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Model Penal Code:
Sexual Assault and Related Offenses

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Model Penal Code:
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. L. INST., Tentative Draft No. 17, 1974), until the official text is published. The vote of approval allows for possible further revision of the drafts to reflect the discussion at the Annual Meeting and to make editorial improvements.

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

The typical ALI Section is divided into three parts: black letter, Comment, and Reporter’s Notes. In some instances there may also be a separate Statutory Note. Although each of these components is subject to review by the project’s Advisers and Members Consultative Group and by the Council and the membership, only the black letter and Comment are regarded as the work of the Institute. The Reporter’s and Statutory Notes remain the work of the Reporter.
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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 and 213.11-213.11J can be found in Council Draft No. 10 (2019), Preliminary Draft No. 10 (2019), and Council Draft No. 9 (2019). In these drafts, current Sections 213.11-213.11J were numbered either as Sections 213.12A-213.12J or as Section 213.12.
Section 213.8. Sexual Offenses Involving Minors

SECTION 213.8. SEXUAL OFFENSES INVOLVING MINORS

(1) Sexual Assault of a Minor. An actor is guilty of Sexual Assault of a Minor when:

(a) the actor knowingly engages in an act of sexual penetration or oral sex with a minor or 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 16 years old; and

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

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraph (b) exist.

Grading. Sexual Assault of a Minor is a felony of the fifth degree \[three-year maximum\] when at the time of the act the actor is younger than 21 years old and a felony of the fourth degree \[five-year maximum\] when at the time of the act the actor is 21 years old or older, except that it is a felony of the third degree \[10-year maximum\] and a registrable offense when at the time of the act the minor is younger than 12 years old, the actor is 21 years old or older, and the actor is aware of, yet recklessly disregards, the risk that the minor is younger than 12 years old.

(2) Incestuous Sexual Assault of a Minor. An actor is guilty of Incestuous Sexual Assault of a Minor when:

(a) the actor knowingly engages in an act of sexual penetration or oral sex with a minor or causes a minor to submit to or perform an act of sexual penetration or oral sex; and

(b) the actor is 18 years old or older, and the minor is younger than 18 years old; and

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

(i) a parent or grandparent of the minor, including a biological, step, adoptive, or foster parent or grandparent; 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; and

(d) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (b) and (c) exist.

Incestuous Sexual Assault of a Minor is a felony of the third degree [10-year maximum]. It is a registrable offense when at the time of the act the minor is younger than 16 years old.

(3) Exploitative Sexual Assault of a Minor. An actor is guilty of Exploitative Sexual Assault of a Minor when:

(a) the actor knowingly engages in an act of sexual penetration or oral sex with a minor or 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 old; and

(c) the actor is more than five 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 holds a position of authority or supervision over the minor, including as a teacher, employer, religious leader, treatment provider, administrator, or coach; and

(e) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (b) through (d) exist.

Exploitative Sexual Assault of a Minor is a felony of the fifth degree [three-year maximum].

(4) Fondling the Genitals of a Minor. An actor is guilty of Fondling the Genitals of a Minor when:

(a) the actor knowingly fondles or engages in masturbatory contact with the genitalia of a minor, or causes a minor to submit to or perform an act of fondling or masturbatory contact with the minor’s own genitalia or the genitalia of any other person; and

(b) the act is for the purpose of any person’s sexual arousal, sexual gratification, sexual humiliation, or sexual degradation; and

(c) the act is without effective consent because:
Section 213.8. Sexual Offenses Involving Minors

(i) the minor is younger than 12 years old and the actor is more than five years older than the minor; or

(ii) the minor is younger than 16 years old and the actor is more than seven years older than the minor and not the legal spouse of the minor; and

(d) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraph (c)(i) or (ii) exist.

Grading. Fondling a Minor is a felony of the fifth degree [three-year maximum], except that it is a felony of the fourth degree [five-year maximum] when at the time of the act the actor is 21 years old or older, the minor is younger than 12 years old, and the actor is aware of, yet recklessly disregards, the risk that the minor is younger than 12 years old.

(5) Aggravated Offensive Sexual Contact with a Minor. An actor is guilty of Aggravated Offensive Sexual Contact with a Minor when:

(a) the actor knowingly engages in an act of sexual contact with a minor or causes a minor to submit to or perform an act of sexual contact; and

(b) the minor is younger than 18 years old; and

(c) the actor is more than five years older than the minor; and

(d) the act, had it been an act of sexual penetration or oral sex, would be an offense as defined by Section 213.1, 213.2, 213.3, 213.4, 213.5, or 213.8(2) or (3); and

(e) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (b) and (c) exist.

Aggravated Offensive Sexual Contact with a Minor is a felony of the fourth degree [five-year maximum].

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

(a) the actor knowingly engages in with a minor, or causes a minor to submit to or perform:

(i) an act of sexual contact; or

(ii) an act involving the touching of the tongue of any person, to any body part or object, when that act is for the purpose of any person’s sexual arousal, sexual gratification, sexual humiliation, or sexual degradation; and

(b) the act is without effective consent because:
Section 213.8. Sexual Offenses Involving Minors

(i) the minor is younger than 12 years old, and the actor is more than five years older than the minor; or

(ii) the minor is younger than 16 years old, and the actor is more than seven years older than the minor and is not the legal spouse of the minor; and

(c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraph (b)(i) or (ii) exist.

Offensive Sexual Contact with a Minor is a misdemeanor [one-year maximum], except that it is a felony of the fifth degree [three-year maximum] when at the time of the act the actor is 21 years old or older, the minor is younger than 12 years old, and the actor is aware of, yet recklessly disregards, the risk that the minor is younger than 12 years old.

(7) Effective consent. Consent is ineffective when the circumstances described in any of the subsections (1) through (6) exist at the time of the act. Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring under the circumstances described in any of those subsections.

(8) Calculation of ages. The age of any person described in this Section should be calculated according to the “days-and-month” approach, which determines age with reference to the day, month, and year of that person’s birth, as measured in whole numbers.

Comment:

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

But the particular vulnerability of minors, who are frequent targets of sexual abuse and exploitation,¹ requires additional proscriptions. The classic framework of force and consent is

¹ Estimates of rates of abuse vary, with rates of around one in four to five for girls, and one in six to 20 for boys, before the age of 17. David Finkelhor et al., The Lifetime Prevalence of Child Sexual Abuse and Sexual Assault Assessed in Late Adolescence, 55 J. ADOLESCENT HEALTH 329, 329 (2014). When these data are parsed to focus only on sexual acts perpetrated by adults against youths and children, rather than peer-to-peer acts, the rate is reported as one in nine for girls and one in 53 for boys. Id. at 332. Such abuse often has lasting and serious consequences. See, e.g., Tamara Blakemore et al., The Impacts of Institutional Child Sexual Abuse: A Rapid Review of the Evidence, 74 CHILD ABUSE & NEGLECT 35, 35 (2017) (“[R]esearch consistently finds a ‘significant link between a history of child sexual abuse and a range of adverse impacts both in childhood and adulthood’. . . .”). See generally infra Reporters’ Notes.
poorly suited to regulating sexual activity with minors. Young minors may willingly submit to inappropriate sexual activity even in the absence of any threat or force, simply because the actor is an older adult. Older minors may have the capacity to consent to sexual behavior with age-appropriate peers, but they are susceptible to manipulation or exploitation by family members or other authority figures. The universal acceptance of sexual offenses defined solely on the basis of the actor’s and complainant’s ages affirms that there is widespread agreement about the need to condemn and deter sexual acts when one party is too young, or the relationship between the parties too imbalanced, for a minor to give meaningful consent.

The 1962 Code and every U.S. jurisdiction currently penalize sexual activity with minors on the basis of chronological age alone, without further inquiry into the presence or absence of consent, force, coercion, or added vulnerability. The use of chronological age as a means of discerning different degrees of sophistication at times creates artificial and imperfect distinctions, but it is the universal approach for want of better alternatives. As the 1962 Code recognized, although “chronological age is only a rough estimate of the group of persons sought to be protected in this section, administrative considerations compel use of this crude index rather than a legal test which would call for expert, contradictory, and often inconclusive testimony on the issue of puberty.” An age-based approach also has longstanding pedigree, despite its shortcomings. As noted in the commentary to the 1962 Model Penal Code, “[a]n early English statute extended felony sanctions to intercourse with a female under the age of 10 with or without her consent.”

Age-gap requirements. Many early codes, including those in place during the drafting of the 1962 Model Penal Code, referred only to the age of the complainant in setting liability, disregarding the age of the actor. But that approach gave rise to numerous objections. The 1962 Code particularly criticized an age-based approach with respect to older girls (the 1962 Code protected female complainants against male actors only), observing that it had the undesirable

2 Megan E. Giroux et al., Differences in Child Sexual Abuse Cases Involving Child Versus Adolescent Complainants, 79 CHILD ABUSE & NEGLECT 224, 230-231 (2018) (comparing data about minors younger than 12 with data about minors between 12 and 17, and specifically acknowledging that the length and repetition, paired with the lesser intrusiveness and violence, of the abuse of younger children follows patterns of “grooming”).

3 Id. at 230 (noting that older adolescents are more likely to be the victims of sexual abuse, particularly by older people outside but connected to the family, among other differences between categories of complainants).


5 Id. at 276 (citing 18 Eliz. c. 7, § 4 (1576); 4 WILLIAM BLACKSTONE, COMMENTARIES *212).
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...effect of penalizing young men for consensual “sexual experimentation between contemporaries.”

Focusing on the age of the complainant alone also fails to account for the differing degree of culpability when the same conduct is engaged in by an immature versus a mature actor. In this respect, the age of the actor is an important consideration for social condemnation, even for complainants too young to consent. A misguided, curious adolescent who intrudes sexually on a young child may deserve punishment, but not at the same level as an adult who has specifically targeted minors for sexual gratification. And a young minor who engages in inappropriate sexual behaviors with peers may require intervention by the state, but not through the punitive and condemning processes of the criminal- or juvenile-justice systems.

Historical changes have also had the effect of widening the scope of liability for statutes based only on the complainant’s age. A statute that appears to punish without regard to the actor’s age may not have had that effect in an era in which minors were not eligible for criminal punishment. For instance, the 1962 Code punished a man who engaged in “sexual intercourse” with a girl under 10, and “deviate sexual intercourse” with a girl or boy under 10, as second-degree felonies, equivalent to forcible rape. That language on its face would seem to impose serious liability for an actor as young as 11 who engages in nominally consensual activity with a nine-year-old complainant. But the Comments to the 1962 Code explain that, in fact, other provisions constrained the availability of punishment for actors who are minors. Specifically, Section 4.10 of the Model Penal Code, in deference to the “widespread adoption of juvenile court[s]” at the time of the Code’s passage, barred criminal conviction for actors under 16, and presumed actors as old as 16 or 17 would also be handled in juvenile proceedings absent explicit waiver. Thus, as practical matter, a criminal conviction required at least a six-year age gap...

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8 Id. Section 213.2(1)(d).


10 Id. at 340; see also infra Reporters’ Notes.
between a complainant and an actor, even if a delinquency finding presumably could attach to an 11-year-old actor with a nine-year-old complainant.\footnote{Model Penal Code Section 213.1 Comment at 340-341 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980).}

Section 213.3 of the 1962 Code, titled “Corruption of Minors and Seduction,” expressly imposed an age gap in its provisions. It punished, as a felony in the third degree, “sexual intercourse” or “deviate sexual intercourse” between a male four or more years older than a female complainant who was under the age of 16.\footnote{Model Penal Code Section 213.3(1)(a) (AM. L. INST., Proposed Official Draft 1962). That Section also penalized an actor who was a “guardian or otherwise responsible for general supervision of [the complainant’s] welfare” if the complainant was under the age of 21. Id. Section 213.3(1)(b).} Complainants 16 years of age or older attained the “age of consent,” and could engage in consensual sexual activity with any person. Conversely, 10- to 15-year-old complainants could lawfully consent to sexual activity with peers within four years of their age. A 14-year-old was thus liable for sexual activity with a complainant of 10, but not 11, 12, or 13. And a 19-year-old was liable for sexual activity with complainants aged 10 to 15.

