she had “never been in that situation before”; appellate court noted that even absent express argument, the government “injected her past experiences into the trial” for the “purpose of bolstering a necessary element of the offenses charged, to wit: compulsion, and negating the defense of consent”); *State v. Williams*, 487 N.E.2d 560 (Ohio 1986) (finding proffered evidence admissible, despite rape shield, because it was relevant not just to credibility, but to “negate the implied establishment of an element of the crime charged”); *State v. Horton*, 68 P.3d 1145, 1150 (Wash. Ct. App. 2003) (finding that rape shield did not bar introduction of juvenile complainant’s past sexual behavior where “[t]he state opened the subject” by eliciting complainant’s denial to prior intercourse, which thereby “implied that [defendant] had caused the ‘penetrating trauma’ to her hymen”).

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1           The following Illustrations help make clear the situations in which this exception is plainly  
2 appropriate and those to which it cannot credibly extend.

3 **Illustrations:**

4           9. Complainant alleges that Accused, previously a stranger, sexually assaulted  
5 Complainant shortly after they encountered each other at a bar. The prosecution suggests  
6 in closing argument that people do not readily consent to sex with complete strangers, and  
7 accordingly that Accused’s defense is simply not believable. Accused seeks to show that  
8 on several prior occasions, Complainant consented to sex with a stranger shortly after  
9 meeting at a bar. Section 213.11(1)(b)(v) does not prohibit Accused from introducing the  
10 evidence to rebut the prosecution’s express argument.

11           10. Same facts as in Illustration 9, except that the prosecution makes no argument  
12 suggesting that consent to sex with a stranger is inherently unlikely. Accused nonetheless  
13 contends that this assumption will be implicit in the minds of the jurors and accordingly  
14 that they will infer that Accused’s claim of consent is implausible. Although there is  
15 nothing inherently illogical in Accused’s contention, it is not convincing. The prevalence  
16 of casual, consensual sex in such situations is well known. As an empirical matter, it is not  
17 credible to contend that a contemporary jury would consider consent under such  
18 circumstances to be “highly implausible.” Section 213.11(1)(b)(v) therefore would block  
19 Accused’s rebuttal evidence.

20           In connection with Illustrations 9 and 10, it is worth observing that the result does not on  
21 any view of the matter depend on a *judge’s* conception of whether the sexual history at issue is  
22 aberrational or whether it shows that the complainant has a propensity to engage in similar acts  
23 with other individuals. A number of controversial decisions have turned on assessments of this  
24 kind, and commentators have rightly observed that such conclusions are not only inappropriate but  
25 also well outside the ken of the judiciary.<sup>83</sup> The relevant judgment to be made is simply a  
26 pragmatic, largely empirical assessment of whether the jury at the trial in question is likely to  
27 consider consent to the acts at issue to be highly implausible, and if so, whether that jury

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<sup>83</sup> Tuerkheimer, *supra* note 31, at 1476, 1487 (noting that “[j]udicial intuitions surrounding sexual patterns are highly suspect” since “judges must simply rely on their hunches,” and yet “judges’ personal experience hardly allows for fair extrapolation”).

1 presupposition (contrary to fact in the case of the present complainant) can be cured through trial-  
2 management tools that do not intrude into the sexual history of the particular complainant.

3 **Illustration:**

4           11. Complainant alleges that Accused and another person offered Complainant a  
5 ride home from the bar where they met, but instead drove Complainant to a remote location  
6 where they slapped and tied down Complainant, and then forced Complainant to perform  
7 a variety of sex acts. Accused seeks to admit evidence of Complainant’s prior history of  
8 voluntarily consenting to participate in sadomasochistic encounters of this kind with other  
9 persons that Complainant had just met. Accused argues that such evidence is necessary  
10 because otherwise the jury will consider it inherently implausible that anyone would  
11 consent to such treatment. Because the alleged circumstances are inherently coercive, and  
12 because Accused does not dispute most of the seemingly coercive details, many jurors  
13 would assume that Accused’s claim of consent to the encounter is intrinsically implausible.  
14 If so, the case for permitting rebuttal evidence becomes particularly strong. In this instance,  
15 moreover, curative instructions might be inadequate. An arid instruction that some people  
16 do consent to sadomasochistic sex is unlikely to overcome the jury’s assumption that the  
17 admitted facts are on their face compellingly forcible and that few individuals engage in  
18 such activity voluntarily. Section 213.11(1)(b)(v) does not bar Accused from introducing  
19 that rebuttal evidence. Rather, a judge may make an admissibility determination applying  
20 general principles of relevance and prejudicial versus probative value, which is likely to  
21 include a finding as to whether the acts are so substantially similar to those alleged in the  
22 present case that they constitute relevant, responsive evidence not outweighed by the strong  
23 likelihood of prejudice.<sup>84</sup>

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<sup>84</sup> Compare *Gagne*, discussed at text accompanying notes 211-212. In *Gagne*, a case involving allegations of brutality similar to those presented in Illustration 4, several judges concluded (in accord with the result reached in this Illustration) that exclusion of the evidence was improper and indeed unconstitutional. The judges who disagreed emphasized that the conduct alleged was especially brutal and that the defense proffer (as they read it) did not suggest that the sexual history to be introduced was sufficiently similar in this crucial respect.

In *Winfield v. Commonwealth*, 301 S.E.2d 15 (Va. 1983), the court considered evidence regarding the complainant’s “distinctive pattern of past sexual conduct, involving the extortion of money by threat after acts of prostitution, of which her alleged conduct in this case was but an example.” *Id.* at 20. Finding such evidence admissible notwithstanding the state’s rape shield statute, the court observed that there must

1           *iv. Constitutional Exception.*

2           The constitutional exception is the one exception to a rape shield statute about which there  
3 can be no argument. Even if not explicitly written, it is obviously required. Inclusion of an  
4 exception ensures that the statute will not be overturned for facial invalidity and encourages courts  
5 regarding their duty to remain mindful of the defendant’s constitutional rights. The language of  
6 the exception is most strongly associated with *Crane v. Kentucky*<sup>85</sup> and is a common expression  
7 of the defendant’s rights under the Due Process, Compulsory Process, or Confrontation Clauses.<sup>86</sup>

8           **3. Sexual Conduct of the Defendant**

9           In 1994, Congress amended the Federal Rules of Evidence to permit prosecutors to  
10 introduce evidence of the defendant’s prior acts of a similar nature in sexual-assault cases. The  
11 new rules, Federal Rules of Evidence 413 and 414, displaced—for sexual-assault cases involving  
12 adult and child victims, respectively—the general rules on character evidence.<sup>87</sup> These rules allow  
13 prosecutors to introduce in cases of sexual assault, “evidence that the defendant committed any  
14 other [sex offense, which] may be considered on any matter to which it is relevant.”<sup>88</sup> They do not  
15 distinguish among prior-misconduct evidence that resulted in conviction, that resulted in acquittal,  
16 or that was never charged or previously brought to light; misconduct in all these categories is  
17 admissible.<sup>89</sup> Rules 413 and 414 therefore depart dramatically from the general rule that character  
18 evidence is inadmissible to prove propensity (behavior in conformity therewith).<sup>90</sup>

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be a “sufficient nexus” between the prior behavior and the disputed case. *Id.* at 21.

<sup>85</sup> *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

<sup>86</sup> *Id.* at 691.

<sup>87</sup> See *United States v. Mound*, 149 F.3d 799, 802 (8th Cir. 1998) (“[T]here is no inherent error in admitting under Rule 413 evidence that would be inadmissible under Rule 404(b): that is the rule’s intended effect.”).

<sup>88</sup> FED. R. EVID. 413, 414 (2012).

<sup>89</sup> Jason L. McCandless, *Prior Bad Acts and Two Bad Rules: The Fundamental Unfairness of Federal Rules of Evidence 413 and 414*, 5 WM. & MARY BILL RTS. J. 689, 699 (1997). However, Rules 413 and 414 do not displace the usual requirement (Rule 403) that evidence is inadmissible when its probative value is substantially outweighed by its prejudicial effect. *United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998) (“The legislative history ... indicates that the district court must apply Rule 403 balancing and may exclude such evidence in an appropriate case.”).

<sup>90</sup> *Michelson v. U.S.*, 355 U.S. 469, 475-476 (1948); FED. R. EVID. 404.

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1           The provisions permitting admissibility for prior sexual acts of the defendant have been  
2 much more controversial than those related to the complainant’s history. The animating principle  
3 behind the rules is that in cases of sexual assault, “evidence of other sexual assaults is highly  
4 relevant to prove propensity to commit like crimes, and often justifies the risk of unfair  
5 prejudice.”<sup>91</sup> Yet in its report to Congress opposing the proposed rule, the Judicial Conference’s  
6 Advisory Committee on Evidence Rules echoed the traditional concerns about character evidence  
7 and voted against the rule, noting “the highly unusual unanimity of the members of the Standing  
8 and Advisory Committees, composed of over 40 judges, practicing lawyers, and academicians, in  
9 taking the view that [Rules 413 and 414 are] undesirable. Indeed, the only supporters . . . were  
10 representatives of the Department of Justice.”<sup>92</sup> Nevertheless, Congress enacted the provisions as  
11 drafted.

12           The majority of jurisdictions have not adopted the federal rules applicable to adult victims,  
13 either as a matter of common law<sup>93</sup> or statute.<sup>94</sup> But a majority of states do permit evidence of

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<sup>91</sup> *Enjady*, 134 F.3d at 1431 (citing 140 Cong. Rec. H8968–01, H8992 (S. Molinari, Aug. 21, 1994)). A tripartite rationale behind the rule has also been reported as: “first, the need to detect a propensity to commit sexual assault; second, the improbability that a rape defendant would be mistakenly accused; and third, the importance of additional evidence given the difficulty with credibility determinations in rape cases.” Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 568 (1997) (emphasis added).

<sup>92</sup> 159 F.R.D. 51, 53 (Feb. 9, 1995).

<sup>93</sup> Rule 413 is a codification of the “depraved sexual instinct” rule known to several States’ common law.

<sup>94</sup> According to one recent survey, roughly 11 states have adopted rules analogous to Federal Rules 413 and 414. Basyle J. Tchividjian, *Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions*, 39 AM. J. CRIM. L. 327, 342 (2012) (citing statutes). See also ARK. CODE ANN. § 16-42-103(a) (West 2012) (“[E]vidence of the defendant’s commission of another sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant, subject to the circuit court’s consideration of the admissibility of any such evidence under Rule 403 of the Arkansas Rules of Evidence.”); LA. CODE EVID. ANN., art. 412.2(A) (2012) (“[E]vidence of the accused’s commission of another crime, wrong, or act involving sexually assaultive behavior or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403.”); NEB. REV. STAT. § 27-414(1) (2012) (“[E]vidence of the accused’s commission of another offense or offenses of sexual assault is admissible if there is clear and convincing evidence otherwise admissible under the Nebraska Evidence Rules that the accused committed the other offense or offenses. If admissible, such evidence may be considered for its bearing on any matter to which it is relevant.”); 12 OKLA. STAT. ANN., tit. 12, § 2413(A) (2012) (“[E]vidence of the defendant’s commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.”).

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1 prior sexual misconduct in sexual-assault cases involving children. One recent study counts 34  
2 jurisdictions that provide a route for admission of a defendant’s prior sexual abuse of a child as  
3 propensity evidence.<sup>95</sup> The remainder of jurisdictions analyze such evidence through generally  
4 applicable character rules, such as Federal Rule 404(b).<sup>96</sup>

5 The standard for determining the admissibility of a defendant’s sexual history under  
6 Section 213.11(2) differs from the standard for determining the admissibility of a complainant’s  
7 sexual history under Section 213.11(1). In the latter case, the evidence is subject to stringent rules  
8 of exclusion, with only narrow exceptions, for reasons discussed above.<sup>97</sup> In the former case,  
9 admissibility is determined by ordinary rules of evidence, which typically impose less rigorous  
10 rules of exclusion. In general, the ordinary rules of evidence will exclude evidence of a defendant’s  
11 prior sexual misconduct when offered to prove propensity but not when offered for a wide range  
12 of other purposes—for example, when offered to impeach the credibility of a defendant who  
13 testifies at trial or to show motive, opportunity, absence of mistake, identity, or common scheme  
14 or plan.

15 Advocates of Rules 413 and 414 nonetheless argue that the pertinent rules of evidence  
16 should afford even wider opportunity for admissibility in the case of evidence concerning the prior  
17 sexual history of the defendant. They note that cases of sexual assault are often credibility contests,  
18 and argue that evidence bolstering the victim’s claims is especially important and should be  
19 allowed.<sup>98</sup> Critics, however, make a far stronger case. First, it is notable that the federal rules have  
20 garnered little support either in the states or in the professional and academic community. In

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<sup>95</sup> Basyle J. Tchividjian, *Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions*, 39 AM. J. CRIM. L. 327, 343 (2012). See also IND. CODE ANN. § 35-37-4-15 (West 2012) (“[E]vidence that the defendant has committed another crime or act of child molesting... (1) against the same victim; or (2) that involves a similar crime or act of child molesting or incest against a different victim; is admissible.”); MO. ANN. STAT. § 566.025 (West 2012) (“[E]vidence that the defendant has committed other charged or uncharged crimes of a sexual nature involving victims under fourteen years of age shall be admissible for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he or she is charged unless the trial court finds that the probative value of such evidence is outweighed by the prejudicial effect.”).

<sup>96</sup> Tchividjian, *supra* note 95, at 343.

<sup>97</sup> See Comment to Section 213.11(1) & Reporters’ Note.

<sup>98</sup> 140 CONG. REC. H8968-01, at H8991 (Aug. 21, 1994) (Statement of Rep. Molinari) (stating that newly admissible evidence is “frequently critical in ... accurately deciding cases that would otherwise become unresolvable swearing matches”).

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1 addition to the near-unanimity of the Judicial Conference in rejecting the rule, the American Bar  
2 Association likewise voted against these provisions.<sup>99</sup> The 1999 revisions to the Uniform Evidence  
3 Rules also rejected similar proposals.<sup>100</sup>

4 In the specific context of child sexual assault, there appears to be broader receptiveness to  
5 evidence of this nature both within state evidentiary codes<sup>101</sup> and in retention of common-law ideas  
6 of “lustful disposition.” In many states, such evidence may be admitted via judicial relaxation of  
7 the Rule 404(b) standard for prior bad acts.<sup>102</sup>

8 Nonetheless, the core cases warranting admission of prior assaults are already covered by  
9 traditional evidence rules, which permit introduction of evidence of prior acts for purposes other  
10 than proving propensity.<sup>103</sup> To the extent that federal Rules 413 and 414 exceed even a generous  
11 interpretation of this principle, they admit evidence with insufficient safeguards for reliability,  
12 invite “mini trials” on collateral issues, and prejudice defendants who already may be vulnerable  
13 to false accusation or mistaken identification. The federal rules also presuppose that sex offenders  
14 are uniquely inclined to high rates of recidivism, even though the empirical evidence is less  
15 clear.<sup>104</sup> As the Judicial Conference of the United States noted in its report opposing Rules 413  
16 and 414:

17 [T]he new rules, which are not supported by empirical evidence, could diminish  
18 significantly the protections that have safeguarded persons accused in criminal  
19 cases and parties in civil cases against undue prejudice. These protections form a  
20 fundamental part of American jurisprudence and have evolved under long-standing

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<sup>99</sup> American Bar Association Criminal Justice Section Report to the House of Delegates, Perspectives on Proposed Federal Rules of Evidence 413-415, 22 FORDHAM URB. L.J. 343 (1995).

<sup>100</sup> Uniform Rule of Evidence (1999), introductory note.

<sup>101</sup> See generally Tchividjian, *supra* note 95, at 343-344 (“All in all, approximately thirty-three states and the District of Columbia have adopted some basis in which evidence of a defendant’s prior sexual abuse of a child can be admissible as propensity evidence.”).

<sup>102</sup> David P. Bryden & Roger C. Park, “*Other Crimes*” Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 540-549 (1994) (describing use of 404(b) exceptions to admit such testimony).

<sup>103</sup> These exceptions are exemplified by Federal Rule of Evidence 404. See generally Tchividjian, *supra* note 95, at 343-344.

<sup>104</sup> See generally James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95 (1994) (exhaustively cataloging and critiquing proffered reasons for rule).

1 rules and case law. A significant concern identified by the committee was the  
2 danger of convicting a criminal defendant for past, as opposed to charged, behavior  
3 or for being a bad person.<sup>105</sup>

4 Moreover, the federal rules arguably reinforce a stereotype that typical sexual offenders  
5 are “deviant,” and this stereotype in turn runs the risk of diminishing the likelihood of prosecution  
6 of suspects who do not meet that image. As Katharine Baker has argued with respect to federal  
7 Rule 413, the rule (a) unjustly treats as indistinguishable the many distinct kinds of rape; (b) singles  
8 out rapists for special treatment, thereby wrongly suggesting that rapists are a small, distinctly  
9 depraved group of offenders rather than, more accurately, a broad and diffuse group of otherwise  
10 ordinary men; and (c) perpetuates empirically contested assumptions that rape offenders are  
11 distinctively more prone to recidivism.<sup>106</sup> In short, she argues, the premises on which the rule rests  
12 cannot be convincingly supported.<sup>107</sup>

13 Section 213.11(2) reflects the judgment that special rules of admissibility should be  
14 strongly supported by empirical or other evidence and that this standard has not been met in the  
15 case of Rule 413 or 414. In accord with the assessment of the Judicial Conference, the American  
16 Bar Association, most states, and scholarly commentary, Section 213.11(2) endorses the view that  
17 the special rules of admissibility reflected in Rules 413 and 414 are unsound and should not be  
18 endorsed in the Model Code.

#### 19 **4. Testimony Outside of the Courtroom**

20 Although the judicial process is likely difficult and unpleasant for every sexual-assault  
21 complainant, special concerns arise with regard to juvenile victims. Historically, courts considered  
22 children incompetent to testify, and as a result few cases involved juvenile complainants.<sup>108</sup> Today,

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<sup>105</sup> 159 F.R.D. at 53.

<sup>106</sup> Id. See also Patrick A. Langan et al., *Recidivism of Sex Offenders Released from Prison in 1994*, Bureau of Justice Statistics, at 2 (Nov. 2003) (tracking 9691 sex offenders released from prison in 1994 for three years, and reporting that “[c]ompared to non-sex offenders released from state prison, sex offenders had a lower overall rearrest rate” of 43 percent versus 68 percent); see also Baker, *supra* note 91, at 578 (citing older Bureau of Justice Statistics study and noting that “[o]nly homicide had a lower recidivism rate than rape”).

<sup>107</sup> Baker, *supra* note 91, at 564-565.

<sup>108</sup> See, e.g., Myrna S. Raeder, *Enhancing the Legal Profession’s Response to Victims of Child Abuse*, 24 CRIM. JUST. 12, 13 (2009) (noting that, before the 1974 passage of the Child Abuse Prevention and Treatment Act, “very few child sexual abuse cases were investigated, let alone prosecuted” and yet by 1997, “child victims made up ... 71 percent of all sex crime victims” reported to police).

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1 child victims and witnesses receive special care and attention in many jurisdictions, both to protect  
2 them from the harshness of the judicial process and to attend to their particular susceptibility to  
3 improper suggestion or influence.<sup>109</sup>

4 A federal statute passed in 1990 provides special protection to juvenile complainants, who  
5 are considered a particularly vulnerable class of witness. The law illustrates some of the procedural  
6 and evidentiary mechanisms employed to lessen the harshness of the judicial experience for child  
7 victims. For example, the law allows for alternatives to live testimony, including two-way closed-  
8 circuit testimony<sup>110</sup> or videotaped depositions.<sup>111</sup> It also provides a right for a child to have the  
9 presence of an “adult attendant” in “close physical proximity” or even in contact with the child at  
10 the time of testimony.<sup>112</sup> Among other things, the statute also outlines procedures for the  
11 determination of competency, the protection of privacy, the closing of the courtroom during a  
12 child’s testimony, the preparation of victim-impact statements, the appointment of guardians ad  
13 litem, and provisions for speedy trial and the stay of civil actions.

14 The in-court testimony experience is especially stressful for children.<sup>113</sup> “Often children  
15 are incompetent to testify or [are] easily confused during cross-examination. As a result, the child

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<sup>109</sup> Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1283-1285 (2005) (recounting recent high-profile cases of false accusation of child abuse, along with “body of research” showing that “young children are more susceptible to suggestion”).

<sup>110</sup> 18 U.S.C. § 3509(b). This procedure is authorized if a court finds that the child is unable to testify because of fear, that the child will suffer emotional trauma from testifying, that the child suffers from mental or other illness, or that the defendant or defense counsel caused the child to stop testifying. Findings must be made on the record. The government, defense attorney (other than a pro se defendant) shall be present; the child’s attorney or guardian, technical personnel, a judicial officer, and anyone else for the welfare of the child may also be present. The judge is to remain in the courtroom with the jury, and the defendant must have a means of contemporaneous communication with counsel. See also Closed-Circuit Television & Recording Technology for Use in Child Abuse Cases, American Bar Ass’n, available at [http://www.americanbar.org/groups/child\\_law/what\\_we\\_do/projects/cctv.html](http://www.americanbar.org/groups/child_law/what_we_do/projects/cctv.html) (last visited Apr. 17, 2014).

<sup>111</sup> 18 U.S.C. § 3509(c) (2012). Depositions are available if a court finds that the child is “likely to be unable to testify” at trial substantially for the reasons given in the footnote above. The defendant is entitled to all trial rights at the deposition, although a two-way closed-circuit proceeding is available if the inability to testify is due to the defendant’s presence. If at any time during trial the child is unavailable to testify, the statute provides for the admission of the videotape.

<sup>112</sup> 18 U.S.C. § 3509(i).

<sup>113</sup> For general background on these issues, including issues of child development, memory, and suggestibility, see JOHN E.B. MYERS, MYERS ON EVIDENCE OF INTERPERSONAL VIOLENCE: CHILD MALTREATMENT, INTIMATE PARTNER VIOLENCE, RAPE, STALKING, AND ELDER ABUSE § 1 (5th ed. 2011).

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1 is often unable to recall crucial details or unable to relate those details to the jury.”<sup>114</sup> Children also  
2 may be unable to overcome the intimidation of the judicial process and face-to-face confrontation  
3 with the defendant. To alleviate some of the pressures of criminal processes, legislatures have  
4 enacted laws that soften the experience for child victims. These provisions take two forms: one  
5 allows for closed-circuit testimony at the time of trial or for video depositions, and the other  
6 provides for consolidation of complaint intake via interviews at Child Advocacy Centers (CACs).

7 Virtually all jurisdictions (49 states and the federal courts) now have legislation regarding  
8 the use of closed-circuit television when supported by strong public-policy concerns.<sup>115</sup> The  
9 Illinois Constitution previously guaranteed the right to face-to-face confrontation of witnesses at  
10 trial,<sup>116</sup> but it was subsequently amended to permit closed-circuit television in these types of  
11 cases.<sup>117</sup> In closed-circuit situations, defense counsel and the prosecutor are typically in another  
12 room with the witness, where the direct examination and cross-examination are conducted. The  
13 judge may remain in the courtroom or join counsel in the remote location. The jury and the  
14 defendant stay in the courtroom and are able to watch the proceedings live; the defendant may  
15 communicate contemporaneously with counsel. However, unlike a two-way closed-circuit  
16 situation, the child’s testimony is taken one-way—that is, blocked from face-to-face confrontation  
17 with the defendant. The deposition procedure is similar, except that the deposition typically takes  
18 place prior to and outside of the courtroom trial.

19 CAC interviews are different in crucial respects.<sup>118</sup> Child Advocacy Centers are places in  
20 which multidisciplinary teams of social workers, medical officials, and child psychologists may

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<sup>114</sup> Todd H. Neuman, *Student Work, A Child’s Well Being v. A Defendant’s Right to Confrontation*, 93 W. VA. L. REV. 1061, 1062 (1991) (internal footnotes omitted).

<sup>115</sup> The District of Columbia does not have a statute authorizing its use, but the highest court has accepted it in practice. *Hicks-Bey v. United States*, 649 A.2d 569, 575 (D.C. Ct. App. 1994) (“In sum, there is no hint in *Craig* that, to satisfy the Confrontation Clause, a court cannot permit a closed circuit television procedure for a child witness in the absence of an authorizing statute. All that is required is trial court findings reflecting compliance with the three ‘necessity’ criteria specified in *Craig*...”). Research failed to produce either a case or a statute from Maine authorizing testimony by closed-circuit television.

<sup>116</sup> *People v. Fitzpatrick*, 633 N.E.2d 685 (Ill. 1994).

<sup>117</sup> *People v. Dean*, 677 N.E.2d 947, 953 (Ill. 1997) (holding that the constitutional amendment deleting “face to face” language did not apply retroactively).

<sup>118</sup> Some states provide both for a deposition-style interview, at which defense counsel would be present, as well as for more traditional CAC procedures. See, e.g., IND. CODE ANN. § 35-37-4-6(f) (West 2010) (“If a protected person is unavailable to testify at the trial...a statement or videotape may be admitted in evidence under this section only if the protected person was available for cross-examination: (1) at [a

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1 interview a child extensively as first responders in order to ascertain what happened in a  
2 streamlined and child-friendly space.<sup>119</sup> CACs not only begin a process of treatment and healing  
3 for an abused child, but also often serve a critical forensic role in establishing the account of the  
4 offense that will serve as a basis for prosecution. Most pertinently, neither defense counsel, the  
5 defendant, nor the judge is present, but the prosecutor or law-enforcement personnel may  
6 participate either actively or passively. Typically, CACs conduct a videotaped forensic interview  
7 of a child that later may play an evidentiary role at trial.

8 Some states have carved out special hearsay exceptions applicable to child testimony, or  
9 for complainants in abuse or sexual-offense cases, in order to allow for admission of evidence such  
10 as a CAC tape if a child is later incapable of testifying because of fear or intimidation. The  
11 provision from Washington, the first state to enact such a statute, offers a good illustration:

12 A statement made by a child when under the age of ten describing [sexual or  
13 physical abuse], not otherwise admissible by statute or court rule, is admissible  
14 in...criminal proceedings...if...[t]he court finds, in a hearing conducted outside the  
15 presence of the jury, that the time, content, and circumstances of the statement  
16 provide sufficient indicia of reliability; and (2) The child either: (a) Testifies at the  
17 proceedings; or (b) Is unavailable as a witness: PROVIDED, That when the child  
18 is unavailable as a witness, such statement may be admitted only if there is  
19 corroborative evidence of the act.<sup>120</sup>

20 Other states rely upon traditional hearsay doctrines, such as the excited-utterance exception, the  
21 medical-diagnosis-or-treatment exception, or general “catch-all” provisions to admit child hearsay  
22 statements without bringing the child victim into court.

23 A majority of jurisdictions (39 states and the federal courts) allow for the admission of  
24 such videotaped interviews with juvenile witnesses, at the discretion of the court, with statutory  
25 guidance.<sup>121</sup> Factors that courts may be required to consider before admitting videotaped  
26 interviews include:

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hearing out of the presence of the jury]; or (2) when the statement or videotape was made.”).

<sup>119</sup> See generally Nancy Chandler, *Children’s Advocacy Centers: Making a Difference One Child at a Time*, 28 *HAMLIN J. PUB. L. POL’Y* 315 (2006).

<sup>120</sup> WASH. REV. CODE ANN. § 9A.44.120.

<sup>121</sup> See, e.g., 725 *ILL. COMP. STAT. ANN.* 5/115-10 (West 2013) (describing exception to the hearsay rule admitting statements as substantive evidence, after hearing on reliability, if allegations of a certain

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- 1 • Age of the child witness<sup>122</sup>
- 2 • Maturity of the child witness
- 3 • Nature of the offense
- 4 • Nature of the testimony expected
- 5 • Possible effect that in-person testimony will have on the child witness
- 6 • Whether the child is available to testify at trial

7 Tapes may also be used to bolster the testimony of a child whose credibility is attacked, or to  
8 provide substantive evidence in the event that the child recants.

9 *The Confrontation Clause.* The Sixth Amendment confrontation right is in tension with  
10 both the use of videotaped testimony and the introduction of interviews (whether through  
11 testimonial, documentary, or videotaped evidence) conducted by psychologists and social workers,  
12 especially those specially designated or trained as liaisons to the judicial process.

13 In *Crawford v. Washington*,<sup>123</sup> the Court upended Confrontation Clause doctrine and  
14 overturned *Ohio v. Roberts*,<sup>124</sup> which had previously endorsed an ad hoc standard of reliability as  
15 the test of the Sixth Amendment right, thereby effectively embracing the standard hearsay  
16 exceptions. *Crawford*, in contrast, held that the admission of any testimonial statement of a  
17 nontestifying witness violated the Confrontation Clause and declared that by “replacing categorical  
18 constitutional guarantees with open-ended balancing tests, we do violence to [the Founders’]  
19 design.”<sup>125</sup>

20 Although the full contours of the doctrine remain unclear, *Crawford* and subsequent  
21 rulings<sup>126</sup> suggest that a “testimonial” statement is one made to “state actors involved in a formal,

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nature and victim under the age of 13 at the time of the offense and the taping).

<sup>122</sup> Jurisdictions vary as to the ceiling set for use of alternative procedures, whether videotaped or closed-circuit testimony. The youngest ceiling for videotaped evidence is 12 years old (Delaware, Minnesota, South Carolina, Wisconsin, and Wyoming). Washington’s ceiling is 10 years old and Georgia’s ceiling is 11 years old, but these ceilings apply only to closed-circuit television because those states do not have statutes authorizing videotaped interviews. The oldest ceiling is under 18 years old (Alaska, Rhode Island, and Federal). Nebraska does not set a ceiling, but leaves an assessment of the maturity of the witness up to the discretion of the court. Iowa sets its ceiling at under 18 years old or marriage, whichever is sooner.

<sup>123</sup> 541 U.S. 36 (2004).

<sup>124</sup> 448 U.S. 56 (1980).

<sup>125</sup> 541 U.S. at 67-68.

<sup>126</sup> *Michigan v. Bryant*, 131 S. Ct. 1143 (2011); *Giles v. California*, 554 U.S. 353 (2008); *Davis v.*

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1 out-of-court interrogation of a witness to obtain evidence for trial.”<sup>127</sup> *Crawford* therefore calls  
2 into question a number of the doctrines presently used to ease the burden on child witnesses or to  
3 introduce statements of nontestifying children. However, the Supreme Court has indicated that  
4 statements by children reporting abuse to persons other than law enforcement do not directly  
5 implicate Confrontation concerns.<sup>128</sup>

6 With regard to closed-circuit television, although the Supreme Court in *Maryland v.*  
7 *Craig*<sup>129</sup> held that the Sixth Amendment does not invariably guarantee face-to-face confrontation  
8 with witnesses at trial, *Crawford* may undermine that decision. *Craig* found that the constitutional  
9 right to confrontation may be denied “where ... necessary to further an important public policy  
10 and ... where the reliability of the testimony is otherwise assured.”<sup>130</sup> But *Crawford* clearly  
11 rejected such *ad hoc* balancing of Sixth Amendment interests, as well as the idea that “in certain  
12 narrow circumstances, ‘competing interests, if closely examined, may warrant dispensing with  
13 confrontation at trial.’”<sup>131</sup>

14 Nevertheless, although “*Craig* appears anathema to *Crawford*,”<sup>132</sup> some scholars have  
15 predicted that *Craig* may be saved. For example, Professor Richard Friedman argues that “the two  
16 cases can coexist peacefully,” since “*Crawford* addresses the question of *when* confrontation is  
17 required; *Craig* addresses the question of *what* procedures confrontation requires.”<sup>133</sup> Moreover,

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Washington, 547 U.S. 813 (2006).

<sup>127</sup> *Michigan v. Bryant*, 131 S. Ct. at 1155.

<sup>128</sup> See *Ohio v. Clark*, 135 S. Ct. 2173 (2015) (holding statements by child to teachers, who were mandatory reporters under state law, were nontestimonial).

<sup>129</sup> 497 U.S. 836 (1990). Justice Scalia, a leading architect of the *Crawford* doctrine, dissented in *Maryland v. Craig*. In *Coy v. Iowa*, 487 U.S. 1012 (1988), the Court (Justice Scalia writing) held that a screen that shielded the witnesses from seeing the defendant, but allowed the defendant and jurors to see the witnesses, violated the Confrontation Clause. 487 U.S. at 1021-1022.

<sup>130</sup> *Craig*, 497 U.S. at 850.

<sup>131</sup> *Id.* at 848 (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (internal quotation marks omitted)).

<sup>132</sup> Myrna S. Raeder, *Comments on Child Abuse Litigation in a “Testimonial” World: The Intersection of Competency, Hearsay, and Confrontation*, 82 INDIANA L.J. 1009 (2007) (arguing *Craig* may be distinguishable); Marc C. McAllister, *The Disguised Witness and Crawford’s Uneasy Tension with Craig: Bringing Uniformity to the Supreme Court’s Confrontation Jurisprudence*, 58 DRAKE L. REV. 481, 532 (2010) (positing that *Craig* is overturned).

<sup>133</sup> Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 CATO SUP. CT. REV. 439, 454 (2004) (emphasis in original).

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1 the Court’s apparent focus in *Crawford* is on the absence of cross-examination under oath,  
2 conditions that are both present in the case of closed-circuit or deposition testimony.<sup>134</sup>

3 Finally, as a result of a series of high-profile cases of false accusations of child abuse, some  
4 courts have agreed to conduct pretrial “taint hearings” intended to assess the reliability of the  
5 child’s complaint.<sup>135</sup> Critics complain that such hearings usurp the jury’s role to weigh the  
6 credibility of witnesses and place unfair constraints on government evidence, whereas advocates  
7 point to the demonstrated susceptibility of child witnesses to improper suggestion.

8 Face-to-face confrontation is a cornerstone of our adversarial process, and should remain  
9 the presumed form in which all testimony is taken. For example, since the *Craig* decision in 1990,  
10 research has underscored the special vulnerability of children to suggestibility, and confrontation  
11 may serve a critical role in safeguarding the reliability of the testimony.<sup>136</sup> Nevertheless, empirical  
12 evidence strongly affirms that children forced to give testimony directly before their abusers may  
13 suffer serious emotional harm, and the purposes of the judicial process as a whole are also  
14 compromised if children routinely shut down or refuse to testify.<sup>137</sup> Accordingly, a limited  
15 exception to the presumption of face-to-face confrontation is warranted, and use of closed-circuit  
16 testimony may be appropriate in certain circumscribed situations.

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<sup>134</sup> As the Court remarked in *Bryant*, describing the holding of *Crawford*, “We therefore limited the Confrontation Clause’s reach to testimonial statements and held that in order for testimonial evidence to be admissible, the Sixth Amendment ‘demands what the common law required: unavailability and a prior opportunity for cross-examination.’” *Michigan v. Bryant*, 131 S. Ct. 1143, 1153 (2011) (quoting *Crawford*, 541 U.S. at 68).

<sup>135</sup> See, e.g., *State v. Michaels*, 642 A.2d 1372 (N.J. 1994) (requiring a pretrial taint hearing); see generally Dana D. Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. CAL. L. REV. 2117 (1996). Taint hearings typically occur in two stages: the defendant bears the initial burden to trigger a hearing by producing some evidence of suggestive or coercive techniques, and then the prosecution must prove the reliability of proffered statements and testimony by clear and convincing evidence.

<sup>136</sup> See generally Amye R. Warren & Dorothy F. Marsil, *Why Children’s Susceptibility Remains a Serious Concern*, 65 LAW & CONTEMP. PROBS. 127 (2002) (highlighting six areas in which research contradicts conventional wisdom, including that suggestiveness (1) occurs in older children and not just preschoolers; (2) is not just correlated to leading questions; (3) occurs outside formal interview settings; (4) is effective in children that might otherwise seem resistant to suggestion; (5) is difficult to train against or prevent; and (6) is difficult to purge from interviewers, even with education).

<sup>137</sup> Dorothy F. Marsil, et al., *Child Witness Policy: Law Interfacing With Social Science*, 65 L. & CONTEMP. PROBS. 209, 211 (2002) (“[T]he phenomenon of confrontational stress experienced by children is amply supported by social science evidence.”) (citing studies).

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1           The regime endorsed by Section 213.11(3) remains mindful of the constitutional  
2 standard.<sup>138</sup> Closed-circuit testimony is allowed only for alleged victims under the age of 12 or  
3 those with intellectual disabilities that seriously impair emotional or cognitive capacity. Requests  
4 must be supported by the testimony of the proponent’s expert, who has examined the child and  
5 finds that the child either will suffer serious distress from having to testify in the presence of the  
6 defendant or will be incapable of testifying due to fear. Although the defendant should be afforded  
7 the opportunity to cross-examine that expert in the hearing or present contrary evidence, Section  
8 213.11(3) gives no presumptive right to the defendant to conduct his or her own psychological  
9 examination of the child. Having received all the evidence, the trial court must find on the record  
10 that the child will experience serious distress as a result of having to testify before the defendant;  
11 that this distress will impede the child’s ability to testify; and that out-of-court procedures are  
12 necessary to, and will in fact significantly mitigate, that distress.

13           Section 213.11(3) further states that the judge shall remain in the courtroom with the  
14 defendant and the jury. The prosecuting and defense attorneys will be present in another room with  
15 the child witness, along with technical personnel, court reporters, and a guardian or support person  
16 for the child. The method of communication must permit all the remote observers to see and hear  
17 clearly the witness and both defense and prosecuting attorneys. In addition, the defendant must  
18 have a means of contemporaneous, private communication with counsel that is effective and not  
19 disruptive, such as through instant message or private microphone.

20           The determination that the judge ought to stay in the courtroom with the defendant and  
21 jurors was made after weighing several competing concerns. On the one hand, there is a strong  
22 need for the judge to be personally present in the place where the testimony is actually given in  
23 order to oversee the flow of the proceedings, to rule promptly on motions, and to observe firsthand  
24 any alleged improprieties. On the other hand, there are compelling reasons to require the judge to  
25 remain in the courtroom, including that he or she must ensure that the technology operates  
26 smoothly in order to fully safeguard the rights of the defendant and the integrity of the factfinding

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<sup>138</sup> *Craig*, 497 U.S. at 855 (“The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than ‘mere nervousness or excitement or some reluctance to testify. . . .’” (citations omitted)).

1 process. Moreover, placing the judge in the satellite location may also be unintentionally viewed  
2 as an endorsement of the complainant’s credibility, by suggesting that the judge is in effect  
3 vouching for the concerns that prevented the complainant from confronting the defendant directly.  
4 Given that other observers, including opposing counsel, will be in the room with the witness and  
5 thus will be able to raise any concerns or improprieties, Section 213.11(3) requires the judge to  
6 remain in the courtroom in order to minimize the isolation of the defendant and jury from what is  
7 likely to be the most crucial portion of the proceeding.

8 Finally, the language of Section 213.11(3) also indicates that it may apply not just to  
9 juvenile complainants, but also to a juvenile witness who is an alleged victim of the defendant.  
10 Thus, for instance, if a court admits prior-bad-acts evidence under Rule 404(b) or a state  
11 equivalent, the prosecution may avail itself of these procedures if necessary to enable a juvenile  
12 witness-victim to present such evidence.

13 As regards the admissibility of videotaped interviews and other prior statements made by  
14 children in the course of the investigation, the *Crawford* doctrine properly bars the admission of  
15 such statements.

## 16 **5. Initial Complaints**

17 The fresh-complaint doctrine arose in response to concern that jurors mistrust the  
18 testimony of a complaining witness when they do not hear evidence that the complainant reported  
19 the incident shortly after its occurrence. Indeed, the common-law “prompt complaint” doctrine  
20 cultivated such expectations, in that “testimony reporting statements made by the victim shortly  
21 after the attack [were] universally admitted to corroborate the victim’s testimony.”<sup>139</sup> Similarly,  
22 corroboration requirements necessitated an evidentiary route for admission of corroborating  
23 reports by victims, resulting in the development of fresh-complaint rules in some jurisdictions.<sup>140</sup>

24 But beginning in the late 1980s and early 1990s, courts began rejecting the “timing myth  
25 as false and the product of gender stereotypes and rape myths”<sup>141</sup> and started eliminating prompt-

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<sup>139</sup> *Commonwealth v. Bailey*, 348 N.E.2d 746, 749 (Mass. 1976), overruled by *Commonwealth v. King*, 834 N.E.2d 1175 (Mass. 2005); see also *People v. Brown*, 883 P.2d 949, 954 (Cal. 1994) (“While such evidence would ordinarily be hearsay, its admission in [rape] cases is justified upon the ground that in such cases, when restricted to the *fact of complaint*, it is in the strictest sense original evidence.” (quotation omitted) (emphasis in original)).

<sup>140</sup> See, e.g., *Burnett v. State*, 225 S.E.2d 28, 29-30 (Ga. 1976) (finding that fresh complaints made by victim met state’s corroboration requirement).

<sup>141</sup> Kathryn M. Stanchi, *The Paradox of the Fresh Complaint Rule*, 37 B.C. L. REV. 441, 448 (1996);

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1 complaint rules as a prerequisite to conviction.<sup>142</sup> Theoretically, then, evidence of a report of rape  
2 should be excluded, since typically “an out-of-court statement that is merely repetitive of a victim’s  
3 trial testimony is not admissible as part of the case-in-chief.”<sup>143</sup>

4 Tension thus arose between juror expectations and the general principles of evidence. The  
5 latter hold that “[t]he testimony of a witness may never be corroborated by proof that the witness  
6 made the same statement of facts on another occasion when not under oath.”<sup>144</sup> Yet jurors arguably  
7 expect such testimony. Even absent explicit argument by the defense, they may assume “in the  
8 absence of evidence of complaint ... that none was made” and as a result may unjustifiably  
9 disbelieve the complainant’s claim.<sup>145</sup> Accordingly, some jurisdictions crafted exceptions to their  
10 ordinary rules of evidence to permit the government in its case-in-chief to introduce testimony  
11 regarding the out-of-court statements of a complainant alleging that a sexual assault was  
12 committed, whether through the testimony of the complainant or from witnesses to those  
13 statements.<sup>146</sup> Such exceptions appear unique to the context of sexual assault,<sup>147</sup> even though the  
14 case for such exceptions presumably could be made in other contexts as well.

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see also *State v. Hill*, 578 A.2d 370, 378 (N.J. 1990) (explaining rationales underlying the rule, and noting that “[i]f we limit the fresh-complaint rule to the *res gestae* exception to the hearsay rule, allowing the admission of spontaneous or excited utterances, then women who had not complained very shortly after the crime would not be able to have their complaints admitted into evidence”).

<sup>142</sup> See Comment to Section 213.11.

<sup>143</sup> *Bailey*, 348 N.E.2d at 748.

<sup>144</sup> Lt. Thomas J. Hilligan, *The Fresh Complaint Rule*, 18 JAG J. 265, 265 (1964).

<sup>145</sup> *Bailey*, 348 N.E.2d at 749.

<sup>146</sup> See, e.g., *People v. Brown*, 883 P.2d 949, 950 (Cal. 1994) (revising the state’s prompt-complaint doctrine to allow “proof of an extrajudicial complaint, made by the victim of a sexual offense,...for a limited, nonhearsay purpose—namely, to establish the fact of, and the circumstances surrounding, the victim’s disclosure of the assault to others....” Courts differ on whether to consider the testimony admissible as an exception to the hearsay doctrine (such as an excited utterance) or as relevant nonhearsay (such as a prior consistent statement, admissible to rebut an express or implied inference of a motive to fabricate). See generally Michael H. Graham, *Admissibility of Initial Complaint of Sexual Assault or Child Molestation*, 48 No. 5 CRIM. L. BULL. ART 9 (2012). The *Brown* court considered the fact-of-complaint-only testimony to be nonhearsay, but noted that facts-and-details testimony would be indisputably hearsay. 883 P.2d at 950-951.

<sup>147</sup> See *People v. Anthony C.*, 6 Misc. 3d 616, 618 (N.Y. Sup. Ct. 2004) (rejecting defendant’s request for a “prompt outcry” instruction in a robbery case, noting that “the doctrine surely has standing vis-à-vis crimes of a sexual nature, where visceral rather than reasoned reflection is evident” but ducking decision whether to apply the doctrine in a robbery case on ground that testimony would not qualify under the doctrine in any event).

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1           The rules that states have adopted to address this concern have been cast as either “first”  
2 complaint or “fresh” complaint provisions. The difference in terminology points to an important  
3 substantive difference in scope: some courts focus on the “fresh” aspect (i.e., admitting only  
4 reports made shortly after the incident—usually hours or a couple of days at most) while others  
5 emphasize the “first” aspect (i.e., admitting any initial report, regardless of timing). Fourteen states  
6 and the federal courts recognize no special exception and thus exclude both kinds of complaint  
7 testimony.<sup>148</sup> But most jurisdictions (36 states plus the District of Columbia) allow one or the  
8 other. Where recognized, the exception comes in two basic varieties: one that allows witnesses to  
9 testify both to the fact of the complaint and to its details (“fact-and-details”), and another that  
10 allows witnesses to testify only to the fact of the complaint (“facts-only”).<sup>149</sup> The fact-only

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<sup>148</sup> In addition to the federal government, the states are: Arizona, Delaware, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Minnesota, Nevada, New Hampshire, Ohio, Oklahoma, Utah, and Wisconsin. However, these jurisdictions have at times allowed in evidence of a similar nature under ordinary rules of evidence. See, e.g., *Winn v. State*, 829 A.2d 142 (Del. 2003); *State v. Parker*, 730 P.2d 921, 924 (Idaho 1986); *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997); *State v. Randolph*, 408 P.2d 397, 398 (Ariz. 1965); *Lindsey v. State*, 209 S.W.2d 462, 463 (Ark. 1948).

<sup>149</sup> Some states counted in the “facts-and-details” category forbid general testimony about the incident, but allow details relating to identity or the nature of the complaint. See, e.g., *Borchgrevink v. State*, 239 P.3d 410, 422 (Alaska Ct. App. 2010) (“We conclude that ‘first complaint’ evidence may include a victim’s identification of the perpetrator, but we also conclude that a trial judge has the authority, under Evidence Rule 403, to exclude this facet of the victim’s first complaint if it appears likely that the jury will use this information for an improper purpose—*i.e.*, treat it as substantive evidence of the defendant’s guilt.”); *State v. Haworth*, 21 P.2d 1091, 1092 (Or. 1933) (“[T]he witness should not be permitted to tell the particulars of the complaint, still enough may be given in evidence to show the nature of the complaint, even though it involves to some extent the particulars thereof, and . . . the rule is not violated by evidence showing the time and place where the complaint was made, the circumstances under which it was made, [and] the condition of the victim when making the complaint.”); *State v. Harrison*, 113 S.E.2d 783, 785 (S.C. 1960) (“The particulars or details are not admissible but so much of the complaint as identifies the time and place with that of the one charged may be shown.”) (internal quotation marks omitted). Some states permit introduction of the evidence as rebuttal to a charge of fabrication, using an exception apparently broader than the prior-consistent-statement exception typically would be. See, e.g., *State v. Golden*, 336 S.E.2d 198, 203 (W. Va. 1985) (“[T]he rule is intended to allow corroboration of an alleged victim’s testimony, since the unexplained failure to make a prompt complaint of rape may discredit her testimony. Even though evidence of prompt complaint is particularly probative where there is an allegation that the charge was fabricated, to be admissible, such testimony must be introduced in rebuttal.”) (internal citations omitted); *State v. Smith*, 540 S.W.2d 189, 191 (Mo. Ct. App. 1976) (internal citations omitted) (“It is also the general principle that the details of the statements made by the victim in the complaint are not admissible in the first instance. The details are only admissible in rebuttal to rehabilitate the credibility of the witness after testimony establishing extrajudicial statements has been introduced for impeachment purposes.”) (internal citations, quotation marks, and parentheticals omitted).