Like the 1962 Code, existing law generally embraces the view that the age of the actor is important; only a minority of jurisdictions penalize sexual activity solely with reference to the complainant’s age, even for the class of very young complainants.\footnote{See Leslie Y. Garfield Tenzer, #MeToo, Statutory Rape Laws, and the Persistence of Gender Stereotypes, 2019 UTAH L. REV. 117, 121-122 (counting 34 states that impose age differentials, and 16 states that impose age thresholds without regard to the actor’s age); see also infra Reporters’ Notes.} Rather, most statutes take a tiered approach to liability that punishes sexual behavior on the basis of the ages of the complainant and of the actor,\footnote{See, e.g., Cal. Penal Code § 261.5(c) (Deering 2020) (“Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony . . . .”); N.C. Gen. Stat. § 14-27.24(a) (2019) (“A person is guilty of first-degree statutory rape if the person engages in vaginal intercourse with a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim.”); Tenn. Code Ann. § 39-13-506(b)(1) (2019) (defining statutory rape, in part, as the “unlawful sexual penetration of a victim” who is “at least thirteen (13) but less than fifteen (15) years of age and the defendant is at least four (4) years old but less than ten (10) years older than the victim”); see also infra Reporters’ Notes, note 4.} excluding liability in most cases of peer sexual activity, imposing moderate liability for adolescents who act out sexually in an impermissible manner, and reserving the most severe penalties for adults who sexually impose on very young minors.\footnote{See Catherine L. Carpenter, On Statutory Rape, Strict Liability, and the Public Welfare Offense Model, 53 Am. U. L. REV. 313, 339 (2003) (“It is somewhat erroneous to think of states having defined one threshold age of consent, although certainly a few states have so declared. Rather, because of the increased complexity of the many statutory schemes, states often provide different ages for consent depending on the particular offense. . . . Indeed, in an attempt to distinguish the egregious felonious sexual activity from the non-egregious, many statutory schemes}
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Code, however, a significant number of states set an older age of consent. Roughly eight states set the age at 17, and another 11 or so at 18. 16 In fact, all five of the most populous states set a general age of consent at 17 or 18, although the specific terms of those statutes vary. 17

In keeping with the dominant pattern, Section 213.8 permits liability for sexual activity with reference to the age of the complainant and of the actor, without any additional evidence of actual or effective consent, force, vulnerability, or coercion. In effect, Section 213.8 declares certain complainants incapable of providing effective consent solely as a result of their age and their age relative to the actor, or to the actor’s special authority over them. 18 Consistent with the 1962 Code, Section 213.8 also sets a general age of consent of 16.

Mens rea. Historically, statutory rape has been treated as a strict-liability offense. 19 Even as of the drafting of the 1962 Code, that rule “continue[d] today in a large number of states.” 20


17 See, e.g., CAL. PENAL CODE § 261.5(a)-(c) (Deering 2020) (“(a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a ‘minor’ is a person under the age of 18 years and an ‘adult’ is a person who is at least 18 years of age. (b) Any person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor. (c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony . . . . ”); FLA. STAT. ANN. § 794.05 (LexisNexis 2019) (defining the second degree felony of “unlawful sexual activity with certain minors” as when a “person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age”); 720 ILL. COMP. STAT. ANN. 5/11-1.50 (LexisNexis 2019) (defining criminal sexual abuse when a “person commits an act of sexual penetration or sexual conduct with a victim who is at least 13 years of age but under 17 years of age and the person is less than 5 years older than the victim” as a misdemeanor); N.Y. PENAL LAW §§ 70.00(2)(e), 130.25(2) (Consol. 2019) (defining rape in the third degree, when an actor “twenty-one years old or more . . . engages in sexual intercourse with another person less than seventeen years old,” as a class E felony, which carries a four-year maximum); TEX. PENAL CODE ANN. § 22.011(a)(2), (c)(1), (e)-(f) (LexisNexis 2019) (defining “child” as a person younger than 17, and penalizing acts of penetration with a child as a second-degree felony, but allowing an affirmative defense for actors within three years of age of complainants 14 or older).

18 Importantly, it is the age of the minor that is of consequence; sexual activity with emancipated minors who fall within the terms of Article 213 remains prohibited, unless a judicial emancipation order or other statute requires otherwise. RESTATEMENT OF THE LAW, CHILDREN & THE LAW § 4.10 & Comment k (AM. L. INST., Council Draft No. 4, 2019).

19 MODEL PENAL CODE Section 213.6 Comment at 413 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980); see also infra Reporters’ Notes, note 3(a).

Today, strict liability persists in a majority of jurisdictions.\textsuperscript{21} As a result, a defendant proven to have engaged in prohibited sexual conduct with a person under the specified age could mount no defense of mistake as to the age, no matter how reasonable or justified.

Despite misgivings, the 1962 Code followed this practice in part, denying any defense of mistake as regards complainants under 10 years old, in part because “any proposed change on this point would encounter political resistance.”\textsuperscript{22} But the Code recognized the imperative to allow a defense of mistake for older complainants, providing a defense of “reasonable belief” for offenses in which criminality depends on the child’s being below a critical age older than 10.\textsuperscript{23} This “compromise solution” proved “extremely influential” according to the commentaries published in the 1980s.\textsuperscript{24}

As explained further in the Reporters’ Note, current law primarily embraces strict-liability standard, but there are three variables evident in alternative models. First, some jurisdictions embrace the “hybrid” model of the 1962 Code, and apply different standards of mens rea based on the age of the complainant. Second, of jurisdictions that embrace some form of mens rea, some require that the government prove a culpable mens rea, whereas others simply permit an affirmative defense of mistake.\textsuperscript{25} Lastly, the law and courts in some jurisdictions have not resolved every aspect of the issue, and thus no definitive statement about mens rea can be made.

The imposition of strict liability has historically been justified on two grounds. First, when the age of consent is set at an age as young as 10, as in the 1962 Code, “no credible error of perception would be sufficient to recharacterize a child of such tender years as an appropriate

\textsuperscript{21} Roughly two-thirds of states impose strict liability for statutory rape, allowing no mistake of age defense. See infra note 239 and accompanying text; see also, e.g., Pritchard v. State, No. 280, 2003, 2004 Del. LEXIS 61, at *4 (Feb. 4, 2004) (explaining that Delaware’s statutory rape law “precludes a defense based on the defendant’s reasonable belief that the victim had reached the age of consent”).

\textsuperscript{22} MODEL PENAL CODE Section 213.6 Comment at 416 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980).

\textsuperscript{23} Id. (“Section 213.6(1) provides, however, that it is no defense to liability for rape or deviate sexual intercourse that the actor reasonably believed the child to be older than 10. It was thought that strict liability would be acceptable for offenses based on such extreme youth and that in any event any proposed change on this point would encounter political resistance. Section 213.6(1) further provides, however, that the actor may defend in cases where the age is set higher than 10 by proving that he ‘reasonably believed’ his sexual partner to be above the specified age. The phrase ‘reasonably believed’ is defined in Section 1.13(16) supra to establish a minimum culpability of negligence. The defendant must establish both the fact and reasonableness of his mistake by a preponderance of the evidence.”).

\textsuperscript{24} Id. at 416-417.

\textsuperscript{25} See infra Reporters’ Notes, note 3(a).
Second, the common law tended to view child sexual abuse as a harm primarily perpetrated by sexually aggressive men upon young, sheltered females. It was also considered a crime to have sexual intercourse of any kind outside of marriage. In this view, the simple act of a grown man being alone with or having a sexual encounter with a young girl not his wife was either criminal or considered obviously wrongful. Thus the greater wrong of engaging in sexual activity was justifiably punished without proof of further mens rea, given the lesser wrong of a man enjoying a private encounter with a girl—reasoning typified by the case of Regina v. Prince. Finally, prosecutors have argued that mens rea requirements place too high a burden in pursuing cases as serious as allegations of child sexual abuse, even given a general preference to impose liability only upon actors proven to have had a culpable mindset.

But none of those premises withstands scrutiny today. First, and most fundamentally, criminality, particularly in the case of offenses involving moral turpitude, always ought to depend on awareness of wrongdoing (a mens rea of at least recklessness) proved beyond a reasonable doubt, and as much so in sexual offenses as in any others. The Supreme Court has increasingly underscored the importance of imposing a mens rea requirement as regards criminal offenses, observing the “basic principle that wrongdoing must be conscious to be criminal.” In United States v. X-Citement Video, the Supreme Court applied this principle directly to an offense involving the sexual exploitation of children. In that case, the Court held that a defendant could not be convicted of possessing child pornography in the absence of evidence that the defendant knew that children were depicted in the images. If anything, the prevalence of sex-offender

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27 See, e.g., Note, Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex, 104 Harv. L. Rev. 1660, 1661 n.9 (collecting fornication and adultery statutes).

28 See R v. Prince [1975] 2 C.C.R. 154 (Eng.) (denying a mistake defense on a lesser legal wrong/lesser moral wrong theory, as taking the complainant from her parents’ legal custody was itself a wrongful act).

29 See B (A Minor) v. Director of Public Prosecutions [2000] 1 All E.R. 833 (repudiating Prince as “at variance with the common law presumption regarding mens rea” and thus “unsound”).


registration and other harsh collateral consequence distinctive to the sexual offenses makes proof of mens rea all the more important in these cases.\(^{32}\)

Beyond this issue of principle, the pragmatic concerns once thought to justify strict liability for sexual conduct with minors no longer hold sufficient force today. For one thing, contemporary law typically does not rest on a single absolute age of consent.\(^{33}\) Rather, the law sets forth tiers of liability that recognize that in modern society even very young children may engage in sexual activity with peers that, while perhaps undesirable, should not be criminalized. As such, the range of “credible error” is actually much greater. Although few nine-year-olds could be mistaken for 18, a 15-year-old might reasonably be perceived to be 16. A tiered liability structure, imposed without proof of mens rea, could therefore have the effect of criminalizing a young person who reasonably, but erroneously, believed a sexual partner to be a peer. A child of 11 who appears or claims to be 13 may be a clearly inappropriate sexual partner to a man of 40, but not so clearly to a minor of 16. Strict liability is thus a poor fit for a contemporary era in which sexual exploration is more common among minors, and for a system of liability attuned to the age of both the complainant and the actor.

Second, empirical evidence has proven that the perpetrators of child sexual abuse overwhelmingly are persons known to the complainant, such as family members, teachers, or clergy.\(^{34}\) The danger of a stranger seducing a young girl and luring her from her home may endure, but the vast majority of those who perpetrate sexual offenses against minors are close associates or family members.

\(^{32}\) See infra Reporters Notes to Section 213.11.

\(^{33}\) See infra Reporters’ Notes, note 3.

\(^{34}\) See Rebecca L. Moles & John M. Leventhal, Editorial, Sexual Abuse and Assault in Children and Teens: Time to Prioritize Prevention, 55 J. ADOLESCENT HEALTH 312, 312 (2014) (“Strangers were the least commonly reported perpetrator; most commonly, the acts were by an acquaintance of the child.”). One study showed that 27 percent of sexual offenders of minors were family members of the victims; for victims under 12, a third to half were family members. The other half of offenders of minors younger than 12 were acquaintances; less than five percent of offenders of complainants younger than 12 were strangers. Even for complainants aged 12 to 17, only 9.8 percent of offenders were strangers; two-thirds were acquaintances and one quarter were family members. Overall, only seven percent of offenders against minors younger than 18 were strangers—ranging from 3.1 percent for complainants under six to 9.8 percent for complainants 12 to 17. HOWARD N. SNYDER, U.S. BUREAU OF JUSTICE STATISTICS, NCJ 182990, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 & tbl.6 (2000). In one study, 74 percent of adolescents (aged 12 to 17) surveyed who stated they had been sexually assaulted reported that the assailant was someone they knew. Over two-thirds of assaults occurred within the complainant’s home (30.5 percent) or neighborhood (23.8 percent) or school (15.4 percent). DEAN G. KILPATRICK ET AL., NAT’L INST. OF JUSTICE, NCJ 194972, YOUTH VICTIMIZATION: PREVALENCE AND IMPLICATIONS 5 (2003), https://www.ncjrs.gov/pdffiles1/nij/194972.pdf.
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The consequence of this is twofold. First, in cases involving young complainants, which overwhelmingly comprise offenses committed by persons known to the complainant, proof of *mens rea* is less likely to present a meaningful hurdle for prosecutors. Actors who are personally known to the complainant—whether a neighbor, parent, stepparent, coach, teacher, or other associate—are more readily proved to have known the complainant’s age. A rule that requires such evidence is unlikely to leave minors unprotected. Moreover, for cases involving authority figures expressly covered by Section 213.8—namely 213.8(2), involving actors who are parental figures, and Section 213.8(3), involving actors in trust roles of other kinds—the age threshold is set high enough that *mens rea* is unlikely to play any significant role. Prosecutors are unlikely to have trouble proving that a coach, teacher, or youth pastor was unaware of a substantial risk that the complainant was under 18.