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1 jurisdictions are in the majority (22 States plus the District of Columbia), while 14 states follow  
2 the facts-and-details approach.<sup>150</sup>

3         The Massachusetts Supreme Judicial Court has played an active role in shaping the  
4 doctrinal evolution of these rules, and thus its opinions over time are illustrative. Under the fresh-  
5 complaint doctrine at the time of *Commonwealth v. Licata*,<sup>151</sup> “an out-of-court complaint  
6 seasonably made by the victim after a sexual assault [was] admissible . . . only to corroborate the  
7 complainant’s testimony [and] a witness [could] testify to the fact of a complaint and also to the  
8 details of the complaint.”<sup>152</sup> In *Licata*, however, the court reexamined this rule and was torn about  
9 its future application. On the one hand, it understood that “many rape victims choose not to  
10 complain at all”<sup>153</sup> and “lack of a fresh complaint in no way implies lack of rape.”<sup>154</sup> On the other  
11 hand, it “recogniz[ed] the unfortunate skepticism that exists [among jurors] as to the truth of  
12 allegations of rape where the victim is perceived as having remained silent.”<sup>155</sup> Despite describing  
13 the origins of the rule as “sexist,” “outmoded,” and “invalid,” the court nonetheless felt compelled  
14 to adhere to it. The court settled on a rule that fresh-complaint evidence is “admissible on the  
15 ground that a victim’s [perceived] failure to make prompt complaint might be viewed by the jury  
16 as inconsistent with the charge of sexual assault and in the absence of evidence of complaint the  
17 jury might assume that none was made.”<sup>156</sup>

18         Just over 10 years later, *Commonwealth v. King*<sup>157</sup> overruled *Licata* and replaced the “fresh  
19 complaint” rule with a “first complaint” rule. Dismissing the relevance of the “freshness,”<sup>158</sup> the  
20 court focused on the “first” aspect, noting that first complaint focuses “on the evidence pertaining

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<sup>150</sup> A ruling in the UK took the principles animating fresh-complaint doctrines one step farther. In *R. v. John Doody* [2008] EWCA Crim 2394, a UK court of appeals held that a judge may instruct the jury that a victim might delay a report of rape due to feelings of shame or embarrassment.

<sup>151</sup> 591 N.E.2d 672 (Mass. 1992), overruled by *Commonwealth v. King*, 834 N.E.2d 1175 (Mass. 2005).

<sup>152</sup> *Licata*, 591 N.E.2d at 673-674.

<sup>153</sup> *Id.* at 674.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* (internal citations omitted).

<sup>157</sup> 834 N.E.2d 1175 (Mass. 2005).

<sup>158</sup> *Id.* at 1190.

1 to the facts and circumstances surrounding the complainant’s *initial* report of the alleged  
2 crime....”<sup>159</sup> Further, its new “first complaint” rule limited such testimony to one witness—the first  
3 person told of the assault. The court reasoned that “the testimony of multiple complaint witnesses  
4 likely serves no additional corroborative purpose, and may unfairly enhance a complainant’s  
5 credibility as well as prejudice the defendant by repeating for the jury the often horrific details of  
6 an alleged crime.”<sup>160</sup> The intention, although not a strict requirement, of the first-complaint rule  
7 was that the witness be *the* first person told of the assault.<sup>161</sup> Under *King*, the witness may testify  
8 both to the fact of the assault and to its details.

9 Commonwealth v. Aviles<sup>162</sup> further modified *King*. Rather than holding the first-complaint  
10 doctrine to be an ironclad rule of admissibility, the court found that the doctrine instead reflects “a  
11 body of governing principles to guide a trial judge on the admissibility of first-complaint  
12 evidence.”<sup>163</sup> In light of the concerns surrounding a first-complaint rule, especially the statements  
13 in *King* regarding corroborative purpose, the dangers of unfair enhancement of the complainant’s  
14 credibility, and the risk of prejudice to the defense, the court found that judges retain discretion  
15 “to determine the scope of admissible evidence....”<sup>164</sup>

16 Further complicating fresh- and first-complaint doctrine is the existence of ordinary  
17 hearsay doctrines that may be stretched to admit much of the same testimony. Courts have relaxed  
18 the strictness of excited-utterance or *res gestae* rules to embrace complaints of an attack made with  
19 less temporal proximity to the incident,<sup>165</sup> and have admitted (as a prior consistent statement)  
20 testimony concerning an alleged victim’s complaints of an attack made *after* an alleged motive to

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<sup>159</sup> Id. (emphasis added).

<sup>160</sup> Id. at 1197 (“A victim who is not fabricating an assault may tell only one other person of the assault, while a liar may spread the tale widely.”).

<sup>161</sup> Id. at 1198 (“In limited circumstances, a judge may permit the testimony of a complaint witness other than, and in lieu of, the very ‘first’ complaint witness. For example, where the first person told of the alleged assault is unavailable, incompetent, or too young to testify meaningfully....”).

<sup>162</sup> 958 N.E.2d 37 (Mass. 2011).

<sup>163</sup> Id. at 49.

<sup>164</sup> Id.

<sup>165</sup> See, e.g., *State v. Parker*, 730 P.2d 921, 924 (Idaho 1986) (“In sex crime cases, the excited utterance exception often receives broader application than in other cases.”); *State v. Noble*, 342 So. 2d 170, 172-173 (La. 1977) (admitting report made two days after incident); *State v. Randolph*, 408 P.2d 397, 399 (Ariz. 1965) (approving admission of excited utterance made 55 minutes after alleged attack).

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1 fabricate had arisen.<sup>166</sup> In contrast, some jurisdictions with fresh- or first-complaint rules construe  
2 them so strictly as to exclude evidence that would be admitted even in jurisdictions that have no  
3 fresh-complaint provisions.<sup>167</sup>

4 Criticism of the first- and fresh-complaint doctrines comes from both victims' supporters  
5 and defendants'-rights advocates. From the former perspective, both doctrines arguably legitimate  
6 the indefensible belief that "true" sexual-assault victims will want to tell others of their attacks,  
7 either immediately (fresh complaint) or eventually (first complaint). Although in any single case  
8 the purpose of the doctrines is to offset this misconception, the law's willingness to admit such  
9 evidence to bolster the complainant's credibility may, by negative inference, tend to undermine  
10 the credibility of victims who did not immediately report an assault.

11 From the defense perspective, both doctrines are criticized for allowing unnecessary and  
12 arguably prejudicial repetition of the fact, and at times even the details, of the alleged assault. Such  
13 repetition risks unfairly bolstering the complainant's account, especially since the witnesses to the  
14 first or fresh complaint have no special insight into its veracity. Rather than use the first- or fresh-  
15 complaint evidence to offset inaccurate expectations about a "real" victim's likely behavior, the  
16 jury could infer from such evidence that the complainant's account is more likely to be true.

17 Nevertheless, sexual-assault victims continue to endure special scrutiny about their claims.  
18 Jurors may still carry biases that lead them to expect to hear that the complainant promptly reported  
19 the offense to *someone*, especially if the complainant delayed reporting the offense to law-

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<sup>166</sup> See, e.g., *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. Ct. App. 2000) (state rule admitting (as nonhearsay) prior consistent statements of a witness when helpful to credibility applies after a challenge to the witness's credibility, without regard to timing of motive to fabricate). It is not always clear in such cases whether such evidence is received as substantive evidence under an exception to the hearsay rules, such as Federal Rule of Evidence 801(d)(1)(B), or as nonhearsay offered solely to prove consistency, see, e.g., *United States v. Simonelli*, 237 F.3d 19, 25-28 (1st Cir. 2001). Compare *State v. McSheehan*, 624 A.2d 560, 562-563 (N.H. 1993) (finding victim has motive to fabricate as soon as incident allegedly occurs, thus excluding statements made afterward, under a strict interpretation of the temporal requirement of this rule). These rules are further complicated by the Supreme Court's opaque reasoning in *Tome v. United States*, 513 U.S. 150 (1995). However, the Federal Rules of Evidence were recently amended to exclude from the definition of hearsay a prior consistent statement by a declarant-witness that "rehabilitate[s] the declarant's credibility when attacked on another ground." Fed. R. Evid. 801(d)(B)(ii).

<sup>167</sup> See, e.g., *Seagrave v. State*, 768 So. 2d 1121, 1122 (Fla. Dist. Ct. App. 2000) (per curiam) (concluding that, because state's first-complaint doctrine applies only when victim complained at the first opportunity, the 12-year-old victim's report made 10 hours after alleged incident—despite multiple opportunities to raise accusation earlier—did not qualify for admission).

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1 enforcement officials (or did not personally report the offense to officials at all).<sup>168</sup> Jurors may  
2 assume from the absence of testimony about an initial report that no prompt report was made and  
3 that the complainant is therefore less credible.

4 Section 213.11(4) attempts to strike the balance between these competing concerns by  
5 crafting a limited provision of special admissibility for out-of-court statements alleging sexual  
6 assault (subsection (4)(a)), while nonetheless rejecting an approach that accords special treatment  
7 to such statements more generally (subsection (4)(b)).

8 Jurors have a strong interest in learning how an accusation came before the judicial system,  
9 and may legitimately expect to hear about the conditions that prompted an investigation. In  
10 addition, when a report was for some reason delayed, jurors have a legitimate interest in knowing  
11 that the complainant previously made a report to a person other than an official, and perhaps the  
12 circumstances or reasons for any delay. Although delay may indicate lack of truthfulness, many  
13 truthful rape victims have understandable reasons for not immediately reporting an incident to  
14 authorities. To the extent that, in the past, such explanations might have been deemed facially  
15 incredible, because of inaccurate ideas about how “real” rape victims respond, admitting evidence  
16 of the reason for failure to make a prompt *official* report permits jurors to fairly weigh and assess  
17 such evidence.<sup>169</sup> Providing greater context and explanation may also help dislodge jurors from  
18 the erroneous assumption that “delay indicates falsity.” Section 213.11(4)(a) therefore allows the  
19 admissibility of statements regarding the reason for any delay. This rule is also in keeping with the  
20 recent amendment to Federal Rule of Evidence 801(d)(1)(B)(ii), which excludes from the hearsay  
21 bar a witness’s prior consistent statement when offered to rehabilitate.

22 Section 213.11(4)(a) permits evidence concerning the fact of the report and the explanation  
23 for delay or failure to report, but it does not permit evidence concerning the details conveyed by  
24 the complainant. Recitation of the details of the complaint by witnesses with no special knowledge  
25 of the incident is hearsay, and renders the defendant unable to challenge the repetition of the  
26 complainant’s account, except by underscoring the complaint witness’s lack of firsthand  
27 observation. The hearsay rule and the Confrontation Clause both rightly reject this palliative as

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<sup>168</sup> Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 472 (2005) (discussing continued adherence to old views).

<sup>169</sup> Many of the reasons commonly cited by complainants in empirical studies of this question—fear of not being believed, shame, desire to protect an offender who is also an intimate, a belief that law enforcement will not help—are reasons that a contemporary jury can weigh fairly.

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1 intrinsically insufficient. The practice of admitting third-party testimony concerning both facts and  
2 details is therefore indefensible.

3         Moreover, the rule expressly contemplates the first report made to another person, not  
4 every subsequent report. In contrast to jurors' legitimate interest in the timing and circumstances  
5 under which the complainant first brought the incident to the attention of another person, jurors  
6 generally should *not* judge the veracity of a complaint on the basis of the presence or absence of  
7 repeated reports. Admitting testimony about *repetition* of the complaint, particularly to parties  
8 other than law enforcement, at best has minimal added value, while at the same time it presents  
9 considerable risk of confusion and prejudice. Jurors who hear such evidence may speculate as to  
10 why one person was told and not another, even though there is no indication that the number of  
11 persons told of a sexual offense reflects either favorably or unfavorably on whether the incident in  
12 fact took place. Rather than reinforce outdated ideas about how "real" victims behave, the law  
13 should underscore that reporting or failing to report to those other than official authorities has no  
14 bearing on whether the complainant's accusation is true. Section 213.11(4)(b) thus rejects a general  
15 rule of special admissibility for reports, while carving a narrow exception for admitting such  
16 reports when offered to rebut an express or implied argument concerning the failure of the  
17 complainant to make a report.

18         In carving a general rule of special admissibility for first complaints, Section 213.11(4)(b)  
19 does not intend to upset the ordinary application of the rules of evidence. Indeed, by declaring such  
20 reports inadmissible "unless deemed admissible by generally applicable rules of evidence," the  
21 rule leaves undisturbed the admissibility of such evidence under ordinary principles. For example,  
22 reports of an assault may be admissible under the excited-utterances or state-of-mind exceptions,  
23 or may be admissible as prior consistent statements. Section 213.11(4)(b) simply endorses a  
24 *special* rule of admission, embraced by many jurisdictions, for the first complaint alleging a sexual  
25 assault.

26         The sole exception to this general rejection of special treatment rests in the second clause  
27 of subsection (4)(b). Specifically, that subsection allows for admission of reporting or lack-of-  
28 reporting evidence where "offered to rebut an express or implied argument concerning the failure  
29 of the complainant to make a report." This language should be construed broadly, in order to afford  
30 a means to address any implication at trial, by either party, regarding the lack of a report. In its  
31 most straightforward application, the provision clearly comes into play in the event of a defense

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1 claim that the complainant should not be believed because the complainant failed to report the  
2 assault to a logical confidante; it would then allow the prosecution to meet such a claim not just  
3 with evidence that the complainant *did* in fact report to that person, but also with evidence of any  
4 *other* relevant report or of any pertinent explanation for its absence. The rule also extends to  
5 defense arguments that imply or assert that the complainant's *behavior* after the incident did not  
6 comport with common intuitions about how a victimized party would behave; it thus allows the  
7 prosecution to rebut such attacks with evidence that the complainant either reported the incident  
8 to others at that time or had specific reasons for failing to do so.

9 This clause of Section 213.11(4)(b) thus is in concurrence with the Supreme Court ruling  
10 in *Tome v. United States*, as well as the revised Federal Rule of Evidence 801(d)(1)(B)(ii). It  
11 acknowledges that the prosecution may find it difficult to counter the ingrained biases and  
12 expectations of jurors, especially as regards sexual-assault cases, and especially when those biases  
13 are being exploited by the defense.

14 **Illustrations:**

15 12. A student alleges a sexual assault by a teacher. The student tells a friend  
16 immediately after the incident. The student also tells a therapist and several members of a  
17 support group. But the student decides to delay official reporting for a year, out of a desire  
18 to graduate and gain acceptance to graduate school unencumbered by the difficulties that  
19 the student perceives an official accusation would present. After graduation, the student  
20 makes the report and the case eventually goes to trial. At trial, the student testifies about  
21 the assault. Under Section 213.11(4)(a), the student may also testify that the student  
22 reported the assault to the friend (although the student may not repeat the details of that  
23 report). The friend may also testify to corroborate that initial report. Finally, the student  
24 may also testify about the decision to come forward to authorities only a year later.  
25 However, Section 213.11(4)(b) offers no independent grounds for admitting testimony  
26 about the reports to the therapist or support group in the government's case-in-chief. In  
27 order for such evidence to be admissible, it must meet its own admissibility criteria (such  
28 as under the hearsay exception for medical reports).

29 13: Same facts as Illustration 12, except that during the cross-examination, the  
30 defense attorney questions the complainant in a manner intended to undermine the  
31 complainant's credibility by suggesting that the complainant fabricated the assault out of

1 anger at a poor grade in the teacher's course, and that the friend is lying for the complainant.  
2 In such circumstances, Section 213.11(4)(b) would permit introduction of the  
3 complainant's reports to other persons, subject to judicial discretion as to the precise  
4 number and testimony of those witnesses.

### REPORTERS' NOTES

5 Data indicate that sexual offenses remain significantly under-reported and under-  
6 prosecuted.<sup>170</sup> Many victim advocates blame legal actors not just for failing to take seriously the  
7 allegations of accusers, but also for inflicting a secondary trauma upon victims in the form of the  
8 process itself.<sup>171</sup> Many jurisdictions have undertaken a range of reforms, including designating  
9 special sex-offense units in prosecution and police departments, funding advocates to help  
10 shepherd victims through a daunting and complicated process, and reforming evidentiary and  
11 procedural rules to better accommodate the needs of victims.<sup>172</sup>

12 No one can doubt the wisdom of overhauling many outdated and prejudicial criminal-  
13 justice rules. Traditional rules of evidence and procedure did not just discourage victims from  
14 coming forward and pursuing justice for their injuries; they also obscured or even blocked justice  
15 by placing inflammatory and misleading hurdles on the path. At the same time, however, too ready  
16 a willingness to dispense with conventional rules has resulted in miscarriages of justice in the other  
17 direction. For instance, a spate of convictions in daycare sexual-abuse cases in the 1980s, all later  
18 overturned,<sup>173</sup> revealed grave problems with the procedures used to interview highly suggestible  
19 children, arguably exacerbated by the relaxation of rules of confrontation.

20 Moreover, race unfortunately continues to cloud accurate assessments of evidence.  
21 Between 1989 and 2012, 244 individuals condemned for rape or other sexual assault were  
22 officially exonerated after postconviction DNA testing made clear that they had no involvement  
23 in the crime.<sup>174</sup> Yet although only about five percent of all rapes involved black perpetrators and

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<sup>170</sup> See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES, , Substantive Material, Part II.D, Discussion Draft No. 2 (AM. LAW INST. 2015).

<sup>171</sup> See generally ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS (2013).

<sup>172</sup> See generally OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY xii (1998).

<sup>173</sup> DEBBIE NATHAN & MICHAEL R. SNEDEKER, SATAN'S SILENCE: RITUAL ABUSE AND THE MAKING OF A MODERN AMERICAN WITCH HUNT 2-4 (1995) (describing moral panic that led to McMartin preschool case, the conviction of Kelly Michaels, and others).

<sup>174</sup> See Know the Cases, Innocence Project, <http://www.innocenceproject.org/know/> (last visited Mar. 21, 2014). Further details on the sexual-assault cases were provided by Innocence Project Research Director Emily West (Nov. 26, 2012). 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 (Univ. of Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, No.

1 white victims,<sup>175</sup> 53 percent of the misidentifications in adult rape cases involved black defendants  
2 incorrectly identified by a white victim. Indeed, 34 percent of exonerations in adult rape cases—  
3 for any reason—were cases involving misidentification of a black defendant by a white victim.<sup>176</sup>  
4 Evidentiary and procedural reform therefore must consider two conflicting realities: too few  
5 incidents of sexual assault are actually prosecuted, in part because of victims’ concerns about the  
6 legal process itself, and yet sex offenses also remain an area of criminal law in which the danger  
7 of unjust conviction runs high.

8 With this contemporary picture in mind, this Note addresses issues related to procedural  
9 and evidentiary rules that specially operate in the sexual-assault context. It first offers an  
10 explanation for the determination not to include provisions on prompt complaint, corroboration,  
11 and cautionary instructions as found in the 1962 Code. It then turns to the admission of evidence  
12 of a complainant’s prior sexual history. This Note does not address Section 213.11(2) (defendant’s  
13 sexual history), Section 213.11(3) (child testimony), or Section 213.11(4) (fresh complaint), as  
14 those topics are fully covered by the Comment to those subsections.

15 (1) *Rescission of the Prompt Complaint, Corroboration, and Cautionary Instruction*  
16 *provisions*

17 Article 213 includes no provisions requiring prompt complaint, corroboration, or  
18 cautionary instructions. All three sets of specialized procedural requirements have for good reason  
19 long since fallen out of favor, and the revised Article eliminates each.

20 With respect to the prompt-complaint requirement, South Carolina is the only jurisdiction  
21 that maintains a true prompt-complaint requirement, in that prosecution is barred if the period  
22 elapses, but its rule applies only in cases alleging assaults in the marital context.<sup>177</sup> Texas also  
23 maintains a version of a prompt-complaint rule, but that provision operates in conjunction with the  
24 state’s corroboration requirement. That is, Texas allows an allegation to be supported by  
25 uncorroborated testimony, so long as the complainant told any person other than the defendant  
26 within a year of the assault; otherwise, the state’s corroboration requirement applies.<sup>178</sup>

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277, June 2012), available at <http://ssrn.com/abstract=2092195>.

<sup>175</sup> See Gross & Shaffer, *supra* note 174, at 49 n.71 (and accompanying text).

<sup>176</sup> *Id.* at 40 (Table 13), 49.

<sup>177</sup> S.C. CODE ANN. § 16-3-658 (2012) (“The offending spouse’s conduct must be reported to appropriate law enforcement authorities within thirty days in order for a person to be prosecuted for these offenses.”); S.C. CODE ANN. § 16-3-615(B) (2012) (“The offending spouse’s conduct must be reported to appropriate law enforcement authorities within thirty days in order for that spouse to be prosecuted for this offense.”). California and Illinois were longstanding holdouts as well, but both states ultimately eliminated their provisions. CAL. PENAL CODE § 264 (2012) as amended by 2006 Cal. Legis. Serv. Ch. 45 (S.B. 1402) (West); 720 ILL. L. COMP. STAT. 5/11-1.10 (2012) as amended by 2004 Ill. Legis. Serv. P.A. 93-958 (H.B. 4771) (West).

<sup>178</sup> TEX. CODE CRIM. PROC. ANN. art. 38.07(a) (West 2012) (“A conviction . . . is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred.”). The statute carves exceptions for victims under 17, over 65, or over 18 if the complainant

1 Similarly, at present 36 states and the federal government have eliminated their  
2 corroboration requirements, either through statutory or judicial action. Thirteen states maintain  
3 limited corroboration provisions,<sup>179</sup> applicable for instance in the event of material inconsistencies  
4 in the victim’s testimony,<sup>180</sup> inherently incredible testimony,<sup>181</sup> or other special situations.<sup>182</sup>

5 Although the corroboration requirement has more adherents than does prompt complaint,  
6 closer inspection of those states that maintain the requirement reveal that most operate in a far  
7 more limited fashion than may appear at first glance. In essence, contemporary corroboration  
8 requirements seem to affirm only that a conviction cannot stand if the testimony of the complaining  
9 witness is itself inherently contradictory or patently incredible, or where the complaining witness  
10 has recanted.<sup>183</sup> Such a rule would seem, if fairly applied, to appropriately enforce the standard for

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“by reason of age or physical or mental disease, defect, or injury was substantially unable to satisfy the person’s need for food, shelter, medical care, or protection from harm.” *Id.* art. 38.07(b). The idea that a fresh complaint could substitute for corroboration was found in other jurisdictions as well.

<sup>179</sup> Those states are: Alaska, Arizona, Kansas, Kentucky, Massachusetts, Mississippi, Missouri, New York, Ohio, Oklahoma, Texas, West Virginia, and Wisconsin. See also *Henry v. State*, 861 P.2d 582, 586 (Alaska Ct. App. 1993); *Robinson v. Commonwealth*, 459 S.W.2d 147, 150 (Ky. Ct. App. 1970); *Commonwealth v. Sineiro*, 432 Mass. 735, 741-742 (2000); *State v. Baldwin*, 571 S.W.2d 236, 239 (Mo. 1978) (en banc); *State v. Clark*, 87 Wis. 2d 804, 816 (1979).

<sup>180</sup> *Commonwealth v. Sineiro*, 740 N.E.2d 602, 607 (Mass. 2000) (“[W]hen the prior inconsistent grand jury testimony concerns an essential element of the crime, the Commonwealth must offer at least some additional evidence on that element....”); *Ben v. State*, 95 So. 3d 1236, 1253 (Miss. 2012) (“We have held that “[a]n individual may be found guilty of rape on the uncorroborated testimony of the prosecuting witness, where the testimony is not discredited or contradicted by other credible evidence.””).

<sup>181</sup> *Remine v. State*, 759 P.2d 230, 232 (Okla. 1988) (“Corroboration is only necessary when the prosecutrix’s testimony is too inherently improbable to support a conviction.”); *State v. McPherson*, 371 S.E.2d 333, 337, 338 (W. Va. 1988) (upholding conviction “on the uncorroborated testimony of the victim, unless such testimony is inherently incredible,” as “when the testimony defies physical laws.”).

<sup>182</sup> New York requires corroboration when the victim’s incapacity to consent derives from the victim’s mental defect or mental incapacity. N.Y. PENAL LAW § 130.16 (McKinney 2012) (“A person shall not be convicted of [a sexual crime] of which lack of consent is an element but results solely from incapacity to consent because of the victim’s mental defect, or mental incapacity, or an attempt to commit the same, solely on the testimony of the victim, unsupported by other evidence....”). Ohio requires corroboration for the lesser crime of sexual imposition. OHIO REV. CODE ANN. § 2907.06(B) (West 2012) (“No person shall be convicted of [sexual imposition] solely upon the victim’s testimony unsupported by other evidence.”). Texas requires prompt report or corroboration, as alternatives. TEX. CRIM. PROC. CODE ANN. § 38.07(a) (West 2012) (“A conviction . . . is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred.”).

<sup>183</sup> E.g., *State v. Williams*, 526 P.2d 714, 716-717 (Ariz. 1974) (“A conviction may be had on the basis of the uncorroborated testimony of the prosecutrix unless the story is physically impossible or so incredible that no reasonable person could believe it.”); *State v. Borthwick*, 880 P.2d 1261, 1262 (Kan. 1994) (internal citations omitted) (the “testimony of the prosecutrix alone can be sufficient to sustain a rape conviction without further corroboration as long as the evidence is clear and convincing and is not so incredible and improbable as to defy belief.”).

Section 213.11. Procedural and Evidentiary Principles Applicable to Article 213

1 judgment of acquittal in any criminal matter.<sup>184</sup> But calling special attention to the context of  
2 sexual assault by imposing an explicit rule of corroboration risks inviting a more stringent standard  
3 in only these cases. Given the potential for arbitrary technical distinctions to corroboration  
4 requirements raised by rules geared toward special circumstances,<sup>185</sup> and the lack of credible  
5 social-scientific evidence demonstrating that sexual-assault complainants falsify their allegations  
6 in notable numbers, the draft eliminates this provision.

7 Lastly, a handful of states and the federal system allow cautionary instructions,<sup>186</sup> but many  
8 of those instructions apply only when the complainant's testimony is uncorroborated,<sup>187</sup> and there

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<sup>184</sup> See, e.g., *Ben v. State*, 95 So. 3d 1236, 1253-1254 (Miss. 2012) (affirming rule that evidence not be discredited or contradicted, but rejecting appellant's claim based on lack of conventional forms of corroboration such as injury or prompt complaint).

<sup>185</sup> *State v. Gardner*, 849 S.W.2d 602, 604 (Mo. Ct. App. 1993) (explaining that corroboration is not required for inconsistencies or contradictions that stem from differences between the victim and other witnesses, those that "bear[] on proof not essential to the case," or those that stem from lack of memory as opposed to direct contradiction).

<sup>186</sup> Arkansas, Hawaii, Kentucky, Nebraska, Oklahoma, West Virginia, and the federal courts grant the trial court discretion as to whether to give a cautionary instruction. See *State v. McPherson*, 31 S.E.2d 333, 338 (W. Va. 1988) ("The trial judge did not err when she denied the accused's motion for acquittal and submitted the case, with an instruction to scrutinize with care and caution the prosecutrix's testimony, to the jury."); *United States v. Merrival*, 600 F.2d 717, 719 (8th Cir. 1979) ("The form of credibility instruction given is within the discretion of the trial court. . . . And, as we have held, this instruction is particularly argumentative and should not be given when there is corroboration of the complaining witness's testimony." (citations omitted)); *Beasley v. State*, 522 S.W.2d 365, 368 n.3 (Ark. 1975) ("You are instructed that the crime of rape, of which Gary Don Beasley is charged, is a serious one, and such a charge is easily made and hard to contradict or disprove; that it is a character of crime that tends to create a prejudice against the person charged; and, for these reasons, it is your duty to weigh the testimony carefully, and then determine the truth with deliberative judgment, uninfluenced by the nature of the charge."); see also *State v. Jones*, 617 P.2d 1214, 1221 (Haw. 1980); *Reddell v. State*, 543 P.2d 574, 578 (Okla. Crim. App. 1975); *Clements v. Commonwealth*, 424 S.W.2d 825, 826 (Ky. Ct. App. 1968); *Fulton v. State*, 81 N.W.2d 177, 180 (Neb. 1957). Five states—Connecticut, Kansas, Mississippi, South Carolina, and Wisconsin—have early 20th-century cases expressing approval of cautionary instructions, see *State v. Brauneis*, 79 A. 70, 73 (Conn. 1911); *State v. Loomer*, 184 P. 723, 724 (Kan. 1919); *Watkins v. State*, 98 So. 537, 538 (Miss. 1923); *State v. Jennings*, 50 So. 2d 352, 354 (Miss. 1951); *State v. Floyd*, 177 S.E. 375, 386-387 (S.C. 1934); *Cobb v. State*, 211 N.W. 785, 789-790 (Wis. 1927), but there are no contemporary decisions and it seems the practice has long since disappeared.

<sup>187</sup> In Maine, New Hampshire, and New Mexico, the law seems to suggest that an instruction should be given in any case whenever the testimony is uncorroborated. *State v. McFarland*, 369 A.2d 227, 228, 230 (Me. 1977) ("In the absence of corroboration, the testimony of the prosecutrix must be scrutinized and analyzed with great care. If the testimony is contradictory, or unreasonable, or incredible, it does not form sufficient support for a verdict of guilty."); *State v. Blake*, 1305 A.2d 300, 305-306 (N.H. 1973) ("We think this charge adequately apprised the jury of the weight to be given the uncorroborated complaining witness' testimony."); *State v. Dodson*, 353 P.2d 364, 365 (N.M. 1960) ("We have held that in a prosecution for rape, where the evidence is conflicting and uncorroborated as to resistance and force, the trial court should caution the jury, and failure to do so is reversible error. The ease with which the charge may be made and the comparative difficulty in defending against it makes the field of sexual crimes one in which the court, under our system of jurisprudence, must do its utmost to insure that the issue goes to the jury in proper

1 is some doubt about whether these requirements remain viable, as it seems no cases since 1988  
2 support or reference the practice.

3 (2) *Section 213.11*

4 *a. Sexual History of the Complainant – Section 213.11(1).* In the 1970s, victims’ advocates  
5 brought increasing awareness of the experiences of sexual-assault victims in the judicial  
6 process.<sup>188</sup> A wave of “rape shield” statutes focused on changing the rules of evidence to protect  
7 complainants from defense efforts to put forward a “loose woman” defense—i.e., to exploit the  
8 complainant’s sexual history as a basis for implying either consent or falsification of the present  
9 charges or to play on jurors’ intuitions that, regardless of the facts, such a woman did not deserve  
10 legal protection. Such laws are now in place in every jurisdiction, and share several features in  
11 common even as they vary in important ways.

12 *i. Existing law*

13 *General inadmissibility clause.* The general-inadmissibility clause is the heart of the rape  
14 shield law. This clause makes evidence of the complainant’s past sexual behavior generally  
15 inadmissible. The precise scope of covered past behavior varies state to state,<sup>189</sup> but the core  
16 prohibition covers sexual activity with those other than the accused.<sup>190</sup> Tracking the traditional  
17 distinction between character or reputation evidence (“victim sleeps around”), and evidence of  
18 specific past acts (“victim slept with Z”), the rape shield statutes likewise vary in their treatment  
19 of these two evidentiary forms. One helpful way to organize these variations is to distinguish  
20 between *unified* statutes (those that treat all evidence of past sexual behavior identically<sup>191</sup>) and  
21 *bifurcated* statutes (those that treat opinion and reputation evidence differently from other  
22 evidence<sup>192</sup>). Bifurcated statutes typically specify that opinion and reputation evidence is never  
23 admissible, but allow exceptions to admit “other evidence.” At present, 31 states and the federal

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context.”). See also *State v. McPherson*, 371 S.E.2d 333, 337-338 (W. Va. 1988) (finding no error in instruction that “if you believe from the evidence in this case that the crime charged against the defendant rests alone on the testimony of the prosecuting witness, . . . then you should scrutinize her testimony with care and caution; although a conviction of a sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible.”).

<sup>188</sup> SCHULHOFER, *supra* note 18, at 25-28 (describing writings of Susan Griffin, Vivian Berger, Catharine MacKinnon, and others); see also CORRIGAN, *supra* note 171.

<sup>189</sup> See Commentary to § 213.11(1)(a)(iv).

<sup>190</sup> See *infra* note 194.

<sup>191</sup> See, e.g., COLO. REV. STAT. § 18-3-407(1) (2011) (“Evidence of specific instances of the victim’s or a witness’s prior or subsequent sexual conduct, opinion evidence of the victim’s or a witness’s sexual conduct, and reputation of the victim’s or a witness’s sexual conduct may be admissible only at trial and shall not be admitted in any other proceeding except at a proceeding pursuant to....”).

<sup>192</sup> See, e.g., LA. CODE EVID. ANN. art. 412(A)-(B) (2010). Article 412(A) is “*Opinion and reputation evidence*” and does not admit of exceptions; article 412(B) is “*Other evidence; exceptions*” and does so admit.

Section 213.11. Procedural and Evidentiary Principles Applicable to Article 213

1 courts have unified statutes; 18 states and the District of Columbia have bifurcated statutes. New  
2 Hampshire follows its own distinct approach.<sup>193</sup>

3 The general inadmissibility provision in a rape shield provision is typically coupled with  
4 statutory exceptions, provision for admission by judicial discretion, or some blend of the two.

5 *Statutory exceptions.* The vast majority of jurisdictions have statutory exceptions to the  
6 general rule of inadmissibility, thereby allowing some evidence of prior sexual history. The  
7 following exceptions are nearly universal among states that use the statutory-exception  
8 mechanism:

- 9 1. Evidence of specific instances of sexual activity with other persons offered to prove that  
10 the accused was not the source of semen, pregnancy, infection, or injury in the present  
11 case.<sup>194</sup>
- 12 2. Evidence of specific instances of prior sexual relations between the complaining witness  
13 and the defendant.<sup>195</sup>
- 14 3. Evidence offered to impeach, if the prosecutor has put the complainant's prior sexual  
15 activity into issue.
- 16 4. Where exclusion of evidence would violate either state or federal constitutions.<sup>196</sup>

17 The less universal statutory exceptions include:

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<sup>193</sup> See *infra* note 223. Another helpful classification yields four models: “Legislated exceptions” laws that bar admission of any evidence subject to certain exceptions; “constitutional catch-all” laws that have limited exceptions, but include a constitutional exception; “evidentiary purpose” laws that assess the purpose of the evidence, rather than erect any general bar; and “judicial discretion” laws that simply leave the determination to the court. Michelle J. Anderson, *Time to Reform Rape Shield Laws: Kobe Bryant Case Highlights Holes in the Armor*, 19 CRIM. JUST. 14 (2004).

<sup>194</sup> Louisiana limits this to evidence arising no more than 72 hours before the alleged criminal conduct occurred. LA. CODE EVID. ANN. art. 412(B)(1).

<sup>195</sup> Thirty-nine states, the federal system, and the District of Columbia distinguish between prior sexual activity of the complainant with the defendant and prior activity with any other person. Eight states do so by excluding the former entirely from the rape shield protections, 15 states do so by carving out a specific exception to the statute, and 18 states do so by carving out an exception but limiting it to evidence introduced as to the issue of consent. See, e.g., COLO. REV. STAT. § 18-3-407(1) (admitting prior or subsequent sexual conduct with the actor); ARIZ. REV. STAT. ANN. § 13-1421(A)(1) (2011) (admitting past conduct with the defendant so long as it is relevant and material to a fact at issue and the prejudicial nature does not outweigh the probative value); TEX. R. EVID. 412(b)(2)(B) (admitting prior behavior with accused as relevant for consent); N.J. STAT. ANN. 2C:14-7(d) (2013) (“Evidence of the victim’s previous sexual conduct with the defendant shall be considered relevant if it is probative of whether a reasonable person, knowing what the defendant knew at the time of the alleged offense, would have believed that the alleged victim freely and affirmatively permitted the sexual behavior complained of.”).

<sup>196</sup> No rape shield statute may validly violate the constitutional rights of a defendant. Some states include this as an explicit statutory exception, in part to insure that a single problematic application of the statute will not justify striking the statute in its entirety.

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- 1       1. *Bias evidence*: Evidence that supports a claim that the complaining witness has a motive to  
2            falsely accuse the defendant of the crime.<sup>197</sup>
- 3       2. *Prior false complaints*: Evidence of false allegations of sexual misconduct previously made  
4            by the complaining witness.<sup>198</sup>
- 5       3. *Multiple partners*: Evidence of sexual behavior with parties not the accused that occurred at  
6            the time of the event giving rise to the sex crime charged.<sup>199</sup>
- 7       4. *Manner of dress*: Evidence of manner of dress offered by the accused, provided that such  
8            evidence “(A) Relates to the motive or bias of the alleged victim; (B) Is necessary to  
9            rebut or explain scientific, medical or testimonial evidence offered by the state; [or]  
10           (C) Is necessary to establish the identity of the victim....”<sup>200</sup>
- 11      5. *Pattern of behavior*: “[E]vidence of a pattern of sexual behavior so distinctive and so closely  
12            resembling the defendant’s version of the alleged encounter with the complainant as to  
13            tend to prove that such complainant consented to the act or . . . lead the defendant  
14            reasonably to believe that the complainant consented.”<sup>201</sup>
- 15      6. *Impeachment*: Evidence of a felony or other crime involving moral turpitude committed by  
16            the complainant, when proffered by the defendant for the purpose of attacking  
17            credibility.<sup>202</sup>
- 18      7. *Lack of chastity*: Evidence of lack of chastity where chaste character of the complainant is

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<sup>197</sup> ARIZ. REV. STAT. § 13-1421(A)(3); OR. REV. STAT. § 40.210(2)(b)(A) & (3)(b)(A) (2011); TEX. R. EVID. 412(b)(2)(C) (2010); VA. CODE ANN. § 18.2-67.7(B) (2010).

<sup>198</sup> ARIZ. REV. STAT. ANN. § 13-1421(A)(5) (2011); COLO. REV. STAT. ANN. § 18-3-407(2); IDAHO R. EVID. 412(b)(2)(C) (2010); MINN. STAT. § 609.347(3)(a)(i); MISS. R. EVID. 412(b)(2)(C); OKLA. STAT. ANN. § 2412(B)(2); VT. STAT. ANN. TIT. 13, § 3255(a)(3)(C) (2012); WIS. STAT. § 972.11(2)(b)(3) (2011).

<sup>199</sup> IDAHO R. EVID. 412(b)(2)(D) (2010); OKLA. STAT. tit. 12, § 2412(B)(3) (2010) (Evidence of “similar sexual acts in the presence of the accused with persons other than the accused which occurs at the time of the event giving rise to the sexual offense alleged.”).

<sup>200</sup> OR. REV. STAT. § 40.210(3)(b) (2011); see also LA. CODE EVID. ANN. art. 412.1 (West 2013); N.J. REV. STAT. § 2C:14-7(e) (2011) (“Evidence of manner of dress where it is “relevant and admissible in the interest of justice, after [a hearing in camera], and a statement by the court of its findings of fact essential to its determination.”); WIS. STAT. § 972.11(2)(d) (West 2013).

<sup>201</sup> North Carolina and Tennessee use nearly identical statutory language. N.C. GEN. STAT. § 8C-1, RULE 412(b)(3) (2010); TENN. EVID. RULE 412(c)(4)(iii) (2010). Florida uses slightly different language. FLA. STAT. § 794.022(2) (2010) (“[...] such evidence tends to establish a pattern of conduct or behavior on the part of the victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent.”).

<sup>202</sup> IND. CODE § 35-37-4-4 Sec. 4(e); TEX. R. EVID. 412(b)(2)(D) (2010). Absent the statutory exception, such evidence could fall within the scope of the rape shield exclusion if the crime in question involved sexual conduct. In the case of a nonsexual crime, the rape shield exclusion would not apply, and the evidence could be admissible for impeachment purposes in accordance with ordinary rules of evidence.

- 1 an element of the alleged crime.<sup>203</sup>  
2 8. *Immediate circumstances*: Evidence of the immediate surrounding circumstances of the  
3 alleged crime.<sup>204</sup>  
4 9. *Prior prostitution*: Evidence that the victim has been convicted of prostitution within three  
5 years of the offense that is the subject of the prosecution.<sup>205</sup>  
6 10. *Psychological fantasy*: Evidence from an expert psychologist or psychiatrist that the  
7 complainant fantasized or invented the acts charged.<sup>206</sup>  
8 11. *Adultery as to credibility*: Evidence of adultery to impeach the credibility of the  
9 complaining witness if otherwise admissible.<sup>207</sup>  
10 12. *Psychotherapist–patient exceptions*: Creating a separate process for evidence relating to  
11 prior treatment when an allegation involves a psychotherapist and patient.<sup>208</sup>

12 *Constitutional exceptions*. Some scholars argue in favor of a general ban on prior sexual  
13 history evidence, subject only to the limits of the constitution. But such an approach is both unwise  
14 and inefficient. Consider the most widely accepted exception to rape shield exclusion: the  
15 exception for the complainant’s prior sexual interaction with that defendant. Every American  
16 jurisdiction endorses this exception when the evidence is offered to support a claim of consent.<sup>209</sup>  
17 Yet, in a detailed discussion of the issue, Michelle Anderson argues that exclusion of prior  
18 consensual sex between the complainant and the accused is both desirable and constitutionally  
19 permissible in almost all situations.<sup>210</sup> With nothing but the constitutional exception to go on,  
20 courts would be left to resolve this commonly recurring and exceptionally important issue on an  
21 ad hoc basis, seeking to determine in each distinct set of circumstances whether keeping from the  
22 jury all evidence of prior sexual interaction between the complainant and the accused would  
23 deprive the defendant of “a meaningful opportunity to present a complete defense.”<sup>211</sup>

24 More complicated scenarios, though obviously less common, arise with some frequency as

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<sup>203</sup> MO. REV. STAT. § 491.015(1)(4) (2010).

<sup>204</sup> MO. REV. STAT. § 491.015(1)(3) (2010); KY. R. EVID. 412(b)(1)(C) (2011).

<sup>205</sup> N.Y. CRIM. PROC. LAW § 60.42(2) (McKinney 2010).

<sup>206</sup> N.C. GEN. STAT. § 8C-1, RULE 412(b)(4) (2010).

<sup>207</sup> S.C. CODE ANN. § 16-3-659.1(1) (2010).

<sup>208</sup> MINN. STAT. § 609.347(6) (2011).

<sup>209</sup> See Anderson, *supra* note 1, at 118 (“[A]ll rape shield laws categorically allow a rape defendant to admit evidence of a woman’s prior sexual conduct with him when it is offered to prove consent.”).

<sup>210</sup> Anderson, *supra* note 1, at 118-130, 147.

<sup>211</sup> Crane v. Kentucky, 476 U.S. 683, 690 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)) (citations omitted).

1 well. In *Gagne v. Booker*,<sup>212</sup> for example, the accused was charged with having forced the  
 2 complainant to participate in simultaneous “three-way” sex with himself and another man. *Gagne*  
 3 acknowledged many of the “facially coercive” details of the incident described by the complainant,  
 4 but argued that her participation was consensual. Fearing that the jury would think it unlikely that  
 5 a woman would voluntarily consent to such an experience (and indeed at trial the prosecutor had  
 6 expressly argued as much), the defendant sought to introduce evidence that the complainant had  
 7 previously consented to a “nearly identical” three-way encounter that included himself, though  
 8 with a different third participant. A Michigan court upheld the exclusion of evidence pertaining to  
 9 the prior three-way episode, and on federal habeas 16 judges of the Sixth Circuit, sitting en banc,  
 10 split four ways on the constitutional issue thus raised. Three (or arguably five) of the circuit judges  
 11 held the exclusion permissible, five held it unconstitutional, and seven held (on differing theories)  
 12 that even if excluding the evidence was unconstitutional, that ruling at trial was not (as required  
 13 for relief on federal habeas) an unreasonable application of clearly established Supreme Court  
 14 precedent.<sup>213</sup>

15 Apart from the question of how the particular constitutional question *should have been*  
 16 answered in *Gagne*, the doctrinal test (“a meaningful opportunity to present a complete defense”) *clearly*  
 17 provides little to no help in resolving the matter. Yet *Gagne* involved a number of recurring  
 18 elements on which legislative guidance one way or the other is surely possible and appropriate—  
 19 (1) sexual behavior that arguably lies outside the conventional mainstream, (2) a prior, somewhat  
 20 similar encounter with the defendant himself, (3) circumstances that on their face plainly imply  
 21 coercion, and (4) prosecutorial argument suggesting that consent under such circumstances is  
 22 inherently unlikely. A well-crafted Code surely should address the relevance to admissibility of  
 23 such factors, or at least as many of them as possible, rather than relying entirely on the  
 24 constitutional exception and leaving it to the courts to decide, over a near-infinite range of factual  
 25 variations, whether exclusion of the evidence in question deprives the defendant of “a meaningful  
 26 opportunity to present a complete defense.”

27 *Catch-all and safety-valve exceptions.* Because constitutional mandates for the admission  
 28 of evidence are demanding, and because enumerated exceptions from the requirement of the rape  
 29 shield exclusion cannot anticipate all scenarios in which accuracy and fairness will be served by  
 30 admitting relevant evidence, most American jurisdictions have available some statutory vehicle  
 31 for admitting more evidence than that covered by the specific exceptions in the proposed Section  
 32 213.11(1)(b). Specifically:

33 ° Both New York and California have broadly worded general exceptions to their rape  
 34 shield laws,<sup>214</sup>

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<sup>212</sup> *Gagne v. Booker*, 596 F.3d 335, 344 (6th Cir. 2010), rev’d en banc, 680 F.3d 493 (6th Cir. 2012).

<sup>213</sup> 680 F.3d 493 (6th Cir. 2012) (en banc), passim.

<sup>214</sup> N.Y. CRIM. PROC. LAW § 60.42(5) (McKinney 2014) (“interests of justice”); CAL. EVID. CODE § 1103(a)(1) (West 2014) (“[O]ffered by the defendant to prove conduct of the victim in conformity with [a

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1           ° Seven states admit evidence based upon judicial discretion (typically phrased in terms of  
2 relevance and probative value versus prejudice);<sup>215</sup>

3           ° Eight jurisdictions have one or more exceptions phrased in broad, potentially elastic  
4 terms, such as exceptions for evidence that someone other than the defendant committed the  
5 offense;<sup>216</sup> that the victim consented;<sup>217</sup> or that the victim’s behavior fit a prior pattern of  
6 conduct;<sup>218</sup>

7           ° Seven states have exceptions for evidence of prior sexual conduct that casts doubt on the  
8 witness’s credibility;<sup>219</sup> and

9           ° Six states permit exceptions for types of prior behavior that, though relatively specific,  
10 raise more difficulties than they avoid, such as prior prostitution.<sup>220</sup>

11           Thus, the majority of jurisdictions have avenues that enable trial courts to admit evidence  
12 crucial to accuracy or fairness without needing to find that admissibility is constitutionally  
13 required. But the optimal means for achieving such flexibility—without jeopardizing the goals of  
14 the rape shield rule—are not easily determined.

15           An earlier draft of Section 213.11 rejected the idea of adopting a broadly worded “catch-  
16 all” or judicial-discretion clause.<sup>221</sup> The concern was that such an approach would in the end admit

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specific] character or trait”).

<sup>215</sup> ALASKA STAT. ANN. § 12.45.045 (West 2014); ARK. CODE ANN. § 16-42-101 (West 2014); KAN. STAT. ANN. § 21-5502 (West 2013); N.M. STAT. ANN. § 30-9-16 (West 2013); R.I. R. Evid. 412; WYO. STAT. ANN. § 6-2-312 (West 2013). Colorado enumerates some explicit exceptions but also has a discretion-only safety valve. COLO. REV. STAT. ANN. § 18-3-407 (West 2011).

<sup>216</sup> E.g., IND. CODE ANN. § 35-37-4-4, Sec. 4(b) (West 2014) (“[A] specific instance of sexual activity shows that some person other than the defendant committed the act upon which the prosecution is founded”); N.C. GEN. STAT. ANN. § 8C-1, RULE 412(b)(2) (West 2013) (“Is evidence ... offered for the purpose of showing that the act or acts charged were not committed by the defendant.”).

<sup>217</sup> IOWA CODE ANN. Rule 5.412(b)(2)(B) (West 2013) (“[O]ffered by the accused upon the issue of whether the alleged victim consented”); NEV. REV. STAT. ANN. §§ 48.069, 48.090 (West 2014) (outlining procedures to introduce “evidence to prove victim’s consent” as opposed to credibility restrictions); WASH. REV. CODE ANN. § 9A.44.020(2) (West 2014); D.C. CODE § 22-3022(a)(2)(B) (2014).