Second, for stranger cases, which statistically appear more likely to occur when older minors are involved, there is no longer the sense that sexual misconduct inexorably requires an initial wrongful act that enables the actor to gain proximity to the complainant. In contemporary society, minors may come into regular, lawful contact with adults. As a result, an adult actor may encounter a minor in places in which the actor has little reason to suspect the minor is not age-appropriate. A 15-year-old who looks mature and uses a fake identification to enter a 21-and-above club, for instance, may actively misrepresent his or her age to a 21-year-old patron. If the patron engages in what the patron believes to be consensual sexual activity, and a factfinder believes that the patron was not aware of a risk that the complainant was underage, then it would be unjust to impose liability on the patron. Even the contemporary analog to the common law concern—for instance, an adult stranger who engages in an internet relationship with a teen and arranges to meet for a sexual encounter—may blur the lines of wrongfulness, as consenting adults regularly do meet and develop relationships online. It is better left to a factfinder to judge whether an actor credibly believed the complainant to be of age.

In this respect, imposing a *mens rea* requirement does not eliminate liability so much as ensure that it is appropriately calibrated. And importantly, an actor who plausibly claims not to have known that the minor was below one age threshold, but nevertheless engages in behavior that would be culpable at the threshold that the actor believed, is still punishable.\(^{35}\) For instance, an

\(^{35}\) See infra Illustration 10.
adult defendant who claims to have believed that a very young complainant was in fact slightly older—for example that an 11-year-old was actually 13—will still be punishable. That is because the actor will in essence be admitting the mens rea necessary to prove to one crime (attempted sexual assault of a minor who is 12 to 15) as a defense to another (sexual assault of minor under 12).  

There is one situation in which the inability to prove a culpable mens rea may exculpate an actor whose culpability sits closer to the line, inasmuch as the actor is able to raise a credible doubt, notwithstanding generally unsavory behavior. That situation involves older actors who engage in nominally consensual activity with minors close to the age of consent. For instance, imagine a 15¾-year-old who willingly becomes sexually involved with a middle-aged actor who deliberately seeks out and preys upon young persons. Under the 1962 Code, which provided a defense of reasonable mistake, as well as under Section 213.8, which requires proof of a culpable mens rea, the actor may escape liability by claiming a reasonable belief that the complainant was 16 and therefore at the age of consent. Assuming no qualifying additional relationship (either parental, as required by Section 213.8(2) or a position of authority, as in Section 213.8(3)), the actor would thus face no criminal liability, because the prosecution cannot prove the necessary mens rea for the completed offense, and the attempted act is not a crime.

But although relationships between older minors and adults may be ill-advised and generally viewed as unacceptable, in the absence of other coercive elements they should not be criminally penalized. In the words of the Commentary to the 1962 Code:

The penal law does not try to enforce all aspects of community morality, and any thoroughgoing attempt to do so would extend the prospect of criminal sanctions far into the sphere of individual liberty and create a regime too demanding for all save the best among us.  

And while the lack of liability in certain cases may be unsatisfying, imposing a mens rea requirement has the further salutary effect of mitigating the effect of the age cutoffs that serve as

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36 The 1962 Code expressly states that “Although ignorance or mistake would otherwise afford a defense to the offense charge, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.” 1962 Code Section 2.04(2).

the necessary scaffold for the tiers of liability. The complainant who is 15½ years old is more plausibly 16 than, say, a 12-year-old, and yet a strict-liability approach to age thresholds would treat actors in both situations equivalently, even if the actor had good reason to believe the former capable of lawful consent. Mens rea helps to soften the impact of age cutoffs by recognizing that, although chronological age is the defining element of liability, it is not the only element.

Another added, but underappreciated, dimension of imposing a mens rea requirement arises with regard to actors with cognitive disabilities. Such persons may have cognitive capacities that render them less sophisticated judges of age, as well as more likely to perceive as a peer a person who in fact is significantly younger. If a cognitively typical 15-year-old becomes willingly sexually involved with a 22-year-old with cognitive disabilities—disabilities that make the 22-year-old a de facto intellectual, emotional, or social peer of the 15-year-old, whom the actor believed to be age-appropriate—then it seems arbitrary to punish the 22-year-old. A recklessness standard requires the government to prove that the actor had at least subjective awareness of a substantial, unjustifiable risk of the other person’s age falling within the statutory range, and of an age gap. Mens rea also ensures that aiders and abettors are held responsible only for assisting in acts that the aider and abettor intended to be unlawful.

Indeed, the judicial decisions that uphold strict liability sound in rationales that no longer pass muster today. For instance, in Owens v. State, the Maryland Supreme Court upheld strict liability on the grounds that there was no constitutional right to engage in extramarital sexual activity, and that jurisdictions have laws against bigamy and fornication. But Lawrence v. Texas has since affirmed a constitutional right to some private consensual sexual activity outside of marriage, and most jurisdictions either have wiped adultery and fornication statutes from their

38 Elizabeth Nevins-Saunders, Incomprehensible Crimes: Defendants with Mental Retardation Charged with Statutory Rape, 85 N.Y.U. L. REV. 1067, 1129 (2010); see Carpenter, supra note 15, at 344 (describing the case of Raymond Garnett, a 20-year-old cognitively disabled man convicted of statutory rape of a 13-year-old girl, who was precluded from arguing that he reasonably believed her to be 16).

39 See United States v. Encarnación-Ruiz, 787 F.3d 581, 596 (1st Cir. 2015) (applying Rosemond v. United States, 572 U.S. 65 (2014), to hold that the government must prove that a defendant charged with aiding and abetting child pornography for filming his friend knew the minor’s age at the time of filming).

40 724 A.2d 43 (Md. 1999).

41 Id. at 53.

42 See Lawrence v. Texas, 539 U.S. 558, 585 (2003); cf. Arnold H. Loewy, Statutory Rape in a Post Lawrence World, 58 SMU L. REV. 77, 77 (2005) (“Lawrence should provide a constitutional defense for an individual who engages in sexual intercourse with a person that he non-negligently believes is an adult.”).
books or do not enforce them in part because they are unconstitutional. Moreover, the fundamental holding of *Lawrence* that affirms a constitutional right to consensual sexual activity between adults underscores the error of punishing a person who is unaware that a sexual partner is not an adult.

For these reasons, Section 213.8 requires proof of a culpable mental state for all statutory offenses. It also reaches beyond existing law and the 1962 Code to impose this requirement as an element of the offense, requiring proof beyond a reasonable doubt by the prosecution, rather than as an affirmative defense. Specifically, the offenses defined in Section 213.8 all require proof of at least the actor’s recklessness—that the actor was aware of, yet recklessly disregarded, a substantial and unjustifiable risk that the complainant was the requisite age for culpability, and that any pertinent age gap existed.

**Grading – General Considerations.** The breadth of interests protected by statutory-rape laws is reflected in the range of punishments imposed for their violation. At one extreme, an adult who sexually abuses a young child merits the most serious of punishments. Such offenses are difficult to detect, the harm caused to the victim is often lasting and severe, and the community opprobrium is high. At the other extreme, an adult who engages in a nominally consensual, if exploitative, sexual relationship with an older minor violates community norms and is a worthy target of deterrence, but is a less appropriate subject for extreme penalties. The constellation of scenarios covered by statutory-rape laws complicates the imposition of punishment just as it complicates the line-drawing exercise for substantive liability.

Grading of the offenses described in Section 213.8 is guided by several key principles. First, at their core, statutory-offense laws are ineffective-consent laws. That is, a sexual act with a minor that involves force, coercion, exploitation, a victim vulnerable for reasons other than age, or evident nonconsent remains subject to the serious penalties prescribed for those offenses in other Sections of Article 213. Section 213.8 applies when those added circumstances are absent.

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43 See, e.g., Alyssa Miller, *Punishing Passion: A Comparative Analysis of Adultery Laws in the United States of America and Taiwan and their Effects on Women*, 41 FORDHAM INT’L L.J. 425, 428, 434 (2018) (noting that adultery was penalized as a capital offense in puritan New England, but now only 20 states have adultery laws on the books, and they are rarely enforced).

44 See, e.g., Carpenter, supra note 15 (arguing that *Lawrence* affirms that public welfare model for statutory rape no longer fits to justify imposition of strict liability).
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But, of course, the absence of these aggravators carries different meaning in different contexts. Grown adults who sexually abuse young minors may have no need to use force or coercion to obtain sexual submission. But inquiring into that child’s consent to the sexual act—or requiring proof of nonconsent—is absurd. A young minor cannot be construed as even nominally consenting to a parent’s sexual advances or the advances of an adult. Moreover, the state’s interest is at its apex when it comes to protecting young minors from inappropriate sexual interest on the part of adults. It is therefore apt to analogize sexual acts between adults and young minors as akin to sexual acts done by force or coercion; the age differential stands in place of overt physical or psychological domination.

The same logic extends to sexual acts between parents and those in a parental role and minors in their care. In such situations, consent is inapposite, even as regards an older minor. A minor cannot reasonably be said to consent to sexual activity when that activity is with a parental figure or guardian. The state’s interest in protecting the minor from exploitation within the family structure and in maintaining the integrity and security of the family as a place of development and maturation justifies imposition of high penalties for those who exploit their special access to a vulnerable minor.

In contrast, sexual activity engaged in willingly by older minors of considerable maturity, even if ill-advised, does not warrant as draconian a response. Unlike younger minors, who may not even possess the autonomy and maturity to understand their capacity to consent or to withhold consent from any sexual overtures, older minors have more developed understandings of their sexuality. Acts with older minors that lack consent as defined by Section 213.0(2)(d) are more appropriately punishable under Section 213.6 or other Sections of Article 213. In relation to older minors, therefore, Section 213.8 makes a distinctive difference in situations in which the minor engaged with apparent willingness (excepting the provisions of Section 213.8(2) and (3)). Although the state maintains an interest in discouraging and deterring such acts, as discussed in the Sections regarding the imposition of substantive liability, the necessary degree of deterrence and harm prevention for such nominally consensual encounters merits a much less serious penalty.

Lastly, as with defining the scope of substantive liability, assessing the proper penalty requires attentiveness not just to the age of the complainant, but also the age of the actor. Many states now formally recognize that peers may engage in sexual exploration, even at tender years, and thus decline to punish such activity when committed by minors against others of the same
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approximate age.45 A minor who engages in inappropriate sexual activity with a much younger minor may cause as serious a harm to that minor as would an adult actor, but the state’s interest in punishment in the two cases differs. While the need to protect young minors from the sexual advances of older minors justifies proscribing such behavior, the associated penalty should aim less for retribution and more for deterrence and rehabilitation given the plasticity of the minor’s mind and the minor’s own sexual immaturity.46

Current law recognizes these considerations in affixing penalties, even as there exists very little consensus as to the appropriate penalties for any particular offense. At the broadest level, as one scholar observed, often “the classification of the crime as a misdemeanor or felony will depend on the relative age of the victim and perpetrator.”47 For instance, “some states … have applied less serious punishment when committed by a perpetrator whose age differential is less than three or four years from the victim or when both perpetrator and victim are below the recognized age of consent. The resulting classifications affect the grading of the offense and punishment of the perpetrator.”48 Jurisdictions also draw both substantive and grading distinctions, foreclosing liability altogether for actors within peer range, and grading actors just outside that range with lesser severity than actors much older.49 Section 213.8 follows this pattern and imposes tiers of liability based on the age of the complainant, the age of the perpetrator, and the difference in ages between them. It reserves the most severe penalties for adults who sexually engage young minors and for parental figures who abuse their roles. But it departs from current law in prescribing significantly less severe penalties for adults who engage in nominally consensual activity with older minors, as well as for older minors who engage in sexual behavior with age-inappropriate younger minors.

In sum, Section 213.8(1) addresses complainants under the age of 16 and imposes three tiers of liability based on the complainant’s age, the actor’s age, and the age gap between them.

45 Carpenter, supra note 15, at 340-341.

46 See Chelsea Leach et al., Testing the Sexually Abused-Sexual Abuser Hypothesis: A Prospective Longitudinal Birth Cohort Study, 51 CHILD ABUSE & NEGLECT 144, 144, 150-151 (2016) (reporting lack of correlation between sexual-abuse history and later sexually abusive behavior in a prospective study, but noting that studies of sexual offenders show rates of history of abuse at around 70 percent—suggesting that most maltreated children do not become abusive, but that most abusive adults were maltreated); see also infra Reporters’ Notes, note 4.

47 Carpenter, supra note 15, at 339.

48 Id. at 341; see also infra Reporters’ Notes, note 3.

49 See infra Reporters’ Notes, note 3.
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Section 213.8(2) penalizes sexual acts committed by parents and grandparents, with a broad definition of those roles that is meant to encompass all those who functionally or formally assume a parental role. Section 213.8(3) prohibits sexual activity when the actor is in a role of authority, even where the complainant is otherwise beyond the age of consent. Section 213.8(4) imposes tiers of heightened punishment for acts of sexual contact—namely, fondling of genitals, that is especially intrusive in nature, and Section 213.8(5) and (6) imposes punishment for sexual contact with minors short of sexual penetration, oral sex, or fondling.