<sup>218</sup> E.g., FLA. STAT. ANN. § 794.022(2) (West 2014) (“[T]ends to establish a pattern of conduct or behavior on the part of the victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent”); N.C. GEN. STAT. ANN. § 8C-1, RULE 412(b)(3) (West 2013); TENN. R. EVID. 412(c)(4)(iii).

<sup>219</sup> See CONN. GEN. STAT. ANN. § 54-86F (West 2014); DEL. CODE ANN. tit. 11, § 3509(d) (West 2014); MD. CODE ANN., CRIM. LAW § 3-319(b)(4)(iv) (West 2014); TENN. R. EVID. 412(c)(2); VA. CODE ANN. § 18.2-67.7(B) (West 2014); WASH. REV. CODE ANN. § 9A.44.020(4) (West 2014); W. VA. CODE, § 61-8B-11(b) (2014).

<sup>220</sup> E.g., IDAHO R. EVID. 412(b)(2)(D) (multiple partners); OKLA. STAT. tit. 12, § 2412(B)(3) (2013); OR. REV. STAT. ANN. § 40.210, Rule 412(3)(b) (West 2014) (manner of dress for limited purposes); N.J. STAT. ANN. § 2C:14-7(c) (West 2014) (same); WIS. STAT. ANN. § 972.11(d) (West 2013) (same); N.Y. CRIM. PROC. LAW § 60.42(2) (McKinney 2014) (prior prostitution).

<sup>221</sup> See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES, Tentative Draft No. 1

1 precisely the kind of evidence that rape shield statutes rightly seek to exclude.<sup>222</sup> Rape shield  
2 statutes are designed to channel and constrain the circumstances in which judges can admit sexual-  
3 history evidence that might arguably be deemed “relevant” in the most generous sense of the term.  
4 A broad “interests-of-justice” exception (like that of New York), or an open-ended judicial-  
5 discretion exception, runs too great a risk that ad hoc determinations will undermine the purpose  
6 and goals of this reform.

7 That draft likewise rejected the alternative of seeking to identify a more comprehensive list  
8 of specific exceptions. To be sure, a more detailed set of exceptions might address certain recurring  
9 scenarios that would otherwise need to be addressed on an ad hoc basis. But detailed exceptions  
10 add considerable complexity to the statute, without solving the fundamental problem of  
11 accommodating atypical situations in which proffered evidence is unexpectedly critical to a claim  
12 in the case.

13 Instead, the earlier version of Section 213.11(1)(b)(v) proposed a narrowly worded safety-  
14 valve exception. That provision would have lifted the presumption of the rape shield exclusion  
15 where the proffered evidence “has an especially strong tendency to prove a material claim, and  
16 exclusion of such evidence would substantially impede a party’s ability to support that claim.”<sup>223</sup>  
17 This approach, however, drew criticism from those who feared that its criteria were too vague and  
18 that it would open the door to undue judicial willingness to admit sexual-history evidence and  
19 would undermine the goals of rape shield exclusion. Accordingly, Section 213.11(1)(b) includes  
20 no all-purpose catch-all or safety valve. Instead, it seeks to accommodate needed exceptions to  
21 rape shield only through the vehicle of specific, targeted exemptions, together with the requisite  
22 exception for evidence when its admission is constitutionally required.

23 *Judicial balancing.* All jurisdictions have some measure of judicial control over the  
24 admission or exclusion of evidence under the auspices of the rape shield statute. Four different  
25 models of control emerge:<sup>224</sup>

- 26 • *Exception-only approach.* The rules applicable in 19 states and the federal system provide  
27 for the admissibility of evidence that falls under an express statutory exception, without

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(AM. LAW INST. 2014).

<sup>222</sup> Tuerkheimer, *supra* note 31, at 1477-1484.

<sup>223</sup> Section 213.7(1)(b)(vi) (Tentative Draft No. 1 (2014)).

<sup>224</sup> New Hampshire’s rape shield law differs from all others, and thus merits special discussion. See N.H. EVID. RULE 412 (2010); N.H. REV. STAT. ANN. § 632-A:6 (2011). It blocks “evidence of prior consensual sexual activity between the victim and any person other than the defendant” except where the Constitution requires its admission. The law is silent on evidence of prior sexual activity between the complaining witness and the defendant—whether or not consensual—and on evidence of prior nonconsensual sexual activity between the complaining witness and someone not the defendant. It also blocks manner-of-dress evidence when offered to prove consent. New Hampshire also prescribes a hybrid standard of constitutional language and simple balancing. N.H. EVID. RULE 412(b)(2) (2010) (“[D]ue process requires the admission of the evidence . . . and the probative value in the context of the case in issue outweighs its prejudicial effect on the victim.”).

Section 213.11. Procedural and Evidentiary Principles Applicable to Article 213

- 1 explicitly requiring any further judicial assessment to assure that its probative value  
2 outweigh potential prejudicial effects.<sup>225</sup>
- 3 • *Exception-plus-balancing approach.* In 22 states and the District of Columbia, evidence  
4 subject to the presumptive exclusion of the rape shield rule can be admitted only if it  
5 (1) qualifies for an express statutory exception *and* (2) passes a judicial balancing test  
6 (typically requiring, for example, that the evidence be more probative than prejudicial).<sup>226</sup>
  - 7 • *Exception or balancing approach.* In two states, covered evidence can be admitted if it  
8 *either* (1) qualifies for an express statutory exception *or* (2) qualifies under a more general  
9 balancing or interests-of-justice test.<sup>227</sup>

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<sup>225</sup> See FED. R. EVID. 412; ALA. R. EVID. 412; DEL. CODE ANN. tit. 11, § 3509 (West 2014); FLA. STAT. ANN. § 794.022 (West 2014); GA. CODE ANN., § 24-4-412 (West 2014); KY. R. EVID. 412; ME. R. EVID. 412; MO. ANN. STAT. § 491.015 (West 2014); MONT. CODE ANN. § 45-5-511 (2013); NEB. REV. STAT. § 27-412 (2013); N.C. GEN. STAT. ANN. § 8C-1, RULE 412 (West 2013); N.D. R. EVID. 412; OKLA. STAT. tit. 12, § 2412 (2013); 18 PA. CONS. STAT. ANN. § 3104 (West 2014); S.D. CODIFIED LAWS § 19-12-15 (West 2014); UTAH R. EVID. 412; VA. CODE ANN. § 18.2-67.7 (West 2014); W. VA. CODE § 61-8B-11 (2014). Some of the rules use conditional language, such as noting that evidence “may” be admitted, which suggests that the court retains discretion to exclude evidence falling under an exception. See, e.g., FLA. STAT. ANN. § 794.022(2). Two states included here are somewhat difficult to classify: Wisconsin (which does not contain balancing language in most of its exceptions, but does for the manner-of-dress exception), WIS. STAT. ANN. § 972.11 (West 2013), Vermont (which does not contain balancing language for its credibility exception, but does for three other exceptions), VT. STAT. ANN. tit. 13, § 3255 (West 2014).

<sup>226</sup> See ARIZ. REV. STAT. ANN. § 13-1421 (2013); CONN. GEN. STAT. ANN. § 54-86F (West 2014); HAW. REV. STAT. § 626-1, RULE 412 (West 2014); IDAHO CODE ANN. § 18-6105 (West 2014) and IDAHO R. EVID. 412; 725 ILL. COMP. STAT. ANN. 5/115-7 (West 2014); IND. CODE ANN. § 35-37-4-4 (West 2014); IOWA CODE ANN. Rule 5.412 (West 2013); LA. CODE EVID. ANN. art. 412, 412.1 (West 2013); MD. CODE ANN., CRIM. LAW § 3-319 (West 2014); MASS. GEN. LAWS ANN. ch. 233, § 21B (West 2014); MICH. COMP. LAWS ANN. § 750.520J (West 2014); MINN. STAT. ANN. § 609.347 (West 2014); MISS. R. EVID. 412; NEV. REV. STAT. ANN. § 50.090 (West 2014); N.J. STAT. ANN. § 2C:14-7 (WEST 2014); OHIO REV. CODE ANN. § 2907.02 (West 2014); OR. REV. STAT. ANN. § 40.210, Rule 412 (West 2014); S.C. CODE ANN. § 16-3-659.1 (West 2013); TENN. R. EVID. 412; TEX. R. EVID. 412; WASH. REV. CODE ANN. § 9A.44.020 (West 2014); D.C. CODE § 22-3022 (2014). California could also be included here, although its structure is difficult to classify. Its statute generally admits covered evidence for credibility or propensity purposes, unless the proffered evidence is offered to prove consent in certain specified crimes; California also imposes a heightened standard for evidence of manner of dress. See CAL. EVID. CODE §§ 782, 1103 (West 2014).

<sup>227</sup> See COLO. REV. STAT. ANN. § 18-3-407(2)(e) (West 2011) (requiring finding that proffered evidence is “relevant to a material issue to the case”). New York’s statute reads:

Evidence of a victim’s sexual conduct shall not be admissible in a prosecution for an offense or an attempt to commit an offense defined in article one hundred thirty of the penal law unless such evidence:

1. proves or tends to prove specific instances of the victim’s prior sexual conduct with the accused;  
or
2. proves or tends to prove that the victim has been convicted of a [prostitution] offense ... within three years prior to the sex offense which is the subject of the prosecution; or
3. rebuts evidence introduced by the people of the victim’s failure to engage in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact during a given period of time;  
or

Section 213.11. Procedural and Evidentiary Principles Applicable to Article 213

- 1       • *Balancing only.* In six states, the statute does not detail explicit exceptions, but simply  
2       instructs the judge to exclude the evidence unless a specified balancing standard is met.<sup>228</sup>  
3       *ii. Assessment of existing laws: overly permissive rules.* Despite their initial promise, rape  
4       shield laws have been a source of disappointment for some victim advocates and reformers  
5       because, in their eyes, courts have been too willing to permit exceptions from the general principle  
6       of inadmissibility.<sup>229</sup> Accordingly, some propose to strip away from rape shield statutes most of  
7       the currently recognized exceptions and to preserve only a few tightly constrained paths for the

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4. rebuts evidence introduced by the people which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim; or  
5. *is determined by the court after an offer of proof by the accused outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination, to be relevant and admissible in the interests of justice.*  
N.Y. CRIM. PROC. LAW § 60.42 (McKinney 2014) (emphasis added).

<sup>228</sup> See ALASKA STAT. ANN. § 12.45.045 (West 2014); KAN. STAT. ANN. § 21-5502 (West 2013); N.M. STAT. ANN. § 30-9-16 (West 2013); R.I. R. Evid. 412; WYO. STAT. ANN. § 6-2-312 (West 2013). Arkansas’s scheme, included in the count here, is difficult to classify. ARK. CODE ANN. § 16-42-101 (West 2014). The rule first sets out a total ban on all evidence “of the victim’s prior sexual conduct with the defendant or any other person,” as well as prior allegations, *id.* § 16-42-101(b), but then provides a discretionary procedure for admitting “evidence directly pertaining to the act upon which the prosecution is based *or evidence of the victim’s prior sexual conduct with the defendant or any other person...*,” *id.* § 16-42-101(c) (emphasis added). South Dakota followed a discretionary model until its recent enactment of a law parallel to the federal rule.

These standards are phrased in terms of relevance and probative value versus prejudice. See, e.g., N.M. STAT. ANN. § 30-9-16 (West 2013):

As a matter of substantive right, in prosecutions ... evidence of the victim’s past sexual conduct, opinion evidence of the victim’s past sexual conduct or of reputation for past sexual conduct, shall not be admitted unless, and only to the extent that the court finds that, the evidence is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

As a matter of substantive right, in prosecutions ... evidence of a patient’s psychological history, emotional condition or diagnosis obtained by an accused psychotherapist during the course of psychotherapy shall not be admitted unless, and only to the extent that, the court finds that the evidence is material and relevant to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

If the evidence referred to in Subsection A or B of this section is proposed to be offered, the defendant shall file a written motion prior to trial. The court shall hear the pretrial motion prior to trial at an in camera hearing to determine whether the evidence is admissible pursuant to the provisions of Subsection A or B of this section. If new information, which the defendant proposes to offer pursuant to the provisions of Subsection A or B of this section, is discovered prior to or during the trial, the judge shall order an in camera hearing to determine whether the proposed evidence is admissible. If the proposed evidence is deemed admissible, the court shall issue a written order stating what evidence may be introduced by the defendant and stating the specific questions to be permitted.

<sup>229</sup> See *supra* note 31.

1 admission of sexual-history evidence. These proposals respond to a genuine and serious problem,  
2 but they leave too little room for the admission of essential defense evidence.

3 The need for care in constructing exceptions is clear. Consider, for example, *State v.*  
4 *Shoffner*.<sup>230</sup> The defendant was charged with raping a woman he had met in a bar, and a North  
5 Carolina court held it was error to exclude proffered testimony to the effect that the complainant  
6 had frequently “accost[ed] men at clubs, p[arties] . . . and [made] sexual advances by putting her  
7 hands ‘all over their bodies.’”<sup>231</sup> The court reasoned that this prior conduct established a “*modus*  
8 *operandi*” probative of consent.<sup>232</sup> In *Hardy v. State*,<sup>233</sup> a Georgia court said that the defendant, a  
9 football player, could support his consent defense by introducing evidence that “the prosecutrix  
10 was known to be sexually active with a predilection for football players.”<sup>234</sup> In *United States v.*  
11 *Kelly*,<sup>235</sup> a military court admitted evidence that the complainant “behaved in a sexually aggressive  
12 manner toward males when drunk” because “evidence that the victim consented to sex freely and  
13 indiscriminately would be relevant to prove she acted in conformity with her habit.”<sup>236</sup> Other  
14 decisions, while rejecting such evidence on narrow grounds, have nonetheless endorsed a broad  
15 principle that a “pattern” of consenting to sex with third parties in particular circumstances can  
16 overcome the rape shield exclusion and be admitted as relevant to establishing willingness to  
17 consent to sex with the defendant in similar circumstances.<sup>237</sup>

18 Admissibility rulings such as these are without doubt unduly permissive. To preclude them,  
19 Deborah Tuerkheimer proposes that “a court should only allow sexual history evidence when the  
20 prosecutor’s case-in-chief has opened the door to its use. To be clear, the door does not open simply  
21 because a defendant claims that the victim consented . . . . Instead, the court must assess the

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<sup>230</sup> 302 S.E.2d 830 (N.C. Ct. App. 1983).

<sup>231</sup> *Id.* at 833.

<sup>232</sup> *Id.* *Shoffner* arose under a North Carolina statute that provides an express exemption from rape shield for “evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant’s version . . . as to tend to prove that such complainant consented.” N.C. GEN. STAT. § 8C-1, RULE 412(b)(3) (2010). Other cases, discussed in the text that immediately follows, reach similar results even without a statutory mandate to do so.

<sup>233</sup> 285 S.E.2d 547 (Ga. Ct. App. 1981).

<sup>234</sup> *Id.* at 549.

<sup>235</sup> 33 M.J. 878 (A.C.M.R. 1991).

<sup>236</sup> *Id.* at 882.

<sup>237</sup> See, e.g., *State v. Pancoast*, 596 So. 2d 162, 163 (Fla. Dist. Ct. App. 1992) (holding with regard to complainant’s willingness to consent to sex with younger men on three prior occasions that “this alone is insufficient to establish a pattern of conduct warranting the admission of prior sexual activity”); *State v. Hudlow*, 659 P.2d 514, 520 (Wash. 1983) (evidence of prior sexual activity with individuals whom the complainant knew was not sufficient to warrant admission in a case where the defendant was a stranger, but “if a complaining witness frequently engages in sexual intercourse with men shortly after meeting them in bars, this would [be admissible] if the defendant claims she consented to sexual intercourse with him under similar circumstances”).

1 evidential worth of the victim’s prior sexual conduct solely in relation to the state’s theory of  
2 guilt.”<sup>238</sup> Under this rubric, if the defendant was charged with having raped the complainant shortly  
3 after meeting her for the first time in a bar, a defense proffer that she had previously consented to  
4 sex with strangers shortly after meeting them in a bar could still be admissible, *but only if* the  
5 complainant testified that she would never consent to sex with a man she had just met, or if the  
6 prosecutor argued that consent under such circumstances was inherently unlikely. Unless the  
7 prosecution made such a claim to bolster its evidence of nonconsent, the sexual-history evidence,  
8 even if it involved sexual encounters at the same bar or at the same time of day, would remain  
9 inadmissible. Professor Tuerkheimer’s point, a forceful one, is that previous willingness to have  
10 sex with a particular person (even if the location and time of day are similar) has at most only  
11 slight probative value on the question of her willingness to have sex with someone else, and that  
12 this probative value is far outweighed by its potential for prejudice in casting the complainant as  
13 promiscuous.

14 The solution proposed, however, is unacceptably restrictive. It is neither fair nor  
15 constitutionally permissible to grant the prosecutor exclusive control over the parameters of  
16 relevant evidence or to exclude all defense evidence not directly responsive to the prosecutor’s  
17 theory of the case. Suppose, for example, that the complainant testifies that the defendant raped  
18 her shortly after meeting her in a bar, and the defendant seeks to bolster his claim of consent by  
19 introducing evidence that the complainant had a boyfriend at the time, that the other man heard  
20 about their encounter, and that the complainant fabricated the charge of rape to cover up her  
21 infidelity. Under Professor Tuerkheimer’s proposal, this defense evidence would be admissible if  
22 the complainant spontaneously testified that she had no other boyfriend, and would never fabricate  
23 a rape charge. But if, as is likely, neither she nor the prosecutor raised those subjects, then the  
24 accused could not go outside the boundaries of the prosecutor’s case-in-chief in order to present  
25 an independent ground for acquittal. Yet the defendant’s right to present a defense, and cross-  
26 examine the witness as to her credibility, cannot hinge on whether the government chose to elicit  
27 evidence that could undermine its own case<sup>239</sup>; indeed the Supreme Court has held specifically  
28 that the accused has a constitutional right to introduce as an independent defense his evidence  
29 suggesting that the complainant had a motive to fabricate growing out of her relationship with

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<sup>238</sup> Tuerkheimer, *supra* note 31, at 1501-1502. Professor Tuerkheimer explains that her approach “allows defendants to offer [sexual-history] evidence when it is directly responsive to specific testimony or comment,” for example when “a victim testifies that she would never willingly participate in a particular sexual behavior.” *Id.* at 1502.

<sup>239</sup> See, e.g., *Lewis v. Wilkinson*, 307 F.3d 413 (6th Cir. 2002) (granting habeas relief where trial court had excluded evidence of complainant’s diary, in which she wrote in part that she felt guilty about the impending trial but was “sick of myself for giving in to them. I’m not a nympho like all those guys think. I’m just not strong enough to say no to them. I’m tired of being a whore. This is where it ends.” The court held that admissibility was required because such evidence constituted not just evidence of bias but independent evidence of consent). See also *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

1 another man.<sup>240</sup> An exemption from rape shield only when the prosecution *explicitly* opens the  
2 door to rebuttal therefore cannot provide an acceptable means to constrain courts that might  
3 otherwise admit sexual-history evidence inappropriately.

4 Michelle Anderson offers a solution that is more flexible in some respects but more  
5 restrictive in others.<sup>241</sup> Her proposal would exclude all evidence of the complainant’s prior sexual  
6 history except in three situations—when relevant to suggest an alternate source for semen,  
7 pregnancy, disease, or injury in the present case; when relevant to suggest the complainant’s bias  
8 or motive to fabricate the present charge; and when it constitutes “[e]vidence of negotiations  
9 between the complainant and the defendant to convey consent in a specific way or to engage in a  
10 specific sexual act at issue.”<sup>242</sup> Outside of these situations, prior sexual behavior of the complainant  
11 would be inadmissible, even when the behavior involved sexual interaction with the defendant  
12 himself.<sup>243</sup>

13 Every American jurisdiction rejects this position,<sup>244</sup> and this consensus is unlikely to erode.  
14 But it is worth examining the reasons why, because the perceived porousness of rape shield laws  
15 in the eyes of some victim advocates often rests on assumptions inapposite to judgments about the  
16 admissibility of evidence.

17 One such assumption is that “[t]he categorical admission of prior sexual conduct between  
18 the complainant and the victim . . . suggests that rapes that occur after a man and a woman have  
19 previously been intimate are less injurious.”<sup>245</sup> The evidentiary rule exempting complainant–

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<sup>240</sup> *Olden v. Kentucky*, 488 U.S. 227 (1988). To be sure, one could reconcile Professor Tuerkheimer’s proposal with the mandate of decisions like *Olden* by arguing that in the example in text the complainant, by testifying that she did not consent, implicitly put her veracity at issue, thus implicitly claimed that she was not fabricating the charge, and thus “opened the door” to defense rebuttal of that implicit claim. But this does not seem a fair reading of Professor Tuerkheimer’s proposal. If it were so construed, moreover, it could no longer function to preclude defense evidence of prior patterns of behavior, because in that broader interpretation of what counts as “opening the door,” the complainant’s claim of nonconsent would open the door to rebuttal evidence providing a wide range of reasons to believe that her testimony was untrue. Indeed, Professor Tuerkheimer foresees and explicitly seeks to foreclose this more flexible interpretation of her test: “To be clear, the door does not open simply because a defendant claims that the victim consented . . . . Instead, the court must assess the evidential worth of the victim’s prior sexual conduct solely in relation to the state’s theory of guilt. . . . [Sexual-history evidence should be admissible] when it is directly responsive to specific testimony or comment. . . . [but] limiting its admissibility to a rebuttal function.” Tuerkheimer, *supra* note 31, at 1501-1503.

<sup>241</sup> Anderson, *supra* note 1.

<sup>242</sup> *Id.* at 147.

<sup>243</sup> See Anderson, *supra* note 1, at 118-130. Other commentators have expressed at least qualified endorsement of this approach, see, e.g., Tuerkheimer, *supra* note 31, at 1498-1499, and it has some support in Canadian law. See *id.* at 1499 n.218.

<sup>244</sup> Dean Anderson acknowledges that “all rape shield laws categorically [exempt] evidence of a woman’s prior sexual conduct with [the defendant] when it is offered to prove consent.” Anderson, *supra* note 1, at 118.

<sup>245</sup> *Id.* at 119.

1 defendant encounters from rape shield exclusion cannot be understood in this manner. As an initial  
2 matter, such evidence is never categorically admissible; it must be relevant, and have probative  
3 value that outweighs its prejudicial effect in the particular case. In any event, a decision to admit  
4 such evidence cannot be seen as suggesting that a rape occurring after previous intimacy is less  
5 injurious. To the contrary, admission of such evidence signifies only that the testimony in question  
6 can help determine whether a rape occurred in the first place. The premise of admissibility is that  
7 a defendant's claim of consent is more likely to be true when the parties previously had been  
8 intimate than when they previously had not. If a jury determines that a rape had indeed been  
9 committed, sentencing becomes a separate issue, and prior intimacy between the parties could be  
10 either an aggravating or mitigating factor, depending on the circumstances.<sup>246</sup>

11 A distinct argument for excluding evidence pertaining to prior complainant–defendant  
12 sexual interaction is that such evidence has little probative value. It is said that admission of  
13 evidence concerning prior complainant–defendant intimacy:

14 rel[ies] on the . . . invidious common law inference that a woman's consent to sexual  
15 intercourse has no temporal constraints. [It] assumes that sex between two people  
16 is an interaction that does not meaningfully change in character in different  
17 contexts. . . . [It relies] on the common law assumption that a woman's consent is  
18 not specific as to act. . . . [T]he law must treat consent as specific for each sexual act,  
19 and not assume that prior consent to sexual petting with the defendant, for instance,  
20 is 'an implied invitation' to sexual intercourse.<sup>247</sup>

21 These arguments rightly stress that sexual consent is always specific to an identified time,  
22 place, and manner of interaction. Prior consent cannot in and of itself afford a substantive defense  
23 to subsequent conduct for which consent was not given at the time. But prosecutors can certainly  
24 argue and judges can certainly instruct the jury to that effect. Most contemporary juries are also  
25 likely to readily comprehend that point. In crafting rape shield provisions, however, reformers  
26 must not equate the absence of a complete substantive defense with the absence of relevancy. The  
27 distinction is fundamental to the law of evidence.<sup>248</sup>

28 The decision to admit evidence of prior consent to sexual petting or even to intercourse is  
29 not a judgment that such consent is in itself a defense to a charge of rape on a later occasion, just  
30 as a decision to admit evidence of a prior good relationship between a defendant and a homicide  
31 victim is not a judgment that such evidence is in itself a defense to a charge of premeditated  
32 murder. In both cases the ruling on admissibility is no more than a conclusion that the fact of

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<sup>246</sup>At sentencing, prior intimacy is no doubt more likely, as an empirical matter, to be considered mitigating. The judgment, nonetheless, must be contextual and can go either way depending on the circumstances.

<sup>247</sup> Anderson, *supra* note 1, at 121, 125, 127.

<sup>248</sup> See, e.g., FED. R. EVID. 401, *adv. comm. notes* (quoting McCormick § 152, p. 317 for the well-known adage, “A brick is not a wall” and concluding that “[a]ny more stringent requirement is unworkable and unrealistic”).

1 consequence to the litigation (nonconsent or premeditation) is less likely to be true when the  
 2 proffered evidence is present than when it is not.<sup>249</sup> Judged by this uncontroversial standard,  
 3 evidence of consent with the accused on a prior occasion clearly meets the requirement of  
 4 relevancy to a claim of consent with the same person on the present occasion: That claim of consent  
 5 in the instance at issue is more likely to be true when the parties had previously been intimate than  
 6 when they had not. Indeed, the contrary position—that consent is no more likely between intimates  
 7 than between strangers—is not plausible.<sup>250</sup>

8 A final argument is that evidence of prior intimacy between the parties can have an overly  
 9 prejudicial effect: “If the defendant and the victim previously had a sexual relationship, the jury is  
 10 often unwilling to convict.”<sup>251</sup> This empirical observation, though no doubt accurate, suggests

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<sup>249</sup> See, e.g., FED. R. EVID. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”).

<sup>250</sup> An argument against admissibility that is technically better grounded in the rules of evidence would be to maintain that prior intimacy with the defendant, though indeed probative in the required sense, is nonetheless inadmissible because its probative value derives from the inference that the prior acts establish “a person’s character in order to show that on a particular occasion the person acted in accordance with the character,” an inference that Federal Rule 404(b) and its state counterparts exclude as a basis for establishing relevancy. This argument fails as well, however, because Rule 404(b) and its state counterparts permit the use of prior acts when offered not to prove character/propensity but instead as proof of “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” FED. R. EVID. 404(b).

In the present context, evidence of prior consensual sex with the accused is generally understood to fall within this latter clause of Rule 404(b), because it tends to prove (1) the complainant’s state of mind (her willingness to consent to sex with the accused) and/or (2) the defendant’s mistake about her consent. See, e.g., Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 815 (1986). In criticism of this reasoning, it is sometimes suggested that (1) a willingness to consent at one moment in time cannot be treated as having no temporal limits; and that a defendant cannot reasonably assume that prior consent signifies future consent. See, e.g., Anderson, *supra* note 1, at 121 (arguing that Galvin’s argument for admissibility relies on the “invidious common law inference that a woman’s consent to sexual intercourse has no temporal constraints”). Points like these, though factually accurate, again set aside conventional criteria for establishing relevance. Galvin’s support for admissibility, for example, is not that prior consent establishes a character trait of the complainant, but only that the complainant’s state of mind at time A is relevant to her state of mind at time B. See Galvin, *supra*, at 815 (“this evidence is probative of the complainant’s state of mind toward the particular defendant, permitting an inference that the state of mind continued . . .”). It is true that the complainant has the right to change her mind and that the ultimate issue must be whether she did consent at time B. But her state of mind at time B is more likely to be one of willingness if she consented at time A than if she had never previously consented, and this differential likelihood is all that is required to establish relevancy on a state-of-mind theory. For the same reason, her consent at time A is relevant to the issue of a defendant’s claim of mistake because the accused is more likely to have made a mistake at time B if she gave him consent at time A than if she had never previously given him consent. Prior acts of consent with the accused therefore clearly meet the requirements for non-propensity admissibility under Rule 404(b) and its state counterparts.

<sup>251</sup> Anderson, *supra* note 1, at 129. Dean Anderson adds that in the eyes of prosecutors and victim advocates, a prior sexual history with the defendant makes it “practically impossible to convince the jury that the incident in question was [nonconsensual].” *Id.* If the prosecutors are right in thinking that the

1 prejudicial effect, however, only if we presuppose that the defendant was guilty. Otherwise, the  
2 greater difficulty of winning convictions in such cases leaves open the question whether the jury’s  
3 unwillingness to convict is attributable primarily to bias against the complainant or instead to  
4 skepticism *justifiably* grounded in factual ambiguity on the issues of consent and reasonable  
5 mistake.

6 Both possibilities have some validity. But in weighing probative value against prejudicial  
7 effect, it becomes crucial to assess *the extent* to which a contemporary jury is likely to harbor  
8 unjustified bias against a complainant who previously had consensual sex with the accused. In this  
9 regard, there can be little doubt that there has been a sea change in our culture since the 1970s.

10 Research collected by Bennett Capers, Deborah Tuerkheimer, and others makes clear how  
11 dramatic the shift has been.<sup>252</sup> In 1977, 87 percent of Americans believed that extramarital sex was  
12 always or almost always wrong; today more than half of girls aged 15 to 19 have engaged in sexual  
13 intercourse, and 98 percent of women between the ages of 25 and 45 are sexually active.<sup>253</sup> Mary  
14 Fan provides data suggesting a high and apparently increasing frequency of sex outside of  
15 committed relationships or in concurrent relationships.<sup>254</sup> Professor Capers reports a single  
16 anecdote that illustrates this transformation: “When Prince Charles announced his engagement to  
17 Princess Diana in 1981, the public demanded evidence of her virginity, which her uncle publicly  
18 provided. There was no such demand in 2011 when Prince William married Kate Middleton after  
19 the two of them had been living together for years.”<sup>255</sup>

20 To be sure, evidence of promiscuity—that the complainant has had sex with multiple  
21 partners—still carries considerable potential for prejudice. But it is difficult to conclude that a jury  
22 would pass invidious judgment on a complainant’s character on hearing evidence showing only  
23 that she (like the present Duchess of Cambridge) had been intimate with a particular partner prior  
24 to marriage.

25 The decisive point, moreover, is that a court cannot assess prejudice solely in terms of  
26 possible distortions to factfinding that result from *admitting* evidence. It must compare any such  
27 possibilities to the distortions that result from *excluding* that evidence. Suppose, for example, that  
28 the complainant and the accused are college students who have had sexual intercourse two or three

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incidents in question were indeed nonconsensual and that the prior sexual history makes it impossible to convince the jury otherwise, this would indeed qualify the prior-history evidence as prejudicial. We need to be careful, however, in assuming that jury resistance to conviction in such cases always lacks factual justification. In any event, in current American practice, such evidence is almost always admissible, and rape convictions, though difficult to obtain, are by no means unheard of in cases involving prior complainant–defendant intimacy, so the claim that it is “practically impossible to convince the jury” is at best hyperbolic.

<sup>252</sup> See Capers, *supra* note 30, at 876-877; Tuerkheimer, *supra* note 31, at 1464.

<sup>253</sup> Capers, *supra* note 30, at 876-877.

<sup>254</sup> Mary D. Fan, *Sex, Privacy, and Public Health in a Casual Encounters Culture*, 45 U.C. DAVIS L. REV. 531, 537-543 (2011).

<sup>255</sup> Capers, *supra* note 30, at 877.

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1 times a week for the past month. Just a few days after their last prior consensual encounter, they  
2 spend the evening in the complainant’s dorm room, the defendant makes sexual advances, and  
3 intercourse ensues. But in this instance the complainant alleges that she rejected the advances and  
4 refused consent; the defendant claims that the encounter was consensual and that, if not, he  
5 reasonably thought it was. To support his defense, the defendant proffers evidence of their prior  
6 intimacy, arguing that the jury cannot fairly evaluate his claims relating to consent and mistake  
7 without knowing that the parties had had frequent consensual encounters in the period just prior to  
8 the alleged offense. Under Dean Anderson’s proposed approach, all evidence relating to their prior  
9 sexual intimacy would be excluded; the jury would be required to assess the plausibility of consent  
10 and good-faith mistake as if the parties had never previously been intimate.<sup>256</sup>

11 No American jurisdiction would consider that result acceptable, but the basis for this  
12 intuition warrants discussion because it is relevant across a wide range of more debatable rape  
13 shield issues. As Professor Capers observes, “when jurors are told nothing, they do not assume  
14 ‘nothing.’ Instead, they use the information they are provided, as well as the surface appearance  
15 of the complainant . . . to fill in the blank.”<sup>257</sup> The implication in the present context is that few  
16 jurors if any will be legally sophisticated enough to know that the complainant and defendant *might*  
17 *or might not* have had previous consensual sex. Instead, nearly all jurors will simply assume—  
18 contrary to fact—that if they have not heard about previous intimacy between the parties, then no  
19 such intimacy existed.<sup>258</sup>

20 In effect, then, rape shield exclusion can sometimes permit the prosecution to use cultural  
21 and sexual dynamics in two opposing ways. On the admissibility question the government can  
22 argue that the presence or absence of prior consent has little or no relevance to the issues at trial,

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<sup>256</sup> Dean Anderson acknowledges that *some* information about the parties’ prior relationship is desirable to provide “meaningful context,” and her proposal therefore would “allow the defendant to discuss general information about the nature of the parties’ relationship, such as the fact that the parties were married or lived together, or dated previously. . . . Descriptions of the level of sexual intimacy previously attained or of specific prior sexual acts, however, befuddle the truth-seeking process, so they should ordinarily be inadmissible.” Anderson, *supra* note 1, at 130. This gloss on the proposal, however, arguably can create more problems than it solves. Merely “hooking up” presumably does not qualify as dating (the latter typically implying a more personal relationship), and conversely, dating need not imply sleeping together. Similarly, cohabitation in current times might signal either a relationship akin to marriage, an entirely asexual friendship, or any number of arrangements in between. The potential for jury confusion seems considerable if jurors are told that the parties had dated previously (or shared a one-bedroom apartment) but are not told whether or how often the parties had been sexually intimate. In any event, however, the more fundamental problem is that excluding evidence of prior intimacy leads to faulty jury assumptions and distorted factfinding whether or not the jury is told that the parties were cohabiting or “dating” previously or at the time of the events at issue at trial.

<sup>257</sup> Capers, *supra* note 30, at 857.

<sup>258</sup> As Professor Capers notes, however, jurors sometimes might fill in this blank in the opposite way, assuming the complainant to be “a Jezebel,” *id.* at 870, for example when the information before them (including the complainant’s race) is inconsistent with what they expect a virginal “madonna” to look like. *Id.* at 856-857, 869-870.

1 but on the guilt-determination question the prosecutor nonetheless can allow the jury to infer that  
2 the absence of evidence of prior consent *is* relevant—highly relevant—to the issues at trial.

3 Of course, the prosecution may have no intent to exploit inconsistent positions. The  
4 prosecution may simply be concerned that jury awareness of the prior encounters will be unduly  
5 prejudicial, or it may believe that a jury uninformed about such evidence will not be unduly  
6 skeptical of the defense claim of consent. Difficulty then arises from tension between the  
7 assumptions underlying the shield and assumptions that jurors ignorant of the rape shield rule bring  
8 with them to court. In such cases, the decision whether to admit or exclude the contested evidence  
9 will resist any analytically unassailable answer, because the judgment about which dangers  
10 predominate turns on elusive empirics and intuitions. At least as a matter of pure logic, the  
11 admissibility decision might sometimes present an apparently unavoidable dilemma.

12 The trial judge, however, has an array of tools for navigating these conflicting contentions,  
13 in cases in which they present a genuine predicament. Though no doubt more awkward in some  
14 situations than simply admitting the sexual-history evidence in the first place, stipulations and  
15 explanatory jury instructions can mitigate unfairness to the defense *without* exposing the  
16 complainant to embarrassing or potentially prejudicial disclosures. These trial-management tools  
17 apparently have yet to be used to sidestep the dilemmas that the rape shield law often poses, but  
18 they offer a means to resolve many rape shield difficulties without the need to risk substantial  
19 unfairness to one side or the other.

20 Specifically, if the prosecution seeks to exclude prior sexual history and the two sides  
21 dispute whether the jurors will draw factually inaccurate inferences from gaps in what they hear,  
22 the straightforward solution is simply to *explain the rules of rape shield*. Needless to say, a jury  
23 should not be told that specific evidence of the complainant's prior sexual history has been  
24 excluded. Instead, the judge should explain, in general terms, that the law deems prior sexual  
25 history irrelevant and inadmissible. Accordingly, jurors would be made aware that they will hear  
26 no such evidence—either because it does not exist, or because it is deemed irrelevant, and therefore  
27 that they should make no assumption *one way or another* about any particular characteristic of the  
28 complainant's sexual history.

29 Indeed, unless proposals to exclude such evidence are intended to allow the prosecution to  
30 benefit both ways, such proposals—if accepted—would seem to require a general instruction of  
31 this kind in all cases, regardless of whether the particular complainant has any of the particular  
32 previous sexual history.<sup>259</sup> Such an instruction might, of course, cause the prosecution more harm

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<sup>259</sup> See generally Capers, *supra* note 30, for discussion of the ways in which rape shield laws fail to convey to the jury the assumptions on which they rest. Capers argues that what shield laws communicate is not that the complainant's prior sexual history is none of the jury's business, but rather that the complainant's prior sexual history is nonexistent, and he maintains that the latter (often inaccurate) picture unfairly discredits the defense in a way that the former, factually accurate picture would not.

It does not necessarily follow, however, that the prosecution should always be able to substitute a stipulation or jury instruction for evidence that provides the texture of prior sexual episodes. See, e.g., *Old Chief v. United States*, 519 U.S. 172 (1997) (discussing the importance of generally allowing litigants to present their theory of the case through concrete testimony rather than arid stipulations). Thus, jury

1 than good, and in many cases it may be far less confusing simply to allow the jury to hear the  
 2 precise evidence. But if this approach is to be challenged, it cannot be tenable to insist  
 3 simultaneously that prior-sexual-history evidence be excluded and that the jury be left to assume  
 4 that such evidence, if available, would have been heard.<sup>260</sup> These conclusions generalize,  
 5 moreover. The admission of sexual-history evidence—or if not, an explanatory jury instruction—  
 6 sometimes is necessary to avert the impact of erroneous assumptions that, even when unstated, can  
 7 powerfully distort jury factfinding. A trial record purged of truthful evidence of prior complainant–  
 8 defendant consensual intimacy is one clear instance of this kind. Unstated assumptions can have a  
 9 distorting impact in other contexts as well, and when they do, the circumstances arguably may  
 10 warrant an exemption from the ordinary preference for rape shield exclusion. Subsection (1)(b)  
 11 addresses situations of this kind.

12 *iii. Assessment of existing law: overly restrictive rules.* There are 16 distinct situations that  
 13 qualify for exemption from rape shield under the law of at least one American jurisdiction, but  
 14 only four of these exemptions can claim essentially universal support.<sup>261</sup> Section 213.11(1)(b)  
 15 endorses the substance of these four and several others, but it rejects seven of the less-universal  
 16 exemptions. In several instances, the decision to reject the exemption requires little comment:  
 17 Categorical exemptions for multiple partners,<sup>262</sup> lack of chastity,<sup>263</sup> prior prostitution,<sup>264</sup>  
 18 psychological fantasy<sup>265</sup> and adultery<sup>266</sup> have only scattered statutory support and are  
 19 irreconcilable with rape shield principles. But two of the exemptions not endorsed—an exception

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instructions may sometimes be an unsatisfactory alternative to concrete testimony; the point in text is simply that when the subject matter is relevant, the prosecution cannot reasonably seek to preclude both.

<sup>260</sup> To be sure, the rules of evidence produce an arguably analogous situation in the case of evidence of a defendant’s prior criminal convictions. Such evidence is not admissible to prove criminal propensity, see, e.g., FED. R. EVID. 404(b), but we do not inform the jury of this exclusionary rule. The situations are not truly comparable, however; the refusal to give the jury such an instruction with respect to a criminal defendant’s rap sheet rests on the policy judgment that the jury *should* treat the defendant *as if* he had no prior convictions—because any jury suspicion that this might not be the case would lead them too readily to convict on the present charges. There is no comparable policy judgment underlying rape shield exclusion. That context does not involve the extra importance of minimizing factual error that convicts the innocent, and the premise of exclusion is that prior sexual history should not enter the jury’s thinking either way, not that the jury should evaluate the allegations *as if* the complainant were chaste.

<sup>261</sup> See nn.193-195 and accompanying text.

<sup>262</sup> IDAHO R. EVID. 412(b)(2)(D) (2010); OKLA. STAT. tit. 12, § 2412(B)(3) (2010) (Evidence of “similar sexual acts in the presence of the accused with persons other than the accused which occurs at the time of the event giving rise to the sexual offense alleged.”).

<sup>263</sup> MO. REV. STAT. § 491.015(1)(4) (2010). Missouri’s lack-of-chastity exception has little general importance, as it applies only when the chaste character of the complainant is an element of the alleged crime. No such circumstance is an element of any Article 213 offense.

<sup>264</sup> N.Y. CRIM. PROC. LAW § 60.42(2) (McKinney 2010).

<sup>265</sup> N.C. GEN. STAT. § 8C-1, RULE 412(b)(4) (2010).

<sup>266</sup> S.C. CODE ANN. § 16-3-659.1(1) (2010).

1 for patterns of similar complainant behavior<sup>267</sup> and a general catch-all or safety-valve  
 2 exception<sup>268</sup>—have significant support in statutes and case law; accordingly they warrant more  
 3 extended discussion here. A final exemption not endorsed—for prior false accusations<sup>269</sup>—raises  
 4 especially complex and controversial issues; it is therefore discussed in a separate section below.<sup>270</sup>

5 *Pattern-of-behavior exceptions.* With respect to “pattern of behavior” evidence, the case  
 6 for admissibility has garnered significant support. As discussed in the preceding section, a number  
 7 of statutes and many judicial decisions endorse the principle that prior instances of consent to sex  
 8 with third parties can overcome the rape shield exclusion and be admitted as relevant to  
 9 establishing willingness to consent to sex with the defendant, provided that the circumstances of  
 10 the prior encounters are sufficiently similar to those alleged in the present case. None of the reasons  
 11 adduced to support the admissibility of such evidence is tenable, however.

12 Probably the leading “common sense” explanation for the pattern exception is the intuition  
 13 that a person who consents to sex in a distinctive situation is more likely to consent in that situation  
 14 again than a person who has never done so—in short, that the pattern evidence is “relevant.”  
 15 Suppose, for example, that the complainant says that she met the defendant, a co-worker, at a bar  
 16 after work and that he proceeded to rape her. The defendant claims consent and proffers evidence  
 17 that the complainant has frequently gone to that same bar after work and had consensual sex with  
 18 one or another of her co-workers after meeting them there. The argument for admissibility is that  
 19 a person who consents under these circumstances is more likely to have consented in the present  
 20 case than a person who had never consented to sex with a co-worker she encountered at a bar after  
 21 work.

22 Examples of this kind present a classic case for rape shield exclusion, not a basis for an  
 23 exception from it. Most fundamentally, even if there is some relevancy in the thin sense of “more  
 24 likely with than without such evidence,” the prejudicial effect is great, and the probative value is  
 25 at best slender: In the eyes of the jury, the evidence may imply promiscuity, triggering a host of  
 26 irrelevant negative assumptions about the complainant, and the likelihood that she consented with  
 27 the defendant depends far more on her feelings for him (and vice versa) than on whether she was

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<sup>267</sup> E.g., N.C. GEN. STAT. § 8C-1, RULE 412(b)(3) (2010) (“[E]vidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant’s version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or . . . lead the defendant reasonably to believe that the complainant consented”). See also TENN. EVID. RULE 412(c)(4)(iii) (2010); FLA. STAT. § 794.022(2) (2010) (“[...] such evidence tends to establish a pattern of conduct or behavior on the part of the victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent.”).

<sup>268</sup> E.g., N.Y. CRIM. PROC. LAW § 60.42(5) (McKinney 2014) (“interests of justice”); CAL. EVID. CODE § 1103(a)(1) (West 2014).

<sup>269</sup> E.g., ARIZ. REV. STAT. ANN. § 13-1421(A)(5) (2011); COLO. REV. STAT. ANN. § 18-3-407(2).

<sup>270</sup> This topic was the subject of discussion and amendment at an Annual Meeting, as recounted in the Reporters’ Note, *infra*.

1 attracted to co-workers A, B, and C. More technical arguments for admissibility under the rules of  
2 evidence are untenable as well.<sup>271</sup>

3 At the same time, while “pattern” evidence as such constitutes a poor category for an  
4 exception from rape shield, some cases that fall under this general heading merit closer scrutiny.  
5 The problem with the general “pattern” category is that it relies on frequency or similarity alone  
6 to determine relevancy. Yet, as in the example above, there is nothing inherently unlikely about a  
7 person meeting an acquaintance at a bar and consenting to sex; indeed, its very plausibility gives  
8 evidence of other similar acts very low probative value. A jury can judge the claim of consent on  
9 the testimony concerning the evening in question, without knowing anything about whether or not  
10 the complainant has ever engaged in such behavior with others.

11 The case changes, however, when some aspect of the alleged incident itself makes a claim  
12 of consent intrinsically implausible—for example, when a sexual encounter entailed behavior  
13 strongly associated with lack of consent, such as violence, restraint, or resistance. In such cases, if  
14 the government overtly “opens the door” by arguing that those circumstances prove the absence  
15 of consent, the defendant must be permitted to introduce evidence of prior consensual conduct of  
16 a similar nature, in order to rebut the prosecutor’s explicit argument. If, instead, the government  
17 lets the evidence speak for itself, and never expressly argues the implausibility of the defendant’s  
18 version of the incident, the same principle nonetheless applies: The exclusion of sexual-history  
19 evidence would unjustly prevent the defendant from rebutting an unspoken and compelling—but  
20 factually inaccurate—inference of his guilt.

21 The lesson of the so-called pattern cases, accordingly, is that the legitimate need for an  
22 exemption from rape shield has nothing to do with any alleged similarity between the  
23 complainant’s behavior on the present and prior occasions. The problem (when there is one) arises

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<sup>271</sup> Settled rules of evidence preclude the use of an individual’s prior acts to establish “the character of a person in order to show action in conformity therewith.” E.g., FED. R. EVID. 404(b). Decisions admitting sexual history to establish a “pattern of behavior” seem, however, to proceed on the premise that such a pattern is relevant to consent in the present case not on a theory of character/propensity but instead on one of the non-propensity purposes that Rule 404(b) permits—for example to prove state of mind (the willingness to consent) or a distinctive “*modus operandi*.” See, e.g., *State v. Shoffner*, 302 S.E.2d 830, 833 (N.C. Ct. App. 1983). The state-of-mind theory is unsound for the reason discussed in text—probative value on that theory is slender at best and the prejudicial effect is substantial. The notion of *modus operandi*, often referred to as the “signature” exception to Rule 404(b), is unsustainable as well. *Modus operandi* permits the admission of prior crimes substantially similar to the offense currently charged because it can help identify the defendant as the perpetrator. If the present offense involves a bar that was robbed just before closing by a man wearing a Groucho Marx mask, and the defendant has already been identified as the perpetrator of three prior robberies involving a bar held up just prior to closing by a man wearing the same mask, the similarity in *modus operandi* can represent a distinctive “signature” and serve to support the allegation that the defendant was the perpetrator in the present case as well. No comparable question is at issue when a complainant charges the defendant with rape and the defendant offers evidence of the prior episodes to buttress his claim of consent. Finally, such behavior could hardly be considered routine enough to qualify as “habit.” FED. R. EVID. 406.

1 from the possibility that the jury will draw erroneous inferences from the acknowledged facts of  
2 the encounter on the occasion at issue in the present trial itself. The potential problem, in short,  
3 flows from the possible jury perception that consent in the circumstances of the present encounter  
4 is implausible, not from whether that behavior falls into a pattern of similar conduct in the past.  
5 *The basis for concern is implausibility on the present occasion, not similarity to conduct in the*  
6 *past.*

7 Whether the circumstances at trial do or do not involve this problem—that of unspoken,  
8 powerful, but erroneous inferences of guilt—will, of course, depend on the particular details of the  
9 case. Nonetheless, a well-designed rape shield statute should provide criteria for addressing the  
10 issue. At the same time, these criteria must not permit the admissibility of “pattern” evidence that  
11 merely involves similarity rather than characteristics tending to rebut arguments of implausibility.  
12 Section 213.11 endeavors to strike the proper balance between these concerns.