1. Sexual Assault of a Minor – Section 213.8(1)

The judgment that all sexual penetration with a young child should be treated as rape, even in the presence of nominal consent, was first given statutory expression during the reign of Elizabeth I.50 The offense has been known colloquially as “statutory” rape ever since.

Originally, the law equated this form of sexual penetration with forcible rape only when the child was younger than 10 years old51 and female.52 Intercourse with an older child was not considered a crime unless the strict requirements of force and resistance had been met. Sexual abuse of young boys by men was covered by general laws prohibiting “sodomy” or “deviate sexual intercourse”; however, “seduction of young boys and male adolescents by older females” was considered “neither to be the serious problem of the other forms of sexual conduct, absent force, nor likely to have the same adverse effects on the victim,”53 and thus was not regulated.

By the mid-20th century, all American jurisdictions had raised the age of consent from 10, though in many instances only by one or two years.54 At the other end of the spectrum, some states raised the age of consent to 17 or even 18.55 Jurisdictions also began to draft statutes that applied to actors without regard to gender,56 that addressed a broader range of sexual imposition than simply vaginal intercourse, and that punished without regard to the gender of the complainant.

50 18 Eliz. c. 7, § 4 (1576).
51 BLACKSTONE, supra note 5, at *212.
52 MODEL PENAL CODE Section 213.1 Comment at 334 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980) (“Traditionally, the law of rape punished only male aggression against females.”).
53 Id. at 338-339.
54 Id. at 324-325.
55 See, e.g., CAL. PENAL CODE § 261.5(a) (Deering 2020) (setting the age of consent at 18); N.Y. PENAL LAW § 130.05(3)(a) (Consol. 2019) (setting the age of consent at 17).
56 MODEL PENAL CODE Section 213.1 Comment at 334-339 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980). This change occurred even though the Supreme Court upheld the gender-specific
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All states now punish intercourse with young minors, but in the case of intercourse with older minors (e.g., those above the age of puberty) few jurisdictions treat such conduct as equivalent in seriousness to intercourse with a young child. Instead, most states follow one of three intermediate approaches—either treating intercourse with an older minor as a crime only when the perpetrator is significantly older; treating all intercourse with an older minor as a prohibited but less serious offense; or combining the first two approaches by grading the seriousness of intercourse with an older minor on the basis of the age of both the victim and the perpetrator.57

These gradations reflect contemporary views that distinguish between sex with minors who are too young to consent at all, and sex with minors who may lawfully consent to sex with peers. It also reflects the current sensibility that distinguishes between what might popularly be called “child sexual abuse” and “statutory rape.” Many jurisdictions treat the former as among the most serious offenses in the penal code, because any suggestion of consent is untenable. In contrast, the latter is viewed with greater leniency, as the minor has reached sufficient maturity to consent in some circumstances, even if not to a partner of much greater years.

The difficulty lies in the need of the law to draw a precise line between these two situations. Determining where to draw that line requires attention to the age of both the complainant and the actor, as well as the rationales that animate the distinction. Generally speaking, contemporary age-based restrictions on sexual activity find justification in three related objectives: the prevention of pregnancy; the desire to protect minors from a potentially intense emotional involvement for which they are not yet prepared; and the protection of minors from intimidation, sexual exploitation, or unwanted intimacy. But the degree to which these purposes are implicated varies considerably on the basis of the ages of complainants and perpetrators. Young minors generally lack the maturity and independence to give meaningful consent to sexual intercourse, and society, with good reason, considers sexual interest in them on the part of older minors and adults as unacceptable and

57 See, e.g., CAL. PENAL CODE § 261.5(b)-(c) (Deering 2020) (categorizing the offense as a misdemeanor when the victim is less than three years younger than the perpetrator, but setting four-year maximum sentence when the age difference is greater than three years); N.Y. PENAL LAW §§ 70.00(2)(c), 70.15(1), 130.20-35 (Consol. 2019) (treating the offense as first-degree rape (with a 25-year maximum prison sentence) when the victim is under 11, or when the victim is under 13 and the actor is 18 or older; second-degree rape (seven-year maximum) when the victim is under 15 and the perpetrator is at least four years older; third-degree rape (four-year maximum) when the victim is under 17 and the perpetrator is at least 21; and a misdemeanor (one-year maximum) in all other instances involving a victim under the age of 17).
dangerous. Older minors may have the capacity to consent to peers, yet require protection from predatory adults. The oldest minors may have the legal right to consent to almost any person of their choosing—even if such a decision is viewed as unwise—and yet still merit protection from adult actors who exploit special relationships, such as a sexually abusive parent or an authority figure.

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

**a. Minors Younger Than 12 Years Old**

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

Sexual intercourse with a 10- or 11-year-old child was therefore treated as a criminal offense only at a lesser level of severity and even then only when the actor was at least 16 years old.

It now seems clear that this judgment—treating sexual intercourse with a child as the most serious form of rape only when the victim was under 10—gives inadequate weight to the gravity and frequency of sexual abuse of very young minors by adults. To be sure, the medical evidence

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58 **MODEL PENAL CODE** Section 213.1 Comment at 329 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980). In cases involving children under 10, the actor would nonetheless have to be at least 16 to be held criminally responsible. See **MODEL PENAL CODE** § 4.10(1) (AM. L. INST., Proposed Official Draft 1962) (setting the age of criminal responsibility at 16); see also **MODEL PENAL CODE** Section 213.1 Comment at 341 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980) (“Section 213.1 [sets] the age of consent at 10 in Subsection (1)(d), which in combination with Section 4.10 effectively precludes conviction of rape without at least a 6-year age differential between the actor and the victim.”).

59 See **MODEL PENAL CODE** Section 213.3(1)(a) (AM. L. INST., Proposed Official Draft 1962).
suggests that the median age for onset of puberty is now lower than it was at the time of the 1962
Code.60 As a result, it seems safe to conclude that today many minors aged 10 and 11 will have
reached puberty. Nonetheless, the number of 10- and 11-year-olds who remain pre-pubescent is
undoubtedly substantial.61 Moreover, while puberty may be viewed as an important milestone for
judging the propriety of criminalizing sexual activities among peers, it has little bearing on the
propriety of adult sexual interest in young minors. A post-pubescent 11-year-old is no more an
appropriate sexual partner for an actor 20 years older than a pre-pubescent 11-year-old. Indeed,
less than one percent of girls and two percent of boys aged 11 years or younger report having had
sex; only five percent of girls and 10 percent of boys 14 years and younger have had sex.62
Moreover, 62 percent of girls who had sex by their 10th birthday describe the sex as
nonconsensual, as compared with 50 percent of those who had sex by 11 and 23 percent of those
who had sex by 12.63 The extraordinary gravity of exposing young minors to sexual experience
must weigh heavily in any judgment about the age below which sexual penetration by a person
outside the complainant’s peer group should be treated as presumptively unacceptable and
dangerous.

But just as there is greater appreciation of the dangers of sexual abuse of young minors by
adults, there is also greater awareness and tolerance of sexual behavior among peers. Minors of all
ages are increasingly exposed to sexual content from an early age, through social media, games,
access to the internet, or popular entertainment.64 As a result, even very young minors may engage

60 See Marcia E. Herman-Giddens et al., Secondary Sexual Characteristics and Menses in Young Girls Seen
in Office Practice: A Study from the Pediatric Research in Office Settings Network, 99 PEDIATRICS 505, 508-509
(1997) [hereinafter Young Girls] (reporting the mean age of onset of breast development as 8.87 for African American
girls and 9.96 for White girls, and of menses as 12.16 and 12.88 in African American and White girls, respectively);
Peter A. Lee et al., Age of Puberty: Data from the United States of America, 109 APMIS 81, 83 tbl.1 (2001); see also
Elizabeth Weil, Puberty Before Age 10: A New “Normal”? (N.Y. TIMES), Mar. 30, 2012,
https://www.nytimes.com/2012/04/01/magazine/puberty-before-age-10-a-new-normal.html. The age of puberty has
also decreased for boys, and is 9 to 10 for genital development and 10 to 11 for pubic hair. Marcia E. Herman-Giddens
et al., Secondary Sexual Characteristics in Boys: Data from the Pediatric Research in Office Settings Network, 130
PEDIATRICS e1058, e1058 (2012).

61 Herman-Giddens et al., Young Girls, supra note 60, at 505.

62 Lawrence B. Finer & Jesse M. Philbin, Sexual Initiation, Contraceptive Use, and Pregnancy Among Young
Adolescents, 131 PEDIATRICS 886, 888 tbl.1 (2013).

63 Id. at 888 tbl.1.

64 Research indicates that children and youth have increasing exposure to sexual content through games,
media, and the internet, and that exposure to sexual content in media affects youths’ beliefs and actions about sex. See
Rebecca L. Collins et al., Sexual Media and Childhood Well-being and Health, 140 PEDIATRICS S162, S164 (2017)
(reporting that 42 percent of 10- to 17-year-olds have seen pornography online, although only 27 percent report
in exploratory sexual behaviors with peers. Such developmentally ordinary acts are not the proper subject of the criminal law.

The goal, therefore, is to prevent sexual exploitation of minors without imposing unjustifiably harsh punishments upon minors engaged in sexual exploration, whether age-appropriate or not. Although hard lines can create abrupt breaks in liability, they are necessary to mitigate the potential for arbitrary selective enforcement. For instance, if two same-aged minor participants engage in nominally consensual activity, then in the absence of a statutory scheme that requires age gaps, a prosecutor could choose to treat one as a “victim” and one as a “perpetrator.” Where the alleged conduct involves force, coercion, or other indicia of lack of consent, such distinctions are defensible. But when age peers both fall within the protected class, and both are engaging in the sexual behavior willingly, any designation of “victim” and “accused” is unprincipled. Similarly, without differentiating on the basis of age gaps, a minor who engages in sexually inappropriate behavior would be equated to a mature adult.

For these reasons, Section 213.8(1) rejects the 1962 Code’s choice of age 10 as the critical demarcation and instead, in accord with the approach currently common in American law, sets 12 as the first pertinent threshold. In order to provide a safe harbor for peer-to-peer, nominally consensual activity, Section 213.8(1) makes explicit that the actor must be more than five years older than the minor. This element works in tandem with Section 213.0(2)(f), which makes clear that an actor must be a person more than 12 years of age.

In operation, this five-year age-gap requirement imposes liability for any actor 17 years or older who engages in an act of sexual penetration or oral sex with a minor 12 or younger. For intentionally viewing it, as compared to 54 percent of 15- to 18-year-old boys and 17 percent of 15- to 18-year-old girls).

65 Nancy Kellogg, The Evaluation of Sexual Abuse in Children, 116 PEDIATRICS 506, 507 (2005) (“[W]hen young children at the same developmental stage are looking at or touching each other’s genitalia because of mutual interest, without coercion or intrusion of the body, this is considered normal (ie, nonabusive) behavior.”); see also Section 213.0(2)(f), Comment – actor over 12.

66 See, e.g., In re D.B., 950 N.E.2d 528, 533 (Ohio 2011) (“But when two children under the age of 13 engage in sexual conduct with each other, each child is both an offender and a victim, and the distinction between those two terms breaks down.”). But see United States v. JDT, 762 F.3d 984, 996-999 (9th Cir. 2014) (rejecting the defendant’s argument that a statute that allows for prosecution of a 10-year-old while identifying a child under 12 as a “protected party” is inherently unconstitutionally vague).

67 See infra Reporters’ Notes, note 2; see also U.S. DEP’T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, NCJ 178238, STATE LEGISLATORS’ HANDBOOK FOR STATUTORY RAPE ISSUES 2 (2000) (surveying state statutory rape laws to determine the trends of “[r]aising the age of the minor who is subject to protection by the law” and “impos[ing] age gaps”).
actors younger than 17 but older than 12, liability will turn on whether the five-year age gap is proved. For example, a 12½-year-old actor may be held responsible for sexual acts with a complainant younger than 7½ years of age, but not if the 12½-year-old engages in nominally consensual sexual activity with a 10-year-old. It is also important to note that, applying Section 4.10, cases involving actors under the age of 16—if adjudicated formally at all—are expected to be handled by juvenile courts rather than by an adult criminal conviction.

b. **Minors at Least 12 Years Old but Younger Than 16 Years Old**

The 1962 Code imposed liability for a third-degree felony for actors who engaged in “sexual intercourse” or “deviate sexual intercourse” with a person under the age of 16, if the actor was four or more years older. The 1962 Code set the general age of consent at 16; thus persons 16 years or more had the capacity to give valid consent, regardless of the age of their partner unless the actor was a guardian or “otherwise responsible for [the Complainant’s] welfare.”