13 *iv. Allegedly false prior accusations by the complaining witness.* Defense allegations that  
14 the complaining witness has previously made false accusations have extraordinary potential for  
15 distorting the factfinding process and casting the complainant in an unjustly pejorative light. The  
16 dangers are aggravated by continuing misconceptions about the nature and frequency of false  
17 accusations and the long Anglo-American history of directing undeserved skepticism toward  
18 sexual-assault complainants. Contemporary courts rightly observe that “[c]redibility of the  
19 witnesses is no more important in sex offenses than in any other case.”<sup>272</sup> Nonetheless, defense  
20 challenges to the veracity of the complainant have an especially sharp potential for prejudice in  
21 sexual-assault cases, and at the same time such challenges sometimes have an essential place in a  
22 legitimate defense.<sup>273</sup> The appropriate treatment of false-accusation claims accordingly is a matter  
23 of utmost importance, one that lies close to the heart of rape shield concerns. Yet existing law is  
24 in a state of remarkable disarray with respect to the standards for determining the admissibility of

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<sup>272</sup> Lopez v. State, 18 S.W.3d 220, 224 (Tex. Crim. App. 2000).

<sup>273</sup> See, e.g., Ellsworth v. Warden, 333 F.3d 1, 5 (1st Cir. 2003) (en banc) (if “the setting and type of alleged lie are similar, ... [false-accusation] evidence would be far more potent than a random unrelated episode of untruthfulness.”); State v. Wyrick, 62 S.W.3d 751, 773 (Tenn. Crim. App. 2001) (“Because of the unique role that the credibility of the victim plays in many sexual crimes, some jurisdictions have effectively created a special exception to their evidentiary rules excluding extrinsic evidence of prior bad acts in order to admit evidence that the victim has previously falsely accused someone of a sexual crime.”).

Similarly, as the New York District Attorney’s Office recently wrote in its memorandum requesting dismissal of a high-profile indictment alleging a sexual assault in light of the information unearthed in subsequent interviews and investigation of the complainant, “[i]t is clear that, in a case where a complainant is accusing a defendant of a sexual assault, the fact that she has given a prior false account of a different sexual assault is highly relevant.” Recommendation for Dismissal at 14, People v. Strauss-Kahn, Indictment No. 02526/2011 (N.Y. Sup. Ct. Aug. 22, 2011), at 14 (finding it further “highly significant” that the prior false allegation was recounted “to prosecutors ... in a completely persuasive manner—identical to the manner in which she recounted the encounter with the [present] defendant”).

1 such evidence. In the words of one commentator, “[t]he confusing state of the case law ...  
2 underscores the need for clear guidance from state rape shield statutes.”<sup>274</sup>

3 In light of the importance of the problem and the exceptionally deficient state of existing  
4 law, Tentative Draft No. 1 (2014) took two steps: It included false-accusation claims within the  
5 scope of “sexual history” evidence that is presumptively inadmissible, and it defined in restrictive  
6 terms the circumstances in which that presumption could give way and in which, accordingly, the  
7 door could open to possible admissibility under other rules of evidence. Tentative Draft No. 1  
8 endorsed the heightened hurdles to admissibility that have emerged in the case law of some states  
9 and would have foreclosed the more permissive approaches that remain prevalent in other  
10 jurisdictions.

11 Nonetheless, at the Annual Meeting in May 2014, strong sentiment was expressed against  
12 this approach. Many members held that the matter was best left to the evolving case law under  
13 other rules of evidence—case law that has generated workable safeguards against undue  
14 admissibility in some jurisdictions, even though it has yet to do so in others. Reflecting this view,  
15 the Institute voted to strike the provisions of Tentative Draft No. 1 (2014) relating to false-  
16 accusation evidence and to state explicitly that such evidence is not included among the sexual-  
17 history matters that are presumptively inadmissible under rape shield. It was not the Institute’s  
18 view that such evidence should be presumptively admissible. Rather, as stated above, the  
19 admissibility of such evidence is to be resolved outside the rape shield framework, under the  
20 Constitution and the jurisdiction’s other rules of evidence.

21 To provide a basis for understanding this difficult issue, the present Comment discusses  
22 the reasons for special concern about defense claims charging the complainant with having  
23 previously made false prior accusations. It then discusses current treatment of the issue under rape  
24 shield statutes and under the background rules of evidence that become the exclusive criteria of  
25 admissibility in the absence of special rape shield protection.

26 *Concern about false-accusation evidence.* As detailed above, a central concern prompting  
27 the initial wave of rape shield statutes was that at one time (prior to the 1970s) prior instances of a  
28 complainant’s consent to extramarital sex were widely accepted as evidence of bad character (and  
29 hence lack of truthfulness) or as evidence that having once consented to a sexual encounter, he or  
30 she was more likely to have consented on the occasion of the present charges. Rape shield statutes  
31 therefore sought to exclude (subject to narrow exceptions) evidence of the complainant’s prior  
32 sexual *activity*. Although a claim that the complainant had previously made a false accusation of  
33 rape does not precisely fit this mold (because it is not necessarily a claim that he or she *did*

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<sup>274</sup> Brett Erin Applegate, Comment, *Prior (False?) Accusations: Reforming Rape Shields to Reflect the Dynamics of Sexual Assault*, 17 LEWIS & CLARK L. REV. 899, 916 (2013). See also Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. LEGIS. 125 (1998); Jules Epstein, *True Lies: The Constitutional and Evidentiary Bases for Admitting Prior False Accusation Evidence in Sexual Assault Prosecutions*, 24 QUINNIPIAC L. REV. 609, 618 (2006) (“The historic response to false accusation evidence is one of imprecision, with its earliest formulations failing to distinguish between its use as substantive or credibility evidence.”).

1 previously engage in consensual sexual activity), it raises the similar problem of special scrutiny  
 2 of the complainant’s credibility. Indeed some jurisdictions, reflecting unjustified myths about the  
 3 prevalence of false accusations, had crafted particularly *generous* admissibility rules, allowing  
 4 defense claims that the complainant had previously leveled a prior false accusation of rape to be  
 5 heard at trial in sexual-offense cases, even though evidence of false accusation of other crimes  
 6 would not have been admissible in parallel circumstances involving prosecution for a nonsexual  
 7 offense.<sup>275</sup> Regardless of their textual specifics, rape shield statutes reflect an underlying spirit  
 8 which seeks to overturn such myths and prevent such special scrutiny of complaining witnesses,  
 9 by sharply curtailing the evidence of prior sexually related behavior that might otherwise be  
 10 admissible under general rules.

11 *Treatment of false-accusation evidence under rape shield statutes.* Although every state  
 12 has a rape shield statute, only eight address the issue of false-accusation evidence explicitly.<sup>276</sup>

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<sup>275</sup> See Applegate, *supra* note 274, at 916-918 (surveying debate over intrinsic versus extrinsic evidence, and noting readiness of courts to hold that, “in the context of sexual assault trials, exceptions must be made to rules prohibiting extrinsic evidence because of the high probative value of evidence of prior false accusations of sexual assault”). See also cases cited in note 272.

Of course, not every state needs to craft special rules, because their evidentiary rules track the common law rather than mirror Federal Rule of Evidence 608(b). The common law would admit extrinsic proof of a prior false accusation as evidence of “corruption.” See, e.g., *State v. Smith*, 743 So. 2d 199, 201-203 (La. 1999) (referencing “long-established principle that ‘[a] witness’ corruption may be evidenced by conduct indicating a general scheme to make false charges or claims.” (quoting *State v. Cappel*, 345 So. 2d 443, 445 (La. 1977)); see also Epstein, *supra* note 274, at 632-634 (noting Wigmore “approves of false accusation evidence as part of the category of witness ‘corruption’” and describes its admissibility as “beyond question.”). As one court explained, under the common law, “a party could present [extrinsic] evidence of a witness’s ‘corruption’—a term that encompassed evidence of (1) the witness’s general willingness to lie under oath, (2) the witness’s offer to give false testimony for money or other reward, (3) the witness’s acknowledgement of having lied under oath on prior occasions, (4) the witness’s attempt to bribe another witness, or (5) *the witness’s pattern of presenting false legal claims.*” *Morgan v. State*, 54 P.2d 332, 335-336 (Ct. App. Alaska 2002) (citing JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* (Chadbourn rev’n 1970), §§ 956-964, Vol. 3A, pp. 802-812) (emphasis added). These principles applied across all kinds of cases, and were not sex-offense specific.

<sup>276</sup> See ARIZ. REV. STAT. § 13-1421(A)(5) (admitting “[e]vidence of false allegations of sexual misconduct made by the victim against others” if relevant and material and prejudice does not outweigh probative value); Colo. Rev. Stat. Ann. § 18-3-407(2)) (including “evidence that the victim or a witness has a history of false reporting of sexual assaults” within scope of protection, which provides for pretrial hearing to determine relevance and materiality); IDAHO R. EVID. § 412(b)(2)(C) (defining “false allegations of sex crimes made at an earlier time” as an exception to rape shield and admissible if relevant and more probative than prejudicial); MINN. STAT. § 609.347(3)(a)(i) (admitting “evidence of the victim’s previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue. In order to find a common scheme or plan, the judge must find that the victim made prior allegations of sexual assault which were fabricated” and applying preponderance standard); MISS. R. EVID. 412(b)(2)(C) (admitting “[f]alse allegations of past sexual offenses made by the alleged victim at any time prior to the trial where relevant and more probative than prejudicial); 12 OKL. STAT. ANN. § 2412(B)(2)) (stating that “false allegations of sexual offenses” are admissible upon pretrial notice); WIS. REV. STAT. 972.11(b)(3)); (excepting “evidence of prior untruthful allegations of sexual assault made by the complaining witness”); 13 VT. STAT. ANN. § 3255(a)(1)(C) (allowing court to admit “evidence of

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1 When interpreting rape shield provisions that do not expressly refer to false accusations, most  
2 courts have read their statutes narrowly and concluded that false-accusation evidence is not  
3 covered by the shield's terms; thus false-accusation evidence is neither presumptively excluded  
4 nor subject to rape shield's special admissibility requirements and pre-trial procedures.<sup>277</sup> As one  
5 court explained, "*false* statements of unrelated sex assaults are not excluded by the rape shield  
6 statute because they are not evidence of sexual *conduct*."<sup>278</sup> Or, as another court put it, "the  
7 defendant is not attempting to inquire into the complaining witness' sexual history to reveal  
8 unchaste character. On the contrary, the defendant seeks to prove for impeachment purposes that  
9 the complaining witness has, in the past, made false accusations concerning sexual behavior."<sup>279</sup>  
10 Some courts have found that their rape shield statutes exclude false-accusation evidence by  
11 implication of their statutory text or commentary.<sup>280</sup> With respect to the federal rape shield  
12 provision (Federal Rule 412), some circuits have repeatedly avoided deciding whether prior false  
13 accusations fall within the scope of the Rule.<sup>281</sup>

14 Even when courts have been willing to move beyond textualism to consider the underlying  
15 policies implicated by rape shield, they have often chosen to differentiate false-accusation

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specific instances of the complaining witness' past false allegations of violations of this chapter" where "it bears on the credibility of the complaining witness or it is material to a fact at issue and its probative value outweighs its private character").

<sup>277</sup> See, e.g., *Smith v. State*, 377 S.E.2d 158, 160 (Ga. 1989) ("Numerous other courts have faced the issue presented by this appeal, and have ruled that evidence of prior false allegations by the victim does not fall within the proscription of rape-shield laws. The courts have reasoned that the evidence does not involve the victim's past sexual conduct but rather the victim's propensity to make false statements regarding sexual misconduct."); *State v. Walton*, 715 N.E.2d 824, 826 (Ind. 1999) ("Evidence of prior false accusations of rape made by a complaining witness does not constitute 'prior sexual conduct' for rape shield purposes."); *State v. Durham*, 327 S.E.2d 920, 926 (N.C. Ct. App. 1985) (noting "statute excluded evidence of 'sexual behavior,' but not evidence of language or conversation whose topic might be sexual behavior"); *State v. LeClair*, 730 P.2d 609, 613 (Or. Ct. App. 1986) ("Evidence of previous *false accusations* by an alleged victim is not evidence of *past sexual behavior* within the meaning of the Rape Shield Law and, therefore, is not inadmissible under OEC 412"); *Clinebell v. Commonwealth*, 368 S.E.2d 263, 264-265 (Va. 1988) ("We conclude that such statements are not "conduct" within the meaning of [the rape shield rule] and therefore, the section is inapplicable."). See also WRIGHT & MILLER § 5384 (citing cases and noting that "[o]ne form of verbal conduct that ought to be excluded from the definition of 'sexual behavior' is prior false accusations of rape. Although the opponents of Rule 412 argued that it would exclude such evidence, the proponents denied that this was a proper reading of the rule.").

<sup>278</sup> *State v. West*, 24 P.3d 648 (Haw. 2001) (citing cases) (second emphasis added).

<sup>279</sup> *Miller v. State*, 779 P.2d 87, 89 (Nev. 1989) (citing cases).

<sup>280</sup> See, e.g., *State v. Tarrats*, 122 P.2d 582, 585 (Utah 2005) (finding false statement not covered by rape shield, citing the advisory-committee notes to the state's statute which specifically state that "[e]vidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412.").

<sup>281</sup> See, e.g., *United States v. Frederick*, 683 F.3d 913, 916-917 (8th Cir. 2012) (choosing to avoid the question whether Federal Rule 412 disallows false prior accusations); *United States v. Tail*, 459 F.3d 854, 859-860 (8th Cir. 2006) (same); *United States v. Bartlett*, 856 F.2d 1071, 1088 (8th Cir. 1988) (same).

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1 evidence from evidence of sexual behavior, and reasoned that rape shield policies were intended  
2 only to restrict the latter. For example, in *Abbott v. State*,<sup>282</sup> the court observed that

3 Nevada’s rape shield law[] precludes admission of a victim’s previous sexual  
4 conduct. However, this court has carved out an exception to [rape shield,] holding  
5 that it does not encompass prior false allegations of sexual abuse or sexual assault  
6 because “it is important to recognize in a sexual assault case that the complaining  
7 witness’ credibility is critical and thus an alleged victim’s prior fabricated  
8 accusations of sexual abuse or sexual assault are highly probative of a complaining  
9 witness’ credibility concerning current sexual assault charges.” As such, “defense  
10 counsel may cross-examine a complaining witness about previous fabricated  
11 accusations, and if the witness denies making the allegations, counsel may  
12 introduce extrinsic evidence to prove that, in the past, fabricated charges were  
13 made.”<sup>283</sup>

14 Similarly, an Indiana court explained:

15 In presenting such [false-accusation] evidence, the defendant is not probing the  
16 complaining witness’s sexual history. Rather, the defendant seeks to prove for  
17 impeachment purposes that the complaining witness has previously made false  
18 accusations of rape. Viewed in this light, such evidence is more properly  
19 understood as verbal conduct, not sexual conduct. As a result, “evidence of prior  
20 false accusations of rape is admissible to attack the credibility of the accusing  
21 witness . . . .”<sup>284</sup>

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<sup>282</sup> *Abbott v. State*, 138 P.3d 462, 473-474 (Nev. 2006).

<sup>283</sup> *Id.* at 473-474 (citing *Miller v. State*, 779 P.2d 87, 88-89 (Nev. 1989)). This is true even though Nevada typically forbids extrinsic evidence to disprove a denial of a specific instance of misconduct. See *Miller*, 779 P.2d at 90.

<sup>284</sup> *Williams v. State*, 779 N.E.2d 610, 613 (Ind. 2002) (quoting *State v. Walton*, 715 N.E.2d 824 (Ind. 1999)) (emphasis added).

1 Numerous other courts<sup>285</sup> and several commentators<sup>286</sup> have reached the same conclusion.

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<sup>285</sup> See, e.g., *State v. Anderson*, 686 P.2d 193, 199-200 (Mont. 1984) (“Despite the general policy against sordid probes into a victim’s past sexual conduct, we conclude that the policy is not violated or circumvented if the offered evidence can be narrowed to the issue of the complaining witness’ veracity.”); *State v. Baron*, 292 S.E.2d 741 (N.C. Ct. App. 1982) (“Since there is no contention that the complainant ever engaged in sexual activity, there was no need to invoke the statute to prevent the disclosure of complainant’s prior statements accusing others of improper sexual advances... [D]efense counsel should have been allowed to introduce the evidence in order to attack the credibility of the witness.”); *State v. Caswell*, 320 N.W.2d 417, 419 (Minn. 1982) (finding error in exclusion of prior-false-accusation evidence, noting that “We question whether one who has falsely accused another of rape has standing to claim she is harassed by evidence of that false accusation.”); *State v. McCarthy*, 446 A.2d 1034 (R.I. 1982) (reversal for prejudicial error, finding “trial justice’s refusal to allow defendant to submit to the jury evidence that the complaining witness had made false charges of rape against another individual undermined defendant’s ability to challenge effectively the complaining witness’s credibility,” where complainant made and withdrew charges against another man at a time subsequent to alleged incident); *State v. Garvie*, 384 N.W.2d 796, 798 (Mich. 1986) (“Notwithstanding the [rape shield] statute, the defendant should be permitted to show that the complainant has made false accusations of rape in the past.”); *Mathis v. Berghuis*, 202 F. Supp. 2d 715, 722 (E.D. Mich. 2002) (“Petitioner had a right to cross examine the complainant regarding prior false accusations ‘of a similar nature,’ and, if she were to deny making such a false accusation, Petitioner would have been entitled to submit into evidence extrinsic proof of such a charge in order to impeach the complainant.”); *Morgan v. State*, 54 P.2d 332, 335-336 (Alaska Ct. App. 2002) (“when there is strong evidence that the complaining witness has falsely accused others of sexual assault, this evidence is admissible.”). Cf. *Dennis v. Commonwealth*, 306 S.W.3d 466 (Ky. 2010) (applying threshold standard of proving falsehood and then noting that “numerous courts, both federal and state, have held that the credibility of the complaining witness in a sex crime case may be attacked by cross-examination concerning a prior false accusation. This is so notwithstanding the fact that such an attack implicates KRE 412, the rape shield rule.”); *State v. Kornbrekke*, 943 A.2d 797, 799 (N.H. 2008) (“A prior false accusation of sexual assault is highly probative of the complainant’s truthfulness or untruthfulness regarding the current charges.”).

<sup>286</sup> Several commentators argue that false accusations are properly excluded from coverage under rape shield statutes. For instance, Jules Epstein recognizes that the goals of rape shield “[a]t their core are the protection of privacy and facilitating the prosecution of sex offense cases,” but he nonetheless finds that none of those “concerns are implicated by admitting false accusation evidence.” Epstein, *supra* note 274, at 651-652. Specifically, he argues that prior false accusations are not sexual conduct, are public rather than private in nature, and thus have little power to humiliate for unfair reasons, and have strong probative value because they indicate “disregard for ... truthful testimony and a willingness to abuse” the legal system. *Id.* at 652. While Professor Epstein is correct that false accusations are highly probative, he unjustly glosses over the problem of establishing whether a prior accusation was, in fact, false. The benefit of rape shield in this context, then, is not so much that it excludes otherwise marginally probative evidence that might be highly prejudicial, but rather that it ensures that the allegedly false accusation was not in fact truthful.

Justice Denise Johnson similarly rejects the inclusion of false accusations within the protection of rape shield, but for a different reason. Denise R. Johnson, *Prior False Allegations of Rape: Falsus in Uno, Falsus in Ominibus*, 7 YALE J.L. & FEMINISM 243, 263 (1995). She argues that false accusations should be admitted according to the principles of Federal Rule of Evidence 608(b), rather than through more onerous proof standards that would allow inquiry into the falsity of the claim. *Id.* at 272. Her approach eliminates the need for pretrial hearings, which she believes give too great an opportunity to harass the complainant and delay proceedings. Specifically, she notes:

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1 Where false-accusation evidence does fall within the scope of rape shield, a further issue  
2 arises—specifically, the standard for determining when such evidence can avoid the presumption  
3 of rape shield exclusion. Under ordinary rules of evidence outside the rape shield framework,  
4 pretrial rulings on admissibility are not always required, and in many jurisdictions defense claims  
5 can be placed before the jury without first meeting a strict evidentiary threshold.<sup>287</sup> But where the  
6 rape shield framework comes into play, pretrial screening outside the presence of the jury is  
7 typically mandated, and a heightened threshold standard of admissibility often applies. The eight  
8 states with express provisions addressing false-accusation evidence under their rape shield laws  
9 differ widely as to what that threshold standard of admissibility should be.<sup>288</sup>

10 Tentative Draft No. 1 (2014) would have required—as a condition of lifting the  
11 presumption of rape shield exclusion—that the trial judge, at a pretrial hearing, find that “the  
12 falsehood of the prior accusation is established by a preponderance of the evidence, with proof  
13 beyond mere evidence that the complaint was judged unfounded or was otherwise not pursued.”<sup>289</sup>  
14 Under the current formulation, in contrast, this and other issues related to the admissibility of false-

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At first blush, the in camera hearing may be viewed as protection for the complaining party. The witness cannot be confronted with the prior accusation for the first time during the trial without time to prepare a response. The pretrial hearing also requires more proof to ask questions about the prior allegations than the “good faith” basis demanded of the questioner under 608(b). Nevertheless, the in camera hearing poses a number of problems.... Complaining witnesses may be deterred from coming forward if ... the exploration of the lie may involve explanations of the witness’s sexual past. If the complaining witness testifies, the defendant has yet another opportunity to question her before trial, with the hope that she will make inconsistent statements or will be too intimidated to continue. Furthermore, the focus of the case is shifted back to the innocence of the complaining witness, requiring a virtue that is not demanded of other witnesses. If the judge then decides that all of the evidence may be presented to the jury, both prosecutor and witness may decide not to proceed.

Id. at 271. But although these concerns are certainly fair, they are true not just of false-accusation evidence but of any evidence that might be covered by rape shield protection.

<sup>287</sup> See text accompanying notes 291-292 (discussing, *inter alia*, the required foundation under Rules 404(b) and 608(b)).

<sup>288</sup> At the strictest end of the scale, Arizona allows such evidence only if the prior false accusation is established by “clear and convincing evidence.” ARIZ. REV. STAT. § 13-1421(B). At the other end of the scale, two jurisdictions impose only a sufficiency standard—i.e., that *a jury might reasonably find* that the prior false accusation was made. *State v. Ringer*, 785 N.W.2d 448 (Wis. 2010) (holding that admissibility is required when a jury can reasonably find that the complainant made an allegation that was, in fact, false); MINN. STAT. § 609.347 (“[S]ufficient to support a finding that the facts set out in the accused’s offer of proof are true”). Colorado follows the preponderance rule, *People v. Weiss*, 133 P.3d 1180, 1182 (Colo. 2006). In Idaho, Oklahoma, Mississippi, and Vermont, the standard is not clearly defined.

<sup>289</sup> MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES Section 213.7(1)(a)(ii), Tentative Draft No. 1, (AM. LAW INST. 2014).

1 accusation evidence are to be resolved exclusively under the jurisdiction’s general rules of  
2 evidence, without any added prerequisites drawn from the rape shield framework.

3 *Treatment of false-accusation evidence under other rules of evidence.* At present, no  
4 jurisdiction wholly blocks a defendant’s allegation that the complainant had previously made a  
5 false accusation of a sexual offense. But the admissibility of such evidence under ordinary rules is  
6 complex and varies widely across American jurisdictions. Texas and Florida largely limit the  
7 admissibility of such evidence to situations in which admissibility is constitutionally required, a  
8 presumably narrow exception, but these jurisdictions do not otherwise delineate what the scope of  
9 this constitutionally required exception is.<sup>290</sup> In contrast, most jurisdictions seek to specify  
10 standards and procedures for determining admissibility, and in many of these jurisdictions these  
11 standards and procedures are notably less restrictive than those which rape shield frameworks  
12 require.

13 Under ordinary rules of evidence, claims regarding a witness’s allegedly false prior  
14 accusation can be offered on two theories—as an attack on *character for truthfulness* (the domain  
15 of Federal Rule 608(b)) or as a prior act offered for a permissible *non-propensity purpose* (the  
16 domain of Federal Rule 404(b)).<sup>291</sup> In addition, such claims can be presented in either of two  
17 forms—questions put to the complainant on *cross-examination* or “*extrinsic*” evidence, that is,  
18 documentary evidence or testimony presented through other witnesses to establish the  
19 complainant’s prior dishonesty.

20 In each of these permutations, prevailing law is to some extent vague or contradictory, but  
21 in many jurisdictions—including most notably the federal courts—the accepted requirements for  
22 admissibility are often permissive, with few significant barriers. Thus, in the federal system, when  
23 defense counsel seeks to impeach a witness for untruthful character (as permitted by Rule 608(b)),

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<sup>290</sup> Florida admits false-accusation evidence only when required by the Confrontation Clause or when the false accusation resulted in a criminal conviction of the accuser. *Pantoja v. State*, 59 So. 3d 1092, 1097-1099 (Fla. 2011) (citing evidence rule that limits general credibility impeachment to prior convictions). Texas rejects any targeted exception for false-accusation evidence relating to sexual offenses and instead follows an ad hoc approach. *Lopez v. State*, 18 S.W. 220, 225 (Tex. Ct. Crim. App. 2000) (“Because we find (1) our precedent does not favor creating a special exception to the Rules of Evidence for sex offenses, and (2) the rationale of the out-of-state cases creating a universal sexual offense exception is unpersuasive, we decline to create a *per se* exception to Rule 608(b) [the rule governing impeachment] for sexual offenses. But . . . we acknowledge that the Confrontation Clause occasionally may require the admissibility of evidence that the Rules of Evidence would exclude.”).

<sup>291</sup> In addition to the theories discussed in the text, evidence of prior false accusation might be proffered to impeach by inconsistency or specific contradiction, or to prove bias or motive to fabricate. For instance, if a complainant testifies on direct examination that he or she would “never lie about something as serious as sexual assault,” then the defense might cross-examine as to a prior false accusation not for purposes of putting character for truthfulness in issue, but rather for the purpose of showing specific contradiction or prior inconsistency. In such cases, ordinary rules would allow the prior accusation to be proven by extrinsic evidence. *THE NEW WIGMORE, A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION* § 2.2 (Roger Park & Tom Lininger eds., 2014) (noting that evidence admitted to prove bias typically may be proved by extrinsic evidence, whereas extrinsic evidence offered to prove inconsistency or specific contradiction must satisfy the collateral-evidence rule).

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1 counsel, on cross-examination of the witness, is permitted to inquire into any specific instance in  
2 which the complainant allegedly lied, as a way of showing that the witness has a poor character  
3 for honesty and thus cannot be trusted in his or her current testimony. When impeaching in this  
4 fashion, the questioner need only have a “good faith” belief in the foundation for the question; no  
5 additional foundation of the kind required in a rape shield framework (such as a pretrial  
6 determination of the strength of the evidence supporting the claim of dishonesty) need be met.<sup>292</sup>  
7 It should be noted, however, that “character for truthfulness” impeachment as permitted by Rule  
8 608(b) is typically limited to cross-examination only.<sup>293</sup>

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<sup>292</sup> 1 MCCORMICK ON EVIDENCE § 41 (Kenneth S. Broun ed., 7th ed. 2013) (“[T]he cross-examiner must have a good faith basis in fact for the inquiry” under Rule 608(b)).

<sup>293</sup> Under Federal Rule 608(b), counsel is typically “stuck with the answer given” on cross-examination. Thus, if the witness denies the alleged prior conduct, the Rule and its state counterparts are often interpreted to preclude the introduction of extrinsic evidence (e.g., documentary or testimonial evidence) to prove the prior falsehood. See FED. R. EVID. 608(b) (“Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness....”).

Despite the language of Rule 608(b), however, courts have held that under particular circumstances, extrinsic evidence may be admissible to attack a witness’s character for truthfulness, and that its admission may sometimes be constitutionally required. See, e.g., *United States v. Smith Grading & Paving, Inc.*, 760 F.2d 527, 531 (4th Cir. 1985) (“Rule 608(b) should not be read so broadly as to disallow the presentation of extrinsic evidence that is probative of a material issue in a case.”); *State v. Walton*, 715 N.E.2d 824, 827 (Ind. 1999) (“[T]he majority of jurisdictions that have considered the question . . . have held that the evidentiary rule preventing evidence of specific acts of untruthfulness must yield to the defendant’s Sixth Amendment right of confrontation and right to present a full defense.”); *Mitchell v. Kardesch*, 313 S.W.3d 667, 682 (Mo. 2010) (en banc) (noting that extrinsic evidence is appropriate where the evidence is of “prior false allegations to authorities of a matter similar in nature to the alleged wrongful conduct in which the witness claimed defendant engaged”); *State v. Barber*, 766 P.2d 1288, 1289 (Kan. Ct. App. 1989) (“[D]espite the restriction of 60–422(d), in a sex crime case, the victim/complaining witness may be cross-examined about prior false accusations, and if she denies making those accusations, defendant may put on evidence of those accusations.”); *State v. Nab*, 421 P.2d 388, 390-391 (Or. 1966) (“[T]he defendant may show, either by cross-examination, independent evidence, or both, that the prosecuting witness has made similar accusations against other persons which were later admitted to be false or were disproved”); *People v. Hurlburt*, 333 P.2d 82, 87-88 (Cal. Ct. App. 1958) (same); *State v. Izzi*, 348 A.2d 371 (R.I. 1975); *Smith v. State*, 377 S.E.2d 158, 160 (Ga. 1989); *Morgan v. State*, 54 P.2d 332, 335-336 (Alaska Ct. App. 2002) (citing JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* (Chadbourn rev. ed. 1970), §§ 956-964, Vol. 3A, pp. 802-812); *State v. Smith*, 743 So. 2d 199, 201-203 (La. 1999); *State v. Cappel*, 345 So. 2d 443, 445 (La. 1977). See generally Applegate, *supra* note 274, at 918 (2013) (reporting on states that allow “admission of *extrinsic evidence* of prior false accusation if the victim denies having made a false accusation”).

The Supreme Court recently declared that forbidding presentation by extrinsic evidence is constitutionally permissible, at least as a general matter. *Nevada v. Jackson*, 133 S. Ct. 1990, 1993-1994 (2013) (constitutionality of allowing cross-examination on an issue while precluding extrinsic evidence “cannot seriously be disputed”). The *habeas* context of *Jackson* might afford an argument for limiting the Court’s *dictum* to that distinctive procedural posture. But even if the Court’s language precludes a federal constitutional mandate for admission of extrinsic evidence as a general matter, it is by no means clear that

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1           The other principal route for introducing claims concerning a witness’s prior false  
2 accusation is the theory of prior acts for a non-propensity purpose (the domain of Rule 404(b)).  
3 This route typically can support not only a line of questioning on cross-examination but also the  
4 introduction of extrinsic evidence, and here too the accepted approach in many jurisdictions—  
5 again notably including the federal courts—can be quite permissive. The contrast between the  
6 ordinary rules of evidence and the rape shield framework thus can be significant. The Supreme  
7 Court’s foundational decision in *United States v. Huddleston*<sup>294</sup> illustrates the point. *Huddleston*  
8 did not involve an allegedly false prior accusation of sexual assault, but courts have often followed  
9 its approach in that context<sup>295</sup> because the Supreme Court used the case to declare general  
10 principles governing standards of admissibility in 404(b) cases (i.e., those involving allegations  
11 concerning a person’s prior behavior).

12           In *Huddleston*, a prosecution for possession of stolen property, the trial court had admitted  
13 evidence alleging that the defendant had previously sold stolen televisions. The theory of relevancy  
14 was not that of propensity (a theory precluded by Rule 404(b)) but rather that the alleged prior  
15 crimes were probative of one of the non-propensity facts permitted by Rule 404(b),<sup>296</sup> in this  
16 instance the defendant’s ability to know whether property is stolen. The Supreme Court held that  
17 extrinsic evidence tending to prove the defendant’s *alleged* prior misconduct was properly allowed  
18 to go to the jury—*without* need for the trial court to find that alleged misconduct had in fact  
19 occurred. Rather, the trial court was only required to determine that *the jury* could reasonably

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the Court intended to preclude such a mandate in the discrete fact situations where courts have previously found one, for example, cases in which the defendant’s entire defense rests on the claim that a juvenile complaining witness has a distinctive motive for fabricating the instant charge and others like it. See, e.g., *United States v. Stamper*, 766 F. Supp. 1396 (W.D.N.C. 1991).

<sup>294</sup> 485 U.S. 681 (1988).

<sup>295</sup> See, e.g., *United States v. Velarde*, 2008 WL 5993210, at \*38 (D.N.M. May 16, 2008) (“While Velarde may not introduce the evidence of L.V.’s false accusations of improper touching for the improper purpose of demonstrating that she acted in conformity with her prior acts, Velarde may offer the evidence to demonstrate one of the proper purposes recognized under rule 404(b), ‘such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.’ Fed. R. Evid. 404(b). Velarde has indicated he intends to introduce the evidence to demonstrate that L.V. had the ‘motive, knowledge, [and] capacity to concoct’ a false allegation involving inappropriate behavior by adults to get what she wanted.”); *United States v. Stamper*, 766 F. Supp. 1396, 1402 (W.D.N.C. 1991), *aff’d*, *In re One Female Juvenile Victim*, 959 F.2d 231 (4th Cir. 1992) (“defendant is entitled to offer the evidence necessary to prove his theory of the case by showing that complainant’s charges against him did not evince a single isolated instance of manipulative behavior, but rather were part of . . . a scheme revealed by the like motives and *modus operandi* of schemes past. . . .”); *State v. Smith*, 743 So. 2d 199, 203 (La. 1999) (proper evidentiary standard is “not whether [the trial court] believed the prior allegations were false, but whether reasonable jurors could find, based on the evidence presented by defendant, that the victim had made prior false accusations. See *Huddleston v. United States*.”).

<sup>296</sup> “Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” FED. R. EVID. 404(b).

1 credit the allegations concerning the earlier acts. In other words, the credibility of the claim  
2 concerning the prior acts and the weight of the evidence supporting that claim were not matters to  
3 be resolved by the trial judge in a pretrial hearing but were to be left for determination by the jury  
4 itself. To appreciate the sharp contrast between the rape shield framework and the Rule 404(b)  
5 approach to allegations concerning a person’s prior conduct, the Supreme Court’s analysis in  
6 *Huddleston* is worth quoting at some length.<sup>297</sup>

7       Petitioner’s reading of Rule 404(b) as mandating a preliminary finding by the trial  
8 court that the act in question occurred not only superimposes a level of judicial  
9 oversight that is nowhere apparent from the language of that provision, but it is  
10 simply inconsistent with the legislative history behind Rule 404(b). The Advisory  
11 Committee specifically declined to offer any “mechanical solution” to the  
12 admission of evidence under 404(b). . . . Petitioner’s suggestion that a preliminary  
13 finding is necessary to protect the defendant from the potential for unfair prejudice  
14 is also belied by the Reports of the House of Representatives and the Senate. . . .  
15 Congress was not nearly so concerned with the potential prejudicial effect of Rule  
16 404(b) evidence as it was with ensuring that restrictions would not be placed on the  
17 admission of such evidence.

18       We conclude that a preliminary finding by the court that [the alleged prior act has  
19 been proved] is not called for. . . . *In determining [admissibility], the trial court*  
20 *neither weighs credibility nor makes a finding that the [conditional fact has been*  
21 *proved] by a preponderance of the evidence.* The court simply examines all the  
22 evidence in the case and decides whether *the jury* could reasonably find the  
23 conditional fact—here, that the televisions were stolen—by a preponderance of the  
24 evidence. . . . Often the trial court may decide to allow the proponent to introduce  
25 evidence concerning a similar act, and at a later point in the trial assess whether  
26 sufficient evidence has been offered to permit the jury to make the requisite finding.  
27 If the proponent has failed to meet this minimal standard of proof, the trial court  
28 must instruct the jury to disregard the evidence.

29       *We share petitioner’s concern that unduly prejudicial evidence might be introduced*  
30 *under Rule 404(b). . . . We think, however, that the protection against such unfair*  
31 *prejudice emanates not from a requirement of a preliminary finding by the trial*  
32 *court, but rather from four other sources:* first, from the requirement of Rule 404(b)  
33 that the evidence be offered for a proper purpose; second, from the relevancy  
34 requirement of Rule 402 . . . ; third, from the assessment the trial court must make  
35 under Rule 403 to determine whether the probative value of the similar acts  
36 evidence is substantially outweighed by its potential for unfair prejudice . . . ; and  
37 fourth . . . that the trial court shall, upon request, instruct the jury that the similar

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<sup>297</sup> *Huddleston*, 485 U.S. at 688-692 (emphasis added).

1 acts evidence is to be considered only for the proper purpose for which it was  
2 admitted.

3 The *Huddleston* approach, of course, differs dramatically from the pretrial judicial  
4 screening function mandated under rape shield. *Huddleston*, as mentioned, was not a false-  
5 accusation case, but because it stands as general authority for the administration of offers of proof  
6 under Rule 404(b), many courts in sexual-offense cases have followed its approach in determining  
7 the admissibility of defense claims concerning allegedly false prior accusations when such claims  
8 are offered for a permissible non-propensity purpose—such as to establish an intent to fabricate in  
9 the instant case or to allege a pattern of such fabrications.<sup>298</sup>

10 Thus in *United States v. Stamper*,<sup>299</sup> a 12-year-old complainant charged the defendant with  
11 statutory rape. The defendant sought to present three witnesses who would testify that the  
12 complainant had falsely accused them of rape as well, all as part of her efforts to be permitted to  
13 move from one home to another. The complainant insisted that the prior accusations were true, but  
14 defendant nonetheless sought to pursue cross-examination and to present his own witnesses to  
15 testify that they were not. His theory of admissibility (among others) was that the evidence  
16 concerning her prior acts was permitted under Rule 404(b) for the non-propensity purpose of  
17 establishing “a continuing scheme on her part to manipulate others for her own selfish  
18 purposes.”<sup>300</sup> After ruling that the evidence was relevant and that its probative value outweighed  
19 its potential for prejudice,<sup>301</sup> the court held that further judicial screening was not called for, that  
20 the evidence was admissible, and that its probative significance was a matter for the jury to assess.  
21 Relying on *Huddleston*, the court stated:<sup>302</sup>

22 There is sufficient relevant evidence, going to the issues of the falsity of the three  
23 prior allegations of sexual abuse and the bias or motive of the complainant in  
24 making such allegations, to warrant the submission of such evidence to the jury.  
25 Thus, it becomes the jury’s province in this case to determine the veracity of these  
26 previous allegations and the weight such allegations may be accorded in their final  
27 determination of Defendant’s guilt or innocence.

28 Many state courts have similarly followed the *Huddleston* framework. Courts in Louisiana,  
29 Oklahoma, and Wisconsin have held that a defendant’s claims concerning allegedly false prior  
30 accusations by the complaining witness in a sex-offense prosecution are admissible, without prior  
31 judicial determination that the accusations were in fact false, provided that a reasonable jury could

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<sup>298</sup> See, e.g., *supra* note 295.

<sup>299</sup> *United States v. Stamper*, 766 F. Supp. 1396 (W.D.N.C. 1991).

<sup>300</sup> *Id.* at 1399.

<sup>301</sup> *Id.* at 1404.

<sup>302</sup> *Id.* at 1406.

1 so find.<sup>303</sup> In addition, courts in New Hampshire, Oregon, and Tennessee have held that an offer  
2 of proof by extrinsic evidence must pass a threshold determination of persuasiveness, but that no  
3 threshold judicial determination (beyond a good-faith belief) is required to raise the issue by cross-  
4 examination.<sup>304</sup> One survey concludes that 16 states have no clear, consistent standard to govern  
5 the matter at all.<sup>305</sup>

6 The upshot in some jurisdictions is that a defendant's claims concerning a prior allegedly  
7 false accusation can be introduced with insufficient safeguards to ensure the plausibility of the  
8 defendant's assertions. For instance, in *State v. Oliveira*, the defendant sought to introduce  
9 evidence that the complainant, who was a minor at the time of the incident, had made two other  
10 accusations of sexual assault and that these accusations had been false.<sup>306</sup> After holding that its  
11 rape shield law did not apply to false accusations, the Supreme Court of Rhode Island turned to  
12 the criteria of admissibility under its ordinary rules of evidence. In Rhode Island, extrinsic  
13 evidence of a complainant's allegedly false prior accusations had been held admissible to defend  
14 against a charge of *physical* assault,<sup>307</sup> and the same principle had been held applicable to prior  
15 allegedly false accusations of *sexual* assault.<sup>308</sup> With respect to the evidentiary threshold for  
16 admitting such evidence, the court in *Oliveira* held that "evidence of a complaining witness' prior  
17 allegations of sexual assault may be admitted 'to challenge effectively the complaining witness's  
18 credibility,' even if the allegations were not proven false or withdrawn."<sup>309</sup> The court held  
19 admissible the proffered testimony claiming that the prior accusations had been false, without  
20 requiring any particular degree of proof in support of the credibility of that testimony.

21 Similarly, in *State v. Smith*, the Louisiana Supreme Court first ruled that because its rape  
22 shield provision was inapplicable, a pretrial hearing was not required.<sup>310</sup> The court then held that  
23 the proper evidentiary standard was "not whether [the trial court] believed the prior allegations

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<sup>303</sup> Applegate, *supra* note 274, at 908 & nn.51-52 (citing cases).

<sup>304</sup> E.g., *State v. Kornbrekke*, 943 A.2d 797, 799 (N.H. 2008) (differentiating between proof standard for cross-examining about false accusation and proof standard for admission of extrinsic evidence); Applegate, *supra* note 274, at 909.

<sup>305</sup> *Id.* at 907-909.

<sup>306</sup> *State v. Oliveira*, 576 A.2d 111, 113 (R.I. 1990).

<sup>307</sup> *State v. Izzi*, 348 A.2d 371, 372-373 (R.I. 1975) (also citing to decision holding that defense claims concerning witness's alleged fabrication of drug sales were admissible to defend against charge of having committed that offense).

<sup>308</sup> *State v. McCarthy*, 446 A.2d 1034 (R.I. 1982) (holding that "withdrawal of a rape charge against a man other than the defendant is admissible as a challenge to the complaining witness' credibility in the defendant's rape trial").

<sup>309</sup> *Oliveira*, 576 A.2d at 114.

<sup>310</sup> *State v. Smith*, 743 So. 2d 199, 203 (La. 1999) ("Article 412 is inapplicable in sexual assault cases where defendant seeks to question witnesses regarding the victim's prior false allegations concerning sexual behavior for impeachment purposes. Consequently, no Article 412 hearing is required when defendant seeks to introduce such evidence.").

Section 213.11. Procedural and Evidentiary Principles Applicable to Article 213

1 were false, but whether reasonable jurors could find, based on the evidence presented by defendant,  
2 that the victim had made prior false accusations. See *Huddleston v. United States.*<sup>311</sup>

3 This threshold requirement is exceedingly modest, because it means that the defendant's  
4 claim concerning prior false charges may be heard by the jury whenever there is evidence sufficient  
5 for a reasonable juror to reach the conclusion that the prior rape charges were untrue, and then it  
6 is left to the jury to determine credibility issues with respect to the truth of the earlier allegations.  
7 Nonetheless this permissive admissibility standard has been endorsed in a number of  
8 jurisdictions.<sup>312</sup>

9 Several states impose an ostensibly stricter threshold for admissibility, by requiring a  
10 "reasonable probability" that the complainant's prior accusations were indeed false.<sup>313</sup> But as  
11 applied in many states, this standard too leaves the trial judge only a modest screening function  
12 and permits defense claims concerning the complainant's prior allegations to be heard by the jury,  
13 which then makes the crucial determinations of credibility and more-likely-than-not persuasive  
14 force. Thus, in *Ellison v. State*,<sup>314</sup> a Georgia court held it an abuse of discretion for the trial judge  
15 to exclude extrinsic evidence charging the complainant with having made a false prior accusation;  
16 the court explained Georgia's threshold requirement of "reasonable probability" as follows:<sup>315</sup>

17 [T]he trial court abused its discretion in determining that there was no reasonable  
18 probability that the prosecutrix had made prior false allegations. The prosecutrix

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<sup>311</sup> *Id.*

<sup>312</sup> See, e.g., *Huddleston*, *supra*; *Stamper*, *supra*; *Oliviero*, *supra*; *McCarthy*, *supra*; *Smith*, 743 So. 2d, *supra*; *State v. Ringer*, 785 N.W.2d 448 (Wis. 2010) (court must find that *a jury could reasonably find* that that complaint did, in fact, make allegations that were false); *State v. DeSantis*, 456 N.W.2d 600, 606-607 (Wis. 1990) (same); *State v. Kringstad*, 353 N.W.2d 302, 311 (N.D. 1984) (requiring "some quantum of evidence"); *Walker v. State*, 841 P.2d 1159, 1161 (Okla. Crim. App. 1992) (requiring a "reasonable basis"); *State v. Nelson*, 265 P.3d 8, 14 (Or. Ct. App. 2011) (requiring "*some evidence* from which the court could find that the complaining witness had made a false accusation") (emphasis added).

Compare *State v. Manning*, 973 A.2d 524, 535 (R.I. 2009) ("[W]e have long viewed evidence of prior false sexual-abuse allegations in the context of a sexual-abuse prosecution as probative of a defendant's guilt or innocence. [However,] the probative value of such evidence may be outweighed by its prejudicial effect . . . . Even though under our case law a defendant need not prove the falsity of the prior accusation, he must at least present *some indicia* tending to show that the prior accusation was false, or else he runs the risk of a determination that its probative value is outweighed by its prejudicial effect.") (emphasis added).

<sup>313</sup> E.g., *Walker v. State*, 707 S.E.2d 122, 126 (Ga. Ct. App. 2011); *Smith v. State*, 377 S.E.2d 158, 160 (Ga. 1989) ("[B]efore such evidence can be admitted, the trial court must make a 'threshold determination [outside the presence of the jury] that a reasonable probability of falsity exists'"); *State v. Barber*, 766 P.2d 1288, 1289-1290 (Kan. Ct. App. 1989); *State v. Goldenstein*, 505 N.W.2d 332, 340 (Minn. Ct. App. 1993); *Ortiz v. Commonwealth*, 667 S.E.2d 751, 760 (Va. 2008).

<sup>314</sup> 400 S.E.2d 360 (Ga. Ct. App. 1990).

<sup>315</sup> *Id.* at 361.

1 admitted the prior accusation (albeit she did not concede that the accusation was  
2 false) and defendant presented the testimony of an independent third party that the  
3 prior accusation was false. Defendant could hardly have made a clearer showing.  
4 The trial court erred in excluding the defendant's evidence of prior false  
5 accusations.

6 Other jurisdictions seek to avoid the dangers of this approach by imposing stricter threshold  
7 requirements for the admissibility of defense claims about a complainant's allegedly false prior  
8 accusations. In *State v. Long*, for example, the Supreme Court of Missouri held that:<sup>316</sup>

9 trial courts [must] make a preliminary determination, outside the presence of the  
10 jury, that (1) the victim made another [relevant] allegation . . . ; (2) this allegation  
11 was false; and, (3) the victim knew the allegation was false. . . . The preponderance  
12 of the evidence standard is . . . the applicable standard for determining whether a  
13 defendant has established that the prosecuting witness previously made knowingly  
14 false allegations.

15 A number of other jurisdictions take a similar view, requiring the trial judge to determine  
16 by a preponderance of the evidence, outside the presence of the jury, that the relevant prior  
17 accusations were false.<sup>317</sup> Although this standard is sometimes said to be followed by “most  
18 courts,”<sup>318</sup> the more candid decisions, even when they support this approach, acknowledge that in  
19 fact “there is no ‘majority rule’ on this issue.”<sup>319</sup>

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<sup>316</sup> *State v. Long*, 140 S.W.3d 27, 31-32 (Mo. 2004) (en banc).

<sup>317</sup> See, e.g., *Morgan v. State*, 54 P.2d 332, 335-336 (Alaska Ct. App. 2002); *State v. Guenther*, 854 A.2d 308 (N.J. 2004). *Guenther*, probably the most rigorous of the recent decisions in terms of its threshold requirements for admissibility, stressed the need for “very strict controls,” *id.* at 323, and accordingly imposed several special rules to limit the admission of false-accusation evidence. *Id.* at 324.

<sup>318</sup> E.g., *Long*, 140 S.W.2d at 32.

<sup>319</sup> *Morgan*, 54 P.2d at 336 (“[H]ow does a defendant prove that a complaining witness has made false accusations of sexual assault? Again, there is no ‘majority rule’ on this issue, even among the states that allow defendants to present extrinsic evidence of a complaining witness’s false accusations.”) Ironically, the *Long* court, in stating that the preponderance requirement or an even stricter standard is endorsed by “[m]ost courts,” 140 S.W.2d at 32, cited *Morgan* as its source for this proposition, even though *Morgan* states otherwise—namely, that “there is no ‘majority rule’ on this issue.” 54 P.2d at 336.

One recent survey of American jurisdictions identified only seven that use the preponderance standard. See Applegate, *supra* note 274, at 907-908 & n.50 (identifying Alaska, Hawaii, Iowa, Missouri, Nevada, New Jersey, and Utah as states adopting this standard). The same survey counts six states (Louisiana, Oklahoma, Oregon, North Dakota, Rhode Island, and Wisconsin), as well as the federal courts following *Huddleston*, as using one of the more permissive standards, such as “some evidence,” “some quantum of evidence,” a “reasonable basis,” or merely evidence sufficient to support a jury finding by a preponderance; the survey also reports several jurisdictions (New Hampshire, Oregon, and Tennessee) that impose higher threshold requirements for the admissibility of extrinsic evidence but not for cross-examination. See *id.* at 907-909 & nn.40-41, 52-54, 58, & 60-61.

Section 213.11. Procedural and Evidentiary Principles Applicable to Article 213

1           *False accusations in earlier versions of Section 213.11.* Tentative Draft No. 1 (2014) aimed  
2 to bring clarity to this sea of confusion and potential unfairness, taking especially into account  
3 continuing misperceptions about the frequency of false accusation and their troubled impact on  
4 sexual-offense policing and prosecution. To do so, Tentative Draft No. 1 included in what was  
5 then Section 213.7 (now numbered as 213.11) four specific clauses designed to restrict the  
6 admissibility of this class of evidence.

7           First, Section 213.7(1)(a)(iv) provided that claims relating to prior false accusation of a  
8 sexual offense were included within the domain of the sexual-history evidence subject to rape  
9 shield restrictions. Second, Section 213.7(1)(a)(iii) specified, contrary to *Huddleston* and the many  
10 cases following its lead, that the relevant admissibility determinations would be made under  
11 specialized rules of procedure (in essence contemplating a pretrial hearing outside the presence of  
12 the jury, as is now made explicit under current Section 213.11(a)(iii)). Third, Section  
13 213.7(1)(a)(ii) provided that “[i]f the proffered sexual activity alleges a prior instance of false  
14 accusation of a sexual offense, such evidence is further inadmissible unless the falsehood of the  
15 prior accusation is established by a preponderance of evidence, with proof beyond mere evidence  
16 that the complaint was judged unfounded or was otherwise not pursued.” It therefore not only  
17 specified the preponderance standard for admissibility, but guided judges in the application of that  
18 standard. In particular, the draft accounted for the high rates at which justified accusations of  
19 sexual assault are recanted or deemed “unfounded” by specifying that such circumstances are not  
20 sufficient in themselves to support a determination that the prior accusation was false. Fourth, on  
21 the specific issue of the complainant’s “character for truthfulness,” Section 213.7(b)(iv) precluded  
22 extrinsic evidence or cross-examination about *any aspect* of a complainant’s sexual history when  
23 offered as “character for truthfulness,” *except* that it permitted qualifying prior false accusations  
24 to be used only when the proffered evidence “is a prior false accusation established in accordance  
25 with subsection (1)(a)(ii)....”

26           In addition to these four limiting requirements, former Section 213.7 left in place any  
27 additional limits on admissibility under a jurisdiction’s general rules of evidence. Thus, in any  
28 jurisdiction where stricter limits on admissibility obtained, such limits would continue to restrict  
29 defense claims relating to allegedly false accusations by the complainant, even when the additional  
30 limits imposed by former Section 213.7 would not apply.

31           Tentative Draft No. 1 thus codified, with somewhat greater specificity, the pretrial  
32 screening and heightened persuasiveness requirements (a preponderance of the evidence) adopted  
33 in several states. Conversely, Tentative Draft No. 1 disapproved the more permissive standards  
34 and procedures governing admissibility that have won endorsement from the U.S. Supreme Court  
35 in *Huddleston* and from the various courts that have followed the *Huddleston* approach in sexual-  
36 assault cases, either across the board or in specific contexts, such as character for truthfulness,  
37 prior acts offered for non-propensity purposes, extrinsic evidence, or cross-examination only.

Section 213.11. Procedural and Evidentiary Principles Applicable to Article 213

1 Tentative Draft No. 1 took no position on the question, much disputed in the state case law,  
2 as to whether extrinsic evidence should *always* be inadmissible for certain purposes, and  
3 accordingly left the law undisturbed in those states that categorically exclude such evidence. But  
4 with respect to states that do admit extrinsic evidence under some circumstances, Tentative Draft  
5 No. 1 would have required the trial judge to find at a pretrial hearing that extrinsic evidence offered  
6 to prove a complainant’s prior false accusation meet a preponderance level of proof, contrary to  
7 the more permissive approach that the Supreme Court authorized in *Huddleston*.

8 Given the extent to which Tentative Draft No. 1 (2014) added to existing law several  
9 significant barriers to the admissibility of defense evidence (and did not in any manner reduce such  
10 barriers), Institute members concerned about potential infringement on the fair-trial rights of the  
11 defendant might have had reservations about the restrictions imposed by Tentative Draft No. 1. In  
12 particular, the power conferred on the trial judge to exclude false-accusation claims determined to  
13 fall short of the preponderance standard might well be considered problematic in cases where the  
14 defendant’s sole defense is that the instant charges reflect a pattern of fabrication driven by a  
15 contextually specific motivation on the part of the complaining witness.<sup>320</sup> The exclusion of  
16 evidence in such a situation, on the basis of the trial judge’s determination that the proffered  
17 defense testimony lacks credibility, might well be seen as either violating the Constitution itself or  
18 impairing the fair-trial values underlying the Confrontation Clause right to present a complete  
19 defense and the Sixth Amendment right to have credibility issues central to guilt resolved by the  
20 jury.

21 At the Institute’s 2014 Annual Meeting, the proponents of a motion to strike the subject  
22 matter of prior false accusation from rape shield protection argued that inclusion of prior false  
23 accusations within the terms of rape shield protection would be detrimental to the interests of  
24 victims. Similarly, members who spoke from the floor in support of the motion to strike uniformly  
25 expressed the view that these provisions would prove disadvantageous to complainants in sexual-  
26 offense cases. Supporters of the motion to strike argued that “[b]y treating an alleged false  
27 accusation of sexual assault as a species of sexual *activity* ... the Draft’s proposal allows for  
28 jurisdictions that so choose to subject it to different and harsher rules—harsher to victims of sexual  
29 assault than other varieties of false statements made by other sorts of witnesses.”<sup>321</sup> In the  
30 proponents’ view, “[t]here is no reason that [the general rules of evidence] should not be sufficient  
31 to govern claims that a victim of sexual assault has made false accusations in the past.”<sup>322</sup> Some

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<sup>320</sup> See, e.g., *United States v. Stamper*, 766 F. Supp. 1396, 1402 (W.D.N.C. 1991).

<sup>321</sup> May Motion at 4.

<sup>322</sup> May Motion at 4. At the Meeting, the proponents of the motion elaborated:

“This is a very unusual provision. The rape shield laws in most U.S. jurisdictions do not address disputes about whether the victim has in the past made false accusations and for a very good reason, because the law of evidence has other satisfactory provisions for the situation in which any sort of witness has told a lie or a falsehood in the past. The inclusion of this novel exception to the rape shield can only lead to a set of rules for the impeachment and cross examination of rape victims that is different from the rules that apply to other

1 supporters of the motion to strike also expressed concern that the draft did not take a firm position  
2 against the admission of extrinsic evidence.

3 Those who supported Tentative Draft No. 1 (2014) and spoke against the motion to strike  
4 held a diametrically opposed view of the state of the law and its impact on complainants. Because  
5 the draft introduced an additional layer of requirements for admissibility, without weakening any  
6 that were otherwise in place under local rules of evidence, the draft in their view could only  
7 enhance the protection afforded to victims, not diminish it. To the extent that the draft created  
8 different rules of admissibility for sexual-offense prosecutions than for cases involving other  
9 crimes, it did so only by imposing special restrictions on defense evidence proffered to cast doubt  
10 on the complainant, a “special rule for rape cases” that is inherent in the concept of any rape shield  
11 statute. In contrast to the approach approved by the Supreme Court in *Huddleston* and adopted in  
12 many American jurisdictions, Tentative Draft No. 1 required pretrial judicial screening of  
13 proffered evidence and imposed a heightened standard of proof. The draft did not categorically  
14 override the possibility—available in the evidence law of many states—of defense efforts to  
15 introduce extrinsic proof to support an allegation that the complainant had previously made a false  
16 accusation. The draft took no position on that issue (and accordingly left in place any state rules  
17 of evidence that permit such evidence), but the motion to strike had the same effect, as it too left  
18 in place any state rules of evidence that permit such evidence.<sup>323</sup>

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witnesses, different and harsher, for it appears that the rule would allow rape victims to be subjected to a form of impeachment, a mini trial, which would not be allowed if the victim were any other sort of witness and which will not be available for the impeachment of the defendant or of his witnesses.” Transcript of American Law Institute, Annual Meeting, May 19, 2014, at 8 (Washington, D.C.) [hereinafter Annual Meeting Tr.].

<sup>323</sup> It is also worth noting that it is not the case that “according to the [Tentative] Draft, the accused is immune from any form of proof about his past sexual predation; he may not even be asked about it (unless he has been convicted and chooses to testify....”). May Motion at 5. To the contrary, that draft (like the present draft) makes no change to the settled principle that a defendant who chooses to testify is subject to all the usual avenues of impeachment and that—even if he does not testify—his prior sexual conduct can be admissible for non-propensity purposes. The draft’s provision concerning the prior sexual conduct of the defendant (now Section 213.11(2)) makes explicit, moreover, that evidence of such conduct of the defendant is “admissible for [non-propensity] purposes, such as for impeachment, bias, or as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Tentative Draft No. 1 (2014), Section 213.7(2); Discussion Draft No. 2, Section 213.11(2). In current practice under comparable state rules of evidence, such matters are routinely admitted as extrinsic evidence against the defendant—even when the defendant does not testify. Evidence against the accused therefore is not in any manner shielded to a greater extent than evidence challenging the complainant’s testimony. It is important to assure that there be no misunderstanding on this point. The principal difference in the present context is the opposite of that asserted in the motion: Evidence challenging the complainant’s testimony is subject to heightened barriers to admissibility under rape shield, and evidence against the accused is not.

1 **SECTION 213.12A. REGISTRATION FOR LAW ENFORCEMENT PURPOSES**

2 **(1) *Offenses Committed in this Jurisdiction***

3 **(a) Except as provided in subsection 213.12A(3), every person convicted of an**  
4 **offense that is designated a registrable offense in this Article shall, in addition to any**  
5 **sanction imposed upon conviction, be obligated to appear personally and register as**  
6 **a sex offender with the law-enforcement authority designated by law in each [county]**  
7 **where the offender resides, is employed, or is a student.**

8 **(b) Notwithstanding any other provision of law, no conviction for an offense**  
9 **under this Article, or for any other criminal offense in this jurisdiction, shall make**  
10 **the offender eligible for or subject to an obligation to register as a sex offender with**  
11 **law enforcement or other governmental authority, nor shall any conviction for an**  
12 **offense under this Article, or for any other criminal offense in this jurisdiction, make**  
13 **the offender eligible for or subject to any other obligation or restriction applicable to**  
14 **sex offenders specifically, other than obligations and restrictions incident to a**  
15 **suspended sentence, probation, or parole, unless that offense is designated a**  
16 **registrable offense under this Article.**

17 **(2) *Offenses Committed in Other Jurisdictions***

18 **(a) Every person obligated to register as a sex offender in another jurisdiction,**  
19 **because of an offense committed in that jurisdiction, who subsequently resides, works,**  
20 **or studies in this jurisdiction, shall register as a sex offender in this jurisdiction and**  
21 **comply with the requirements of this Section, provided that the offense committed in**  
22 **the other jurisdiction would be a registrable offense under this Article if committed**  
23 **in this jurisdiction.**

24 **(b) Notwithstanding any other provision of law, no conviction for an offense in**  
25 **another jurisdiction shall make the offender eligible for or subject to an obligation to**  
26 **register as a sex offender with law enforcement or other governmental authority in**  
27 **this jurisdiction, nor shall any conviction for an offense in another jurisdiction make**  
28 **the offender eligible for or subject to any other obligation or restriction in this**  
29 **jurisdiction applicable specifically to sex offenders, other than obligations and**  
30 **restrictions incident to a suspended sentence, probation, or parole, unless the**  
31 **commission of that offense obligates the offender to register as a sex offender in that**

1 jurisdiction and that offense would be a registrable offense under this Article if  
2 committed in this jurisdiction.

3 (3) *Juvenile Offenders.* No person shall be subject to the obligation to register under  
4 subsection (1) of this Section, to other obligations or restrictions under this Section, or to  
5 additional collateral consequences under Section 213.12I, on the basis of an offense  
6 committed when the offender was under the age of 18, or on the basis of an adjudication of  
7 delinquency based on conduct when the delinquent was under the age of 18; provided,  
8 however, that this subsection (3) shall not apply to an offender convicted of Sexual Assault  
9 by Aggravated Physical Force or Restraint if the offender was at least 16 years old at the  
10 time of that offense.

11 (4) *Scope and Implementation of the Obligation to Register, Associated Duties, and*  
12 *Other Collateral Consequences Applicable Specifically to Sex Offenders*

13 (a) Notification of the offender's duty to register and associated duties is  
14 governed by Section 213.12B.

15 (b) The time of initial registration is governed by Section 213.12C.

16 (c) The information required upon registration is specified in Section  
17 213.12D.

18 (d) The duty to keep registration current is specified in Section 213.12E.

19 (e) The duration of the registration requirement is specified in Section  
20 213.12F.

21 (f) Penalties for failure to register are governed by Section 213.12G.

22 (g) Access to registry information is governed by Section 213.12H.

23 (h) Additional collateral consequences of conviction are governed by Section  
24 213.12I.

25 (i) Standards and procedures for relief from the duty to register, associated  
26 duties, and additional collateral consequences applicable specifically to sex offenders  
27 are governed by Section 213.12J.

28 **Comment:**

29 1. *Offenses committed in this jurisdiction.* Section 213.12A(1) applies to collateral  
30 consequences potentially applicable on the basis of an offense committed in this jurisdiction.

Section 213.12A. Registration for Law Enforcement Purposes

1           *a. Subsection (1)(a).* In order to serve law-enforcement purposes, subsection (1)(a) obliges  
2 an offender to register as a sex offender and fulfill related duties when offense committed is  
3 designated under this Article designates it as a registrable offense.

4           The following offenses are the only offenses designated as registrable offenses under this  
5 Article:

6                   (i) Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint.

7                   (ii) Section 213.2. Sexual Assault by Physical Force, but only when committed after  
8 the offender had previously been convicted of a felony sex offense.

9                   (iii) Section 213.3(1). Sexual Assault of an Incapacitated Person, but only when  
10 committed after the offender had previously been convicted of a felony sex offense.

11                   (iv) Section 213.8(1). Sexual Assault of a Minor Younger than 12, but only when  
12 the offender is a [reserved] degree older.

13                   (v) Section 213.8(2). Sexual Assault of a Minor 12 to 16 Years of Age, but only  
14 when the offender who is a [reserved] degree older.

15                   (vi) Section 213.8(3). Incestuous Sexual Assault of a Minor.

16           Subsection (1)(a) requires offenders convicted of one of these designated offenses to  
17 register with law-enforcement authorities in each locality where the offender resides, works, or  
18 studies. Municipal organization and local logistical capabilities will determine for each state the  
19 official agency and jurisdictional level where the registration obligation is centered. For example,  
20 in California, offenders required to register must do so “with the chief of police of the city in which  
21 he or she is residing, or the sheriff of the county if he or she is residing in an unincorporated area  
22 or city that has no police department, and, additionally, with the chief of police of a campus of the  
23 University of California, the California State University, or community college if he or she is  
24 residing upon the campus or in any of its facilities.”<sup>1</sup> In Pennsylvania, offenders required to  
25 register must do so with an appropriate official of the correctional facility where incarcerated prior  
26 to release, with the Pennsylvania Board of Probation and Parole, or with the Pennsylvania state  
27 police, depending on the circumstances.<sup>2</sup>

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<sup>1</sup> Cal. Penal Code §290(b) (2019).

<sup>2</sup> 42 Pa. Cons. Stat. Ann. § 9799.19 (2019)

## Section 213.12A. Registration for Law Enforcement Purposes

1           **b. Subsection (1)(b).** Existing sex-offender registration requirements and related provisions  
2 are codified in diverse places within the corpus of state law. In addition, many jurisdictions impose  
3 sex-offender registration and related obligations on the basis of sexual offenses other than rape  
4 and sexual assault—sex-related offenses that fall outside the scope of Article 213 such as  
5 exhibitionism, stalking, and possession of child pornography. Section 213.12A(1)(b) provides that  
6 an obligation to register as a sex offender, related duties, and other collateral consequences  
7 applicable to sex offender specifically may not be imposed on an offender on the basis of any  
8 offense committed in this jurisdiction that is not defined by Article 213 and designated a registrable  
9 offense under this Article.

10           Subsection (1)(b) therefore makes clear that the registration provisions of Article 213.12A  
11 supersede prior law governing sex-offender registration and other sex-offender collateral  
12 consequences in the jurisdiction. Once enacted, the Article 213 designation of offenses that are  
13 registrable, and the provisions of Sections 213.12A-J specifying the scope and limits of collateral  
14 consequences applicable to sex offenders specifically constitute the exclusive source of law  
15 applicable to these collateral consequences in the jurisdiction. Obligations and restrictions incident  
16 to a suspended sentence, probation, or parole, and collateral consequences not applicable to sex  
17 offenders specifically—that is, obligations or restrictions applicable both to persons convicted of  
18 sex-offenses and to persons convicted of other offenses, such as disqualifications from voting, jury  
19 service or eligibility for public benefits—are governed by *Model Penal Code: Sentencing*, and are  
20 not affected by the provisions of Sections 213.12A-J.

21           **2. Offenses committed in other jurisdictions.** Section 213.12A(2) applies to sex-offender  
22 collateral consequences potentially applicable when an offender enters the jurisdiction after having  
23 been convicted of a sex offense in another jurisdiction. Under subsection (2)(a), this out-of-state  
24 offender is subject to the registration obligations of Section 213.12A if and only if two  
25 requirements are met: the offender must be obliged to register as a sex offender in the jurisdiction  
26 where the offense was committed *and* the offense must be one that would be a registrable offense  
27 if committed in this jurisdiction.

28           Under subsection (2)(b), the out-of-state offender is subject to those registration obligations  
29 *only* if these two requirements are met. Many jurisdictions require registration for a much broader  
30 array of offenses than those that trigger registration obligations under Article 213; the policy  
31 judgment underlying Section 213.12A, that sex-offender registration should be carefully targeted,

1 makes registration unnecessary in such cases. Conversely, an offender may have committed an  
2 offense that would be registrable if committed in this jurisdiction but is not registrable in the  
3 jurisdiction where it was committed. That situation will seldom arise in practice, because few states  
4 if any restrict the registration obligation more narrowly than does Article 213. In such an event,  
5 however, the policy underlying Section 213.12A *would* call for the public-safety measures that  
6 Section 213.12A contemplates, and some jurisdictions accordingly require sex-offender  
7 registration on the basis of offenses not registrable where committed, if the offense is registrable  
8 when committed in that jurisdiction.<sup>3</sup> Nonetheless, since the offense was not registrable where  
9 committed, the offender would not receive registration-related notice at the time of conviction. It  
10 is therefore neither practical nor fair for that offender to face Section 213.12A requirements when  
11 subsequently entering this state.

12         3. *Juvenile offenders.* Subsection (3) protects juveniles from the obligation to register and  
13 from other collateral consequences specific to sex offenders, regardless of the offenses they  
14 committed, and regardless of whether the potential trigger for those consequences is an  
15 adjudication of delinquency or a criminal conviction under this Article, except that juveniles  
16 convicted of Sexual Assault by Aggravated Physical Force or Restraint remain subject to the  
17 requirements of Section 213.12A if they were at least 16 years old at the time of that offense.

## REPORTERS' NOTES

18         ***1. Introduction: sex-offender collateral consequences generally.***

19         Every state currently has legislation requiring sex offenders, on release from custody, to  
20 register with local authorities in their place of residence, to keep authorities informed of changes  
21 in their address, and to observe a variety of other restrictions, including (in many states) limits on  
22 places where they can live or work. This legislation makes their personal information available to  
23 law enforcement and typically permits the general public to access these registries under various  
24 circumstances. Many of the new laws also establish a regime of community notification—a  
25 requirement that local authorities take affirmative steps to inform the public about the names and  
26 addresses of convicted sex offenders living, working, or studying in the area. Federal law not only  
27 establishes a nationwide, internet-accessible registry of this information but also requires every  
28 state, as a condition of receiving certain federal funds, to maintain a sex-offender registry with  
29 specific minimum features. Although originally inspired by concern over violent recidivists, these  
30 laws now apply even to first offenders convicted of a broad range of sexual offenses, including

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<sup>3</sup> TBS.

1 possession of child pornography and statutory rape (sometimes including statutory rape in which  
2 victim and perpetrator are close in age).

3 Collateral consequences of conviction are not confined to the sex offenses, and in recent  
4 years they have proliferated across broad swaths of the criminal law, prompting several prominent  
5 law-reform bodies to address collateral sanctions applicable to offenders in general.<sup>4</sup> These  
6 initiatives have considered under one umbrella virtually the entire gamut of collateral sanctions  
7 triggered by conviction not only of sexual offenses but also offenses ranging from homicide to  
8 drug crimes, securities fraud, and drunk driving; likewise they seek to cover not only registration  
9 and community notification, but also such sanctions as disenfranchisement, ineligibility for public  
10 housing, loss of other public benefits, barriers to occupational licensing and the like.

11 These efforts mainly aim to identify general principles and corresponding statutory  
12 language suitable for application to any collateral consequence associated with conviction for any  
13 offense. Because they cover so much terrain, they cannot delve into the substantive question of  
14 when a given sanction should be available for a given offense. Rather, of necessity they focus on  
15 general principles of coherence, notice, and procedural fairness that can be cast in broadly  
16 applicable terms—for example, requiring that the sentencing judge explain applicable collateral  
17 consequences to defendants prior to entry of a guilty plea and at sentencing; that appropriate  
18 authorities compile in one place a list of the jurisdiction’s collateral sanctions; that jurisdictions  
19 allow offenders to seek relief from inappropriate collateral sanctions; and that sentencing  
20 commissions develop guidelines for courts to use in making substantive decisions about whether  
21 to impose a given collateral sanction or grant relief from it.<sup>5</sup> These treatments inevitably stop short  
22 of the sustained attention to the range of issues that arise in the context of collateral sanctions  
23 applicable specifically to the sexual offenses.

24 These issues are not only important in their own right, but they also have important  
25 implications for the substantive definition of the sexual offenses. In deciding the proper scope of  
26 penal prohibitions, legislative bodies must consider the severe collateral consequences typically  
27 triggered by state offenses denominated as “rape” or “sexual assault.” Concerns of this nature  
28 presumably shaped the Institute’s original decision, in 1962 MPC § 213.5, to address matters of  
29 procedure and evidence distinctive to rape that go beyond mere substantive crime definition.  
30 Sections 213.12A-J likewise reflect the judgment that sound treatment of the sexual offenses in  
31 Article 213 cannot confine itself to offense definitions alone but must also address collateral  
32 sanctions authorized or required upon conviction.

33 Note 2 examines the historical development of sex-offender collateral consequences. Note  
34 3 provides a brief overview of the policy concerns surrounding these laws and the Institute’s

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<sup>4</sup> 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); *Model Penal Code: Sentencing*, Article 7, at. 238-261.

<sup>5</sup> See, e.g., *Model Penal Code: Sentencing*, supra note 4.

1 perspective on the underlying issues. Note 4 describes the restrictions and disabilities in question  
2 and variation in the relevant state and federal legislation, with respect to both registration regimes  
3 and other sex-offender collateral consequences. Note 5 examines in detail the policy goals of this  
4 kind of legislation and assesses the evidence bearing on its effects, both intended and unintended.  
5 Note 6 explains the approach of Article 213 with regard to sex-offender collateral consequences  
6 generally. Note 7 addresses the issues specific to registration that are resolved in Sections  
7 213.12A-J.

## 8 **2. Historical Background.**

9 Since the 1930s and before, convicted sex offenders have faced a variety of special  
10 sanctions, including mandatory sterilization and indefinite commitment for psychiatric treatment.<sup>6</sup>  
11 But these measures had relatively little visibility or importance when the Model Penal Code was  
12 originally drafted. That picture changed dramatically in the early 1990s, when public interest in  
13 identifying previously convicted sex offenders emerged with new intensity following several  
14 highly publicized murders of young children in the early 1990s.<sup>7</sup> In 1993, 12-year-old Polly Klaas  
15 was kidnapped, raped, and murdered by a man with a prior record for the commission of serious  
16 violent crimes. The next year, seven-year-old Megan Kanka was sexually assaulted and killed by  
17 a career sex offender who lived across the street. Several similar incidents were widely publicized  
18 during the 1990s and shortly thereafter.<sup>8</sup> The legislative reaction to the Klaas killing focused on  
19 the “three-strikes-and-you’re-out” solution, which mandates extended terms of imprisonment for  
20 offenders previously convicted of two serious or violent felonies.<sup>9</sup> In New Jersey, Megan Kanka’s  
21 murder prompted a different response, imposing registration requirements applicable only to sex  
22 offenders. Within weeks of the killing, the state Assembly declared a legislative emergency, and a  
23 sex-offender registration law passed, without committee hearings, about two months later.<sup>10</sup>

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<sup>6</sup> 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* 65, 66-74 (2009).

<sup>7</sup> See generally Logan, *supra* note 6, at 49-108; Terry & Ackerman, *supra* note 6, at 74-94.

<sup>8</sup> 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.

<sup>9</sup> See Michael Vitello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395 (1997).

<sup>10</sup> 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).

## Section 213.12A. Registration for Law Enforcement Purposes

1 In 1990, Patricia Wetterling responded to the murder of her 11-year old son Jacob by  
2 establishing a foundation to press for the enactment of sex-offender registration laws.<sup>11</sup> A year  
3 after New Jersey’s enactment of Megan’s Law, her efforts bore fruit when Congress, as part of the  
4 Violent Crime Control and Law Enforcement act of 1994, enacted the Jacob Wetterling Crimes  
5 Against Children and Sexually Violent Offender Registration Act, which required all states, on  
6 pain of loss of federal funding, to establish a system of registration for all offenders convicted of  
7 a sexually violent offense or any criminal offense against a minor.<sup>12</sup>

8 Congress subsequently repealed that statute and replaced it with a broader law—the Sex  
9 Offender Registration and Notification Act of 2006 (“SORNA”).<sup>13</sup> SORNA establishes a national  
10 registry for sex offenders, publicly available on the Internet, directs each state to maintain its own  
11 registry, and requires states to create a criminal offense, punishable under state law by more than  
12 a year’s imprisonment, for a sex offender who fails to register or meet a deadline for updating  
13 required registry information.<sup>14</sup> After the passage of SORNA, many states expanded their own  
14 registration requirements and enacted other special restrictions. In addition, it is a federal crime,  
15 punishable by up to 10 years in prison, for a person convicted of a state-law sex offense to travel  
16 interstate without maintaining an up-to-date registration with state authorities.<sup>15</sup>

17 Britain and other European nations have faced similar public pressure to make sex-offender  
18 information more readily available, but unlike the United States, they have generally declined to  
19 respond to that pressure.<sup>16</sup> One fundamental reason is that the continental European nations, and  
20 to a lesser extent the United Kingdom (UK), generally treat criminal-history information as  
21 confidential, in order to protect the privacy of offenders and to aid their rehabilitation.<sup>17</sup>  
22 Regulations in the European Union (EU), applicable (for the moment) in the UK as well, require  
23 specific safeguards to protect the confidentiality of criminal history information, and stipulate that  
24 registries of criminal convictions “may be kept only under the control of official authority.”<sup>18</sup> The

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<sup>11</sup> 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 the crime was assumed to be the work of a sexual predator.

<sup>12</sup> See 42 U.S.C. § 14071(f)(1) (Supp. III 1997).

<sup>13</sup> PUB. L. NO. 109-248, tit. I, 120 Stat. 590 (2006) (codified as amended at 34 U.S.C. §§ 20901-20929 (2019)).

<sup>14</sup> 34 U.S.C. § 20913(e).

<sup>15</sup> 18 U.S.C. § 2250.

<sup>16</sup> 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>.

<sup>17</sup> See James B. Jacobs & Elena Larruri, *Are Criminal Convictions a Public Matter?: The USA and Spain*, 14 PUNISHMENT & SOC’Y 3, 12-14 (2012).

<sup>18</sup> European Union Directive 95/46/EC, European Parliament & Council, 24 Oct. 1995, art. 8(5).

1 EU has modified that background presumption only to the extent of seeking to bar convicted sex  
2 offenders from working with children and seeking to make convictions for sexual offenses against  
3 children accessible to employers whose staff serve that clientele. Although such objectives seem  
4 modest relative to those pursued in American jurisdictions, “[p]rogress towards [imposing these  
5 restrictions] has been slow,”<sup>19</sup> in part because of the commitment to the confidentiality of criminal  
6 records that is embedded in the law of the continental EU nations. In the UK, a public agency is  
7 responsible for determining which forms of private employment should be closed to sex offenders.  
8 UK employers and volunteer organizations have a duty to check the criminal background of those  
9 applying for positions that afford close contact with children and other especially vulnerable  
10 groups, such as the elderly and the handicapped. But the disabilities imposed on sex offenders are  
11 far more limited than in the United States, and registry information is not available to the general  
12 public, largely because of concern that widespread dissemination of criminal history and  
13 burdensome disabilities can undermine offender rehabilitation.<sup>20</sup> Similarly, in Canada, registry  
14 information is available solely to law enforcement, for the purpose of investigating and preventing  
15 sex offenses, and is not available to the public.<sup>21</sup> Almost no foreign countries have adopted the  
16 prevalent U.S. practice of proactive notification of sex offender registry information to community  
17 organizations and the general public.<sup>22</sup>

18 Laws of this kind pose several distinct policy issues: What, precisely, is their underlying  
19 justification? Does their adverse impact on the offender’s prospects for gainful employment and  
20 reintegration into the community outweigh their potential contribution to social protection and  
21 public peace of mind? Do registries in fact provide such peace of mind, and how might they be  
22 structured for optimal effect?

23 **3. Overview of policy concerns and the judgments underlying Sections 213.12A-J.**

24 Despite their prevalence, registration and other collateral-consequence laws targeting sex  
25 offenders rest on highly contested premises. The best available studies discredit many of their  
26 central justifications. At the same time, the research provides strong evidence of unintended  
27 negative impacts, including tendencies (especially for the broadest of these laws) to *aggravate*  
28 recidivism and *jeopardize* public safety, the very opposite of the results that lawmakers and the  
29 general public expect registration and community notification to accomplish.

30 This realization is now widespread among criminal justice professionals, even those who  
31 otherwise disagree about almost all other policies relating to sexual offenses. Critics of registration,

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<sup>19</sup> Jacobs & Blitsa, *supra* note 16, at 34.

<sup>20</sup> TBS.

<sup>21</sup> 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).

<sup>22</sup> 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, 317 & n.11 (2018).

## Section 213.12A. Registration for Law Enforcement Purposes

1 community notification, residency and employment restrictions, and the like include substantial  
2 numbers of victim advocates, who see harsh collateral consequences as major contributors to the  
3 frequent reluctance of police and prosecutors to properly charge serious sex offenders, and to the  
4 frequent reluctance of judges and juries to properly convict them.<sup>23</sup> The U.S. Department of Justice  
5 now grants states considerable leeway to sidestep some of the ostensibly mandatory federal  
6 requirements and in acknowledging their unintended consequences, the Department cautions  
7 against any expansion of these regimes.<sup>24</sup> In candid moments, many state lawmakers, even while  
8 supporting this legislation themselves, describe it as overbroad and largely counterproductive, but  
9 politically impossible to oppose.<sup>25</sup>

10 Mindful of these assessments, Sections 213.12A-J provide for sex-offender disabilities on  
11 a substantially more restricted basis than that found in currently prevalent state and federal  
12 legislation. Positions supported by strong currents of public opinion and widely endorsed in the  
13 political process cannot be ignored, and Article 213 does not lightly depart from them. At the end  
14 of the day, however, the Model Code must be guided by the best available evidence and judgments  
15 not deformed by known imperfections in the relevant political deliberations.

16 Sections 213.12A-J therefore limit sex-offender collateral consequences to the domains  
17 most likely to offer public-safety benefits, without strong counterproductive side-effects. It does  
18 so through four distinct mechanisms.

19 First, the relevant provisions sharply distinguish registration *for law-enforcement purposes*  
20 from other restrictions and disabilities, including community notification, residency and  
21 employment restrictions, and other sex-offender disabilities. Up-to-date registration with local  
22 law-enforcement authorities can serve legitimate law-enforcement purposes and is far more cost-  
23 effective than other sex-offender disabilities. Moreover, so long as the confidentiality of these  
24 records is preserved, registration exclusively for law-enforcement purposes poses relatively few  
25 dangers to public safety and to the welfare of offenders themselves. Other sex-offender disabilities,  
26 in contrast, are costly to implement and entail significant, well-documented difficulties<sup>26</sup>;  
27 accordingly they must be targeted and managed with particular care. Sections 213.12A, D & E  
28 therefore require all adults convicted of a registrable offense to provide up-to-date registry  
29 information to local law-enforcement authorities, but Section 213.12H imposes on those  
30 authorities a strong obligation to preserve the confidentiality of that information, and Section  
31 213.12I strictly limits community notification and other sex-offender disabilities,

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<sup>23</sup> See note xx, *infra*.

<sup>24</sup> See note xx, *infra*.

<sup>25</sup> See note xx, *infra*.

<sup>26</sup> See note xx, *infra*.

1           Second, Section 213.12A sharply restricts the class of offenders to whom the threshold  
2 duty to register applies. It precludes registration of nearly all juvenile offenders, and for adults, it  
3 imposes the threshold duty to register only upon conviction of offenses that most strongly arouse  
4 public concern.

5           Third, the registration framework shortens in two ways the duration of required  
6 registration. Under federal law and that of most states, the serious offenses that require registration  
7 under Section 213.12A typically would trigger an obligation to register for life.<sup>27</sup> In contrast,  
8 Section 213.12F limits to 15 years the registrant's duty to keep registry information current and  
9 provides for automatic termination of that duty at an earlier date if the offender meets specified  
10 rehabilitative goals during the initial registration period; in either case the offender is removed  
11 from the registry at the end of the applicable period. In addition, Section 213.12J permits the  
12 offender to apply for early removal from the registry or relief from some or all of the duties  
13 associated with registration upon an appropriate showing of rehabilitation,

14           Fourth, Section 213.12I tightly constrains, and in most cases eliminates, other sex-offender  
15 disabilities, such as community notification and restrictions on residency, employment, internet  
16 access, and the like. In current law, community notification is widely required for a long list of  
17 sex-related offenses, and other sex-offender disabilities, though not mandated by federal law, are  
18 also commonly imposed. In contrast, Section 213.12I permits community notification and other  
19 sex-offender disabilities only when an individual, case-by-case risk assessment case strongly  
20 supports the need for such measures, to an extent that outweighs their well-established potential  
21 for costly, counterproductive and criminogenic effects.

22           ***4. Current Law: What Burdens Are Imposed and on Whom?***

23           As discussed above, federal SORNA requires each state, on pain of losing federal funds,  
24 to maintain a registry of convicted sex offenders and specifies many parameters that state  
25 registration regimes must satisfy to comply with the federal mandate, including the offenses that  
26 must trigger the obligation to register, the information states must include in their registries, the  
27 duration of a registrant's duties and the frequency with which registrants must provide updates.  
28 Separately, SORNA requires states to make it a criminal offense, punishable by at least a year in  
29 prison, for a designated offender to fail to register or miss a deadline for updating registry  
30 information.<sup>28</sup> Beyond federal mandates pertaining to the registry system itself, Federal SORNA  
31 directs states to afford public access to their registry and establish a program for promptly notifying  
32 concerned entities and individuals in the community about any change in information pertaining  
33 to registrants in the area. Federal SORNA does not seek to dictate state approaches to other sex-  
34 offender disabilities, such as restrictions on residency, employment, GPS monitoring, and internet  
35 usage.

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<sup>27</sup> TBS.

<sup>28</sup> Federal SORNA § 20913(e).

Section 213.12A. Registration for Law Enforcement Purposes

1 All states have a registration regime applicable to persons convicted of a broad list of sexual  
2 offenses.<sup>29</sup> But states vary considerably in the extent to which they conform to federal SORNA  
3 expectations with respect to many of the ostensibly mandated details, particularly with regard to  
4 triggering offenses, public access, and community notification. States also vary in the extent to  
5 which they impose other sex-offender disabilities.

6 *a. Which Offenders?* Federal SORNA requires states to impose the obligation to register  
7 as a sex offender and meet other requirements on anyone convicted of a broad list of sexual  
8 offenses, both felonies and misdemeanors. Juvenile delinquency adjudications based on  
9 comparable sexual misconduct are included if the minor was at least 14 years old at the time of the  
10 offense.<sup>30</sup> The designated offenses range from the most violent sex crimes to any offense of  
11 coerced sexual contact, solicitation of a minor to engage in any sexual conduct, possession of child  
12 pornography, “video voyeurism” (defined as photographing or filming the private area of an  
13 individual without the individual’s consent<sup>31</sup>), and any other “sexual act” not involving consenting  
14 adults, even low-level misdemeanors such as public indecency. For example, for an offense  
15 comparable to MPC § 251.1, the petty misdemeanor of committing “any lewd act which [the  
16 offender] knows is likely to be observed by others who would be affronted,” SORNA requires  
17 mandatory registration, public access, and community notification under the “sex offender” label.

18 Federal SORNA establishes a three-tier offender-classification system based solely on the  
19 seriousness of the sex offense and whether it was the defendant’s first. All offenders convicted of  
20 a qualifying sex offense, regardless of classification, must (to comply with SORNA) face at  
21 minimum all of the restrictions and disabilities detailed in Note 4(d) below with respect to  
22 registration, public access to registry information, and community notification—that is, proactive  
23 law enforcement measures to alert schools, other local agencies, and the general public to the  
24 identify of registered sex offenders present in the area. The three tiers differ only in the length of  
25 time the offender is subject to the restriction and the accompanying duty to keep registration  
26 information current (15 years for the least serious offenders, life for the most), and the frequency  
27 with which the offender must appear personally to confirm the required information (once a year  
28 for the least serious offenders, quarterly for the most).

29 Many states similarly impose the burdens of a sex-offender conviction automatically on  
30 offenders convicted of any of a broad array of sex-related crimes. The triggering offenses typically  
31 include all felonies and misdemeanors, however classified, that fall within the purview of Article  
32 213, as well as many offenses that do not—for example, possession of child pornography,  
33 solicitation to practice prostitution, sexual performance involving a minor, and exhibitionism. In

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<sup>29</sup> 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).

<sup>30</sup> SORNA § 20911.

<sup>31</sup> See 18 U.S.C. § 1801 (2019).

1 some states, the list of covered misconduct includes as many as 40 distinct offenses.<sup>32</sup> In some of  
2 these jurisdictions, the burdens of sex-offender conviction automatically extend not only to  
3 registration, often for life, but also to stringent residency restrictions.<sup>33</sup> Some states grade  
4 offenders according to tiers of seriousness, but as under federal SORNA, their tiers are determined  
5 solely by prior record and the nature of the offense of conviction.

6 Other state regimes are more nuanced. Many exclude young offenders from registration  
7 and other obligations.<sup>34</sup> Many states further narrow the universe of affected offenders by using a  
8 ranking system to vary the scope of the collateral burdens as a function of the intensity of perceived  
9 need. One common approach eschews categorization based solely on the conviction offense and  
10 prior record. Instead, many states classify sex offenders on the basis of an individualized risk  
11 assessment that considers a variety of factors pertinent to the nature and seriousness of the risk  
12 posed, such as whether the victim of the offense was a minor, and the age difference and  
13 relationship between victim and offender.<sup>35</sup> In New York, the level of assessed risk affects the  
14 duration of the obligation to remain registered and the type of information that can be publicly  
15 released.<sup>36</sup> Minnesota, New Jersey, Oregon, Washington, and Vermont, among other states, rely  
16 on actuarial assessment to distinguish sex offenders and the basis of risk and assign more serious  
17 collateral consequences to offenders who pose the greatest danger to the public.<sup>37</sup> In Georgia, a  
18 “Sex Offender Registration Review Board”<sup>38</sup> uses research-based assessments to assign “points”

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<sup>32</sup> 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).

<sup>33</sup> 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 (February 2008).

<sup>34</sup> See, e.g., Lisa Ann Minutola & Riya Saha Shah, *A Lifetime Label: Juvenile Sex Offender Registration*, 33 DEL. LAW. 8, 12 (2015).

<sup>35</sup> E.g., N.Y. CORRECT. LAW, §§ 168-169-W (2019). See generally Hinton, *supra* note xx (noting that many law-enforcement officials follow classification systems that are more nuanced, and therefore more restrictive than the ostensibly mandatory federal regime).

<sup>36</sup> See [N.Y.] Div. of Crim. Just. Services, “Risk Level & Designation Determination,” [https://www.criminaljustice.ny.gov/nsor/risk\\_levels.htm](https://www.criminaljustice.ny.gov/nsor/risk_levels.htm) (last 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”).

<sup>37</sup> Citations TBS. See also Colorado.

1 that are used to compute a score indicating a high, moderate, or low risk of re-offending; sexual  
2 attacks against strangers and a history of multiple offenses are among the factors considered  
3 indicative of high risk.<sup>39</sup>

4 *b. Which Burdens?*

5 All states require registrants to update their registry information periodically and authorize  
6 criminal punishment for failing to register or keep registry information up to date.<sup>40</sup> And the great  
7 majority permit public access to registry information on an essentially unlimited basis.<sup>41</sup> Similarly,  
8 most states, at their own initiative, regularly distribute registry information to the entire community  
9 or to pertinent government agencies and to private organizations where contact with children or  
10 other vulnerable individuals might occur.

11 Nearly all states bar sex offenders from working as teachers, security guards, and in other  
12 sensitive occupations, but many exclude sex offenders from much more extensive forms of  
13 employment.<sup>42</sup> Sex offenders are commonly prohibited from living near schools, parks, and other  
14 places where children congregate.<sup>43</sup> And even when not formally excluded from living or working  
15 at a certain place, community notification can create almost insuperable barriers to finding a  
16 landlord or employer willing to deal with them. At least 17 states require sex offenders to wear a  
17 GPS monitoring device that enables law enforcement to determine their location at all times. Other

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<sup>38</sup> 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 Jul. 29, 2019) <https://www.sorrb.org/board-information/standing-procedures>.

<sup>39</sup> For example, sexual attacks against strangers and a history of multiple offenses are high-risk indicators of recidivism. See Hinton, *supra* note xx.

<sup>40</sup> See Carpenter & Beverlin, *supra* note 29, at 1078 (2012) (describing sex-offender registry laws enacted in the wake of federal SORNA).

<sup>41</sup> For details, see Reporters' Note to Section 213.12H, *infra*. See also "Collateral Consequences," ABA CRIMINAL JUSTICE SECTION, <http://www.abacollateralconsequences.org/search/?jurisdiction=37>.

<sup>42</sup> See "Collateral Consequences," *supra* note 41; 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).

<sup>43</sup> Geraghty, *supra* note 42, at 514-515 (summarizing states' residency-restriction laws). For further detail, see notes 151-152, *infra*.

1 restrictions, less common for the time being, range from GPS monitoring<sup>44</sup> and limits on using the  
2 Internet<sup>45</sup> to chemical castration.<sup>46</sup>

3 **5. Results.**

4 Because most states have implemented simultaneously a package of diverse sex-offender  
5 duties and restrictions, much of the data-driven research cannot tease out the separate effects of  
6 registration alone or of other common elements of sex-offender policy. Other research  
7 methodologies do shed some light on that question, but the overall picture is best understood by  
8 beginning with what is known about the impact of sex-offender collateral consequences generally.  
9 This Note then focuses on the likely benefits and costs of their individual components, and the  
10 Notes to Sections 213.12H & I return to that question, with more sustained attention to the impact  
11 of collateral consequences other than law-enforcement registration alone.

12 *a. Intended Effects and Inherent Limitations.* The various collateral-consequence measures  
13 (registration, public access, notification, residential restrictions, employment restrictions, and the  
14 like) differ substantially in the burdens they represent for offenders, but broadly speaking they  
15 share the same two goals—to reduce recidivism and to facilitate self-protective measures on the  
16 part of the public. A collateral aim, no doubt, is to alleviate public fear, even if the measures have  
17 no concrete effect on the behavior of offenders or law-abiding citizens. Some state legislators have  
18 occasionally articulated a third objective that is specific to residency restrictions—the goal of  
19 making life so difficult for convicted sex offenders that they will simply choose to leave the state.<sup>47</sup>

20 The success of sex-offender collateral-consequence laws in reducing recidivism has been  
21 extensively studied, and there is also significant research examining how members of the public

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<sup>44</sup> See Kamika Dunlap, *Sex Offenders After Prison: Lifetime GPS Monitoring?*, FINDLAW BLOTTER, February 1, 2011; Michelle L. Meloy & Sharenda Coleman, GPS Monitoring of Sex Offenders, in *Wright*, supra note 16, at 243 (reporting that as many as 46 states use GPS monitoring to track sex offenders under some circumstances). The Supreme Court has held that GPS monitoring of a sex offender 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*, March 30, 2015.

<sup>45</sup> 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](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).

<sup>46</sup> 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.*

<sup>47</sup> 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 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”).

1 alter their behavior in response to these laws. The research consistently establishes four points.  
2 First, in terms of the primary objective—reducing recidivism—the studies conducted to date are  
3 either inconclusive or establish that pertinent gains were not achieved. Similarly, with respect to  
4 the aim of enhancing citizen self-protection, research has detected no significant measurable  
5 benefits and powerfully counterproductive side effects: community notification, unrestricted  
6 citizen access to registry information, and restrictions on residency and employment are associated  
7 with strongly negative impacts on offenders, including great difficulty reintegrating into society  
8 and significantly enhanced rates of recidivism.<sup>48</sup> Third, there is an inherent mismatch between the  
9 risks that different sorts of sex offenders pose and the restrictions to which they are subject. Finally,  
10 the laws are expensive to implement.

11 (i) *Reducing Recidivism*. The Supreme Court, echoing a commonly held view, has stated  
12 that “[t]he risk of recidivism posed by sex offenders is ‘frightening and high.’”<sup>49</sup> There is little to  
13 no evidence to support this assumption, which has been thoroughly debunked.<sup>50</sup> Recidivism in this  
14 group of offenders is not unusually elevated; the available research strongly suggests the  
15 opposite—that “[s]ex offenders have some of the lowest recidivism rates of any class of  
16 criminal.”<sup>51</sup> In a 2002 Department of Justice study, sex crimes were one of the offense categories  
17 for which convicted offenders had the lowest rates of re-arrest for any new offense, and only 2.5  
18 percent of released rapists were rearrested for a new rape, while 13.4 percent of released robbers  
19 were rearrested for a new robbery and 22 percent of offenders convicted of a non-sexual assault  
20 were rearrested for a new assault.<sup>52</sup>

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<sup>48</sup> See Reporters’ Notes, *infra*.

<sup>49</sup> *Smith v. Doe*, 538 U.S. 84, 103 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)).