Section 213.8(1) carries over the sensibility that 16 is the appropriate age of consent, in the absence of incest or an abuse of power. It also largely mirrors the substantive provisions of the 1962 Code by requiring an age gap before the imposition of liability, although it sets the minimum gap as more than five years, rather than four. The decision to increase the gap from four to five years is consistent with, although not dominant in, existing law. It also mirrors typical structures of American socialization, such as the educational system: An age-gap threshold at only four years would expose an 18-year-and-two-month-old to criminal liability for engaging in consensual sexual activity with a 14-year-and-one-month-old— even though the two are respectively a senior and freshman in high school.

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68 MODEL PENAL CODE Section 213.3(1)(a), (2) (AM. L. INST., Proposed Official Draft 1962).

69 Id. Section 213.3(1)(b). That offense was graded as a misdemeanor. Id. Section 213.3(2).

70 See, e.g., HAW. REV. STAT. § 707-732(1)(c)(i), (2) (2019) (penalizing sexual penetration of a person 14 to 16 years of age by a person five or more years older as a class C felony); KY. REV. STAT. ANN. § 510.090(1)(a)-(b) (LexisNexis 2019) (penalizing oral and anal penetration by an actor 21 or older with a person less than 16, or by an actor at least 10 years older than a person 16 or 17); ME. REV. STAT. ANN. tit. 17-A, § 254(1)(A) (LexisNexis 2019) (penalizing sexual acts as a class D crime when with a person 14 or 15 years old where the actor is at least five years older); cf. CAL. PENAL CODE §§ 286(b), (c)(1), 287(b), (c)(1) (Deering 2020) (punishing anal penetration and oral sex of any person under 18 as a misdemeanor, but elevating the offense to a low-level felony where the complainant is under 16 and the actor is over 21, and as a three-to-eight-year offense where the complainant is under 14 and the actor is more than 10 years older); MASS. ANN. LAWS ch. 265, § 23A (LexisNexis 2020) (punishing sexual penetration of a child under 16, either with a five-year gap for complainants under 12, or a 10-year gap for complainants aged 12 through 15).
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In the era when the 1962 Code was drafted, sexual activity by adolescents under 18 was widely disapproved, both in principle and in light of the undeniable risk of pregnancy entailed in such encounters. The Institute nonetheless judged that sexual experimentation among adolescents was so widespread that it could not be viewed as per se aberrational, victimizing, or exceptionally dangerous to an extent warranting deterrence through criminal sanctions:

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

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

The social facts underlying this 1962 assessment certainly are no less applicable today, and jurisdictions have widely followed the Code’s recommendation to criminalize adolescent sexual activity only when there is a substantial age difference between the parties. Minors at least 12 years old typically have attained sufficient maturity that the law deems them capable of consent in certain situations—specifically, with age-appropriate peers. But the law also deems it worthwhile to protect such minors from potentially predatory relationships, even if those relationships are nominally consensual.

In operation, Section 213.8(1), by applying to minors younger than 16 and imposing a five-year age gap, effectively criminalizes nominally consensual sexual acts between 12-year-olds and actors 17 years old or older at one extreme, and sexual activity between 15-year-olds and actors 20 years old or older at the other extreme. Section 213.8(1) contains a marriage exception because, in some jurisdictions, persons aged 12 to 15 may in fact be lawfully married; thus, marriage

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72 See id. at 341 & n.181; see also Carpenter, supra note 15, at 334-357 (collecting and analyzing contemporary state laws governing statutory rape). But see Colin Campbell, Annotation, Mistake or Lack of Information as to Victim’s Age as Defense to Statutory Rape, 46 A.L.R. 5th 499, 510-513 (1997) (listing the 28 states that impose strict liability for statutory rape regardless of the age of the actor).
exceptions are commonly found in statutes that define liability solely with reference to the age of
the parties. Although ample policy reasons counsel against permitting minors to marry even with
parental consent, that policy judgment lies outside the boundaries of this Article 213 revision.
Accordingly, in a state that permits a minor to marry, it would be anomalous for the criminal law
to penalize sexual intimacy between spouses.

Illustration:

1. Complainant, who is 14, enjoys multi-player online video games that include
catches amongst the players. Complainant meets another player, Accused, online and begins
a friendship. Complainant tells Accused that Complainant is 14, and Accused admits to
being 58. One day, Complainant confesses in the chat to having developed a “crush” on
Accused, and Accused expresses reciprocal feelings. Complainant and Accused agree to
meet at a nearby hotel for a sexual encounter involving sexual penetration and oral sex.
The encounter occurs as planned, but afterwards Complainant’s parents learn of the event
and report it to the police. These facts, if proven beyond a reasonable doubt, permit a
finding that Accused violated Section 213.8(1). Accused knows that Complainant is 14,
and that Accused is 58, and that there are more than five years between them. Complainant’s

73 See, e.g., COLO. REV. STAT. § 18-3-402(1)(d)-(e) (2018) (defining sexual penetration as sexual assault
where the actor “is not the spouse of the victim” only where the victim is less than 15 and the actor is at least four
years older or where the victim is 15 to 17 and the actor is at least 10 years older); ME. REV. STAT. ANN. tit. 17-A,
§ 253(1)(B) (LexisNexis 2019) (defining gross sexual assault as a Class A crime where the victim is younger than 14
and is “not the actor’s spouse”).

74 See, e.g., Pamela E. Beatse, Marital Rights for Teens: Judicial Intervention that Properly Balances Privacy
and Protection, 2009 UTAH L. REV. 625, 627 & n.8 (2009) (citing studies that show early marriages are less stable);
Vivian E. Hamilton, The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage, 92 B.U.
L. REV. 1817, 1844-1850 (2012) (surveying adverse effects of early marriage, and noting that 80 percent of marriages
entered into by those in their mid-teens end in divorce).

75 See Beatse, supra note 74, at 628-629 (noting that 18 is the minimum age of consent for marriage in most
states, but a majority of states also allow minors younger than 18 to marry with judicial consent in addition to parental
permission).

76 One court has held, however, that the license to engage in sexual activity with a minor otherwise protected
under statutory-rape law extends only to the spouse; if the minor divorces or engages in consensual extramarital sexual
activity, the non-spousal actor may still be punished. See State v. Huntsman, 204 P.2d 448, 451 (Utah 1949) (affirming
conviction of an adult man for consensual intercourse with a 17-year-old legally married to another man, stating that
“[t]he fact that a female under that age is capable of consenting to marriage does not indicate that she can consent to
illicit sexual intercourse, nor does the fact that by marriage she is capable of consenting to intercourse with her husband
indicate that she is capable of consenting to illicit intercourse with another person”).
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consent to the encounter is irrelevant. Because Accused is older than 21, the offense would be graded as a fourth-degree felony.

Notably, Section 213.8(1) may also apply in cases in which a minor’s response to the unwanted sexual overtures of an older person is ambiguous—such as frozen immobility, tacit compliance, or other ambiguous conduct on the part of the minor. While such responses may, in the context of all the circumstances, satisfy the requirement of the element of lack of consent under Section 213.6, it is also possible that such proof could fail to satisfy the factfinder beyond a reasonable doubt. In addition, even if the factfinder viewed the evidence as establishing the minor’s lack of consent, it might still fail to meet the requirements of Section 213.6 because the actor raises a reasonable doubt about the actor’s awareness of a substantial risk that the minor was not consenting (even if a reasonable person would have known). Section 213.8(1) renders the absence of consent irrelevant to the actor’s liability, based on a legislative judgment that the age difference precludes the minor from having the capacity to give effective consent.

Illustration:

2. Complainant, who is 15, is spending the night at an uncle’s home during a family holiday. Complainant is asleep in the guest room when Uncle, who is 46, enters and slips quietly into the bed. Complainant wakes and says, “What are you doing in here?” Uncle puts a finger over his lips and says, “Shhh.” Uncle then removes Complainant’s pajamas and engages in an act of sexual penetration as Complainant lies passively. The next day, Complainant reports the incident. Uncle contends that the Complainant, to whom he is related by marriage, had been flirting with him throughout the holiday and had invited him to Complainant’s bedroom that night. Complainant denies Uncle’s evidence. Complainant agrees that Complainant never protested the sexual act, but states that the act was wholly uninvited.

If the factfinder believes Complainant, Uncle may be found guilty of a violation of Section 213.6, which prohibits sex without consent. Even though Complainant did not protest or resist the act in any way, Section 213.0(4) stipulates that resistance is not required to find lack of consent. The circumstances of the act—including Complainant’s young age, the age gap between Complainant and Uncle, the fact that the Uncle and Complainant are
related, and Uncle’s furtive and secretive approach, may permit the factfinder to conclude both that the act was without consent and that Uncle was aware of a substantial risk of this. But even if the factfinder determines that the evidence does not meet the requirement of proof beyond a reasonable doubt of lack of consent, Section 213.8(1) permits Uncle to be held guilty on the basis of the Complainant’s age and Uncle’s age. Complainant is 15 years of age, and Uncle is more than five years older. Because Uncle is older than 21, the offense would be punishable as a fourth-degree felony.

c. Grading – Section 213.8(1)

Section 213.8(1) defines three tiers of punishment based on the age of the actor, the age of the complainant, and the age gap between them. In this respect, Section 213.8(1) departs from the 1962 Code.77 The 1962 Code punished all violations of its applicable provisions without regard to the actor’s age in absolute terms: as a first-degree felony for acts of sexual penetration with a female younger than 10,78 as a second-degree felony for acts of “deviate sexual intercourse” with

77 Grading liability based on both the age of the actor and the age of the complainant is common in existing law. For instance, similar to Section 213.8, Nebraska defines “sexual assault of a child in the first degree,” a Class IB felony, as sexual penetration by an actor at least 19 with a child under 12, creating an eight-year gap, or by an actor 25 years or older with a complainant aged 12 to 16, creating a 13-year gap. NEB. REV. STAT. ANN. § 28-319.01(1)-(2) (LexisNexis 2019). Nebraska then defines second- or third-degree sexual assault of a child, a Class II or Class IIIA felony respectively, as sexual contact where an actor is at least 19 and the complainant is under 14. Id. § 28-320.01(1)-(3). Similarly, Georgia defines statutory rape as sex with a person younger than 16, and punishes actors 18 or younger and within four years of a 14- to 16-year-old complainant as a misdemeanor; actors 21 or older with 10 to 20 years’ imprisonment; and all other actors with one to 20 years. GA. CODE ANN. § 16-6-3 (2020); see also id. § 16-6-4(b) (punishing child molestation with five to 20 years’ imprisonment, except that an actor 18 or younger and within four years of a complainant aged 14 to 16 is guilty only of a misdemeanor). In current law, however, gaps of four or fewer years are most common, especially for children under 12. See, e.g., ME. REV. STAT. ANN. tit. 17-A, § 255-A(1)(E-1) (LexisNexis 2019) (“A person is guilty of unlawful sexual contact if . . . [t]he other person . . . is in fact less than 12 years of age and the actor is at least 3 years older.”); MD. CODE ANN., CRIM. LAW § 3-308(b)(2) (LexisNexis 2019) (prohibiting “sexual act[s] with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 4 years older than the victim”). See generally AEQUITAS, RAPE AND SEXUAL ASSAULT ANALYSES AND LAWS, at 110-20 (2014) (surveying state law based on perpetrator-victim age difference). Ten-year gaps more commonly found in statutes that apply to older youths. See, e.g., DEL. CODE ANN. tit. 11, §§ 770(a)(1)-(2), 771(a)(1), 772(a)(2)(g) (2019) (imposing liability for rape in the fourth degree when the actor is over 30 years old and the complainant is between 16 to 18; and for rape in the third degree when the complainant is 14 to 16 and the actor is 10 years older, or the complainant is under 14 and the actor is over 19; and for rape in the second degree for a complainant under 12 and a defendant 18 or older).

Finally, existing law not only grades liability on the basis of age gaps, but also distinguishes criminal and noncriminal behavior that way. See, e.g., COLO. REV. STAT. § 18-3-402(1)(d)-(e) (2018) (punishing sexual penetration when the complainant is less than 15 years of age and the actor is four or more years older, or when the complainant is at least 15 but under 17 and the actor is 10 years older, but not punishing the same acts when the actor within 10 years of the victim’s age).

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a female younger than 10,\textsuperscript{79} and as a third-degree felony for either kind of sexual act with a female younger than 16, when the male actor was at least four years older.\textsuperscript{80} Under the 1962 Code, therefore, an 18-year-old high school student who had a consensual sexual relationship with a 13-year-old was exposed to the same degree of liability as a 56-year-old adult in the same sexual relationship.

Section 213.8(1), in contrast, punishes sexual activity differently on the basis of the age of the actor and of the complainant. It starts from the premise that adults who sexually abuse minors younger than 12 deserve the most serious punishments, at a level akin to actors who obtain sexual submission by use of force. Section 213.8(1) reflects this judgment by punishing acts by actors 21 years old or older with complainants younger than 12 as a third-degree felony and a registrable offense, and acts by actors more than 21 years old with complainants between 12 and 16 years old as a fourth-degree felony. The combined effect of these provisions is to reserve the harshest penalties for adult actors who engage in sexual activity with minors significantly younger, including young minors.