<sup>50</sup> 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). 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*, March 6, 2017.

<sup>51</sup> 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 re-offend than convicted burglars and thieves); Wesley G. Jennings, Richard Tewksbury & Kristen Zgoba, *Sex Offenders: Recidivism and Collateral Consequences*, available at NCJRS <https://www.ncjrs.gov/pdffiles1/nij/grants/238060.pdf> (2011).

<sup>52</sup> U.S. Dept. of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994*, at 1, 9 (2002). See also U.S. Dept. of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders*, 25-26 (1997) (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

1           Importantly, recorded recidivism rates for sex offenses are deflated by exceptionally low  
2 rates of reporting, arrest, and conviction for these crimes. A number of methodologies have been  
3 used to control for this difficulty. But recidivism is surely a greater concern than the data imply,  
4 and awareness of this distortion arguably bolsters the case for registration policies to strengthen  
5 prevention of crimes that are more frequent than might appear. But low rates of reporting, arrest,  
6 and conviction also mean that the great majority of those who commit sex offenses are not  
7 convicted in the first place, so they are not on a registry when they commit their subsequent  
8 offenses. Registry regimes cannot help prevent this large chunk of recidivist sex offenses. Indeed,  
9 many professionals believe they actually *impede* effective enforcement by focusing attention on a  
10 relatively small population of unlikely recidivists, at the expense of attention to the much larger  
11 population of potential offenders not yet caught and therefore not yet on any registry.

12           Misunderstandings about the data on these points are sufficiently widespread to warrant  
13 further discussion. On several occasions, the Supreme Court has stated that “convicted sex  
14 offenders are much more likely than any other type of offender to be rearrested for a new rape or  
15 sexual assault.”<sup>53</sup> The claim is literally true but misleading. It relies on a Bureau of Justice  
16 Statistics finding that a convicted rapist is more likely than someone convicted of some other crime  
17 (e.g., bank robbery) to be arrested subsequently for rape;<sup>54</sup> it does not find that rapists, as compared  
18 to other offenders, have a higher rate of recidivism for their offense of conviction or for subsequent  
19 crime generally. Indeed, a Justice Department analysis of prisoners released in 1994 found that  
20 among 1717 ex-prisoners subsequently arrested for rape, *less than five percent* had previously been  
21 convicted of that offense.<sup>55</sup> Properly understood, in other words, the data invoked to support sex-  
22 offender registration paradoxically show how *misdirected* these laws are: By focusing attention on  
23 offenders previously convicted of rape, such legislation risks diverting attention from the vastly  
24 larger pool of individuals who will eventually commit that crime—individuals who were  
25 previously convicted of other offenses or not previously convicted of any crime at all.

26           Although sex offenders, therefore, are *not* more likely than other offenders to re-offend,  
27 collateral-consequence legislation arguably could be defended on the basis that sex crimes, being  
28 distinctively harmful and unsettling, warrant special effort to prevent them. The crucial question,  
29 then, is whether registration and other collateral-consequence measures have succeeded in doing  
30 so. Most studies suggest that they have not.

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for violence”). All such studies are of course sensitive to the definition of re-offending (which offenses and whether established by arrest or conviction), and the time period over which recidivism is measured.

<sup>53</sup> Smith, *supra*, 538 U.S. at 103 (quoting *McKune*, 536 U.S. at 33).

<sup>54</sup> U.S. Dept. of Justice, *Sex Offenses and Offenders*, *supra* note xx, at 27.

<sup>55</sup> U.S. Dept. of Justice, *Recidivism of Prisoners Released in 1994*, *supra* note xx, at 9-10.

## Section 213.12A. Registration for Law Enforcement Purposes

1 Before-after studies have found no significant correlation between recidivism rates and the  
2 passage of registration laws, public registries, and community notification.<sup>56</sup> A regression analysis  
3 found that *registration alone*, by keeping police informed about sex offenders in the area, tended  
4 to deter the frequency of reported sex offenses against neighbors of the offender (but not against  
5 family members or more distant strangers).<sup>57</sup> *Notification laws* had some apparent crime-reduction  
6 effect by deterring *non-registered* offenders from committing offenses that would render them  
7 eligible for this sanction,<sup>58</sup> but community notification also tended to increase recidivism among

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<sup>56</sup> 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 re-offending 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 re-offending post-1994). 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 sex offenders released from prison between 1990 and 2000; they found a significant drop in re-offending 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 re-arrest or time from prison release to re-arrest. *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 re-arrest for sex crimes, and a slightly larger but still statistically insignificant drop in the rate of re-arrest 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 re-arrest (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 re-offending rates, and in any case the difference was observed only in re-arrests for crimes generally, not in re-arrests 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).

<sup>57</sup> 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).

<sup>58</sup> Deterrence has not been officially advanced as a policy rationale for registration laws, and to do so would undermine the classification of these collateral consequences as non-punitive; that classification

1 offenders who *were* registered. As a result, “any beneficial effect of registration on recidivism is  
2 dampened by the use of notification, and [thus] . . . the punitive aspects of notification laws may  
3 have perverse consequences.”<sup>59</sup>

4 Overall, the available research does not conclusively exclude the possibility that  
5 registration, notification, restricted residency, and similar collateral consequences could  
6 potentially contribute to public safety. But after two decades of experience with such laws, and  
7 with the considerable body of evidence that experience has generated, their beneficial effects (if  
8 any) have yet to be discerned.

9 One reason for this inability to detect public-safety benefits may be that some benefits were  
10 realized but were offset by the negative consequences for public safety that these laws also entail.  
11 That possibility is examined in Note 5(b) below.

12 (ii) *Transparency and Self-protection*. Public access and community notification give the  
13 public and organizations responsible for the welfare of vulnerable populations an ability to take  
14 precautions. Indeed, the perception of transparency and empowerment seems to follow almost  
15 automatically from public access and community notification. But their effects have been  
16 decidedly mixed. The evidence is discussed in the Reporters’ Note to Section 213.12H, which  
17 addresses the specifics of public access to registry information. Overall, the research suggests that  
18 public awareness typically prompts few self-protective measures, and that the very existence of  
19 these regimes tends to divert attention away from much more significant sexual dangers.<sup>60</sup>

20 (iii) *Mismatch*. The collateral-consequence laws under consideration here were initially  
21 prompted by cases like Megan Kanka’s: a young child sexually assaulted by a stranger with a prior  
22 history of sexual offenses who was, unbeknownst to her parents, living nearby. Nonetheless, from  
23 the start these laws extended their reach to offenses against adults and to offenders who were well  
24 known to their victims. Such expansive conceptions of the offenders to be targeted are  
25 understandable and potentially justified, but they sweep within the single rubric of the “sex  
26 offender” individuals who may present different risks that, if so, call for different measures of  
27 social protection. Offenders can be distinguished on three especially important dimensions. But  
28 those differences are not necessarily stable. A fourth problem is that not all offenders “specialize”  
29 in a particular type of victim or a sexual offense. Instead, research finds significant rates of “cross-  
30 over” sexual offending (“polymorphism” in the language of behavioral science). These four  
31 “mismatch” concerns are crucial for sound registration policy.

32 First is the “stranger danger” myth. Though contemporary sex offender registration  
33 regimes grew out of highly publicized stranger crimes, most sexual assaults—by a wide margin—  
34 involve family members or acquaintances. In a Wisconsin sample of 200 recidivist sex offenders,

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is the foundation for an extensive Supreme Court jurisprudence holding that these “regulatory” measures  
are not subject to the ex post facto prohibition. **CITES.**

<sup>59</sup> Prescott & Rockoff, *supra* n.55, at 181.

<sup>60</sup> See Reporters’ Note to Section 213.12H, *infra*.

1 *none* had perpetrated crimes against strangers; a more comprehensive Justice Department study  
2 found that among child victims of sexual abuse, 34 percent had been molested by family members  
3 and an additional 25 percent by close acquaintances.<sup>61</sup> Moreover, despite important qualifications  
4 in the “cross-over” literature discussed below, perpetrators who molest a family member seldom  
5 go on to target strangers. It should be superfluous to point out that the needs for notification and  
6 residency restrictions are quite different (if they apply at all) when a parent is convicted of  
7 molesting the parent’s own child; yet stranger assaults and acquaintance assaults are legally  
8 identical offenses. That means that in the prevalent state and federal approach, classifying  
9 offenders automatically based on the legal offense of conviction, stranger and acquaintance  
10 offenses entail precisely the same collateral consequences.

11 Second, the “child victim” concern is not a myth, but it involves a distinctive set of  
12 behavioral and rehabilitative issues. Offenders who target young, pre-adolescent children  
13 (pedophiles) usually present different risks from those of the offender who has assaulted an adult.  
14 Many classification regimes automatically place offenses against minors in a more serious  
15 category, but some do not. And even where that distinction is drawn, it is often insufficiently  
16 discriminating. Classifications often fail to take into account the age of the minor victim or to  
17 differentiate between pedophiles and offenders who are themselves teenagers who had consensual  
18 sex with other teens who were close or identical in age.

19 Third, is the problem of risk vs. remedy. Offenses involving adults, even those in the least  
20 serious category, nonetheless remain subject to the full panoply of collateral consequences; their  
21 treatment may differ from offenses against children, as in the federal regime, only in the length of  
22 the registration period (merely 15 years rather than 25 years or life). Yet many of the required  
23 collateral consequences—such as the federal mandate to notify day-care centers and common state  
24 mandates barring residence close to school zones (not to mention prohibitions on living near a  
25 school-bus stop)—apply even though the necessity for these measures is different or nonexistent  
26 when the offender is an employer who groped an adult employee in the store room or a person  
27 who raped an adult stranger but shows no indication of being attracted to pre-adolescent children.<sup>62</sup>

28 Fourth, “cross-over” offending complicates this picture. Although in conventional wisdom,  
29 the pedophile and the person who forcibly rapes an adult are often assumed to harbor different  
30 sexual proclivities, this is not uniformly true. One recent study of the issue found that among  
31 recidivist offenders, 37 percent of those who initially raped or sexually assaulted an adult

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<sup>61</sup> See Jill Levenson, Sex Offender Residence Restrictions, in *SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS* 267, 275 (Richard G. Wright Ed., 2009); PATRICIA TJADEN & NANCY THOENNES, DEP’T OF JUSTICE, Findings From the National Violence Against Women Survey, available at <https://www.ncjrs.gov/pdffiles1/nij/210346.pdf> (2006).

<sup>62</sup> In many states, residency restrictions apply to all offenders regardless of their classification. Catherine Elton, Behind the Picket Fence, *THE BOSTON GLOBE*, May 6, 2007, at 36; Geraghty, *supra* note xx, at 516.

1 subsequently committed a sexual offense against a pre-pubescent child.<sup>63</sup> Research finds similar,  
2 though less pronounced, polymorphism across the stranger-acquaintance divide. In one study of  
3 sexual recidivists, over 25 percent had sexually assaulted both strangers and non-strangers,<sup>64</sup> but  
4 other studies find recidivist targeting patterns to be “highly stable” in terms of victim-offender  
5 relationship (i.e., stranger vs. acquaintance vs. intra-familial) as well as the victim’s gender.<sup>65</sup>  
6 Cross-over offending cautions against narrowly matching collateral sanctions to the character of  
7 the triggering offense. But because baseline rates of recidivism for sexual offenses are quite low  
8 (only 2.5 percent in one Department of Justice study),<sup>66</sup> cross-over offenses by previously  
9 convicted recidivists represent a small sliver of the total problem, arguably not enough to justify  
10 the law-enforcement effort and expense devoted to the issue. And some aspects of cross-over  
11 offending actually reinforce these reasons to restrict rather than extend the scope of registration  
12 and notification. One study of recidivist sex offenders released on parole found that only 4.5  
13 percent had been arrested only for sex offenses. The others had heterogeneous prior records—they  
14 had either committed a nonsexual offense first (and hence would not have been on a registry prior  
15 to committing their sexual offense) or they committed a sex offense first (and hence would have

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<sup>63</sup> 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. OF 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 cross-over 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%.”).

<sup>64</sup> Rachel Lovella, et al., *Offending Patterns for Serial Sex Offenders Identified via the DNA Testing of Previously Unsubmitted Sexual Assault Kits*, 52 J. OF CRIM. JUST. 68, 72 (2017). The authors also find that among recidivists who targeted strangers, there was significant cross-over offending by age. *Id.*

<sup>65</sup> Skye Stephens, et al., *supra* n.xx, 52 J. OF CRIM. JUST. at 41 (2017) (finding rates of polymorphism below 10% for victim gender and below 20% in terms of victim-offender relationship).

<sup>66</sup> See text at note xx, *infra*. On the inferences to be drawn from the fact that exceptionally low conviction rates for sex offenses artificially deflate these recidivism figures, see text following note xx, *infra*.

1 been on a registry subject to law-enforcement attention in that regard, but then went on to commit  
2 a nonsexual offense).<sup>67</sup>

3 (iv) *Cost*. Legislators sometimes assume that registration, residency restrictions, and other  
4 collateral burdens on sex offenders are virtually cost-free so far as the state itself is concerned. But  
5 these measures are expensive to implement, especially when (as is typical) the requirements target  
6 a large, heterogeneous group of offenders. Recording and updating the required information and  
7 installing the requisite website technology can cost each jurisdiction millions of dollars per year,<sup>68</sup>  
8 without even counting the resulting need for law-enforcement personnel to reduce the time they  
9 can devote to responding to emergencies and other duties.<sup>69</sup>

10 This experience raises great doubt about whether these measures are fiscally viable and  
11 worth their direct costs to state and local government. Many state criminal-justice agencies, after  
12 careful assessment, have concluded that they are not, especially when more selective approaches  
13 can achieve most or all of the benefits at considerably lower cost.<sup>70</sup>

14 *b. Unintended Effects*. In contrast to the intended benefits of collateral sanctions, for which  
15 empirical measures of success are disappointing or nonexistent, unintended negative side-effects  
16 are well-documented. This is particularly true with respect to burdens that extend beyond the  
17 disclosure of registry information to law-enforcement agencies themselves—burdens such as public  
18 access, community notification, and restrictions on residency and employment. The issue is  
19 discussed in more detail in the Reporters’ Note to Section 213.12I, which addresses the specifics  
20 of collateral consequences additional to the duty to register with law enforcement.<sup>71</sup>

21 The negative impacts *on offenders* include difficulty in obtaining housing and employment,  
22 psychological stigma, and physical abuse by misguided members of the public.<sup>72</sup> These  
23 consequences in turn mean negative impacts *for public safety* because the adverse personal impacts  
24 for offenders impede their reintegration into society and aggravate their risks of re-offending.<sup>73</sup>

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<sup>67</sup> 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).

<sup>68</sup> See text accompanying notes xx-xx, *supra*. See also Hinton, *supra* note xx, at 2.

<sup>69</sup> See Geraghty, *supra*, note 40, at 518.

<sup>70</sup> See text accompanying note xx, *supra*.

<sup>71</sup> See Reporters’ Note to Section 213.12G, *infra*.

<sup>72</sup> See, e.g., *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 . . .”).

<sup>73</sup> Prescott & Rockoff, *supra* note 55, at 181.

## Section 213.12A. Registration for Law Enforcement Purposes

1           It could be that the intuitively plausible law-enforcement benefits of these laws partially or  
2 fully offset these negative consequences for public safety, a result that would explain the inability  
3 of researchers to detect any *net* gain in re-offending rates. If so, the resulting symmetry is a poor  
4 one, taking no account of the human consequences for registered offenders and their families, and  
5 achieving a public-safety equilibrium only by driving up law-enforcement effort and expense to a  
6 sufficient extent to counterbalance the *increased* dangerousness of potential offenders.

7           Perhaps unexpectedly, victim advocates and organizations actively engaged in providing  
8 support services for rape survivors share these concerns and have been forceful critics of  
9 registration and other collateral consequences. A recurring grievance is the way that registration  
10 and notification have “done a disservice by . . . the construction of sexual assault risk—who poses  
11 it, who faces it, and how to mitigate it—and [by] the reinforcement of a victim hierarchy that  
12 demeans most victims.”<sup>74</sup> Victim services organizations like state-based Coalition[s] Against  
13 Sexual Assault (CASA’s) repeatedly elaborate on this theme. A victim advocate affiliated with a  
14 CASA in the Northeast explained that these laws “have confused the public by emphasizing the  
15 least common offender.”<sup>75</sup> At another CASA, an advocate noted that “Vulnerability [for sexual  
16 abuse] is actually reinforced by these laws because it turns the attention [of the public and the  
17 criminal justice system towards] one-percent of the crime.”<sup>76</sup>

18           Advocates similarly object that sex offender laws “reinforce a narrow [view] that only  
19 forced sexual contact with a stranger that results in grave bodily harm is a ‘real’ assault, and that  
20 only child victims are ‘real victims’<sup>77</sup>; that view in turn ‘makes it harder [for victims] to come  
21 forward [because the laws] reinforce the notion that [the justice system, the public, and service  
22 providers] are only interested in a specific offender type.’<sup>78</sup>

23           Another prominent concern for victim advocates has been that expensive initiatives to  
24 impose collateral-consequence restrictions on offenders have been coupled with “absolutely no  
25 corresponding increase in material support for victim services.”<sup>79</sup> Further, “[a]ccording to several  
26 CASAs, these expensive laws have demonstrated little to no discernable impact on reducing  
27 recidivism. Instead, they eat up scarce resources, scare victims into not reporting [an abusive]

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<sup>74</sup> Rachel Kate Bandy, “The Impact of Sex Offender Policies on Victims,” in *Wright*, supra n.xx, at 491.

<sup>75</sup> *Id.* (quoting CASA interviewee).

<sup>76</sup> *Id.* (quoting CASA interviewee located on West coast).

<sup>77</sup> *Id.*, at 493.

<sup>78</sup> *Id.*, (quoting CASA interviewee based in Southeast).

<sup>79</sup> *Id.*, at 502 (reporting views of a West Coast CASA).

1 loved one, and reinforce to the public stereotypes about what violence is and who perpetrates it.<sup>80</sup>  
2 One advocate summarizes that “[t]hese policies are about a *sense* of safety, not *real* safety.”<sup>81</sup>

3 Patricia Wetterling, the mother of a murder victim, is widely credited with playing a pivotal  
4 role in enactment of SORNA’s predecessor, the first federal legislation mandating the creation of  
5 state regimes for sex-offender registration.<sup>82</sup> Wetterling continues to support registration as a  
6 useful law enforcement tool, along with notification when it is carefully done (“the way we do it  
7 in Minnesota”), but she has come to regret much of the overextended legislation that her initiative  
8 spawned. She describes residency restrictions as “ludicrous,” noting that “most sex offenses are  
9 committed by somebody that gains your trust, or is a friend or relative.... [N]one of these laws  
10 address the real [problem] that nobody wants to talk about.”<sup>83</sup>

11 Registration of juvenile offenders has had distinctively harsh consequences, and  
12 assessments of its value have been especially negative. The relevant research is discussed in the  
13 Reporters’ Note to Section 213.12A(3), which imposes special limits on juvenile registration.

14 **6. The Model Code: Sections 213.12A-J.** A regime to govern sex-offender collateral  
15 consequences must address dense thicket of substantive and procedural issues. Distinctive features  
16 of local law necessarily affect the appropriate statutory structure and language dealing with  
17 operational detail. Thus, many facets of scope and implementation do not lend themselves to  
18 treatment in Model Code intended for a multi-jurisdictional audience. Crucial issues of drafting  
19 and policy, however, are common to all jurisdictions and can be addressed in universal terms:  
20 Which offenses and which offenders should ever be subject to restrictions specific to sex  
21 offenders? How much information should be publicly accessible? Should particular collateral  
22 sanctions (for example, limits on where an offender can live) ever be imposed upon conviction of  
23 a sexual offense? If so, which sex offenses should trigger exposure to that sanction, and should it  
24 be imposed automatically or only after an individualized assessment of benefits and costs? What  
25 should be the duration of the disabilities in question? What procedural safeguards should attend  
26 the determination of whether a particular offender should be subject to a particular disability or  
27 whether a previously imposed disability should be lifted? Sections 213.12A-J address broadly  
28 relevant issues of this kind.

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<sup>80</sup> *Id.*, at 505.

<sup>81</sup> 505 (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.”).

<sup>82</sup> See text at n.xx, *supra*.

<sup>83</sup> Patricia Wetterling & Richard G. Wright, *The Politics of Sex Offender Policies: An Interview with Patricia Wetterling*, in Wright, *supra* note xx, at 101-103. For further discussion of Wetterling’s further criticism of residency restrictions see Reporters’ Note to Section 213.12H, *infra*.

## Section 213.12A. Registration for Law Enforcement Purposes

1 Sections 213.12A-J do not accept the federal framework as a given and instead reconsider  
2 the federal baseline on its merits, for two reasons. First, the federal “mandate” is quite weak,  
3 because noncompliance causes states to lose only 10 percent of their federal law-enforcement  
4 grants.<sup>84</sup> By comparison, the costs of compliance typically are many times greater. For example,  
5 in California, the state’s Sex Offender Management Board estimated that complying with federal  
6 SORNA would cost the state at least \$38 million, as against a loss of only \$2.1 million in federal  
7 funds.<sup>85</sup> For Texas, comparable figures were assessed at a cost of \$39 million for SORNA  
8 compliance, as against a loss of only \$1.4 million in federal funding.<sup>86</sup> In Colorado, the state  
9 estimated that the federal funds lost (\$240,000) would suffice to implement SORNA only in a  
10 single mid-size law-enforcement agency.<sup>87</sup> As a result, in most states, SORNA is seen as an  
11 unfunded mandate of considerable proportions.<sup>88</sup>

12 Second, and partly as a consequence of the first point, as of August 2019, only 22 states  
13 had complied with the federal mandate.<sup>89</sup> All states have some system for registering sex  
14 offenders, but the majority have chosen to go their own way, adopting more flexible approaches,  
15 even at the cost of losing some federal funds. The collateral burdens imposed on sex offenders  
16 vary widely, exceeding the federal minimum in some jurisdictions but falling below it in others.

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<sup>84</sup> 34 U.S.C. § 20925(a) (2019).

<sup>85</sup> 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](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>.

<sup>86</sup> 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>.

<sup>87</sup> 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-%2009-19-08.pdf](http://dcj.state.co.us/odvsom/Sex_Offender/SO_Pdfs/SOMB%20AWA%20White%20Paper%20Final%20-%2009-19-08.pdf). In addition to the California, Colorado, and Texas assessments just cited, see also Russell Hinton, “Georgia’s Sexual Offender Registry” GEORGIA DEPARTMENT OF AUDITS AND ACCOUNTS PERFORMANCE AUDIT OPERATIONS 09-18 (2010), available at <http://www.atlantaunfiltered.com/wp-content/uploads/2010/08/sex-offender-registry-audit.pdf>.

<sup>88</sup> 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#>.

<sup>89</sup> See “SORNA” OFFICE OF JUSTICE PROGRAMS, DEPARTMENT OF JUSTICE, <http://ojp.gov/smart/sorna.htm> (last accessed August 10, 2019) (listing 22 states that “[h]ave 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 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 213.12A. Registration for Law Enforcement Purposes

1 This pattern suggests widespread dissatisfaction with the federal regime, whether because of fiscal  
2 or policy concerns.

3 For these reasons, Sections 213.12A-J, while targeting issues that the federal mandate  
4 currently leaves to the discretion of the states, also evaluate, and in part reject, approaches that  
5 current federal law seeks to mandate nationwide. The potential benefits of sex-offender collateral  
6 consequences become attenuated and costs together with negative side-effects dominate decisively  
7 when—as under currently prevalent law—the obligation to register applies indiscriminately to  
8 offenders of widely divergent culpability and future risk; when public access to registry  
9 information is essentially unlimited; and when special measures go beyond registration to include  
10 affirmative community notification, occupational and residency restrictions, and the like. The  
11 broad, inflexible sweep of collateral-consequence sanctions under federal SORNA and under the  
12 legislation of most states is unjust and counterproductive. On this point, well-considered  
13 arguments for a more limited approach have won a positive reception in the legislatures and law  
14 enforcement agencies of a significant minority of the states, even in the face of considerable  
15 political risk. By delineating a balanced, discriminating approach, Sections 213.12A-J offer a  
16 template for legislatures willing to consider much-needed reform in this area.

17 The Article 213 offense definitions limit eligibility for collateral sanctions of any sort, and  
18 for eligible offenses, Sections 213.12A-J provide a structure for selectively assessing the need to  
19 burden the offender with particular sorts of collateral consequences beyond the threshold  
20 requirement of registration itself. These provisions require restraint in imposing registration,  
21 community notification, residency restrictions and related collateral consequences, in light of the  
22 public-policy costs of such sanctions that, although not readily apparent to the general public, are  
23 nonetheless substantial and well-documented in all the relevant research.

24 Section 213.12A establishes the scope of the threshold duty to register. Issues relevant to  
25 implementing that duty are discussed in the Reporters' Notes to Section 213.12B (for the notice  
26 offenders must receive), Section 213.12C (for the time when the obligation to register ripens),  
27 Section 213.12D (for the information registrants and states themselves must provide), Sections  
28 213.12E & F (for the registrant's duty to periodically update registry information and the duration  
29 of that duty), and Section 213.12G (for penalties applicable to failure to register or update registry  
30 information as required). Consequences other than registration are discussed in more detail in the  
31 Reporters' Notes to subsequent Sections, which restrict, substantively and procedurally, the  
32 offender's exposure to other collateral consequences. Section 213.12H strictly limits public access  
33 to registry information. Section 213.12I establishes a formal procedure for deciding on the need  
34 for additional offender obligations or disabilities; identifies factors the authorized official must  
35 weigh in determining whether a particular offender should incur such consequences<sup>90</sup>; and requires

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<sup>90</sup> 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*

1 a written explanation of the reasons why any additional collateral consequence is justified in the  
2 interest of public safety, after due consideration of its impact on the offenders prospects for  
3 successful reintegration into law-abiding society. Finally, Section 213.12J addresses procedures  
4 by which offenders can obtain early relief from sex-offender duties and disabilities, including the  
5 duty to keep registry information current.

6 **7. Section 213.12A. Registration for Law-Enforcement Purposes**

7 The findings canvassed above cast considerable doubt on the efficacy and wisdom of nearly  
8 all the common collateral-consequence requirements enacted for sex offenders since the early  
9 1990s. One response to that assessment would be to discard registration-related practices entirely  
10 and treat sex offenders living in the community no differently from anyone else who has a criminal  
11 record. That approach, however, gives insufficient weight to legitimate social interests, especially  
12 the law enforcement interests that a local registry can serve.

13 To be sure, law-enforcement officials can readily retrieve criminal-history information,  
14 regardless of the jurisdiction where the conviction occurred, when they need background on a  
15 person of interest in a particular criminal investigation. But that option is more cumbersome than  
16 the ability to quickly determine through the local registry whether that individual has a serious  
17 sex-offense record. And a criminal-history search of the national data base is beside the point when  
18 there is an effort to identify the unknown perpetrator of an unsettling sexual crime. At least to the  
19 extent that the information does not leave law-enforcement hands, its public-safety value easily  
20 outweighs the potential costs. An obligation to register with local law-enforcement authority  
21 therefore seems readily defensible for the most serious offenders. Section 213.12A delineates the  
22 appropriate reach of that obligation.

23 A significant difficulty is that once information exists anywhere in cyberspace, its  
24 confidentiality is fragile, no matter what the law may say.<sup>91</sup> Whether the combined risks of data  
25 breach and data misuse outweigh the law-enforcement value of location-specific sex-offender  
26 information is not easy to determine; the answer inevitably depends in large part on the danger  
27 posed by particular types of offenders. The difficulty of appraising that trade-off counsels in favor  
28 of limiting the registration obligation, with its attendant costs, to offenders most likely to pose a  
29 significant public-safety threat, and then relying on offender-specific assessments of risk, as many  
30 states already do, to determine the frequency and duration of information-update obligations and  
31 eligibility for early termination of registration and other collateral consequences.

32 A separate but especially salient interest is the value of heightened possibilities for citizen  
33 self-protection in settings such as schools, day-care centers, and nursing homes, where staff have  
34 frequent, unsupervised access to young children and other particularly vulnerable individuals. That

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*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).

<sup>91</sup> Leakage of ostensibly confidential information has been a problem for registry information even before the internet. See Logan, *supra* n.xx, at 229 n.218

1 interest is discussed in connection with the provisions of Section 213.12H, which govern public  
2 access to registry information.

3 **a. Section 213.12A(1): Adults convicted of sex offenses in this jurisdiction.** The Article  
4 213 offense definitions classify as “registrable,” and therefore capable of triggering sex-offender  
5 collateral consequences, only those sexual offenses most likely to signal a propensity for  
6 dangerous predatory sexual behavior. The following Article 213 offenses are classified as  
7 registrable:

8 (i) *Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint.* This, the most  
9 serious sexual offense, involves exceptionally aggressive sexual abuse that clearly justifies special  
10 concern about the danger of violent recidivism.

11 (ii) *Section 213.2. Sexual Assault by Physical Force.* This offense covers a wide range of  
12 sexual misconduct, from that involving force just short of “aggravated physical force” to many  
13 lesser degrees of force and threat, including any amount physical force that is more than negligible,  
14 provided of course that the offender has the necessary culpable awareness of causing sexual  
15 submission to or performance of penetration or oral sex without consent by those forcible means.  
16 So defined, the offense includes within its reach misconduct that, while very serious, does not  
17 necessarily mark the offender as a threat to children or a potentially violent predator. To require  
18 registration for all such offenders would therefore be overbroad. Section 213.2 therefore classifies  
19 the offense as registrable only when the offense conduct occurs after the offender had previously  
20 been convicted of a felony sex offense.

21 (iii) *Section 213.3(1). Sexual Assault of an Incapacitated Person.* This offense similarly  
22 covers a wide range of sexual misconduct, and the conduct within its reach, while very serious,  
23 does not necessarily mark the offender as a threat to children or a potentially violent predator. To  
24 require registration for all such offenders would therefore be overbroad. Section 213.3(1) therefore  
25 classifies the offense as registrable only when the offense conduct occurs after the offender had  
26 previously been convicted of a felony sex offense.

27 (iv) *Section 213.8(1) & (2).* These offenses involve sexual penetration or oral sex with a  
28 victim under the age of 16 by an offender who is a *[reserved]* degree older. This is predatory sexual  
29 abuse of exceptionally serious nature, justifying the special precautions that the sex-offender  
30 registry permits.

31 (v) *Section 213.8(3).* This offense involves sexual penetration or oral sex with a victim  
32 under the age of 21 by an offender who is a parent, guardian, or other adult in a similarly direct  
33 position of trust and responsibility for the victim’s welfare. This is exceptionally serious sexual  
34 misconduct, involving exploitation and abuse of trust that calls for the special precautions that the  
35 sex-offender registry permits.

36 The one comparably dangerous Article 213 offense not classified as registrable is the  
37 offense of Sex Trafficking under Section 213.9. Like the registrable offenses, it is an especially  
38 serious felony involving predatory behavior and exploitation of vulnerable victims. But as its  
39 motivation is primarily economic, it calls for a different kind of law-enforcement attention. Unless

1 its perpetrators are themselves guilty of other Article 213 offenses, they do not warrant inclusion  
2 in a sex-offender registry that aims to identify a different sort of offender.

3 The other Article 213 offenses all involve serious crimes, and their perpetrators  
4 undoubtedly may include a certain number of potential recidivists. But the empirical research and  
5 experience detailed above makes clear that the currently prevalent approach, which seeks to cast  
6 widest conceivably defensible net is unjust, costly, and counterproductive. With respect to the  
7 other Article 213 offenses, the social harms of registration demonstrably outweigh its potential  
8 benefits. Making this judgment explicit, Section 213.12A(1)(b) stipulates that no conviction for  
9 any other criminal offense under Article 213 or any other criminal law of this jurisdiction can be  
10 the basis for requiring sex-offender registration or any other obligation applicable to sex offenders  
11 specifically, other than obligations incident to a suspended sentence, probation, or parole.

12 ***b. Section 213.12A(2): Adults convicted of sex offenses in other jurisdictions.*** Section  
13 213.12A(2)(a) requires certain adults convicted sex offenses in other jurisdictions to register with  
14 the appropriate local authority if they subsequently live, work, or study in this jurisdiction. This  
15 out-of-state sex offender is subject to the registration obligations of Section 213.12 if and only if  
16 two requirements are met: the offender must be obliged to register as a sex offender in the  
17 jurisdiction where the offense was committed *and* the offense must be one that would be a  
18 registrable offense if committed in this jurisdiction.

19 Many jurisdictions require sex-offender registration for a much broader array of offenses  
20 than those that trigger registration obligations under Article 213. The policy judgment underlying  
21 Section 213.12A, that sex-offender registration should be carefully targeted, makes registration  
22 unnecessary and inappropriate in such cases. Accordingly, Section 213.12A(2)(b), like Section  
23 213.12A(1)(b), stipulates that no conviction for any offense not registrable under Article 213 can  
24 be the basis for requiring sex-offender registration or any other obligation in this jurisdiction  
25 applicable to sex offenders specifically.

26 Conversely, an offender may have committed an offense that would be registrable if  
27 committed in this jurisdiction but is not registrable in the jurisdiction where it was committed. That  
28 situation will seldom arise in practice, because few states if any restrict the registration obligation  
29 more narrowly than does Article 213. In such an event, however, the policy underlying Section  
30 213.12A *would* call for the public-safety measures that Sections 213.12A-J contemplate, and some  
31 jurisdictions accordingly require sex-offender registration on the basis of offenses not registrable  
32 where committed, if the offense is registrable when committed in that jurisdiction.<sup>92</sup> Nonetheless,  
33 since the offense was not registrable where committed, the offender would not receive registration-  
34 related notice at the time of conviction. It is therefore neither practical nor fair for that offender to  
35 face Section 213.12A requirements when subsequently entering this state.

36 With respect to other offenses committed outside this jurisdiction, the social harms of sex-  
37 offender registration demonstrably outweigh its potential benefits. Accordingly, Section  
38 213.12A(2)(b), like Section 213.12A(1)(b), stipulates that no conviction for any other criminal

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<sup>92</sup> TBS.

1 offense can be the basis for imposing an obligation to register or any other obligation applicable  
2 to sex offenders specifically.

3 ***c. Section 213.12A(3): Juvenile offenders.***

4 Under current law, many states impose duties to register and other sex-offender collateral  
5 consequences for a long list of sex offenses even when the perpetrator was a minor at the time of  
6 the misconduct. Registration is widely required, often for life, not only when the youthful offender  
7 is convicted of a criminal offense as an adult but also in many circumstances where the offense  
8 was the basis for an adjudication of delinquency. Federal SORNA seeks to require states to extend  
9 registration to juveniles adjudicated delinquent if they were at least 14 years of age at the time of  
10 the offense and the offense was comparable to or more severe than the federal crime of aggravated  
11 sexual abuse or an attempt or conspiracy to commit that offense.<sup>93</sup>

12 The research is replete with heartbreaking stories of the unnecessarily cruel, life-destroying  
13 impact of placing children on a sex-offender registry for offenses committed as minors.<sup>94</sup> The  
14 impact has been not only harsh but particularly counterproductive. Victim advocates note that  
15 “juvenile offender registration [has] inadvertently created a disincentive for victims to disclose  
16 [their victimization]”<sup>95</sup>; that their clients “fear that there are no intermediate interventions  
17 available”; and that when abused at the hands of a juvenile, “they fear that the youth will be  
18 required to register as a sex offender and will, therefore, be ‘branded’ for life despite being  
19 potentially amenable to treatment.”<sup>96</sup>

20 Patricia Wetterling is especially outspoken in condemning juvenile registration. “I don’t  
21 see any, not one redeeming quality in doing that. . . . Registering juveniles is ludicrous and wrong  
22 always.” Noting that she objected to the language covering juveniles when the Jacob Wetterling  
23 bill was being drafted, she recalls that she “kept raising questions about treating juveniles the same  
24 way we treat adults. It makes no sense at all . . . . I was told not to worry about the juvenile  
25 provisions because that would get thrown out. I was told there was no way that it would pass . . .  
26 and yet [it did].”<sup>97</sup>

27 Victim advocates report that “juvenile offender registration [has] inadvertently created a  
28 disincentive for victims to disclose [their victimization].”<sup>98</sup> They say their clients “fear that there  
29 are no intermediate interventions available,” and that when abused at the hands of a juvenile, “they

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<sup>93</sup> SORNA § 20911(8) (2019). Under the federal criminal code, aggravated sexual abuse is defined as ...18 USCS § 2241.

<sup>94</sup> *Human Rights Watch, Raised on the Registry* (2013).

<sup>95</sup> Bandy, *supra* note 72, at 471, 488.

<sup>96</sup> *Id.*

<sup>97</sup> Wetterling & Wright, *supra* note 81, at 99, 101.

<sup>98</sup> Bandy, *supra* note 72x, at 471, 488.

1 fear that the youth will be required to register as a sex offender and will, therefore, be ‘branded’  
2 for life despite being potentially amenable to treatment.”<sup>99</sup>

3 Apart from the vivid anecdotal evidence, systematic research tells a consistently negative  
4 story. Findings suggest that registration of juveniles has no preventive effect<sup>100</sup> and substantial  
5 criminogenic consequences,<sup>101</sup> with overall effects that are unambiguously negative. One  
6 quantitative study estimates that juvenile registration alone saddles the public with social costs,  
7 net of benefits, amounting to at least \$40 million per year, and that community notification  
8 pertaining to offenders placed on a registry as minors generates net social costs of at least \$10  
9 billion per year.<sup>102</sup>

10 Studies from other methodological perspectives consistently reach qualitatively similar  
11 results.<sup>103</sup> In 2016, the Federal Advisory Committee on Juvenile Justice, in recommendations to  
12 the Justice Department’s Office of Juvenile Justice and Delinquency Prevention, reported that  
13 juvenile sex offender registration laws “are inconsistent with research and evidence-based practice  
14 and undermine positive outcomes.” The Committee urged rejection of the registration approach  
15 for juveniles in preference to using “evidence-based, community based and family-focused  
16 responses.”<sup>104</sup> Largely concurring in this recommendation, the Justice Department’s official  
17 guidance on the subject noted that “[j]uvenile cases have been pled to non-registration offenses at

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<sup>99</sup> Id.

<sup>100</sup> 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).

<sup>101</sup> Catherine L. Carpenter, *Throwaway Children: The Tragic Consequences of a False Narrative*, 45 SW. L. REV. 461 (2016).

<sup>102</sup> 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>.

<sup>103</sup> 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 n.xx.

<sup>104</sup> GEORGE W. TIMBERLAKE & AMY M. DAVENPORT, FED. ADVISORY COMM. ON JUVENILE JUSTICE, RECOMMENDATIONS OF THE FEDERAL ADVISORY COMMITTEE ON JUVENILE JUSTICE 4 (2016), [https://facj.ojp.gov/ojpasset/Documents/FACJJ\\_Recommendation\\_OJJDP\\_November\\_2016.pdf](https://facj.ojp.gov/ojpasset/Documents/FACJJ_Recommendation_OJJDP_November_2016.pdf).

1 the expense of the juvenile not being eligible for treatment,” even though “[c]ost-benefit analysis  
2 demonstrates that sex-offender treatment programs for youth can provide a positive return on  
3 taxpayer investment.” The Department concluded that “[f]urther expansion of SORN [Sex  
4 Offender Registration and Notification] with juveniles is not recommended.”<sup>105</sup>

5 Responding in part to these assessments, several state courts have held that mandatory  
6 registration of juvenile sex offenders is unconstitutional because it lacks an individualized  
7 assessment of risk.<sup>106</sup> At a minimum, the research suggests, juvenile registration must be reserved  
8 for “situations where either unique risk or needs are clearly associated with the commission of a  
9 crime”<sup>107</sup> and offenders convicted (or adjudicated delinquent) for conduct as minors must have  
10 viable opportunities to terminate their registration duties at an early date. But even a limited period  
11 on a sex-offender registry leaves a youthful offender’s sex-offense status widely available through  
12 public and private databases, in effect creating long-term punishment and leading many to argue  
13 that minors should be exempt from registration and notification requirements entirely.<sup>108</sup> Eleven  
14 states specifically exclude minors from their state sex-offender registries, despite the federal  
15 mandate to the contrary.<sup>109</sup>

16 Reflecting these persuasive assessments, Section 213.12A(3) rejects registration and all  
17 associated disabilities for juveniles—that is, offenders under the age of 18 at the time of their  
18 offense—regardless of the underlying offense, except in the case of offenders over 16 who are  
19 criminally convicted of a sexual assault involving aggravated physical force or restraint, in  
20 violation of Section 213.1.

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<sup>105</sup> U.S. Dep’t of Justice, *Office of Justice Programs, Sex Offender Management Assessment and Planning Initiative* (2016).

<sup>106</sup> *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).

<sup>107</sup> 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 under the age of 14, and those juvenile offenders who fail to complete an assigned rehabilitation treatment program).

<sup>108</sup> 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).

<sup>109</sup> Minutola & Shah, *supra* n.xx, at 8.

**SECTION 213.12B. NOTIFICATION OF THE OBLIGATION TO REGISTER AND ASSOCIATED DUTIES**

**(1) Prior to accepting a guilty plea, and at the time of sentencing after conviction on a guilty plea or at trial, the sentencing judge shall:**

**(a) inform the offender who is subject to registration of the registration requirement;**

**(b) explain the duties associated therewith, including:**

**(i) the identity and location, or procedure for determining the identity and location, of the government office or agency where the offender must appear to register as required by Section 213.12A;**

**(ii) the duty to report to that office or agency periodically in person, as required by Section 213.12E(1); and**

**(iii) the duty to promptly notify at least one of the local jurisdictions where the offender is registered of any change in the registry information pertaining to the offender, as required by Section 213.12E(2);**

**(c) notify the offender of the right to petition for relief from those duties as provided in Section 213.12J;**

**(d) confirm that defense counsel has explained to the offender those duties and the right to petition for relief;**

**(e) confirm that the offender understands those duties and that right;**

**(f) require the offender 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 offender understands those duties and that right;**

**(g) ensure that if the offender cannot read or understand the language in which the form is written, the offender will be apprised 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 Section 7.04.<sup>110</sup>**

**(2) At the time of sentencing, the offender shall receive a copy of the form signed pursuant to subsection (1)(f) of this Section.**

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<sup>110</sup> See *Model Penal Code: Sentencing*, § 7.04(1) (Proposed Final Draft (2017)).

1           **(3) If the offender is sentenced to a custodial sanction, an appropriate official shall,**  
2 **shortly before release of the offender from custody, again inform the offender of the**  
3 **registration requirement, explain the rights and duties associated therewith, including and**  
4 **the right to petition for relief from those duties, and require the offender to read and sign a**  
5 **form stating that those rights and duties have been explained and that the offender**  
6 **understands those rights and duties. At the time of release from custody, the offender shall**  
7 **receive a copy of that form.**

8 **Comment:**

9           *Subsection (1)* specifies the procedures for notifying the offender of applicable registration  
10 rights and duties and also details the information that must be included in that notification.  
11 *Subsection (2)* requires the sentencing judge to provide the offender a copy of the form signed  
12 pursuant to subsection (1). For an offender who is incarcerated after conviction, *subsection (3)*  
13 specifies the procedures for again notifying an incarcerated offender of applicable registration  
14 rights and duties prior to that offender’s release from custody.

**REPORTERS’ NOTES**

15           The notification provisions of Federal SORNA are stated in the briefest terms, requiring  
16 only that an appropriate official “inform the sex offender of the duties of a sex offender ...[,]  
17 explain those duties; [and] require the sex offender to read and sign a form stating that the duty to  
18 register has been explained and that the sex offender understands the registration requirement.”<sup>111</sup>  
19 Subsection (1) adds specificity by building on the notification protocols applicable to collateral  
20 consequences generally under the sentencing provisions of the Model Penal Code.<sup>112</sup>

21           Going beyond those protocols:

22           (a) subsection (1)(b), consistent with federal SORNA, requires the sentencing judge to  
23 explain the required information to the offender;<sup>113</sup>

24           (b) subsection (1)(d) requires the judge to insure that defense counsel has also explained  
25 that information,

26           (c) subsection (1)(e) requires the judge to ensure that the offender understands that  
27 information;

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<sup>111</sup> SORNA § 20919(a).

<sup>112</sup> See *Model Penal Code: Sentencing*, supra note 108, § 7.04(1).

<sup>113</sup> MPCs requires the sentencing judge to provide that information to the offender in writing but does not explicitly require the judge to explain it or assure that the offender understands.

Section 213.12B. Notification of the Obligation to Register and Associated Duties

1 (d) under subsection (1)(f), the judge must, consistent with federal SORNA, require the  
2 offender to read and sign a form stating that defense counsel and the judge have explained the  
3 relevant information and that the offender understands it; and

4 (e) subsection (1)(g) calls attention to the need to communicate effectively with offenders  
5 who cannot read or understand the language in which notification is given.

6 **SECTION 213.12C. TIME OF INITIAL REGISTRATION**

7 **A sex offender subject to registration shall initially register:**

8 **(a) if incarcerated after sentence is imposed, then within 48 hours of release;**

9 **or**

10 **(b) if not incarcerated after sentence is imposed, then not later than five**  
11 **business days after being sentenced for the offense giving rise to the duty of**  
12 **registration.**

13 **Comment:**

14 Section 213.12C specifies the time when the obligation to register ripens.

**REPORTERS' NOTES**

15 Federal SORNA requires that a sex offender who is required to register must do so within  
16 a strict time frame. Offenders who have been incarcerated must register “*before* completing a  
17 sentence of imprisonment with respect to the offense giving rise to the registration requirement.”<sup>114</sup>  
18 A sex offender not sentenced to a term of imprisonment must register “not later than 3 business  
19 days after being sentenced for that offense.”<sup>115</sup> These deadlines are unnecessarily tight and a  
20 considerable challenge to meet. Not all incarcerated offenders will know prior to release exactly  
21 where they will be living, and even when their new address is known in advance, incarcerated  
22 offenders can hardly be expected to travel to their new residence *before release* and then appear  
23 *in person* at the designated local agency, as federal SORNA and most state registry regimes  
24 require.<sup>116</sup> Taken literally, these provisions guarantee that incarcerated sex offenders subject to  
25 registration will commit a crime the moment they step outside the prison gate. To avoid this absurd  
26 result, the statute authorizes the Attorney General to prescribe rules for registering sex offenders

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<sup>114</sup> SORNA § 20913(b)(1) (emphasis added).

<sup>115</sup> SORNA § 20913(b)(2).

<sup>116</sup> 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.

1 who are unable to comply with these deadlines,<sup>117</sup> hardly the most straightforward way to address  
2 a simple problem. And the three-day time limit for sex offenders not sentenced to incarceration,  
3 though not inherently ridiculous, is also unnecessarily tough to meet.

4 Section 213.12C sets more realistic deadlines that adequately meet any realistic public  
5 safety concern.

6 **SECTION 213.12D. INFORMATION REQUIRED IN REGISTRATION**

7 **(1) An offender subject to registration pursuant to Section 213.12A shall provide the**  
8 **following information to the appropriate official for inclusion in the sex-offender registry:**

9 **(a) the name of the offender (including any alias used by the offender);**

10 **(b) the Social Security number, if any, of the offender;**

11 **(c) the address of each residence at which the offender resides or expects to**  
12 **reside;**

13 **(d) the name and address of any place where the offender is an employee or**  
14 **expects to be an employee;**

15 **(e) the name and address of any place where the offender is a student or**  
16 **expects to be a student;**

17 **(f) the license-plate number and a description of any vehicle owned or**  
18 **regularly operated by the offender.**

19 **(2) *Supplementary Information.* The local jurisdiction in which an offender registers**  
20 **shall ensure that the following information is included in the registry for that offender and**  
21 **kept up to date:**

22 **(a) the text of the provision of law defining the criminal offense for which the**  
23 **offender is registered;**

24 **(b) the criminal history of the offender, including the date and offense**  
25 **designation of all convictions; and the offender's parole, probation, or supervised-**  
26 **release status;**

27 **(c) any other information required by law.**

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<sup>117</sup> SORNA § 20913(d) authorizes the Attorney General to prescribe rules for the registration of sex offenders who are unable to comply with the deadlines prescribed in § 20913(b).