The third avenue of liability gives special consideration to actors between 12 and 21 years old. At one end of the continuum, some sexual activity by actors within this age range is not punishable at all by Section 213.8(1). Peer sexual activity with minors within five years of age is unpunished in Section 213.8(1). At the other end of the continuum, a young actor who engages in sexual activity with very young complainants is liable, as is an actor nearing 21 who engages in sexual activity with minors nearing the age of consent. Under Section 213.8(1), both sets of actors are punishable with a felony in the fifth degree. Thus, for example, a 12-year-old actor who engages in sexual activity with a child aged seven or younger is eligible for a fifth-degree felony (rather than the more serious third-degree penalty that would have applied if the actor were 21 or older), as is a 20-year-old actor who engages in sexual activity with a minor 12 to 15 years old (rather than the more serious fourth-degree penalty that would apply were the actor over 21). The requirement that the actor be 21 years old or younger thus ensures a diminished punishment for the two least culpable categories of actors: actors within close range of complainants nearing the

\textsuperscript{79} Id. Section 213.2(1)(d).

\textsuperscript{80} Id. Section 213.3(1)(a), (2).
There are several reasons to single out actors younger than 21 for distinctive treatment. Actors 21 or younger who engage in sexual activity with minors nearing the age of consent may be making ill-advised choices, or exploiting the immaturity of the other person for the actor’s sexual benefit. But the minor complainant retains far greater agency and autonomy when dealing with a slightly older person as compared to a much older adult. A 20-year-old who engages in a sexual relationship with a 14-year-old deserves punishment, but not to the same degree as a 40-year-old undertaking the same activity. Reducing the applicable punishment from a fourth-degree felony to a fifth-degree felony when the actor is 21 or younger acknowledges both the relative sexual maturity of older minors, who are thus more likely to have engaged in the activity with nominal willingness, as well as the diminished culpability of an actor who engages in an encounter that at least carries the patina of consent. It also pays heed to the inherent arbitrariness of age-based statutes, which by necessity create abrupt breaks in liability. Under the terms of Section 213.8, for instance, a 20¾-year-old who has consensual sex with a 15½-year-old is liable for a fifth-degree felony, while a 50-year-old who has consensual sex with a 16-year-old is not liable for any offense. Although the actor bears responsibility for seeking an inappropriately young sexual partner, and thus is an appropriate target for deterrence and condemnation, the degree of deviance suggested by such selection diminishes as the gap between the complainant and actor shrinks.

Similarly, actors younger than 21 who engage in prohibited sexual acts with minors younger than 12, while proper subjects of deterrence and punishment, should also be treated much less harshly than fully mature adults who engage in the same abuse. Minors who engage in inappropriate sexual conduct may be engaging in misguided but nonmalicious sexual exploration or mimicking their own prior experiences of abuse.81 Actors who are themselves within the range of puberty may be juggling their own understandings of the proper bounds of sexual activity and may have both less experience and less capacity controlling sexual impulses. They are also still within the period of maturation and sexual development, and therefore have a greater capacity for

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81 See infra notes 186-187 and accompanying text.
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The minor’s motivations may derive from a constellation of factors ranging from purely exploitative sexual abuse to sexual curiosity to a misguided romance. Although such behavior deserves both deterrence and condemnation, it is not equivalent to the same acts of misconduct committed by a sexually mature adult against a young child. A fifth-degree felony is an appropriate punishment for an actor younger than 21 who engages in sexual activity with another minor more than five years younger, even if that person is very young.

Finally, actors younger than 12 who engage in intimate sexual activity with other minors may be worthy subjects of state interest, such as if the other minor is significantly younger. But Section 213.8(1), along with Section 213.0(2)(f), reflect the judgment that, absent allegations of conduct involving aggravated physical force or restraint, the state’s interests are adequately served through the family-law system (such as abuse and neglect or child-in-need-of-supervision petitions) or mental-health and community-based programs, not through juvenile-justice or criminal-justice courts.

Illustrations:

3. Complainant, who is nine years and 10 months old, lives next door to Accused, who is 32 years old. Accused knows that Complainant is under 12 years old, and that Accused is more than four years older. Complainant’s parent is friendly with Accused, and on occasion relies on Accused to provide child care. One day, Accused and Complainant are sitting on Accused’s couch playing video games when Accused says, “Let me show you something that feels really good.” Accused removes Complainant’s shorts and performs oral sex on Complainant. Based on these facts, Accused could be found guilty of a violation of Section 213.8(1). Because Complainant is younger than 12 and Accused is over 21, the offense is punishable as a third-degree felony.

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82 See infra Reporters’ Notes, note 4.
83 Section 213.0(2)(f) expressly exempts charges under Section 213.1 from the requirement that an actor be more than 12 years of age.
84 See NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES 323 (Jeremy Travis et al. eds., 2014) (“Principles for the restrained use of punishment—similar to the values of crime control and offender accountability—have deep roots in normative theories of jurisprudence and social policy.”). See generally JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007) (critiquing the resort to penal sanctions in the United States to address all social ills).
4. Same facts as in Illustration 3, except that Accused is a 15-year-old teen. Accused knows that Complainant is under 12, and Accused is more than five years older. Because Accused is younger than 21, the offense is punishable as a fifth-degree felony. Under Section 4.10, the offense is intended for adjudication in juvenile court.

5. Same facts as in Illustration 3, except that Accused is 13 years and six days old. The act is not punishable under Section 213.8(1), because the nine-year-old complainant is within five years of the age of the actor, and there must be more than a five-year age gap. Such incidents are left to the social-welfare system and other nonpunitive responses.

6. Same facts as in Illustration 3, except that Complainant is 14 years old. Accused knows that Complainant is 14, and that Accused is 32. The offense is punishable as a felony of the fourth degree, because Accused is over 21 and more than five years older than Complainant, and Complainant is older than 12 but younger than 16.

7. Complainant, a 15½-year-old sophomore in high school, attends a party at the college fraternity of Complainant’s brother. Complainant gets into a long conversation with Accused, a college student who is 20 years and 8 months old, during which Complainant confesses to being 15. Accused invites Complainant up to Accused’s room, where the two engage in mutually desired sexual activity, including sexual penetration. When Complainant returns home at the end of the weekend, Accused and Complainant begin an email correspondence. Complainant’s parents find the correspondence and report the relationship to the local authorities. Based on these facts, Accused could be found guilty of a violation of Section 213.8(1). Complainant is between 12 and 16 years of age, and Accused is more than five years older; Complainant’s nominal consent is irrelevant. Because Accused is younger than 21 years old, the act is punished as fifth-degree felony. In the absence of additional facts, this evidence does not support liability under any other provision of Article 213, as the acts of sexual penetration were consensual.

8. Same facts as in Illustration 7, except that Accused is a 43-year-old professor. Accused may be found guilty of a violation of Section 213.8(1). Because Accused is older than 21, and the Complainant is younger than 16 but older than 12, the offense is punishable as a fourth-degree felony.

Section 213.8(1)(c) requires that the actor know or recklessly disregard a risk that the complainant was younger than 16 and that the actor is more than five years older. An actor must
also be proven reckless as to more specific age thresholds in order to enhance the punishment. Therefore, an actor who reasonably believed the complainant to be older than 12 is relieved of liability under the enhanced provision, even though the actor may be liable for an offense under a different subsection. Of course, an actor may assert a belief that a complainant was 12 years or older, but the factfinder can reject that assertion if the factfinder thinks that the evidence proves beyond a reasonable doubt that the actor was aware of a substantial and unjustifiable risk that the complainant was in fact under 12.

Illustrations:

9. Accused, a 17-year-old student, is attending a middle-school sporting event when Accused encounters Complainant, who is 11 years and 10 months old. Complainant, who is tall and looks much older than 11, tells Accused that Complainant is 13 and a student at the school. Accused and Complainant go to a secluded area under the stadium to talk and engage in sexual activity, but they are interrupted by Complainant’s sibling, who finds them and yells at Accused, “[Complainant] is only 11! What are you doing!?” Complainant’s sibling reports the incident to the police. Based on these facts, the factfinder could not find Accused guilty under Section 213.8(1). Although Accused is more than five years older than Complainant, and Complainant is under 12, Accused was not aware of a substantial, unjustifiable risk that Complainant is under 12, given Complainant’s statement, appearance, and the location where they met, as well as the absence of evidence that would have alerted Accused to a risk to the contrary. Under the facts as Accused believed them, Complainant was 13 (thus over 12 years old), and at most four years younger than Accused. Section 213.8(1) does not penalize sexual activity between minors within five years of one another’s age.

10. Same facts as in Illustration 9, except that Accused is 36. Accused may be found guilty of a violation of Section 213.8(1). Even if Accused believed Complainant to be 13, Accused knows that Complainant is younger than 16 years old and more than five years younger than Accused. However, Accused cannot be found guilty of the third-degree felony offense. Accused is older than 21, and Complainant is younger than 12, but in the absence of additional facts, it cannot be found beyond a reasonable doubt that Accused recklessly disregarded the risk that Complainant was under 12. Accused can be found guilty of a fourth-degree felony, because Accused is more than 21 years old.
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It is important to underscore that the liability provided in Section 213.8 does not relieve liability under Sections 213.1 through 213.6 for actors who engage in nonconsensual sexual activity with minors. In such cases, the prosecution may elect to pursue more serious punishment if any of the aggravating factors of force, coercion, vulnerability, extortion, exploitation, or lack of consent are present.

Illustrations:

11. Accused is the 16-year-old friend of Complainant’s sibling. Accused knows that Complainant is 10 years old. Late one night when Accused is spending the night, Complainant wakes up and finds Accused in Complainant’s room, standing over Complainant’s bed. Complainant, startled, says, “What are you doing here?” Accused silently climbs on top of Complainant and begins to remove Complainant’s pajamas. Complainant struggles to get free and cries out, saying, “Stop! What are you doing?!” but Accused presses down against Complainant to prevent Complainant’s escape, and puts a hand over Complainant’s mouth to stifle Complainant’s protests. Accused sexually penetrates Complainant, who later reports the incident. Based on these facts, Accused may be found guilty of a violation of Section 213.8(1), and punishable for a fifth-degree felony, because Accused is under 21 years old, but more than five years older than Complainant, whom Accused knows to be only 10 years old. But a factfinder may also find Accused guilty of a violation of Section 213.2, since Accused knowingly used physical force or restraint to cause Complainant to submit to an act of sexual penetration, or of Section 213.6, since Accused knowingly engaged in an act of sexual penetration without Complainant’s consent.

12. Same facts as in Illustration 11, except that Accused is 13 and Complainant is 13. There is no basis for liability under Section 213.8(1), because even though Complainant is younger than 16, Accused and Complainant are the same age. But a factfinder may properly find that Accused committed a violation of Section 213.2 (physical force or restraint) or Section 213.6 (without consent). Accused is over the age of 12, as required by Section 213.0(2)(f), and the act of holding Complainant down, covering Complainant’s mouth, and ignoring Complainant’s protests and efforts to break free provide a basis upon which the factfinder could find force and lack of consent.
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13. Same facts as in Illustration 11, except that Accused is 11 years old and Complainant is five years old. These facts do not support a finding of any criminal offense. Under Section 213.0(2)(f), an accused must be over 12 to be held criminally liable for any offense other than specified violations of Section 213.1. Rather, this troubling conduct is more appropriately and productively managed outside of the adult-criminal-law or juvenile-law systems.

2. Incestuous Sexual Assault of a Minor – Section 213.8(2)

Sexual abuse of minors is a pervasive problem in our society,\(^85\) and in a significant number of cases the abuser is a close relative or associate of the victim.\(^86\) In cases involving family members, sexual penetration may be part of a pattern of abuse that began when a child was younger, but even if the victim is on the cusp of adulthood, the state maintains a proper role in protecting minors from exploitation by caregivers responsible for their well-being. The inherently exploitative nature of a sexually intimate relationship between a minor and a person closely connected to the minor’s care, whether by blood or association, leads every jurisdiction to adopt statutes prohibiting child molestation and abuse.

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

**Section 230.2. Incest.** A person is guilty of incest, a felony of the third degree, if he knowingly marries or cohabits or has sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood [or an uncle, aunt, nephew or niece of the whole blood]. “Cohabit” means to live together under the representation or appearance of being

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\(^85\) Snyder, supra note 34, at 12 (“[C]rimes against juvenile victims are the large majority (67 percent) of sexual assaults handled by law enforcement agencies.”). The majority of victims are female, but child victims tend to include slightly more males than in the adult context. Specifically, in one study—which defined sexual assault to include rape, sodomy, assault with an object, and forcible fondling—the proportion of female victims is: 69 percent of victims under six; 73 percent of victims under 12, and 82 percent of victims under 18. Id. at 4.