1           **(3) Homeless offenders**

2           **If an offender subject to registration lacks a residential address, the offender shall, at**  
3 **the time of registration, report with as much specificity as possible the principal places where**  
4 **the offender sleeps and eats, in lieu of the information required under subsection (1)(c).**  
5 **Thereafter, the registrant shall confirm or update those locations once every thirty days.**

6           **(4) Correction of Errors**

7           **Each locality where an offender registers shall provide efficacious, reasonably**  
8 **accessible procedures for correcting erroneous registry information and shall, at the time of**  
9 **registration, provide the registrant instructions on how to use those procedures to seek**  
10 **correction of registry information that the registrant believes to be erroneous.**

11 **Comment:**

12           Subsections (1) and (2) specify the information that the registrant and the registering  
13 authority itself must provide. They require the disclosure of considerable detail, as do all existing  
14 sex-offender registration regimes, consistent with their perceived public-safety objectives.

15           Subsection (3) explains the information to be provided, in lieu of the offender's  
16 residential address, when the registrant is or becomes homeless. It allows the homeless registrant  
17 to update the relevant information once every 30 days, even if the registrant has relocated one or  
18 more times in the interim.

19           Subsection (4) obliges each locality where an offender registers to inform the registrant, at  
20 the time of registration, how to seek correction of registry information that the registrant considers  
21 erroneous. It does not specify any particular correction procedures but leaves those details to each  
22 local jurisdiction, subject to the requirement that the procedures afforded be reasonably user-  
23 friendly, offer expeditious means to determine the validity of a registrant's complaint and correct  
24 information found to be erroneous.

**REPORTERS' NOTES**

25           **1. Subsections (1) and (2): The required information.** Federal SORNA directs states to  
26 obtain from each sex offender a long list of detailed personal information, including the registrant's  
27 name, address, and social-security number; the location of the registrant's current employment or  
28 school; and the license-plate number and description of any vehicle owned or operated by the  
29 registrant. In addition, states must themselves provide to the directory the offender's criminal  
30 history, physical description and a current photo, fingerprints, palm prints, a DNA sample, and a

1 photocopy of the offender’s driver’s license or identification card.<sup>118</sup> States vary considerably in  
2 the information that offenders must provide.<sup>119</sup>

3 Subsections (1) & (2) follow federal SORNA requirements with respect to the information  
4 required to be reported.

5 **2. Subsection (3): Homeless registrants.** Nineteen states and the District of Columbia  
6 provide no statutory guidance on how homeless registrants can satisfy their obligation to report  
7 and continuously update their residency. Federal SORNA is silent on this issue as well. Among  
8 states that do address the problem, periodic update requirements range from 90 days to a month  
9 (Florida, Texas), a week, or even every three days (Arizona, Georgia, North Dakota).<sup>120</sup>

10 Registry requirements, along with unrestricted public access, community notification, and  
11 restrictions on housing and employment, are themselves a major cause of homelessness among sex  
12 offenders.<sup>121</sup> Adding insult to injury, the extra burdens of more frequent updating and shortened  
13 periods for doing so can make compliance virtually impossible; in Arizona, the state supreme court  
14 struck down that states’s requirement that homeless registrants report every 72 hours.<sup>122</sup> In Florida,  
15 a registrant who becomes homeless must notify the relevant authority within 48 hours; in  
16 Minnesota, notification is required within 24 hours.<sup>123</sup>

17 Subsection (3), following California’s relatively simple approach,<sup>124</sup> allows the homeless  
18 registrant to update the relevant information once every 30 days, even if the registrant has moved  
19 one or more times in the interim.

20 **3. Subsection (4): Correction of errors.** Federal SORNA contains no mandate that states  
21 put in place any process to correct erroneous registry information, and many states likewise fail to  
22 do so. Subsection (4) makes clear that states must provide this essential safeguard and ensures that  
23 the offender will be made aware of the available procedures. It requires each locality where an  
24 offender registers to inform the registrant, at the time of registration, how to seek correction of

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<sup>118</sup> SORNA § 20914.

<sup>119</sup> See Carpenter & Beverlin, *supra* note 27, at 1078 (2012) (describing sex-offender registry laws enacted in the wake of SORNA).

<sup>120</sup> See FL. STAT. ANN. 943.0435(4) (b), (c); TEX. CODE CRIM. PROC. ANN. art. 62.051(j)(1)--(2) (West 2017); 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).

<sup>121</sup> See generally Jill Levenson, *Where for Art Thou: Transient Sex Offenders and Residence Restrictions*, <https://journals.sagepub.com/doi/pdf/10.1177/0887403413512326>.

<sup>122</sup> *State v. Burbey*, 403 P.3d 145 (Ariz. 2017).

<sup>123</sup> MINN. STAT. 243.166 (subdiv. 3a (a)) (2019). See also *Boyd v. State*, 408 P.3d 362 (Wash. Ct. App. 2017), upholding a similar Washington provision.

<sup>124</sup> CAL. PENAL CODE § 290.011(d) (West 2017). Texas similarly allows homeless registrants to update their residency information once every 30 days. TEX. CODE CRIM. PROC. ANN. art. 62.051(j)(1)--(2) (West 2017).

1 erroneous registry information. It does not lay down the details that an appropriate system must  
2 include, since those matters depend in large measure on local logistics, customs, and agency  
3 procedures. But the correction processes afforded must be reasonably user-friendly and must be  
4 designed to ensure that complaints will be resolved promptly and that information found to be  
5 erroneous will be corrected without unnecessary delay.

6 **SECTION 213.12E. DUTY TO KEEP REGISTRATION CURRENT**

7 **(1) *Periodic Updates.* A sex offender who is required to register under Section 213.12A**  
8 **shall, not less frequently than once every year, appear in person in at least one jurisdiction**  
9 **where the offender is required to register, verify the current accuracy of the information**  
10 **provided in compliance with Section 213.12D, allow the jurisdiction to take a current**  
11 **photograph, and report any change in the identity of other jurisdictions in which the offender**  
12 **is required to register.**

13 **(2) *Change of Circumstances***

14 **(a) Each jurisdiction that maintains a sex-offender registry shall permit**  
15 **registrants to notify the jurisdiction, by means of U.S. mail, internet notification, or**  
16 **other readily accessible means of communication of the jurisdiction's choosing, of any**  
17 **change of name, residence, employment, or student status, and any change in the**  
18 **identity of all other jurisdictions in which the offender is required to register.**

19 **(b) Each jurisdiction that maintains a sex-offender registry shall advise each**  
20 **registrant, at the time of registration, of the registrant's option to utilize the means of**  
21 **communication established under subsection (2)(a), rather than appearing personally**  
22 **for that purpose, if the registrant so chooses.**

23 **(c) A sex offender subject to registration under Section 213.12A shall, not later**  
24 **than five business days after each change of name, residence, employment, or student**  
25 **status, notify at least one local jurisdiction specified in Section 213.12A of:**

26 **(i) all changes in the information that the offender is required to**  
27 **provide under Section 213.12D, and**

28 **(ii) the identity of all other jurisdictions in which the offender is**  
29 **required to register.**

30 **(3) The local jurisdiction notified of any changes pursuant to subsections (1) and (2)**  
31 **shall promptly provide the offender a written receipt confirming that the updated**

1 **information has been provided, and shall provide that information to all other jurisdictions**  
2 **in which the offender is required to register.**

3 **Comment:**

4 Subsection (1) requires periodic re-registration in person once a year.

5 Changes to a registrant's name, residence, employment, or student status must be reported  
6 more promptly. Subsection (2)(a) requires jurisdictions to permit registrants to do so by one or  
7 more readily utilized means of communication of the jurisdiction's choosing, and subsection (2)(b)  
8 requires jurisdictions to advise registrants of their ability to use that option, if they prefer, rather  
9 than reporting the change of information in person,.

10 Subsection (2)(c) requires registrants to provide the necessary notification within five  
11 business days and to inform the jurisdiction notified about all other jurisdictions in which the  
12 offender is required to register.

13 Subsection (3) requires the jurisdiction initially notified of any changes pursuant to  
14 subsections (1) and (2) to promptly provide the updated information to all other jurisdictions in  
15 which the offender is required to register.

**REPORTERS' NOTES**

16 **1. Periodic Updates.** Federal SORNA requires registrants to appear periodically in person  
17 in at least one jurisdiction where they are required to register, allow that jurisdiction to take a  
18 current photograph, and verify the current accuracy of the registry information pertaining to them.  
19 The required frequency of these periodic updates under federal SORNA varies from quarterly to  
20 yearly as a function of the seriousness of the offense that triggers the registration duty. But updates  
21 only on an annual or semi-annual basis are permitted only for lower-level offenses that Section  
22 213.12A does not treat as registrable at all.<sup>125</sup> Federal SORNA requires updates at least every three  
23 months for all of the offenses that are registrable under Article 213.

24 Such frequent re-registration in person is unnecessarily burdensome and in effect punitive,  
25 because registrants are in any event required to notify the pertinent local agency within a matter of  
26 days whenever there is a change of the registrant's name, residence, employment, or student status.  
27 Absent such a change of circumstances, reporting in person serves only to assure the current  
28 accuracy of the offender's personal appearance as recorded in the photograph on file, and that need

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<sup>125</sup> Federal SORNA permits annual updates for Tier I offenses, which include such crimes as ..... The statute permits semi-annual updates for Tier II offenses, which include such crimes as ..... [TBS].

## Section 213.12E. Duty to Keep Registration Current

1 is readily met on an annual basis.<sup>126</sup> Therefore, absent a change in circumstances, Section 213.12E  
2 requires periodic re-registration in person only once a year.

3 **2. Change of Circumstances.** Under Federal SORNA, state registration regimes must  
4 require offenders to appear in person before appropriate state authorities, not later than three  
5 business days after any change of name, residence, employment, or student status, in order to  
6 update the pertinent information. Requiring the registrant to provide these updates *in person* and  
7 to do so within *three days* is unnecessarily burdensome and in effect punitive because, with respect  
8 to information of this nature, in person appearance provides no assurance of accuracy that cannot  
9 be attained by requiring submission of appropriate documentation in writing, whether by U.S. mail,  
10 internet messaging, or other means of efficient communication.

11 Accordingly, subsection (2)(a) requires each jurisdiction to permit registrants to report  
12 changes in this information by any readily accessible means of communication of the jurisdiction's  
13 choosing, and subsection (2)(b) requires jurisdictions to advise registrants of the availability of  
14 that option. Finally, subsection (2)(c) requires registrants to provide the necessary notice within  
15 five business days rather than just three.

## 16 SECTION 213.12F. DURATION OF REGISTRATION REQUIREMENT

17 **(1) Subject to the provisions of subsection (3), an offender subject to registration shall**  
18 **keep the registration current for a period of 15 years, beginning on the date when the**  
19 **offender is released from custody after conviction for the offense giving rise to the**  
20 **registration requirement; or if the offender is not sentenced to a term of incarceration,**  
21 **beginning on the date when the offender is sentenced for that offense.**

22 **(2) At the expiration of that 15-year period, the duty to keep that registration current**  
23 **will terminate; the offender will not be subject to any further duties associated with that**  
24 **registration requirement; and no public or private agency other than a law-enforcement**  
25 **agency shall thereafter be permitted access to the offender's registry information.**

26 **(3) If, during the first 10 years of the period during which the offender is required to**  
27 **keep the registration current, the offender:**

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<sup>126</sup> Federal SORNA does not treat an offender'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 uses that stratagem to evade SORNA surveillance.

1           **(a) successfully completes any period of supervised release, probation, or**  
2           **parole, other than a financial obligation, such as a fine or restitution, that the**  
3           **offender, despite good-faith effort, has been unable to pay; and**

4           **(b) successfully completes any required sex-offender treatment program; and**

5           **(c) is not convicted of any additional offense under this Article, or any offense**  
6           **in another jurisdiction that would be an offense under this Article if committed in this**  
7           **jurisdiction; then:**

8           **the duty to keep that registration current will terminate; the offender will not be**  
9           **subject to any further duties associated with that registration requirement; and no public or**  
10           **private agency other than a law-enforcement agency shall thereafter be permitted access to**  
11           **the offender’s registry information.**

12           **(4) When the offender’s duty to register terminates under subsections (1) or (3), the**  
13           **law-enforcement agency in the local jurisdiction where the offender resides will, upon the**  
14           **offender’s request, notify all other jurisdictions in which the offender has registered that the**  
15           **offender’s duties associated with that registration requirement have terminated and that no**  
16           **public or private agency other than a law-enforcement agency shall thereafter be permitted**  
17           **to have access to that registry information.**

18           **Comment:**

19           Section 213.12F(1) specifies the duration of the registration requirement, including the  
20           duration of the offender’s continuing obligation to keep registry information current.

21           Subsection (3) provides for automatic early termination of the registration obligation if the  
22           offender successfully satisfies specified rehabilitative goals during the initial registration period.

23           Subsection (4) provides that when the offender’s registration duties terminate under  
24           subsection (1) or (3), the agency in the local jurisdiction where the offender resides must, upon the  
25           offender’s request, report that termination to all other jurisdictions where the offender is registered  
26           and caution those jurisdictions that no public or private agency other than a law-enforcement  
27           agency may have access to that registry information.

**REPORTERS’ NOTES**

28           Federal SORNA specifies the duration of registration and the accompanying duty to keep  
29           information current—15 years for Tier I offenses (the least serious), 25 years for Tier II offenses,  
30           and life for Tier III offenses, which include offenses comparable to the offenses registrable under

## Section 213.12F. Duration of Registration Requirement

1 Article 213. The statute affords only limited opportunity for early relief from these obligations.  
2 For Tier I offenders who maintain a clean record for 10 years, registry obligations terminate at the  
3 end of that period, and for offenders adjudicated delinquent on the basis of a Tier III offense,  
4 registry obligations terminate after 25 years if they maintain a clean record for that period. Under  
5 federal SORNA, no other offenders are eligible for early relief from registry obligations. Thus,  
6 even a juvenile offender must remain on the registry for at least 25 years, and Tier III adult  
7 offenders must be retained for life on the registry, with all its attendant obligations, even if they  
8 remain entirely crime-free for decades.<sup>127</sup>

9 States vary considerably in the duration of their obligation to keep registration information  
10 current, but lifetime registration is commonly required for the most serious offenses, such as those  
11 that are registrable under Article 213. Early relief also varies considerably but many, including the  
12 22 states that are SORNA compliant, impose inescapable lifetime registration on the most serious  
13 sex offenders.<sup>128</sup>

14 There is no plausible justification for maintaining the registry obligation for such an  
15 extended period, without regard to the offender's subsequent behavior. Among the minority of  
16 sex-offenders who recidivate at all, nearly all do so within five or at most 10 years of release from  
17 custody.<sup>129</sup> Together with the natural decay of offending rates by age, a crime-free period of 10  
18 years provides strong assurance that the likelihood of the offender's committing a new sexual  
19 offense is remote, certainly no higher than the risk that a person of the same age with no previous  
20 sex-offense record will commit a new sexual offense. Although the possibility of a false negative  
21 cannot be excluded, that vanishingly small risk must be weighed against the cost, in terms of  
22 required law-enforcement attention and resources, of maintaining and constantly updating registry  
23 information on thousands of ex-offenders who will never pose any threat to public safety.

24 Accordingly, Section 213.12F sets the duration of the obligation to register and its  
25 associated duties at 15 years, with early termination of those obligations after 10 years for  
26 offenders who maintain a clean record throughout that period. In the event that the offender does  
27 commit a new sexual offense during that period, of course, the offender will face a new criminal  
28 sentence, along with whatever additional registry obligations are triggered by the new offense.

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<sup>127</sup> 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; (C) successfully completing any periods of supervised release, probation, and parole; and (D) successfully completing an appropriate sex offender treatment program ....”.

<sup>128</sup> See Carpenter & Beverlin, *supra* note 29, at 1078 (2012).

<sup>129</sup> TBS.

1 **SECTION 213.12G. FAILURE TO REGISTER**

2 **(1) *Failure to Register.* A person required to register under Section 213.12A is guilty**  
3 **of Failure to Register, a misdemeanor, if that person knowingly fails to register or knowingly**  
4 **fails to update a registration as required.**

5 **(2) *Affirmative Defense.* In a prosecution for Failure to Register under subsection (1)**  
6 **of this Section, it is an affirmative defense that:**

7 **(a) circumstances beyond the control of the accused prevented the accused**  
8 **from complying;**

9 **(b) the accused did not voluntarily contribute to the creation of those**  
10 **circumstances in reckless disregard of the requirement to comply; and**

11 **(c) after those circumstances ceased to exist, the accused complied as soon as**  
12 **reasonably feasible.**

13 **Comment:**

14 Section 213.12G defines the misdemeanor offense of Failure to Register, applicable to the  
15 offender who knowingly fails to register or knowingly fails to update required registry information.  
16 It provides an affirmative defense for a person who cannot comply with required registration  
17 obligations because of circumstances beyond that person’s control, provided that the person did  
18 not voluntarily contribute to creating those circumstances in reckless disregard of the requirement  
19 to comply and subsequently complied as soon as reasonably feasible. A person convicted of a  
20 misdemeanor “may be sentenced ... to a term of incarceration ... [that] shall not exceed [one  
21 year].”<sup>130</sup>

**REPORTERS’ NOTES**

22 Federal SORNA requires states to make it a criminal offense, punishable by “a maximum  
23 term of imprisonment that is greater than 1 year,” for an offender who is required to register to fail to  
24 do so or to miss a deadline for updating any change of the required information.<sup>131</sup> In addition,

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<sup>130</sup> Id., § 6.06(7)(a). The maximum term is “stated in brackets [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., § 6.06, Comment *k*, p. 157.

<sup>131</sup> Id., § 20913(e).

1 federal law makes it a crime, punishable by up to 10 years in prison, to travel interstate after  
2 knowingly failing to register or update a required registration.<sup>132</sup>

3 State statutory offenses for failure to register and for failure to fulfill related duties vary  
4 widely but generally cluster in the low end of the range the federal SORNA seeks to impose on  
5 the states. Consistent with that pattern, the Article 213.12G offense requires a mens rea of  
6 knowledge and is punishable as a misdemeanor.

7 **SECTION 213.12H. ACCESS TO REGISTRY INFORMATION**

8 **(1) Confidentiality**

9 **(a) Each local jurisdiction in which the offender is registered shall exercise due**  
10 **diligence to ensure that all information in the registry remains confidential, except**  
11 **that such information shall be made available upon request to any law-enforcement**  
12 **agency in connection with the investigation of any offense.**

13 **(b) Any disclosure pursuant to subsection (1)(a) shall include a warning that**  
14 **the law-enforcement agency receiving the information must exercise due diligence to**  
15 **ensure that the information remains confidential; that such information may not be**  
16 **disclosed to any person or public or private agency other than a law-enforcement**  
17 **agency, including any person or agency seeking to conduct a background check in**  
18 **connection with employment or service; and that the information thus disclosed may**  
19 **not be used to injure, harass, or commit a crime against the offender or anyone else;**  
20 **and that any such actions against the offender or anyone else could result in civil or**  
21 **criminal penalties.**

22 **(2) *Unauthorized Disclosure of Registry Information.* An actor is guilty of**  
23 **Unauthorized Disclosure of Registry Information if:**

24 **(a) the actor, having received registry information in an official capacity or**  
25 **otherwise subject to an obligation to ensure that the information remains confidential,**  
26 **knowingly or recklessly discloses that information, or permits that information to be**  
27 **disclosed, to any person not authorized to receive it; or**

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<sup>132</sup> 18 U.S.C. §2250(a) (2019).

1           **(b) the actor obtains access to registry information by computer trespassing or**  
2           **otherwise in violation of law and subsequently for commercial gain knowingly or**  
3           **recklessly discloses that information, or permits that information to be disclosed, to**  
4           **any person.**

5           **Unauthorized Disclosure of Registry Information under subsection (2)(a) of this**  
6           **Section is a misdemeanor. Unauthorized Disclosure of Registry Information under**  
7           **subsection (2)(b) of this Section is a felony of the fourth degree.**

8           **Comment:**

9           Section 213.12H seeks to insure that registry information be reserved for law-enforcement  
10          use and not made available for other purposes. Subsection (1) requires that registry information be  
11          disseminated no more widely than necessary to serve the direct law-enforcement objectives of the  
12          registration regime. Under subsection (2), Unauthorized Disclosure of Registry Information is a  
13          misdemeanor, and the offense becomes a felony of the fourth degree when an actor obtains the  
14          information illegally and subsequently disseminates it for commercial gain. The sentencing  
15          provisions of the Model Penal Code provide that a misdemeanor is punishable by imprisonment  
16          for a term that “shall not exceed [one year],” and a felony of the fourth degree is punishable by  
17          imprisonment for a term that “shall not exceed [five] years.”<sup>133</sup> These maximum terms are in  
18          brackets because the Code “does not offer exact guidance on the maximum prison terms that  
19          should be attached to different grades of ... offenses.”<sup>134</sup>

**REPORTERS’ NOTES**

20          Federal SORNA and most state registration regimes contemplate largely unrestricted  
21          public access to registry information. The federal statute requires states to post on the Internet and  
22          make available to the general public, in conveniently searchable form, all information included in  
23          the registry, subject to specified exceptions. States are required to withhold from the public the  
24          offender’s social-security number, the names of victims, and all information about arrests that did  
25          not result in conviction. In addition, states are permitted to withhold information concerning  
26          certain low-level offenders, when the victim of the offense was an adult. For the more serious  
27          offenses, and for all covered offenses involving a minor, states are permitted to withhold (in

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<sup>133</sup> Id., §§ 6.06(6)(d), 7(a). These maximum 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., § 6.06, Comment *k*, p. 157.

<sup>134</sup> Id., § 6.06, Comment *k*, p. 157.

1 addition to social-security number and records of arrests not resulting in conviction) only the name  
2 of an offender's employer or (for a student) place of study. In other words, for more serious  
3 offenders, and for *any* offender convicted of a covered offense involving a minor, states *must* make  
4 available to any member of the public the offender's current address, physical description, current  
5 photo, a photocopy of the offender's driver's license, and identifying information for any vehicle  
6 the offender uses. In addition, the state information must be submitted to the Attorney General,  
7 who maintains a national registry of the same information, also accessible in searchable form on  
8 the Internet, subject to the same restrictions.<sup>135</sup>

9 Across the states, public access to registry information takes different forms in different  
10 jurisdictions. The great majority comply with federal SORNA by maintaining registries readily  
11 accessible to any member of the general public. But some restrict access to entities with a  
12 demonstrated need, such as schools and youth camps, and limit at least some of the registry  
13 information available to qualifying entities. A few states restrict access even more tightly, but that  
14 approach is currently the exception.<sup>136</sup>

15 Public access, however, is only the beginning of a pervasive system for raising community  
16 awareness and sensitivity with regard to the sex offenders in the area. Federal SORNA requires  
17 each local jurisdiction to employ active measures to alert interested individuals and public and  
18 private agencies when a sex offender registers in the area. Most states take similar steps with regard  
19 to public access and community notification. And in any event, all state registry information, once  
20 transmitted to the Attorney General, becomes readily accessible nationwide through a national  
21 registry available on the internet.

22 Section 213.12H deals only with access to registry information by interested parties who  
23 seek it, while Section 213.12I (Additional Collateral Consequences of Conviction) addresses a  
24 variety of other collateral consequences, including proactive measures to alert individuals and  
25 organizations in the community. Accordingly, details particular to community notification are  
26 discussed in the Reporters' Note to Section 213.12I. Many issues, however, are common to public  
27 access and community notification; these are discussed here.

28 Open records and government transparency are bedrock, if oversimplified, values in  
29 American political culture. In addition, both public access and community notification can enable  
30 citizens to feel a sense of empowerment with regard to crimes that many consider especially  
31 sinister, unpredictable, and frightening. Payoffs of this kind are arguably important even if such  
32 laws have no effect on actual recidivism rates.

33 But the empirical research shows that actual effects are complicated, even with respect to  
34 these seemingly inherent benefits. Public access to registry information and indiscriminate  
35 community notification designed to alert the population to the presence of a sex offender in its

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<sup>135</sup> SORNA § 20918.

<sup>136</sup> See "Collateral Consequences," ABA CRIMINAL JUSTICE SECTION, <http://www.abacollateralconsequences.org/search/?jurisdiction=37>.

1 midst have been responsible for unwarranted public alarm at the same time that they generate  
2 acutely counterproductive side effects.

3 Studies in Ohio and Minnesota found no statistically significant relationship between being  
4 notified about a high-risk sex offender in the neighborhood and taking steps to protect *oneself*  
5 (such as installing better locks or lighting).<sup>137</sup> But among residents who were parents, those  
6 receiving notification in both states were more likely to take steps to protect *their children*, such  
7 as warning them not to talk to strangers and not to let unknown persons into the home.<sup>138</sup>

8 Of course, such warnings should be routine for all children; it would be worrisome if some  
9 parents not receiving notification and finding nothing of note at their own initiative neglected to  
10 warn their children out of a false sense of security (false because children are equally if not more  
11 vulnerable to attack by individuals with no prior sex-offense record and recidivist sex offenders  
12 *not* living in their own neighborhoods).<sup>139</sup> It would be similarly worrisome if parents who receive  
13 notification tend to emphasize the dangers of stranger abuse at the expense of warnings and  
14 protective measures appropriate with respect to the even-higher risk of abuse at the hands of  
15 relatives, teachers, and other acquaintances. In any case, without minimizing the importance of  
16 such warnings, it is safe to say that state and local law enforcement could easily use other public-  
17 education measures, where necessary, to encourage wise child-protection behavior on the part of  
18 parents and teachers, without incurring the direct costs (and indirect consequences for offenders)  
19 entailed in public registries and community-notification laws.

20 Negative impacts on offenders are convincingly documented in an extensive literature.  
21 They include a high incidence of joblessness, social isolation, homelessness, suicide, and on  
22 occasion even physically violent victimization at the hands of self-appointed vigilantes or  
23 psychologically unstable citizens who object to having a sex offender nearby.<sup>140</sup> Because these  
24 powerfully criminogenic effects hinder the offender's rehabilitation and make recidivism more  
25 likely, they offset to some extent and probably outweigh the potential public-safety benefits of  
26 self-protection and the enhanced possibilities for surveillance and deterrence of registrants.<sup>141</sup>

27 The strongest case for public access is presented when a school, day-care center or other  
28 organization or person has a justified need to perform a background check on an individual being

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<sup>137</sup> 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).

<sup>138</sup> Bandy, *supra* note 137, at 249, 255; Beck, et al., *supra* note 137, at 163.

<sup>139</sup> See text accompanying note xx, *supra*.

<sup>140</sup> See, e.g., *E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir. 1997) (noting that “[r]etribution has been visited by private, unlawful violence and threats . . .”).

<sup>141</sup> Prescott & Rockoff, *supra* note 57, at 181.

1 considered for a position involving contact with anyone a vulnerable population. But the national  
2 data base affords a readily available and more efficient means to perform background checks on  
3 known individuals, without need to access a local registry that can too easily be misused.

4 In light of these considerations, Section 213.12H marks a major departure from the  
5 prevalent American approach of investing considerable resources in the effort to maximize the  
6 public availability of sex-offender information. Both to promote just treatment of persons  
7 convicted of sexual offenses and, very importantly, to further public safety goals rather than  
8 impeding them, Section 213.12H seeks to ensure maximum feasible confidentiality for registry  
9 information.<sup>142</sup>

10 **SECTION 213.12I. ADDITIONAL COLLATERAL CONSEQUENCES OF CONVICTION**

11 **(1) *Definition.* For purposes of this Section, the term “additional collateral**  
12 **consequence” means any government action or government-imposed restriction or disability**  
13 **applicable specifically to persons convicted as sex offenders, other than (a) the fine,**  
14 **probation, supervised release, or term of incarceration authorized upon conviction of the**  
15 **offense, and (b) the obligation to register and the associated duties specified under Section**  
16 **213.12A. Those additional collateral consequences include any government-imposed**  
17 **restriction upon an offender’s occupation, employment, education, internet access, or place**  
18 **of residence; any government action notifying a community organization or entity or a**  
19 **private party that the offender resides, works, or studies in the locality; and any other**  
20 **government action providing registry information to a public or private organization, entity,**  
21 **or person except as authorized by subsection (3) of this Section.**

22 **(2) *Additional Collateral Consequences Applicable to Persons Not Required to Register.***  
23 **Notwithstanding any other provision of law, no person shall be subject to an additional**  
24 **collateral consequence unless that person has been convicted of a registrable offense and is**  
25 **required to register as a sex offender under Section 213.12A.**

26 **(3) *Additional Collateral Consequences Applicable to Persons Required to Register.***  
27 **Notwithstanding any other provision of law, a person required to register as a sex offender**

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<sup>142</sup> *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.

1 under Section 213.12A may not be subject to any additional collateral consequence unless  
2 the sentencing judge or other designated official, after affording the offender notice and an  
3 opportunity to respond concerning the proposed additional collateral consequence,  
4 determines that the additional collateral consequence is manifestly required in the interest  
5 of public safety, after due consideration of:

6 (a) the nature of the offense;

7 (b) all other circumstances of the case;

8 (c) the offender's prior record; and

9 (d) the potential negative impacts of the restriction, disability, or government  
10 action on the offender, on the offender's family, and on the offender's prospects for  
11 rehabilitation and reintegration into society.

12 (4) *Limitations.* The sentencing judge or other designated official who approves any  
13 additional collateral consequence pursuant to subsection (3) of this Section must determine  
14 that the additional collateral consequence:

15 (a) satisfies all applicable notification requirements set forth in Section  
16 213.12B;

17 (b) is authorized by law;

18 (c) is drawn as narrowly as possible to achieve the goal of public safety;

19 (d) is accompanied by a written statement of the official approving the  
20 additional collateral consequence, explaining the need for the specific restriction or  
21 disability imposed or government action to be taken, the evidentiary basis for that  
22 finding of need, and the reasons why a more narrowly drawn restriction, disability,  
23 or government action would not adequately meet that need; and

24 (e) is imposed only for a period not to exceed that permitted by Section  
25 213.12F.

26 **Comment:**

27 Section 213.12I determines when conviction for a sex offense can trigger obligations in  
28 addition to the basic duties to register with law enforcement and to keep the registry information  
29 up to date.

30 Subsection (1) defines the operative term "additional collateral consequence," in order to  
31 make clear that it includes any government action or government-imposed restriction or disability

## Section 213.12I. Additional Collateral Consequences of Conviction

1 applicable specifically to persons convicted as sex offenders, other than the sentence of fine,  
2 probation, supervised release, or incarceration imposed upon conviction, and the basic duties  
3 associated with registration itself. The additional collateral consequences referenced include such  
4 common sex-offender disabilities as restriction upon an offender's employment, education,  
5 internet access, and residency. Also included is the widespread practice of notifying community  
6 organizations and private citizens that a sex-offender is present in the area; notification and  
7 disclosure are permitted only when authorized under the conditions specified in subsections (3)  
8 and (4).

9 Because the "additional collateral consequences" governed by Section 213.12I include  
10 only restrictions and disabilities applicable specifically to sex offenders as such, Section 213.12I  
11 does not affect collateral consequences imposed on wider categories of offenders, such as the  
12 restrictions that many jurisdictions impose on ex-offenders' rights to vote, serve on juries, or  
13 receive public benefits.

14 Subsection (2) stipulates that "additional collateral consequences," as defined, are  
15 categorically precluded in the case of offenders who are not subject to registration under Section  
16 213.12A. Additional collateral consequences may be imposed on offenders who are subject to  
17 registration, but only in compliance with the standards and procedures specified in subsections (3)  
18 and (4). The offender must have notice of the additional collateral consequences contemplated and  
19 an opportunity to respond. Thereafter, the sentencing judge or other official designated to make  
20 the determination may authorize one or more additional collateral consequences, but only upon  
21 finding that each additional consequence is manifestly required in the interest of public safety,  
22 after considering all relevant circumstances, including the nature of the offense, the offender's  
23 prior record, the potential negative impacts of the additional restriction, disability, or government  
24 action on the offender, on the offender's family, and on the offender's prospects for rehabilitation  
25 and reintegration into society.

26 Subsection (4) 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 offender's registry obligations under Section 213.12F.

**REPORTERS' NOTES**

1 Section 213.12I establishes standards and procedures for imposing additional collateral  
2 consequences, beyond those delineated in Sections 213.12A-H. These consequences can include  
3 community notification, restrictions on employment, residency, and internet access, GPS  
4 monitoring, and a number of other restrictions and disabilities.

5 Regarding *community notification*, federal SORNA requires states, at their own initiative,  
6 to regularly provide their registry information (other than information exempted from public  
7 access, such as registrants' social security numbers) to law-enforcement and other appropriate  
8 government agencies (such as schools and public-housing agencies) in the locality where the  
9 registered offender resides, works, or studies. Direct notification also must be given to:<sup>143</sup>

10 "Any agency responsible for conducting employment-related  
11 background checks ...[;]

12 "Social service entities responsible for protecting minors in the child  
13 welfare system[;]

14 "Volunteer organizations in which contact with minors or other  
15 vulnerable individuals might occur[; and]

16 "Any organization, company, or individual who requests such  
17 notification ...."

18 Moreover, federal SORNA allows any concerned organization or individual to opt to receive the  
19 notification as frequently as once every five business days or even sooner.<sup>144</sup>

20 Some states, resisting the broad mandate of federal SORNA, provide affirmative  
21 notification only on a restricted basis and do not automatically notify any organization or  
22 individual who requests it, independent of a demonstrated need.<sup>145</sup> Nearly all provide notification  
23 to community entities and individuals with a need to know (such as schools and youth camps).<sup>146</sup>

24 The majority, however, afford affirmative notification much more widely, along the lines  
25 that federal SORNA requires, often essentially notifying the entire community at large. For  
26 example, in Pennsylvania, the state maintains a website listing all registered sex offenders, with  
27 their home and work addresses, the license-plate number of their car, and their sex-offender  
28 classification. The website advises those who visit it that the information it provides "could be a  
29 significant factor in protecting yourself, your family members, or persons in your care" from the

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<sup>143</sup> SORNA § 20923(b).

<sup>144</sup> SORNA § 20923(c).

<sup>145</sup> Washington State, *infra*....

<sup>146</sup> See "Collateral Consequences," *supra* note 136.

## Section 213.12I. Additional Collateral Consequences of Conviction

1 “recidivist acts” of those listed.<sup>147</sup> In a recent year, three million people accessed the site.<sup>148</sup> To  
2 further enhance public awareness, the Pennsylvania State Police send out “red alerts” by email to  
3 anyone who asks to be informed whenever a registrant in their area adds or deletes their home,  
4 work or school address; in a recent year the State Police sent out almost four million of these red  
5 alerts.<sup>149</sup>

6 *Limits on employment and residency* are not addressed in federal SORNA, and state  
7 approaches vary widely. Nearly all states bar sex offenders from working in particularly sensitive  
8 areas of employment (such as teachers, security guards), but the list of excluded occupations is far  
9 from uniform.<sup>150</sup> At least 27 states and many municipalities prohibit some (or all) sex offenders  
10 from living within 500, 1000, or 2000 feet of schools, parks, playgrounds and day-care centers.<sup>151</sup>  
11 In densely populated counties, such residency restrictions can make it virtually impossible for  
12 convicted sex offenders to live anywhere in the jurisdiction.<sup>152</sup> Some states bar sex offenders from  
13 living close to school-bus stops, a requirement that can preclude offenders, even in rural areas,  
14 from residing almost anywhere in the county.<sup>153</sup> Compounding the burden of such restrictions,  
15 parolees are often required as a condition of their parole (and on pain of parole revocation), to  
16 obtain employment within 45 days of release (even though community notification puts employers

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<sup>147</sup> See <https://www.pameganslaw.state.pa.us/>.

<sup>148</sup> Pennsylvania State Police, Megan’s Law Section, 2017 Annual Report, at 5-6, available at [https://www.pameganslaw.state.pa.us/Documents/ MeganLaw Annual Report.pdf](https://www.pameganslaw.state.pa.us/Documents/MegansLaw%20Annual%20Report.pdf).

<sup>149</sup> *Id.*

<sup>150</sup> See “Collateral Consequences,” *supra* note 136; Geraghty, *supra* note 42, at 515 (2007).

<sup>151</sup> Geraghty, *supra* note 42, at 514-515 (summarizing states’ residency-restriction laws); accord, Jill Levenson, Sex Offender Residency Restrictions, in *Wright*, *supra* note xx, at 267, 268 (stating that 30 states impose residency restrictions); “Collateral Consequences,” *supra* note 136 (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*, N.Y. Ct. App., Feb. 17, 2015.

<sup>152</sup> See, e.g., *Williams v. Dept. of Corrections & Community Supervision*, N.Y. Sup. Ct., N.Y. L.J., Jan. 23, 2014 (upholding constitutionality of condition that paroled sex offender not live within 1000 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*, Cal. S. Ct., March 2, 2015 (holding that California voter initiative barring all convicted sex offenders from living within 2000 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).

<sup>153</sup> 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).

1 on alert not to hire them)<sup>154</sup> or to reside in a particular county (even though virtually no housing  
2 may be available to them there).<sup>155</sup>

3 At least 17 states require sex offenders to wear a GPS monitoring device that enables law  
4 enforcement to determine their location at all times.<sup>156</sup> Less common for the time being, but worthy  
5 of note, are statutes in at least three states (Indiana, Louisiana, and Nebraska) that prohibit sex  
6 offenders from using the Internet to engage in social networking.<sup>157</sup> Instead of imposing a  
7 categorical ban on internet use, a California voter initiative required registered sex offenders to  
8 provide to law enforcement all their email addresses and user names, and to notify authorities  
9 within 24 hours of any changes to that information.<sup>158</sup> Alabama recently joined a small group of  
10 states taking the lead in another area, imposing chemical castration as a condition of parole after  
11 conviction for certain sex offenses.<sup>159</sup>

12 These restrictions and disabilities have prompted a host of constitutional challenges, with  
13 frequently conflicting holdings and little prospect that litigation will abate any time soon.<sup>160</sup> Even  
14 where courts have found such restrictions constitutionally permissible, however, the cases have  
15 underscored the overbreadth and unfairness that the restrictions can present both generally and as  
16 applied to particular offenders, juveniles and elderly parolees in particular.<sup>161</sup> Overall, the evidence

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<sup>154</sup> See, e.g., *State v. Dull*, Kan. S. Ct., June 5, 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).

<sup>155</sup> See cases cited in note xx, *supra*.

<sup>156</sup> 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 16, at 243 (reporting that as many as 46 states use GPS monitoring to track sex offenders under some circumstances). The Supreme Court has held that GPS monitoring of a sex offender 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*, March 30, 2015.

<sup>157</sup> 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](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).

<sup>158</sup> *Doe v. Harris*, 9th Cir., Nov. 18, 2014 (upholding preliminary injunction against enforcement of this restriction on ground of its likely unconstitutionality under the First Amendment).

<sup>159</sup> 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.*

<sup>160</sup> With respect to the constitutionality of mandatory lifetime GPS monitoring of sex offenders, compare *Belleau v. Wall*, Cir. Jan. 29, 2016) (upholding Wisconsin provision to that effect), with *State v. Dykes*, (S.C. May 9, 2012) (holding South Carolina provision to that effect unconstitutional as a violation of due process).

1 establishes with little doubt that indiscriminate community notification and restrictions on  
2 residency and employment are responsible for wasted law enforcement effort and misdirected  
3 civilian efforts at self-protection, with little to no public-safety payoff, and harsh, criminogenic  
4 impact on the offenders themselves.<sup>162</sup>

5 In California, *GPS monitoring* of sex offenders has cost the state \$60 million annually.<sup>163</sup>  
6 The costs for states and localities involve more than simply the additional dollar outlays. In some  
7 jurisdictions, sheriff's deputies and other government employees have had to reduce the time they  
8 can devote to other duties, including 9-1-1 dispatch, in order to monitor sex-offender residences  
9 and post eviction notices for those living in impermissible zones.<sup>164</sup> GPS locational monitoring  
10 requires law-enforcement agents to spend more time at their computers and less time directly  
11 supervising parolees or carrying out other duties in the field.<sup>165</sup> To make matters worse, 99 percent  
12 of the GPS alerts received in some jurisdictions have come from low-battery signals or other false  
13 alarms; only one percent indicated that an offender had entered a restricted area.<sup>166</sup> Of course, the  
14 low incidence of true alarms would be consistent with the hypothesis that GPS monitoring deters  
15 offenders from violating their restrictions, but even if this is the case, the frequency of false alarms  
16 means that any such gains come at a high price in terms of required law-enforcement attention.

17 With respect to *residency restrictions*, the evidence of possible benefit is similarly  
18 disappointing. The Minnesota Department of Corrections found that among sex offenders re-  
19 arrested after release from prison (seven percent of all sex offenders released, a figure far lower  
20 than the recidivism rate for other serious crimes), “[n]ot one . . . would likely have been deterred  
21 by a residency restriction law,” largely because “[offenders who] established direct contact with  
22 victims . . . were unlikely to do so close to where they lived.”<sup>167</sup> The Colorado Department of  
23 Corrections found that child molesters who re-offended did not live closer to child-care facilities  
24 and schools than first offenders arrested for similar crimes; the Department therefore concluded  
25 that “[p]lacing restrictions on the location of . . . supervised sex offender residences may not deter  
26 the sex offender from re-offending and should not be considered as a method to control sexual

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<sup>161</sup> See cases cited in notes xx-xx, *supra*.

<sup>162</sup> See also Reporters' Notes to Sections 213.12A & H, *supra*.

<sup>163</sup> 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-](http://www.msnbc.msn.com/id/43186851/ns/us_news-)

<sup>164</sup> See Geraghty, *supra*, note 42, at 518.

<sup>165</sup> See Thompson, *supra* note 163.

<sup>166</sup> *Id.*

<sup>167</sup> 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>.

1 offending recidivism.”<sup>168</sup> Other available evidence on the efficacy of residency restrictions is  
2 uniformly to the same effect.<sup>169</sup>

3 These consequences in turn mean negative impacts for public safety because the adverse  
4 personal impacts for offenders impede their reintegration into society and aggravate their risks of  
5 re-offending. Successful reintegration and law-abiding behavior typically depend on stable living  
6 arrangements, supportive family relationships, and steady employment,<sup>170</sup> while poor social  
7 support and psychological distress are important risk factors for sexual recidivism.<sup>171</sup> Thus, any  
8 direct gains from greater law-enforcement efficacy or from improved public awareness and self-  
9 protection may be outweighed by an *increased* likelihood of recidivism.<sup>172</sup>

10 In several widely reported incidents, sex offenders have been brutally attacked and even  
11 murdered by neighbors who learned of their presence through registration and notification  
12 programs.<sup>173</sup> More systematic research has largely depended on offender self-reports, arguably a  
13 reason to discount some of the unfavorable consequences described. Subject to that caveat,  
14 however, the studies find extensive evidence of worrisome impacts.

15 Among offenders subject to community notification in Connecticut and Indiana (an  
16 undifferentiated group of defendants convicted of any sex offense), 21 percent lost a job because

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<sup>168</sup> 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>.

<sup>169</sup> See text at notes xx-xx *infra* (Tewksbury and ACA).

<sup>170</sup> CUMMING & BUELL, SUPERVISION OF THE SEX OFFENDER (1997); Levenson, *supra* note xx, at 282-283; Elton, *supra* note xx, at 38 (“community reintegration, therapy, and stability help reduce recidivism among the majority of [sex] offenders”).

<sup>171</sup> R.K. Hanson & A. J. R. Harris, Dep’t of Solicitor Gen. of Can., Dynamic Predictors of Sexual Recidivism (1998), available at <http://www.static99.org/pdfdocs/hansonandharris1998.pdf>; Levenson, *supra* note xx, at 267, 281.

<sup>172</sup> Prescott & Rockoff, *supra* note 57, at 181.

<sup>173</sup> 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”); *E.B. v. Verniero*, 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 offenders 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 offender 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).

1 a boss or co-worker learned of their status,<sup>174</sup> 21 percent were forced to move out of their residence  
2 because a landlord or neighbor found out, 10 percent had been physically assaulted after  
3 community notification had been given, and 16 percent of offenders reported that a member of  
4 their household had been threatened, harassed, or assaulted.<sup>175</sup> Roughly half reported fearing for  
5 their safety, and a similar proportion said they felt alone and isolated because of community  
6 notification.<sup>176</sup> On a more positive note, 22 percent of the offenders said registration and  
7 notification had helped them avoid re-offending, but a larger proportion expressed feelings of  
8 hopelessness, with 44 percent of the offenders agreeing with the statement that “no one believes I  
9 can change, so why even try.”<sup>177</sup>

10 Adverse impacts may be even more widespread among offenders in the highest risk  
11 categories.<sup>178</sup> In a sample of high-risk sex offenders in Wisconsin, all but one said that notification  
12 made it harder for them to reintegrate into the community.<sup>179</sup> The study found that 83 percent had  
13 been excluded from a residence, and 57 percent had lost a job because of community  
14 notification.<sup>180</sup> More than three-quarters reported being ostracized by neighbors and  
15 acquaintances, or either humiliated, harassed, or threatened by community residents or others.<sup>181</sup>  
16 In two-thirds of the cases, adverse effects extended to the parents or children of offenders; relatives  
17 commonly experienced emotional distress and sometimes had been humiliated or ostracized by  
18 acquaintances.<sup>182</sup> Similar findings recur throughout the literature. In a Florida study, 35 percent of  
19 the registered offenders were forced to move, 27 percent had lost their jobs, and 19 percent had  
20 been harassed.<sup>183</sup> In light of this research and their own on-the-ground experience, a number of

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<sup>174</sup> 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).

<sup>175</sup> Id.

<sup>176</sup> Id.

<sup>177</sup> Id.

<sup>178</sup> 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>.

<sup>179</sup> Id. at 9.

<sup>180</sup> Id. at 10.

<sup>181</sup> Id. at 9.

<sup>182</sup> Id.

<sup>183</sup> 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 re-integration); Richard Tewksbury, *Experiences and*

## Section 213.12I. Additional Collateral Consequences of Conviction

1 states resist public demand for indiscriminate community notification and restrict that measure to  
2 a narrow category of the highest-risk offenders.<sup>184</sup> In Washington, the state’s Sex Offender Policy  
3 Board unanimously recommended that “sex offender registration information should be exempt  
4 from public disclosure.” The Board noted that “this information has been held from public  
5 disclosure for decades, and has proven to be in the best interests of the public, of victims of sexual  
6 assault, of community safety, and of registered sex offenders – both in terms of facilitating their  
7 successful reintegration into the community and in terms of their physical safety.”<sup>185</sup>

8 The negative consequences of restricted living arrangements (whether as a direct  
9 consequence of residency prohibitions or an indirect effect of community notification) can be  
10 dramatic, because these limitations tend to push registered sex offenders into socially disorganized,  
11 economically disadvantaged communities.<sup>186</sup> In Iowa, residency restrictions barred sex offenders  
12 from 98 percent of one county’s housing units,<sup>187</sup> and throughout the state many offenders became  
13 homeless.<sup>188</sup> In one Florida county, restrictions on living near a school-bus stop left only one  
14 percent of the county open to residency by sex offenders.<sup>189</sup> At the same time, “research provides  
15 little if any support for the effectiveness of residential restriction laws in deterring or preventing  
16 sexual offenses.”<sup>190</sup>

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*Attitudes of Registered Female Sex Offenders*, 68 FED. PROBATION 30, 31 (2004) (female registered sex offenders 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 registered sex offenders in Illinois said that restrictions had “impeded their ability to reintegrate into community life”).

<sup>184</sup> NJ, VT.

<sup>185</sup> 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](https://sgc.wa.gov/sites/default/files/public/sopb/documents/general_recommendations.pdf)

<sup>186</sup> Richard Tewksbury, *supra* n.xx, at 533.

<sup>187</sup> 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).

<sup>188</sup> See Elton, *supra* note xx, at 38.

<sup>189</sup> See Tewksbury, *Experiences and Attitudes*, *supra* note 183, at 533.

<sup>190</sup> Tewksbury, *Residency Restrictions*, *supra* note xxx, 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”); 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, 22 (2016) (arguing that restrictions on sex offender residency should be abolished).

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1 In sum, registration, community notification, and residency restrictions have frequent,  
2 well-documented adverse impacts on sex offenders. And (other things being equal) these impacts  
3 tend to make recidivism *more likely*.

4 Victim advocates add to these reservations. They list a wide range of harmful impacts for  
5 victims, for example, that “residency restrictions . . . have inadvertently created a disincentive for  
6 victims to disclose [their victimization].”<sup>191</sup> Victims informed about residency restrictions “rolled  
7 their eyes, seemingly in exasperation” at the irrelevancy of these laws to their situation.<sup>192</sup>

8 A state Coalition Against Sexual Assault reported that notification, GPS tracking, and  
9 residency restrictions “have actually impeded public safety because they have reinforced to the  
10 public grossly inaccurate depictions of the type of sexual assault risk one is most likely to face. . .  
11 . [b]y focusing on the ‘stranger danger’ myth, people are less aware of a more likely assailant: a  
12 person they know. These myths, in turn, have created a public demand for sexual assault risk  
13 mitigation (e.g. residency restrictions, offender registries and notification) aimed at particularly  
14 scary, but unlikely, threats.”<sup>193</sup> Many of these Coalitions have “publicly denounced residency  
15 restriction laws, describing them as ‘irresponsible’ and ‘counterproductive.’”<sup>194</sup>

16 Patricia Wetterling, one of the original leaders of the movement for registration and  
17 community notification, is equally emphatic. Residency restrictions, she says, are “wrong and  
18 ludicrous and make no sense at all. We’re putting all our energy on the stranger, the bad guy, and  
19 the reality is it’s most sex offenses are committed by somebody that gains your trust, or is a friend  
20 or relative, and so none of these laws address the real, sacred thing that nobody wants to talk  
21 about.”<sup>195</sup> Wetterling adds, “When these guys are released from prison, we want them to succeed.  
22 . . . All of these laws they’ve been passing make sure that they’re not going to succeed. They don’t  
23 have a place to live; they can’t get work. Everybody knows of their horrible crime and they’ve  
24 been vilified. There is too much of a knee jerk reaction to these horrible crimes. . . . [T]here is no  
25 safe place for these guys. We have not built into the system any means for success . . . .”<sup>196</sup>

26 Unless carefully targeted, therefore, most of these measures almost inevitably aggravate  
27 the very dangers that they are intended to allay.

28 In light of these findings, Section 213.12I creates a strong presumption against limits on  
29 sex-offender residency and employment, GPS monitoring, and other restrictive measures that can

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<sup>191</sup> Bandy, *supra* note 74, at 471, 488.

<sup>192</sup> *Id.*, at 490.

<sup>193</sup> *Id.*, at 491-492 (paraphrasing CASA interviewee based in Southwest).

<sup>194</sup> *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”).

<sup>195</sup> *Id.*, at 101-103,

<sup>196</sup> *Id.*, at 107-108, 112.

1 only impede the offender’s prospects for re-integration into society. The same presumption applies,  
2 for the same reason, against community notification as well, despite its firm pedigree in federal  
3 law and widespread acceptance in the states.

4 Different issues are presented when community notification or a particular sex-offender  
5 restriction is deployed on a carefully targeted basis. An obvious example might be a nursery  
6 school’s request for affirmative notification in the event that a registered sex offender moves into  
7 the area. To accommodate potentially legitimate needs of this sort, subsections (3) and (4) establish  
8 a framework for approving on a case-by-case basis specific collateral consequences, additional to  
9 those authorized by Sections 213.12A-H. The official making that individual determination is  
10 required to give careful consideration to the public-safety need for the particular measure; to weigh  
11 that need against its impact on the offender, the offender’s family, and the offender’s prospects for  
12 rehabilitation and reintegration into society; and to ensure that any measure approved is drawn as  
13 narrowly as possible to achieve the goal of public safety.

14 This standard will not open the door to routine imposition of community notification or  
15 other additional collateral consequences just because a community organization asserts a particular  
16 need to know, or because a particular registrant has been found guilty of a very serious offense.  
17 For example, a nursery school seeking to avoid hiring employees who have sex-offense records  
18 does not require affirmative notification every time a new registrant moves into the area; ordinary  
19 background check procedures suffice for that purpose.<sup>197</sup> In contrast, a commitment to notify the  
20 nursery school about any registrant in the area who has a particularly serious record of prior  
21 convictions for molesting young children might be warranted, provided that such a decision is  
22 reached after carefully considering all the circumstances. And similarly, a registrant with a prior  
23 record of that nature might reasonably face a narrowly targeted restriction on living or seeking  
24 employment near schools and play areas where young children congregate, provided again that the  
25 restriction is imposed only after carefully considering all the circumstances.

26 The important point is that the interests in public safety and successful offender  
27 rehabilitation both require that the unintended harms of additional collateral consequences be fully  
28 appreciated and that their use accordingly be limited to a narrow range of specially compelling  
29 circumstances.<sup>198</sup> Subsections (3) & (4) identify the factors that the sentencing judge or other authorized  
30 official must weigh in determining whether a particular offender should incur such consequences.<sup>199</sup>

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<sup>197</sup> See Reporters’ Note to Section 213.12H, addressing the related issue of whether organizations of this sort need access to registry information.

<sup>198</sup> Cf. *Doe v. Attorney General*, 686 N.E.2d 1007 (Mass. 1997) (holding Massachusetts provision subjecting sex offender 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).

<sup>199</sup> 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

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and Additional Collateral Consequences

1 SECTION 213.12J. RELIEF FROM OBLIGATION TO REGISTER, ASSOCIATED DUTIES, AND  
2 ADDITIONAL COLLATERAL CONSEQUENCES

3 (1) *Petition for relief.* At any time prior to the expiration of the obligation to register,  
4 the associated duties, or any additional collateral consequences, the offender may petition  
5 the sentencing court, or other authority authorized by law, to issue an order of relief from  
6 all or part of that obligation or those duties or consequences.

7 (2) *Proceedings on petition for relief.* The authority to which the petition is addressed  
8 may either dismiss the petition summarily, in whole or in part, or institute proceedings as  
9 needed to rule on the merits of the petition. If that authority chooses to entertain submissions,  
10 hear argument, or take evidence prior to ruling on the merits of the petition, it shall give the  
11 prosecuting attorney notice and an opportunity to participate in those proceedings.  
12 Following those proceedings, the authority to which the petition is addressed may grant or  
13 deny relief, in whole or in part, from the obligation to register, any associated duties, and  
14 any additional collateral consequences. An order granting or denying relief following those  
15 proceedings shall explain in writing the reasons for granting or denying relief.

16 (3) *Standard for relief.* The authority to which the petition is addressed may grant  
17 relief under subsection (2) of this Section if it finds that the obligation, duty, or consequence  
18 in question is likely to impose a substantial burden on the offender's ability to reintegrate  
19 into law-abiding society, and that public-safety considerations do not require continued  
20 imposition of the obligation, duty, or consequence after due consideration of:

- 21 (a) the nature of the offense;  
22 (b) all other circumstances of the case;  
23 (c) the offender's prior record; and

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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).

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1           **(d) the potential negative impacts of the restriction, disability, or government**  
2           **action on the offender, on the offender’s family, and on the offender’s prospects for**  
3           **rehabilitation and reintegration into society.**

4           **Relief should not be denied arbitrarily or for any punitive purpose.**

5           **(4) *Subsequent proceedings.* An order of relief granted under this Section does not**  
6           **preclude the sentencing court or other authorized authority from later revoking that order**  
7           **if, on the basis of the offender’s subsequent conduct and any other substantial change in**  
8           **circumstances, the authority finds by a preponderance of the evidence that public-safety**  
9           **considerations, weighed against the burden on the offender’s ability to reintegrate into law-**  
10           **abiding society, no longer justify the order of relief.**

11           **Comment:**

12           Section 213.12J identifies the standards and procedures for relieving an offender from the  
13           obligation to register, from the associated duties, or from any additional collateral consequences.  
14           It largely follows the framework applicable generally to petitions for relief from collateral  
15           consequences, as specified in the sentencing provisions of the Model Penal Code,<sup>200</sup> with  
16           additional detail pertinent to sex-offender collateral consequences.

17           In deciding whether to grant relief, the sentencing judge or other official authorized to  
18           make the determination is instructed to consider all the circumstances of the case, with particular  
19           attention to the nature of the offense; the offender’s prior record; and the potential negative impacts  
20           of the collateral consequence in question on the offender, on the offender’s family, and on the  
21           offender’s prospects for rehabilitation and reintegration into society. Some states endorse  
22           essentially similar criteria, but offer greater detail. Washington, for example, breaks down these  
23           general categories into twelve factors and adds that the court may also take into account “[a]ny  
24           other factors the court may consider relevant.”<sup>201</sup>

**REPORTERS’ NOTES**

25           Federal SORNA makes no provision for early relief from registration and its associated  
26           duties and restrictions. More than half the states provide some opportunity for early termination of  
27           registration requirements, though in almost all cases the opportunity is limited to persons convicted

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<sup>200</sup> See *Model Penal Code: Sentencing*, supra note 110, § 7.04(2) & (3).

<sup>201</sup> WASH. REV. CODE ANN. § 9A.44.142 (2019).

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1 of the least serious sexual offenses.<sup>202</sup> Section 213.12J draws on the early relief provisions of  
2 *Model Penal Code: Sentencing*, Article 7, with additional provisions relevant to sex-offender  
3 collateral consequences, and with several adjustments to align sex-offender relief with  
4 implementation details and policy considerations specific to this context.<sup>203</sup>

5 (a) MPCS directs that petitions for relief be addressed to the sentencing court, and this is a  
6 common approach among jurisdictions that authorize early relief from sex-offender registry  
7 obligations.<sup>204</sup> However, many jurisdictions take a different approach. In some, petitions for relief  
8 must be addressed to a court in the jurisdiction where the registrant resides.<sup>205</sup> In some states, the  
9 sentencing court acts on the advice on a board of experts;<sup>206</sup> elsewhere the final decision is  
10 entrusted to an independent risk assessment board.<sup>207</sup> It seems appropriate to allow for local  
11 flexibility in this regard. Section 213.12J endorses that approach.

12 (b) MPCS imposes a daunting burden of proof: the offender must demonstrate by clear and  
13 convincing evidence that the criteria for relief are satisfied. The effect is to create a strong  
14 presumption in favor of sustaining a mandatory collateral consequence that by definition was not  
15 initially attuned to the situation of the individual offender. This high hurdle has drawn criticism as  
16 unduly difficult to meet with respect to collateral consequences generally.<sup>208</sup> It is especially  
17 inappropriate in the context of sex-offender collateral consequences, because these duties and  
18 restrictions carry no strong presumption that they are likely to be sufficiently justified in the  
19 individual instance. To the contrary, the case for most collateral consequences is mixed at best,  
20 particularly with the passage of time since the offender's initial registration. Accordingly, for sex-  
21 offender collateral consequences, the appropriate burden of proof is not a matter that can be  
22 suitably constrained in advance. Section 213.12J(3) does not specify a particular burden of proof  
23 and instead leaves this decision to the sound discretion of the decision-making authority.

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<sup>202</sup> See “Relief from Sex Offender Registration Obligations,” <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex-offender-registration-obligations/>.

<sup>203</sup> The collateral-consequence provisions of MPCS were not intended to apply without exception to the unique circumstances of sex-offender collateral consequences. See *CITE*.

<sup>204</sup> 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.

<sup>205</sup> 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).

<sup>206</sup> 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).

<sup>207</sup> 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).

<sup>208</sup> See Demleitner, *supra* note 22, at 321-323.

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1           (c) MPCCS sets stiff criteria for granting relief. The offender must show that the collateral  
2 consequence in question is (i) not substantially related to the elements and facts of the conviction  
3 offense; (ii) likely to impose a substantial burden on the offender’s ability to re-integrate into  
4 society; *and* (iii) not required by public safety considerations. In the context of sex-offender  
5 collateral consequences, it will too often be impossible to demonstrate that all three of these criteria  
6 are met. Except in rare instances, sex-offender collateral consequences will be intrinsically related  
7 to the elements and facts of the underlying sexual offense, making the first essential criterion  
8 beyond reach in most cases, even when the balance of public-safety considerations and adverse  
9 impacts on the offender clearly warrant relief. Accordingly, Section 213.12J(3) allows the  
10 decision-making authority to grant relief simply on the basis of a finding that the collateral  
11 consequence in question is likely to impose a substantial burden on the offender’s ability to  
12 reintegrate into law-abiding society, and that public-safety considerations do not require its  
13 continued imposition.

14           (d) MPCCS permits the decision-making authority to deny relief without making any  
15 specific finding that the evidence and the relevant criteria warrant that result. And when the  
16 decision-making authority does grant relief, MPCCS does not expressly require that the necessary  
17 findings be explained in writing. Section 213.12J(2) specifies that when the decision-making  
18 authority institutes proceedings to rule on the merits of a petition for relief, an order granting *or*  
19 *denying* relief following those proceedings must explain in writing the reasons for granting or  
20 denying relief.



## 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 gender-neutral terms are used in place of the original gendered language.*

### **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.**

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### **1.13 General Definitions**

**In this Code, unless a different meaning plainly is required:**

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**(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;**

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**(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.

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## **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 person's conduct and the circumstances known to the person its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in that person'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 person's failure to perceive it, considering the nature and purpose of the person's conduct and the circumstances known to the person, involves a gross deviation from the standard of care that a reasonable person would observe in that person'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.

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**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]<sup>1</sup> 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 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:**

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<sup>1</sup> 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....”

(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**

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(2) “bodily injury” means physical pain, illness or any impairment of physical condition;

## Appendix A

**(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. DEFINITIONS AND GENERAL PRINCIPLES OF LIABILITY

**(1) This Article is governed by the Part I of the 1962 Model Penal Code, including the definitions given in subsection 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 of 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 done knowingly and for the purpose of sexual arousal, sexual gratification, sexual humiliation, or sexual degradation of any person:**

**(i) touching the intimate parts of another person with any body part or object; or**

**(ii) touching another person with the intimate parts of any person; or**

**(iii) causing another person to touch, with any body part or object, the intimate parts of that person, the actor, or a third party; or**

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\* Approved by the membership, May 2017.

(iv) touching, or causing a person to touch, the clothed or unclothed body of any person with the ejaculate of any person;

where “intimate parts” for purposes of subparagraphs (i)-(iii) means the genitalia, anus, groin, buttocks, inner thigh, or breast, whether clothed or unclothed.

(d) “Consent”<sup>\*\*</sup>

(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)(d)(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 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.

(e) Force.

(i) “Physical force or restraint” means a physical act or physical restraint that significantly restricts a person’s ability to move freely, or that inflicts or is capable of inflicting more than negligible physical harm, pain, or discomfort. Such harm includes but is not limited to a burn, black eye, or

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<sup>\*\*</sup> Approved by the membership, May 2016.

bloody nose, and such pain or discomfort includes but is not limited to a kick, punch, or slap on the face.

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

(f) “Actor” means a person more than 12 years of age, unless the person is charged with the offense of Sexual Assault by Aggravated Physical Force (Section 213.1) or Aggravated Offensive Sexual Contact (Section 213.7(1)), and includes, where relevant, a person guilty of an omission.

(g) “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 213.12.

(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 the actor causes another person to submit to or perform an act of sexual penetration or oral sex and:

(a) the act is without effective consent because the actor uses or explicitly or implicitly threatens to use aggravated physical force or restraint against any person; and

(b) 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.

**(2) *Grading.*\* Sexual Assault by Aggravated Physical Force or Restraint is a registrable offense and is a felony of the third degree, but it is a felony of the second degree 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 that 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 engage in the act of sexual penetration or oral sex, or who assist in the use of or threat to use aggravated physical force or restraint when that act occurs; or**

**(c) recklessly causes serious bodily injury to any person.**

**(3) *Effective consent.* Effective consent is absent when the other person submitted to or performed the act of sexual penetration or oral sex because the actor used or threatened to use aggravated physical force or restraint. Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a circumstance described in subsection (1). If applicable, the actor may raise an affirmative defense of Permission to Use Force under 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 the actor causes another person to submit to or perform an act of sexual penetration or oral sex and:**

**(a) the act is without effective consent because the actor uses or explicitly or implicitly threatens to use physical force or restraint against any person; and**

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\* Throughout Article 213, grading decisions have been deferred pending completion of a draft covering all the Article substantive offenses. Grading judgments in brackets are only suggestive place-holders; focused analysis and discussion will be devoted to the issue in due course.

\*\* For Section 213.1(1) and Section 213.2, the Reporters are considering two options. In one, Section 213.2 would be graded as a 3d degree felony; Section 213.1(1) would carry a maximum 5 years higher than that applicable to a 3d degree felony. In the other option, Section 213.2 would be graded as a 4th degree felony; Section 213.1(1) would be graded as a 3d degree felony.

(b) the actor recklessly disregards the risk 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 physical force or restraint.

(2) *Grading.* Sexual Assault by Physical Force or Restraint is a felony of the [\*\*] degree and a registrable offense when the actor has previously been convicted of a felony sex offense.

(3) *Effective consent.* Effective consent is absent when the other person submitted to or performed the act of sexual penetration or oral sex because the actor used or threatened to use physical force or restraint. Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a circumstance described in subsection (1). If applicable, the actor may raise an affirmative defense of Permission to Use Force under Section 213.10.

#### SECTION 213.3 SEXUAL ASSAULT OF A VULNERABLE PERSON

(1) *Sexual Assault of an Incapacitated Person.* An actor is guilty of Sexual Assault of an Incapacitated Person when the actor causes another person to submit to or perform an act of sexual penetration or oral sex and:

(a) 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 conduct because of a substance administered to the person, without the person's knowledge or consent, when the actor either administered the incapacitating substance for the purpose of impairing the person's ability to appraise, control, or remember the person's conduct, or knows that it was surreptitiously administered by another for that purpose; and

(b) the actor recklessly disregards the risk that the other person is in that condition.

Sexual Assault of an Incapacitated Person is a felony of the third degree and a registrable offense when the actor has previously been convicted of a felony sex offense.

**(2) *Sexual Assault of an Impaired Person.*** An actor is guilty of Sexual Assault of an Impaired Person when the actor causes another person to submit to or perform an act of sexual penetration or oral sex and:

**(a) 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 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; and**

**(b) the actor recklessly disregards the risk that the other person is in that condition at the time of the act.**

**Sexual Assault of an Impaired Person is a felony of the fourth degree.**

**(3) *Sexual Assault of a Person Subject to a State-Imposed Restriction on Liberty.*** An actor is guilty of Sexual Assault of a Person Subject to a State-Imposed Restriction on Liberty when the actor, who did not have a consensual sexually intimate relationship with the other person at the time that the 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:

**(a) the act is without effective consent because at the time of the act the other person is:**

**(i) housed in a prison, hospital, or other custodial environment in which the actor holds or purports to hold a position of authority or supervision; or**

**(ii) in custody, on probation, on parole, in a pretrial release or pretrial diversion or treatment program, or in any other status involving state-imposed restrictions on liberty, and the actor holds or purports to hold any position of authority or supervision with respect to that person's status or compliance with those restrictions; and**

(b) the actor knows that the other person is an individual over whom the actor is in a position of actual or apparent authority or supervision over the restriction on the other person's liberty.

Sexual Assault of a Person Subject to a State-Imposed Restriction on Liberty is a felony of the fifth degree.

(4) *Absence of effective consent.* Effective consent is absent when a circumstance described in subsections (1), (2), or (3) 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 under a 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 the actor causes another person to submit to or perform an act of sexual penetration or oral sex and:

(a) 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 a person of ordinary resolution in that person's situation under all the circumstances; and

(b) the actor recklessly disregards the risk that the other person submitted to or performed the act because of that threat.

(2) *Grading.* Sexual Assault by Extortion is a felony of the fourth degree.

(3) *Effective consent.* Effective consent is absent when the other person submitted to or performed the act of sexual penetration or oral sex because the actor explicitly or

implicitly threatened any of the actions specified in subsection (1). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a circumstance described in subsection (1). If applicable, the actor may raise an affirmative defense of Permission to Use Force under Section 213.10.

**SECTION 213.5. SEXUAL ASSAULT BY EXPLOITATION**

**(1) An actor is guilty of Sexual Assault by Exploitation when the actor causes another person to submit to or perform an act of sexual penetration or oral sex and:**

**(a) the act is without effective consent because:**

**(i) the actor led the other person to believe falsely that the act had diagnostic, curative, or preventive medical properties; or**

**(ii) the actor led the other person to believe falsely that the actor was someone else who was personally known to that person; or**

**(iii) the other person 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; and**

**(b) the actor recklessly disregards the risk that the other person submitted to or performed the act because of one or more of these circumstances.**

**(2) *Grading.* Sexual Assault by Exploitation is a felony of the fifth degree.**

**(3) *Absence of effective consent.* Effective consent is absent when the other person submitted to or performed the act of sexual penetration or oral sex because the actor engaged in any of the conduct described in subsection (1). 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.**

**SECTION 213.6. SEXUAL ASSAULT IN THE ABSENCE OF CONSENT**

**(1) An actor is guilty of Sexual Assault in the Absence of Consent if the actor causes another person to submit to or perform an act of sexual penetration or oral sex and**

**(a) the other person does not consent to that act; and**

(b) the actor recklessly disregards the risk that the other person does not consent to that act.

(2) *Grading.* Sexual Assault in the Absence of Consent under subsection (1) is a felony of the fifth degree, except that it is a felony of the fourth degree when:

(a) the offense under subsection (1) occurs in disregard of the other person's expressed unwillingness, or is so sudden or unexpected that the other person has no adequate opportunity to express unwillingness before the act occurs; and

(b) the actor recklessly disregards the risk that a circumstance described in subsection (2)(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 Permission to Use Force under Section 213.10.

#### SECTION 213.7. OFFENSIVE SEXUAL CONTACT

(1) *Aggravated Offensive Sexual Contact.* An actor is guilty of Aggravated Offensive Sexual Contact when:

(a) the actor causes another person to submit to or perform an act of sexual contact; and

(b) the act is without effective consent because:

(i) the actor knowingly uses or explicitly or implicitly threatens to use physical force or restraint against any person; and knows that the other person submitted to or performed the act of sexual contact because of that use or threat; or

(ii) the other person lacks substantial capacity to appraise, control, or remember that person's conduct because of a substance administered to the person, without the person's knowledge or consent, when the actor either administered the incapacitating substance for the purpose of impairing the person's ability to appraise, control, or remember the person's conduct, or knows that it was surreptitiously administered by another for that purpose.

Aggravated Offensive Sexual Contact is a felony of the fifth degree.

(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, and**
- (b) the actor knows or recklessly disregards that the other person did not consent to that act; or**
- (c) that act is without effective consent because:**
  - (i) the actor knows or recklessly disregards that the other person is unaware that such act is occurring; or**
  - (ii) the act occurs under circumstances as defined by Section 213.2, involving the use of physical force;**
  - (iii) the act occurs under circumstances as defined by Section 213.3, other than Section 213.3(1)(a)(ii), involving vulnerable persons; or**
  - (iv) the act occurs under circumstances as defined by Section 213.4, involving extortion; or**
  - (v) the act occurs under circumstances as defined by Section 213.5, involving exploitation.**

**Offensive Sexual Contact is a petty misdemeanor.**

**(3) *Absence of effective consent.*** Effective consent is absent when the other person submitted to or performed an act of sexual contact under any of the circumstances described in subsections (1) 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 subsection (1)(b)(i), (2)(b), or (2)(c)(ii), (iii), or (iv) may raise an affirmative defense of **Permission to Use Force under Section 213.10.**

#### **SECTION 213.8. SEXUAL OFFENSES INVOLVING MINORS**

**(1) *Sexual Assault of a Minor Younger than 12.*** An actor is guilty of **Sexual Assault of a Minor Younger than 12** when:

- (a) the actor knowingly causes a minor to submit to or perform an act of sexual penetration or oral sex; and**
- (b) the act is without effective consent because:**
  - (i) the minor is younger than 12 years of age; and**

- (ii) the actor is more than four years older than the minor; and
- (c) the actor recklessly disregards the risk that the minor is younger than the age of 12.

If the actor is younger than 18 years of age at the time of the offense, then the offense is a felony of the fifth degree. If the actor is 18 years of age or older, then the offense is a felony of the third degree, and a registrable offense when the actor is [reserved] or more years older.

**(2) *Sexual Assault of a Minor 12 to 16 Years of Age.*** An actor is guilty of Sexual Assault of a Minor 12 to 16 Years of Age when:

- (a) the actor knowingly causes a minor to submit to or perform an act of sexual penetration or oral sex; and
- (b) the act is without effective consent because:
  - (i) the minor is at least 12 but younger than 16 years of age; and
  - (ii) the actor is more than five years older than the minor and is not the legal spouse of the minor; and
- (c) the actor knows or recklessly disregards the risk that the minor is younger than 16 years of age.

If the actor is fewer than 10 years older than the minor at the time of the offense, then the offense is a misdemeanor. If the actor is 10 or more years older than the minor at the time of the offense, the offense is a felony of the fourth degree, and is a registrable offense when the actor is [reserved] or more years older.

**(3) *Incestuous Sexual Assault of a Minor.*** An actor is guilty of Incestuous Sexual Assault of a Minor when:

- (a) the actor knowingly causes a minor to submit to or perform an act of sexual penetration or oral sex; and
- (b) the actor is a person 18 years of age or older, and the minor is younger than 18 years of age; and
- (c) the act is without effective consent because the actor is:
  - (i) a parent or grandparent of the other person, including biological, step, adoptive, and foster parents or grandparents; or

(ii) a person who, at the time of the offense, is 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 minor, who resides intermittently or permanently in the same dwelling as the minor.

**Incestuous Sexual Assault of a Minor is a felony of the third degree, and a registrable offense.**

**(4) *Exploitative Sexual Assault of a Minor.* An actor is guilty of Exploitative Sexual Assault of a Minor when:**

(a) the actor causes a minor to submit to or perform an act of sexual penetration or oral sex; and

(b) the minor is younger than 18 years of age; and

(c) the actor is more than 10 years older than the minor and is not the legal spouse of the minor; and

(d) the act is without effective consent because the actor is in a position of trust to the minor, or holds an authoritative or supervisory role over the minor, including as a teacher, educational or religious counselor, mental-health treatment provider, school administrator, extracurricular instructor, or coach.

**Exploitative Sexual Assault of a Minor is a felony of the fifth degree.**

**(5) *Fondling a Minor.* An actor is guilty of Fondling a Minor when:**

(a) the actor knowingly causes a minor to submit to or perform an act of fondling or masturbatory contact with the genitalia of any person, for the purpose of sexual arousal, sexual gratification, sexual humiliation, or sexual degradation of any person; and

(b) the act is without effective consent because:

(i) the minor is younger than 12 years of age and the actor is more than four years older than the minor; or

(ii) the minor is least 12 years of age but younger than 16 years of age and the actor is more than seven years older than and not the legal spouse of the minor; and

(c) the actor recklessly disregards the risk that the circumstances described in subsection (b) exist.

**Fondling a Minor is a felony of the fourth degree if the minor is younger than 12 years of age, and a felony of the fifth degree if the minor is 12 years of age or older.**

**(6) *Offensive Sexual Contact with a Minor.* An actor is guilty of Offensive Sexual Contact with a minor when:**

**(a) the actor knowingly causes a minor to submit to or perform**

**(i) an act of sexual contact; or**

**(ii) an act involving the touching of the mouth, lips, or tongue of any person, to any body part or object, for the purpose of sexual arousal, sexual gratification, sexual humiliation, or sexual degradation of any person; and**

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

**(i) the minor is younger than 12 years of age, and the actor is more than five years older than the minor; or**

**(ii) the minor is at least 12 years of age but younger than 16 years of age, and the actor is more than seven years older than the youth and is not the legal spouse of the youth; and**

**(c) the actor knows or recklessly disregards the risk that the circumstances described in subsection (b) exist.**

**Offensive Sexual Contact with a Minor is a felony in the fifth degree when at the time of the act the minor is younger than 12 years of age, and a misdemeanor when the minor is 12 to 16 years of age.**

**(7) *Absence of effective consent.* Effective consent is absent when the circumstances described in subsections (1) through (7) exist at the time the child submitted to or performed 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 that subsection.**

#### **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 years of age and is being or will be caused to submit to or perform a commercial sex act; and the actor recklessly disregards the risk that the person is younger than 18 years of age 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 on any person;**

**(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 any 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 a reasonable person 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 any person.

(3) *Grading.* Sex Trafficking is a felony of the [third] degree, [reserving question whether this is a registrable offense].

(4) *Effective consent.* Effective consent is absent when coercion is being or will be used to cause a person to submit to or perform a commercial sex act, or when the person is less than 18 years of age. Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring under any of those circumstances. If applicable, the actor may raise an affirmative defense of Permission to Use Force under Section 213.10.

#### SECTION 213.10. PERMISSION TO USE FORCE OR TO IGNORE THE ABSENCE OF CONSENT

(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, or 213.7, or to ignore the lack of consent otherwise proscribed by Section 213.6.

(2) Permission is “explicit” under subsection (1) when it is given orally or by written agreement specifying that the actor may ignore the other party’s expressions of unwillingness or other absence of consent, identifying the specific forms and extent of force, restraint, or threats that are permitted, and 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 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 under circumstances in which the other party will be unconscious, asleep, or otherwise unable to withdraw that permission.

(c) the actor recklessly disregards a risk of inflicting death or serious bodily injury; or

(d) at the time explicit permission is given, the other party is, and the actor recklessly disregards the risk that the other party is:

(i) less than 18 years of age;

(ii) giving that permission while subjected to physical force or restraint;

(iii) giving that permission because of the use or a threat to use physical force or restraint, or extortion as defined by Section 213.4, if that person 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 or impaired, as defined by Section 213.3(1) or Section 213.3(2);

(vi) in a status involving a state-imposed restriction on liberty, as defined by Section 213.3(3); or

(vii) subject to exploitation, as defined by Section 213.5(1)(a)(i) or (ii).

**SECTION 213.11. PROCEDURAL AND EVIDENTIARY PRINCIPLES APPLICABLE TO ARTICLE 213**

**(1) *Sexual Activity of the Complainant***

**(a) *General Rule***

(i) In a prosecution under this Article, notwithstanding any other provision of law, reputation or opinion evidence regarding the sexual history of the complainant is not admissible, unless constitutionally required.

(ii) Specific instances of the complainant's sexual history with persons other than the accused that are otherwise admissible according to generally

applicable rules of evidence are inadmissible except as provided in subsection (1)(b).

(iii) Specialized rules of court shall establish procedures for determining, prior to trial whenever possible, the admissibility of evidence covered by this Section.

(iv) For purposes of this Section, “sexual history” shall mean any behavior, condition, or expression related to human sexuality, or allegations thereof, whether voluntary or involuntary, including but not limited to evidence and allegations relating to sexual intimacy, contact, and orientation; use of pornography; sexual fantasies and dreams; use of contraceptives; habits of dress; and marital and partnership history or status. “Sexual history” shall not include any allegedly false accusation of a sexual offense.

(b) *Exceptions.* Evidence of specific instances of a complainant’s sexual history shall not be inadmissible under subsection (1)(a):

(i) when offered to prove that the defendant was not the source of physical evidence, pregnancy, infection, or injury in the present case; or

(ii) when offered to impeach admitted evidence by specific contradiction or prior inconsistency; or

(iii) when offered to prove the complainant’s bias or motive to fabricate a material fact; or

(iv) when offered to counter evidence or argument by the prosecution that a complainant has an unexpected, specific kind of precocious sexual knowledge given the age or cognitive capacity of the complainant, and thus the allegation is more likely to be true; or when the prosecutor makes such a suggestion or argument, regardless of the complainant’s age or cognitive capacity; or

(v) when offered to rebut or provide an alternative explanation for evidence, argument, or other specific circumstances apparent to the trier of fact which suggest that the defendant’s defense is highly implausible; or

(vi) when the exclusion of such evidence would deprive the defendant of the meaningful opportunity to present a complete defense or would otherwise violate the Constitution.

***(2) Prior Sexual History of the Defendant***

Evidence of the sexual history of the defendant is not admissible to prove the character of the defendant in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as for impeachment or bias, or as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

***(3) Testimony Outside of the Courtroom***

(a) Testimony of an alleged victim of the defendant may be taken outside the courtroom in accordance with the procedures specified in subsection (3)(b) if, at the request of any party, the court finds on the record, after a hearing based on evidence that includes the testimony of a medical or psychological expert who has examined the alleged victim, that

(i) the alleged victim is less than 12 years of age at the time of trial, or has a documented developmental delay to the extent that his or her emotional or cognitive capacity is no greater than that of a child aged 12;

(ii) the alleged victim will suffer serious emotional distress if required to testify in the presence of the defendant;

(iii) such distress will impair the alleged victim's ability to communicate, or will render the victim incapable of testifying; and

(iv) the procedure is necessary to, and will significantly, mitigate that distress.

(b) After making the findings required by subsection (3)(a), the court may order that the testimony of an alleged victim be taken outside the courtroom and outside the physical presence of the judge, the defendant, and the jury, provided that all of the following conditions are met:

(i) The testimony is taken during the proceeding.

(ii) The testimony is taken via a method of communication that allows the defendant, judge, and jury to hear and see clearly the witness and counsel for prosecution and defense.

(iii) Counsel for the defense is present in the room in which the alleged victim testifies and has the opportunity to cross-examine the alleged victim in the usual way; or, in the event that the defendant elects to proceed *pro se*, then the court has appointed standby counsel prior to the commencement of trial, who shall be present.

(iv) The room in which the alleged victim testifies contains no person other than the witness, counsel for the prosecution, counsel or standby counsel for the defense, the operators of the technical equipment, any essential court personnel, and no more than one person who the court finds contributes to the well-being of the alleged victim.

(v) During the testimony, the defendant, judge, and jury shall remain in the courtroom.

(vi) The defendant shall be provided with a confidential and nondisruptive means of instantaneous communication with defense counsel.

**(4) *Initial Complaint***

(a) In a prosecution under this Article, and to the extent consistent with the constitutional right of confrontation, the prosecution may introduce in its case-in-chief evidence that shows the time and place where the complaint was first made to another person, along with evidence tending to establish the reasons for any delay, provided that such evidence is not substantially more prejudicial than probative. The court shall take care to circumscribe the admissible testimony to avoid reference to the details alleged in the complaint, including by limiting the testimony of a witness and by limiting the number of witnesses produced.

(b) Evidence of reports, or lack of reports, to other persons is inadmissible, unless deemed admissible by generally applicable rules of evidence, or unless offered to rebut an express or implied argument concerning the failure of the complainant to make a report.

**Section 213.12A. REGISTRATION FOR LAW ENFORCEMENT PURPOSES**

***(1) Offenses Committed in this Jurisdiction***

**(a) Except as provided in subsection 213.12A(3), every person convicted of an offense that is designated a registrable offense in this Article shall, in addition to any sanction imposed upon conviction, be obligated to appear personally and register as a sex offender with the law-enforcement authority designated by law in each [county] where the offender resides, is employed, or is a student.**

**(b) Notwithstanding any other provision of law, no conviction for an offense under this Article, or for any other criminal offense in this jurisdiction, shall make the offender eligible for or subject to an obligation to register as a sex offender with law enforcement or other governmental authority, nor shall any conviction for an offense under this Article, or for any other criminal offense in this jurisdiction, make the offender eligible for or subject to any other obligation or restriction applicable to sex offenders specifically, other than obligations and restrictions incident to a suspended sentence, probation, or parole, unless that offense is designated a registrable offense under this Article.**

***(2) Offenses Committed in Other Jurisdictions***

**(a) Every person obligated to register as a sex offender in another jurisdiction, because of an offense committed in that jurisdiction, who subsequently resides, works, or studies in this jurisdiction, shall register as a sex offender in this jurisdiction and comply with the requirements of this Section, provided that the offense committed in the other jurisdiction would be a registrable offense under this Article if committed in this jurisdiction.**

**(b) Notwithstanding any other provision of law, no conviction for an offense in another jurisdiction shall make the offender eligible for or subject to an obligation to register as a sex offender with law enforcement or other governmental authority in this jurisdiction, nor shall any conviction for an offense in another jurisdiction make the offender eligible for or subject to any other obligation or restriction in this jurisdiction applicable specifically to sex offenders, other than obligations and restrictions incident to a suspended sentence, probation, or parole, unless the commission of that offense obligates the**

offender to register as a sex offender in that jurisdiction and that offense would be a registrable offense under this Article if committed in this jurisdiction.

**(3) *Juvenile Offenders.*** No person shall 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 213.12I, on the basis of an offense committed when the offender was under the age of 18, or on the basis of an adjudication of delinquency based on conduct when the delinquent was under the age of 18; provided, however, that this subsection (3) shall not apply to an offender convicted of Sexual Assault by Aggravated Physical Force or Restraint if the offender was at least 16 years old at the time of that offense.

**(4) *Scope and Implementation of the Obligation to Register, Associated Duties, and Other Collateral Consequences Applicable Specifically to Sex Offenders***

**(a)** Notification of the offender's duty to register and associated duties is governed by Section 213.12B.

**(b)** The time of initial registration is governed by Section 213.12C.

**(c)** The information required upon registration is specified in Section 213.12D.

**(d)** The duty to keep registration current is specified in Section 213.12E.

**(e)** The duration of the registration requirement is specified in Section 213.12F.

**(f)** Penalties for failure to register are governed by Section 213.12G.

**(g)** Access to registry information is governed by Section 213.12H.

**(h)** Additional collateral consequences of conviction are governed by Section 213.12I.

**(i)** Standards and procedures for relief from the duty to register, associated duties, and additional collateral consequences applicable specifically to sex offenders are governed by Section 213.12J.

**SECTION 213.12B. NOTIFICATION OF THE OBLIGATION TO REGISTER AND ASSOCIATED DUTIES**

**(1) Prior to accepting a guilty plea, and at the time of sentencing after conviction on a guilty plea or at trial, the sentencing judge shall:**

**(a) inform the offender who is subject to registration of the registration requirement;**

**(b) explain the duties associated therewith, including:**

**(i) the identity and location, or procedure for determining the identity and location, of the government office or agency where the offender must appear to register as required by Section 213.12A;**

**(ii) the duty to report to that office or agency periodically in person, as required by Section 213.12E(1); and**

**(iii) the duty to promptly notify at least one of the local jurisdictions where the offender is registered of any change in the registry information pertaining to the offender, as required by Section 213.12E(2);**

**(c) notify the offender of the right to petition for relief from those duties as provided in Section 213.12J;**

**(d) confirm that defense counsel has explained to the offender those duties and the right to petition for relief;**

**(e) confirm that the offender understands those duties and that right;**

**(f) require the offender 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 offender understands those duties and that right;**

**(g) ensure that if the offender cannot read or understand the language in which the form is written, the offender will be apprised 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 Section 7.04.<sup>2</sup>**

**(2) At the time of sentencing, the offender shall receive a copy of the form signed pursuant to subsection (1)(f) of this Section.**

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<sup>2</sup> See MODEL PENAL CODE: SENTENCING, § 7.04(1) (Proposed Final Draft (2017)).

**(3) If the offender is sentenced to a custodial sanction, an appropriate official shall, shortly before release of the offender from custody, again inform the offender of the registration requirement, explain the rights and duties associated therewith, including and the right to petition for relief from those duties, and require the offender to read and sign a form stating that those rights and duties have been explained and that the offender understands those rights and duties. At the time of release from custody, the offender shall receive a copy of that form.**

**SECTION 213.12C. TIME OF INITIAL REGISTRATION**

**A sex offender subject to registration shall initially register:**

- (a) if incarcerated after sentence is imposed, then within 48 hours of 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 213.12D. INFORMATION REQUIRED IN REGISTRATION**

**(1) An offender subject to registration pursuant to Section 213.12A shall provide the following information to the appropriate official for inclusion in the sex-offender registry:**

- (a) the name of the offender (including any alias used by the offender);**
- (b) the Social Security number, if any, of the offender;**
- (c) the address of each residence at which the offender resides or expects to reside;**
- (d) the name and address of any place where the offender is an employee or expects to be an employee;**
- (e) the name and address of any place where the offender 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 offender.**

**(2) *Supplementary Information.* The local jurisdiction in which an offender registers shall ensure that the following information is included in the registry for that offender and kept up to date:**

(a) the text of the provision of law defining the criminal offense for which the offender is registered;

(b) the criminal history of the offender, including the date and offense designation of all convictions; and the offender's parole, probation, or supervised-release status;

(c) any other information required by law.

**(3) *Homeless offenders***

If an offender subject to registration lacks a residential address, the offender shall, at the time of registration, report with as much specificity as possible the principal places where the offender sleeps and eats, in lieu of the information required under subsection (1)(c). Thereafter, the registrant shall confirm or update those locations once every thirty days.

**(4) *Correction of Errors***

Each locality where an offender registers shall provide efficacious, reasonably accessible procedures for correcting erroneous registry information and shall, 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 213.12E. DUTY TO KEEP REGISTRATION CURRENT**

(1) *Periodic Updates.* A sex offender who is required to register under Section 213.12A shall, not less frequently than once every year, appear in person in at least one jurisdiction where the offender is required to register, verify the current accuracy of the information provided in compliance with Section 213.12D, allow the jurisdiction to take a current photograph, and report any change in the identity of other jurisdictions in which the offender is required to register.

**(2) *Change of Circumstances***

(a) Each jurisdiction that maintains a sex-offender registry shall permit registrants to notify the jurisdiction, by means of U.S. mail, internet notification, or other readily accessible means of communication of the jurisdiction's choosing, of any change of name, residence, employment, or student status, and any change the identity of all other jurisdictions in which the offender is required to register.

(b) Each jurisdiction that maintains a sex-offender registry shall advise each registrant, at the time of registration, of the registrant's option to utilize the means of communication established under subsection (2)(a), rather than appearing personally for that purpose, if the registrant so chooses.

(c) A sex offender subject to registration under Section 213.12A shall, not later than five business days after each change of name, residence, employment, or student status, notify at least one local jurisdiction specified in Section 213.12A of:

(i) all changes in the information that the offender is required to provide under Section 213.12D, and

(ii) the identity of all other jurisdictions in which the offender is required to register.

(3) The local jurisdiction notified of any changes pursuant to subsections (1) and (2) shall promptly provide the offender a written receipt confirming that the updated information has been provided, and shall provide that information to all other jurisdictions in which the offender is required to register.

#### SECTION 213.12F. DURATION OF REGISTRATION REQUIREMENT

(1) Subject to the provisions of subsection (3), an offender subject to registration shall keep the registration current for a period of 15 years, beginning on the date when the offender is released from custody after conviction for the offense giving rise to the registration requirement; or if the offender is not sentenced to a term of incarceration, beginning on the date when the offender is sentenced for that offense.

(2) At the expiration of that 15-year period, the duty to keep that registration current will terminate; the offender will not be subject to any further duties associated with that registration requirement; and no public or private agency other than a law-enforcement agency shall thereafter be permitted access to the offender's registry information.

(3) If, during the first 10 years of the period during which the offender is required to keep the registration current, the offender:

(a) successfully completes any period of supervised release, probation, or parole, other than a financial obligation, such as a fine or restitution, that the offender, despite good-faith effort, has been unable to pay; and

(b) successfully completes any required sex-offender treatment program; and  
(c) is not convicted of any additional offense under this Article, or any offense in another jurisdiction that would be an offense under this Article if committed in this jurisdiction; then:

the duty to keep that registration current will terminate; the offender will not be subject to any further duties associated with that registration requirement; and no public or private agency other than a law-enforcement agency shall thereafter be permitted access to the offender's registry information.

(4) When the offender's duty to register terminates under subsections (1) or (3), the law-enforcement agency in the local jurisdiction where the offender resides will, upon the offender's request, notify all other jurisdictions in which the offender has registered that the offender's duties associated with that registration requirement have terminated and that no public or private agency other than a law-enforcement agency shall thereafter be permitted to have access to that registry information.

#### **SECTION 213.12G. FAILURE TO REGISTER**

(1) *Failure to Register.* A person required to register under Section 213.12A is guilty of Failure to Register, a misdemeanor, if that person knowingly fails to register or knowingly fails to update a registration as required.

(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 213.12H. ACCESS TO REGISTRY INFORMATION**

**(1) Confidentiality**

**(a) Each local jurisdiction in which the offender is registered shall exercise due diligence to ensure that all information in the registry remains confidential, except that such information shall be made available upon request to any law-enforcement agency in connection with the investigation of any offense.**

**(b) Any disclosure pursuant to subsection (1)(a) shall include a warning that the law-enforcement agency receiving the information must exercise due diligence to ensure that the information remains confidential; that such information may not be disclosed to any person or public or private agency other than a law-enforcement agency, including any person or agency seeking to conduct a background check in connection with employment or service; and that the information thus disclosed may not be used to injure, harass, or commit a crime against the offender or anyone else; and that any such actions against the offender or anyone else 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 in an official capacity or otherwise subject to an obligation to ensure that the information remains confidential, 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 for commercial gain knowingly or recklessly discloses that information, or permits that information to be disclosed, to any person.**

**Unauthorized Disclosure of Registry Information under subsection (2)(a) of this Section is a misdemeanor. Unauthorized Disclosure of Registry Information under subsection (2)(b) of this Section is a felony of the fourth degree.**

**SECTION 213.12I. ADDITIONAL COLLATERAL CONSEQUENCES OF CONVICTION**

**(1) *Definition.*** For purposes of this Section, the term “additional collateral consequence” means any government action or government-imposed restriction or disability applicable specifically to persons convicted as sex offenders, other than (a) the fine, probation, supervised release, or term of incarceration authorized upon conviction of the offense, and (b) the obligation to register and the associated duties specified under Section 213.12A. Those additional collateral consequences include any government-imposed restriction upon an offender’s occupation, employment, education, internet access, or place of residence; any government action notifying a community organization or entity or a private party that the offender resides, works, or studies in the locality; and any other government action providing registry information to a public or private organization, entity, or person except as authorized by subsection (3) of this Section.

**(2) *Additional Collateral Consequences Applicable to Persons Not Required to Register.*** Notwithstanding any other provision of law, no person shall be subject to an additional collateral consequence unless that person has been convicted of a registrable offense and is required to register as a sex offender under Section 213.12A.

**(3) *Additional Collateral Consequences Applicable to Persons Required to Register.*** Notwithstanding any other provision of law, a person required to register as a sex offender under Section 213.12A may not be subject to any additional collateral consequence unless the sentencing judge or other designated official, after affording the offender 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 offender’s prior record; and**
- (d) the potential negative impacts of the restriction, disability, or government action on the offender, on the offender’s family, and on the offender’s prospects for rehabilitation and reintegration into society.**

**(4) *Limitations.*** The sentencing judge or other designated official who approves any additional collateral consequence pursuant to subsection (3) of this Section must determine that the additional collateral consequence:

**(a)** satisfies all applicable notification requirements set forth in Section 213.12B;

**(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 the specific restriction or disability imposed or government action to be taken, the evidentiary basis for that 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 by Section 213.12F.

**SECTION 213.12J. RELIEF FROM OBLIGATION TO REGISTER, ASSOCIATED DUTIES, AND ADDITIONAL COLLATERAL CONSEQUENCES.**

**(1) *Petition for relief.*** At any time prior to the expiration of the obligation to register, the associated duties, or any additional collateral consequences, the offender may petition the sentencing court, or other authority authorized by law, to issue an order of relief from all or part of that obligation or those duties or consequences.

**(2) *Proceedings on petition for relief.*** The authority to which the petition is addressed may either dismiss the petition summarily, in whole or in part, or institute proceedings as needed 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 shall give the prosecuting attorney notice and an opportunity to participate in those proceedings. Following those proceedings, 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 additional collateral consequences. An order granting or denying relief following those proceedings shall explain in writing the reasons for granting or denying relief.

**(3) *Standard for relief.*** The authority to which the petition is addressed may grant relief under subsection (2) of this Section if it finds that the obligation, duty, or consequence in question is likely to impose a substantial burden on the offender'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 offender's prior record; and

**(d)** the potential negative impacts of the restriction, disability, or government action on the offender, on the offender's family, and on the offender's prospects for rehabilitation and reintegration into society.

Relief should not be denied arbitrarily or for any punitive purpose.

**(4) *Subsequent proceedings.*** An order of relief granted under this Section does not preclude the sentencing court or other authorized authority from later revoking that order if, on the basis of the offender's subsequent conduct and 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 offender's ability to reintegrate into law-abiding society, no longer justify the order of relief.