\(^86\) In one study, roughly 27 percent of offenders were family members of young victims, with that percentage increasing as the victim’s age gets younger. Another 60 percent of offenders were known, although not related, to the victim. Only 14 percent of offenders were strangers to the victim; for victims under six, just three percent of offenders were strangers, and for victims six to 12, just five percent were strangers. Id. at 10 tbl.6. “Nearly all offenders in sexual assaults . . . were male,” and 23 percent of offenders were under the age of 18. Id. at 8 & tbl.5.
married. The relationships referred to herein include blood relationships without regard to legitimacy, and relationship of parent and child by adoption.87

Notably, this provision is deliberately limited to blood relationships, except for the inclusion of adoptive parents. The comment further explains that the use of brackets for select first-degree relatives “reflect[ed] uncertainty as to whether they should be added.”88 The purpose of the provision was given as “protection of the integrity of the family unit,” a justification which stands today.89 However, Section 230.2 is both over- and underinclusive in light of that goal. It is overinclusive because it punishes first-degree relatives outside the nuclear familial unit, regardless of the age of those individuals or the closeness of their emotional connection to one another. It is underinclusive because Section 230.2 excluded sexual acts with a stepchild or stepsiblings, on the ground that “it was thought inappropriate to enforce a permanent bar on marriage between steprelations.”90 It also covers only acts of vaginal penetration. But the modern family unit is defined far more by cohabitation and acts of caregiving than by biology, and acts of oral sex or anal penetration surely disrupt family harmony as significantly as do acts of vaginal penetration.

In this respect, the critical function of the incest provision in the 1962 Code was less to prohibit sexual abuse of minors within a family unit than to prevent the formation of consanguineous marital or reproductive units.91 Although that may be a laudable goal, it is excessive to proscribe as a third-degree felony any sexual conduct among consenting adults simply on the basis of a familial association. It likewise is unacceptable not to heighten the punishment for actors who prey upon minors in their care, simply because the actor lacks an actual blood relation.

89 Id.
Instead, the primary regulatory provision for sexual abuse of minors within the family structure in the 1962 Code was its provisions governing sexual acts with minors under 10 or minors under 16, both of which apply to a broader range of sexual acts, and without any added proof of familial or other relationship.92 The only relationship-based provision of Article 213, punished as “Corruption of Minors” in Section 213.3(1)(b), applies to acts of sexual penetration with a person under the age of 21, where the actor was a “guardian or otherwise responsible for the general supervision of [the complainant’s] welfare.”93 The Comment to that Section explained that “the principal function of Section 213.3(1)(b) is to repress [sexual relationships between a father and stepdaughter] where the child is less than 21 years old and where the stepfather has been appointed guardian or stands in loco parentis.”94 The provision also applied to others, such as “probation officers, camp supervisors, and the like.”95 Significantly, however, the 1962 Code did not view these acts as serious violations. Section 213.3(1)(b) was graded as a misdemeanor, and an accused could defend the charge by proving by a preponderance of the evidence that “the victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others.”96

In the time since the drafting of the 1962 Code, the abuse of minors—of all ages—by those ostensibly charged with their care has emerged as a pressing social issue.97 Sexual abuse of minors is now viewed as a serious crime worthy of particular attention when the perpetrators are those most closely connected to the minor. Accordingly, Section 213.8(2) penalizes as a third-degree felony acts of sexual penetration of and oral sex with minors younger than 18 years old, when the actor is a parent, grandparent, or one who acts in a parental role to the child. This Section is meant to supersede the flawed liability described in Section 230.2.

Section 213.8(2) has several critical components. First, Section 213.8(2) expands the category of minors protected under Section 213.8 all the way to legal adulthood (the age of 18) in

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92 Model Penal Code Section 213.1(1)(d) (Am. L. Inst., Proposed Official Draft 1962) (labelling sexual intercourse with females under 10 a second-degree felony); id. Section 213.2(1)(d) (labelling deviate sexual intercourse with any person under 10 a second-degree felony); id. Section 213.3(1)(a) (labelling sexual intercourse or deviate sexual intercourse with a person under 16 years of age, by one four years older or more, a third-degree felony).

93 Id. Section 213.3(1)(b).


95 Id.


97 See infra Reporters’ Notes, note 1.
cases in which the actor serves a parental role in the minor’s life. Second, Section 213.8(2) permits liability to attach without regard to any inquiry into force, consent, or willingness; consent is deemed irrelevant because the special relationship between guardian and minor prevents the minor from offering any form of authentic consent. Of course, a parent who acts with force, while a minor is asleep or unconscious, or in any of the other circumstances proscribed by Sections 213.1 through 213.6, may also be held liable under those provisions. Third, Section 213.8(2) authorizes a serious penalty—a third-degree felony—even when the complainant is an older minor otherwise capable of freely consenting to sexual activity. For parental figures who sexually intrude upon a child under 12 years of age, the sanction is thus equivalent to those available under Section 213.8(1). But for parental figures who intrude on complainants 12 through 15 years of age, the punishment is raised from a fourth-degree felony to a third-degree felony. And exploitative parental figures become eligible for serious criminal sanction, a third-degree felony, as opposed to no liability when the minor is aged 16 to 18. Fourth, Section 213.8(2)(d) requires proof that the actor know both the age and the actor’s relationship to the minor. Although a *mens rea* requirement may seem absurd, given that the vast majority of actors will obviously easily be proved to know both the minor’s age and their relationship to the minor, it is necessary given the possibility of unknown biological connections.98

The terms of Section 213.8(2) and the severity of the authorized punishment reflect the judgment that a guardian or parental figure engaging in sexual activity with a minor in the guardian’s or parental figure’s care constitutes an extreme breach of trust, inflicts an especially egregious form of harm, and causes a particularly profound and lasting detrimental impact.99 The punishment further underscores that sexual intimacy between parental figures and minors in their care, regardless of age, is uniformly forbidden. Such acts are treated as akin to sexual intimacy

98 See, e.g., Tabitha Freeman et al., *Sperm Donors Limited: Psychosocial Aspects of Genetic Connections and the Regulation of Offspring Numbers*, in *REGULATING REPRODUCTIVE DONATION* 165, 166-172 (Susan Golombok et al. eds., 2016) (describing the current and historical policy and practice of controlling “offspring numbers”); see also id. at 175 (reporting that two of 30 families reported accidental meetings of mothers using same donor, and noting that “[t]he unexpectedly high frequency of accidental meetings between same donor families encountered in our research raises questions about what has previously been viewed as the ‘remote’ possibility of same donor offspring unwittingly meeting and forming relationships”).

99 See infra Reporters’ Notes, note 4. The special obligation of the caregiver to the minor is also why the statute does not apply in the reverse, to penalize sexual abuses committed by children against their parents, or by wards against their guardians. Sexual penetration under such circumstances may violate other provisions of Article 213, but do not on their face offend Section 213.8(2).
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with very young minors or to sex by force. The core of the violation proscribed by Section 213.8(2) is thus not as much animated by concerns of age or consanguinity as it is based on the breach to a singular relationship of trust and dependence.100

Of course, the challenge lies in defining the precise relationships that should be covered by a provision authorizing a high penalty for any acts of sexual penetration or oral sex on the basis of that relationship alone. Other subsections of 213.8 ensure that many actors who engage in incestuous behavior will be punished; all adults who engage in acts of sexual penetration or oral sex with minors under 12, are eligible for a third-degree felony. The purpose of a special provision for incest is: 1) to ensure liability for actors who engage in sexual acts with minors 16 or older, who otherwise may freely consent to sexual activity; 2) to heighten the punishment for sexual activity with complainants older than 12; and 3) to condemn sexual relationships in certain familial configurations. With respect to the last point, it is therefore necessary to define the category of covered relationships in a manner that conforms most narrowly to the situations in which abuse of that relationship is most egregious and cannot be adequately addressed by other parts of the Code. Although there will always be outlier cases, the goal should be to impose liability tailored to the relationships most likely to raise special concern, whether as a result of the type of connection alone between the actor and complainant, or as a result of the special vulnerability of the complainant in light of the actor’s status.

Accordingly, Section 213.8(2) imposes liability for parental and grandparental figures, the sexual partners of those persons, and any other legal guardian or de facto parent. In defining these categories, Section 213.8(2) takes a broad view of the scope of figures characterized by a parental or grandparental role, in three ways. First, Section 213.8(2)(c) includes persons related by biology, marriage, adoption, or legal status as a foster parent.101 Second, it includes persons who may not

100 For instance, in Commonwealth v. Rahim, 805 N.E.2d 13, 17 (Mass. 2004), the Supreme Judicial Court of Massachusetts was forced to dismiss six incest charges against a defendant who had raped his 15-year-old stepdaughter, due to the plain language of the statute ignoring nonblood relationships, regardless of the emotional or psychological connection between stepparent and child. See id. at 23 (“This is no doubt a difficult case in the sense that construing the statute in accord with the plain meaning of its words will result in the dismissal of six indictments alleging that the defendant committed incest by having sexual intercourse with his stepdaughter when she was fifteen and sixteen years old.”). But see Howard v. Commonwealth, 484 S.W.3d 295, 298-299 (Ky. 2016) (holding that the incest statute at issue, which did not specify blood relationships in its text, applied to a stepparent and stepparent relationship).

101 In contrast to the 1962 Code, nearly all jurisdictions use terminology that encompasses full blood, half-blood, step, and adoptive relationships. See, e.g., TEX. PENAL CODE ANN. § 25.02(a), (c) (LexisNexis 2019) (defining
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directly parent, but whose relationship to the parent justifies equivalent treatment. And third, it includes persons who, although not a formal parent, serve in a parental role to the child.

A parental figure who makes sexual advances on a minor sends conflicting signals about the role and function of the parent in the minor’s life. Apart from continued strong social taboos against sex between minors and their caregivers, the guardian role is shaped by the adult’s provision of shelter, food, educational opportunity, social and emotional development, and other basic needs of the minor. For young minors, the addition of a requirement that the minor gratify the adult sexually confounds these other roles and presents a confusing and intolerable conflict between the minor’s interest and that of the adult. Even older minors more capable of expressing independent judgment must nonetheless confront the impossible choice between breaking the familial bond, asserting true independence, and acceding to the adult’s sexual desires. Sexual abuse by a parental figure contorts the developmental process by corrupting the minor’s natural evolution toward maturity and independence, including the gradual development of intimate social and sexual relationships with age-appropriate partners.

The same is true for grandparents, many of whom have the same kind of special access to the child typified by the parental relationship. One study found that “11% of grandparents live in the same household as their grandchild,” and of those, “5% are primary caregivers.”\footnote{AARP, 2018 GRANDPARENTS TODAY NATIONAL SURVEY: GENERAL POPULATION REPORT at 12 (2019), https://doi.org/10.26419/res.00289.001. That survey also reports that over half of grandparents view themselves as providing a “moral compass” to their grandchildren. Id. at 3.} Another study found that, of children who are not living with a parent, over half (1.7 million) live with their grandparents, far outstripping any other group.\footnote{Family Structure and Children’s Living Arrangements, CHILDSTATS.GOV, https://www.childstats.gov/americaschildren/family1.asp (last visited Aug. 18, 2020).} But even grandparents who do not live with their grandchildren have special bonds that differentiate them as a group from other family members and caregivers. Grandparents commonly host grandchildren overnight in their homes, go out to eat with grandchildren, attend family celebrations, and engage in recreation and travel together.\footnote{See AARP, supra note 102, at 24 (surveying how often grandparents engage in specific “in-person opportunities to connect with their grandchildren”).} Although some grandparents may not have as close a bond as others, as a category, grandparents are commonly beloved figures, often second only to parents, in many children’s lives. Like parents knowing acts of sexual intercourse with full blood, half-blood, step, or adoptive relations as a third-degree felony, unless the other person is a “ancestor or descendant by blood or adoption,” which case it is a second-degree felony).
who impose upon children sexually, grandparents who impose upon their grandchildren sexually place the grandchildren in a particularly vulnerable and untenable position. In this case, the grandchild is thrust in between a parent and the parent’s parent, forced to choose to hurt one or the other by disclosing or reporting an inappropriate advance.

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

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

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105 One study found that children with a single parent who has a live-in partner are 20 times more likely to be sexually abused than children within a two-parent family, and that although only one-third of children live in single and stepparent families, they are two-thirds of children sexually abused. Sedlak, A.J., Mettenburg, J., Basena, M., Petta, I., McPherson, K., Greene, A., and Li, S., Fourth National Incidence Study of Child Abuse and Neglect (NIS–4): Report to Congress. Washington, DC: U.S. Department of Health and Human Services, Administration for Children and Families, at 5-22 (2010). Analogously, although sexual abuse by grandparents is far less common than abuse by parents, research shows that stepgrandchildren are at greater risk. Leslie Margolin, Sexual Abuse by Grandparents, 16 CHILD ABUSE & NEGLECT 735, 739 (1992) (reporting that about one-third of grandparent abuse cases involved stepgrandchildren, and the abuse tended to be “more severe”).
as factors.\textsuperscript{106} Section 213.8(2) applies only to ongoing relationships; if the relationship has terminated, then the protections of 213.8(1) or other provisions of Article 213 apply. Otherwise, the factors listed provide helpful guidance in determining the existence of a sexual partnership. In colloquial terms, this subsection is meant to cover individuals who would be identified as a common-law spouse or a boyfriend or girlfriend; it excludes best friends or roommates who do not hold themselves out as in a relationship with the characteristics of an intimate sexual partnership.

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

The inclusion of “legal and de facto guardians” in Section 213.8(2)(c)(iii) likewise permits liability for persons who, while not a formal parent of the child, serve in a parental role. In family law, the terms “legal guardian” and “de facto parent” are well-defined concepts that apply to determine when persons otherwise not formally “parents” of a child may nonetheless assert parental rights.\textsuperscript{107} Typically, the test for a de facto parent requires proof of the exercise of continuous parental authority over a child, for instance, that that the person live with the minor for

\textsuperscript{106} ARIZ. REV. STAT. ANN. § 13-1401(B) (LexisNexis 2020).

\textsuperscript{107} See RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 1.82 Comment a, at 64 (AM. L. INST., Tentative Draft No. 2, 2019) (noting that “a majority of states now recognize the rights of de facto parents to seek contact and responsibility for a child”); see also UNIF. NONPARENT CUSTODY & VISITATION ACT § 4 (UNIF. LAW COMM’N 2018) (outlining the circumstances under which a court “may order custody or visitation to a nonparent”); UNIF. PARENTAGE ACT § 609(d) (UNIF. LAW COMM’N 2017) (specifying the procedures under which a de facto parent may be adjudicated to be a parent).
a significant period, assume the obligations of parenthood without expectation of compensation, develop a parental bond with the minor, and have done so with the parent’s encouragement or consent.\footnote{RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 1.82(a) (AM. L. INST., Tentative Draft No. 2, 2019).}

The term “de facto guardian” is not intended to include temporary guardians or those who have exercised care over a child intermittently or for compensation, such as a nanny, a parent hosting a sleepover, a teacher, a religious figure, or a coach. Although those persons may share equal authority over the minor as a parent in such situations, the bond is of an entirely different character. A minor in such a situation at least in theory retains a safe space to retreat from such encounters, or to report the threat, in contrast to a minor who is experiencing sexual attacks within his or her own home or family. Extricating the victim from a situation of abuse involving a more transient figure typically poses less longstanding emotional, financial, and psychological harm. It is generally much easier never to see a coach or teacher again than it is to accuse and renounce a member of one’s own family.\footnote{See supra, Comment to Section 213.5(4), for more discussion of authority figures.} The risks of abuse in those situations warrant prohibition but at a lower level of punishment, as provided in Section 213.8(3).

For the same reasons, Section 213.8(2) is restricted to parents, grandparents, their romantic partners, or those legally or functionally in a parental role. It does not apply to other relatives, such as aunts, uncles, cousins, or siblings, unless they share a household and play a significant parental role such that they are de facto parents.\footnote{Most jurisdictions extend the prohibition on incest to guardians, grandparents, aunts and uncles, and many also include siblings, nieces and nephews. E.g., ARK. CODE ANN. § 5-14-103(a)(4)(A) (2019); N.Y. PENAL LAW §§ 255.25-.27 (Consol. 2019). Other states simply forbid acts of sexual intercourse among persons “within the degrees of consanguinity within which marriages are declared by law to be incestuous and void”—CAL. PENAL CODE § 285 (Deering 2020)—or by “such person’s guardian or [a person] otherwise responsible for the general supervision of such person’s welfare.” CONN. GEN. STAT. ANN. § 53a-71(a)(4) (LexisNexis 2019).} These individuals could incur liability when the minor is under 16, pursuant to Section 213.8(1), but not automatically when the minor is older. Although the taboo on incest typically includes these categories, the specific reasons to elevate the punishment for the crime when a parental figure is involved are absent. Siblings, cousins, and nieces and nephews typically do not have the same power or emotional influence over a minor as do family members that are more senior. While some of these persons may be of an age or in a position akin to that of a parental figure, generally speaking they are more akin to peers. Moreover,
inclusion of more distant relatives raises difficult problems of line-drawing; in many families, some aunts and uncles are younger than their nieces or nephews.

Relationships that do not involve the direct guardianship role do not consistently raise the same degree of tension between the complainant’s status within the family, need for protection, and vulnerable proximity versus the actor’s sexual demands. For this reason, the revised Code also rejects the liability described in Section 230.2 ("Incest").111 Instead, sexual overtures by persons previously covered in 230.2 of the 1962 Code, but no longer covered in 213.8(2), are governed by Section 213.8(1). Only when such persons satisfy the criteria set out in (2) does that provision apply. Adoption of Article 213 therefore repeals Section 230.2.

Section 213.8(2) also departs from the 1962 Code in setting the upper age threshold at 18, rather than 21. The 1962 Code explained:

[T]he higher age reflects the realistic assumption that a much older child may be subject to imposition and domination by one who occupies a position of authority and control. Moreover, the guardian or person similarly situated bears a special responsibility for guidance of his ward. Betrayal of that obligation by sexual intimacy is decidedly wrongful even if the child is old enough to take care of himself in most situations.112

Although that rationale still holds true, the age of 18 is widely recognized as the age of legal emancipation. In contemporary society, roughly half of those aged 18 to 24 live outside their childhood homes.113 Approximately 40 percent of 18- to 24-year-olds are enrolled in some form of higher education,114 and roughly 72 percent of those aged 16 to 24 who are not in school are in the workforce.115 As a minor reaches adulthood, the rationales justifying greater protection fade.

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111 See supra text accompanying notes 91-96.
113 See America's Families and Living Arrangements: 2017, U.S. CENSUS BUREAU tbs.A3 & AVG1, https://www.census.gov/data/tables/2017/demo/families/cps-2017.html (last updated Mar. 22, 2019) (finding that the total number of coresident parents with children 18 to 24 is 12,310, and the total number of householders 18 to 24 is 6,239, with a note that the average number of people over 18 in these households is about two).
114 College Participation Rates: Percent of 18 to 24 Year Olds Enrolled in College, NAT’L INFO. CTR. FOR HIGHER EDUC. POLICYMAKING & ANALYSIS, http://www.higheredinfo.org/dbrowser/index.php?measure=104 (last visited Aug. 18, 2020) (demonstrating that the percentage of college enrollment by state tends to be between 31 percent and 42 percent, with the most of the more populous states trending toward 40 percent).
And although the restrictions of Section 213.8(1) may leave a gap in protection for minors over 18 with respect to some familial actors when the actor imposes sexually but not in a way that invokes the protections of Sections 213.1 through 213.6, such a gap is preferable to the risk of overbreadth. Including persons above the age of 18 runs the risk of criminalizing relationships that, although distasteful and against community sentiment, nonetheless cannot be described as unambiguously nonconsensual. Moreover, in cases in which the complainant is still vulnerable, and the sexual activity is unwanted, the provisions of Section 213.6 fill the gap so long as the factfinder concludes that the actor was aware of a substantial risk that the other person did not consent.

Illustrations:

14. Complainant, who is 16, lives with Complainant’s parent. Complainant’s parent’s partner, Accused, occasionally spends the night at Complainant’s home. Accused also has an occasional sexual relationship with Complainant’s parent, and at the time of the incident called the parent Accused’s “boo.” Witnesses testify that, based on their observations of the relationship and statements by Accused and Complainant’s parent, they believed Accused and Complainant’s parent to be dating. One day, Accused enters Complainant’s room late in the evening and climbs into bed with Complainant. Accused tells Complainant that Accused is going to show Complainant “about being grown-up” and removes Complainant’s pants. Complainant nervously says, “Okay…” and then Accused engages in an act of anal penetration. Accused admits the incident, but claims that Complainant had been flirting with Complainant for the past year and that Accused has not engaged in sexual activity with Complainant’s parent for at least six months. Accused argues that Complainant is 16, which is past the age of consent. Based on this evidence, a factfinder could find Accused guilty of violating Section 213.8(2). Accused knew that Complainant is under 18, and the factfinder could conclude that Accused was knowingly the sexual partner of Complainant’s parent. Section 213.8(2) does not require that the sexual relationship be exclusive, or that the sexual partner formally cohabitate with the parent. The offense is punishable as a third-degree felony. Section 213.8(2) makes any question of Complainant’s willingness irrelevant.

15. Same facts as in Illustration 14, except that Accused, a sibling of Complainant’s parent, lives in the same home as Complainant and regularly acts as a guardian, such as by cooking meals for Complainant, taking Complainant to school or athletic events, and
enforcing Complainant’s curfew. Based on these facts, Accused could be found guilty of a
violation of Section 213.8(2). The factfinder could conclude beyond a reasonable doubt
that Complainant is under the age of 18 and Accused resides with Complainant as a de
facto parent.

16. Accused is the 46 year-old sibling of Complainant’s parent. Complainant, who
is 16, sees Accused a couple of times a year on holidays, and on such occasions Accused
spends the night in Complainant’s home. On one such holiday, Accused enters
Complainant’s room at night and engages in an act of sexual penetration. Based on these
facts, Accused is not liable under Section 213.8(2), because Accused is not in a parental or
guardianship role towards the Complainant, nor in a sexual relationship with
Complainant’s parents or grandparents. Accused is also not liable under Section 213.8(1),
because Complainant is not younger than 16 years old. Thus, Accused is liable only if the
evidence proves guilt beyond a reasonable doubt under another provision of Article 213,
such as Section 213.6, which prohibits sexual penetration without consent. However, if the
factfinder believes that Accused did not know or recklessly disregard that Complainant did
not consent—for instance, if the factfinder concludes that Accused believed that
Complainant assented—then Accused cannot be found guilty.

17. Complainant, who is 25 years old, was adopted at a young age. After several
years tracking down Complainant’s biological parents, Complainant locates one of
Complainant’s biological parents, Accused. The two become close, and then begin a
consensual sexual relationship. Based on these facts, there is no violation of Section
213.8(2). Section 213.8(2) prohibits sexual intercourse between a minor and a parent, but
because the Complainant is over 18, the statute does not apply.

18. Accused is Complainant’s 16-year-old child. One day, Accused enters
Complainant’s bedroom, wakes Complainant, and then engages in an act of sexual
penetration as Complainant sobs, stunned. Based on these facts, Accused is not guilty of a
violation of Section 213.8(2). Accused, the actor, is not a parent of Complainant;
Complainant is the parent of Accused. Accused might, however, be found guilty of another
offense under Article 213, such as Section 213.6.
3. Exploitative Sexual Assault of a Minor – Section 213.8(3)

One circumstance that warrants special consideration is that of authority figures who engage in sexual activity with older minors. Most authority figures involved with a minor younger than 16 will be punishable under Section 213.8(1), without regard to the actor’s status as an authority figure; if the complainant is younger than 12, the offense will be a felony of the third degree, and if the complainant is 12 through 15 years old, the offense will be a felony of the fourth degree. But the question remains whether the law should also punish authority figures who sexually engage with 16- and 17-year-olds who nominally consent to the acts, and thus the actor is not eligible for punishment under any of the other provisions of Sections 213.1 through 213.6.

The 1962 Code punished such acts by authority figures in Section 213.3(1)(b) as a misdemeanor, as discussed in the Comment to Section 213.8(3). In existing law, statutes prescribing special penalties for actors in positions of authority to a child are common.116

Arguments might be made against penalizing such behavior. Sixteen-year-old adolescents in contemporary society are—as a general matter—sufficiently mature and sufficiently aware of the implications of sexual penetration to be able to exercise autonomous, if not always wise, judgment. But because research underscores both the extent to which older actors exploit their positions of trust for sexual gratification, and the lasting individual and social impact those actions have, continued protection remains appropriate.117 Moreover, awareness of the frequency of and harm caused by sexual abuse of young people by authority figures such as clergy, staff at group or foster-care homes, or athletic coaches has led to increased efforts to deter and penalize such conduct.

The requirement that the actor “hold[] a position of authority or supervision over the minor” is intended to ensure that Section 213.8(3), which is predicated on abuse of authority, does not sweep too broadly. The examples listed—“teacher, employer, religious leader, treatment provider, administrator, or coach”—share in common the characteristic of authoritative power.

116 See, e.g., COLO. REV. STAT. §18-3-405.3 (2018) (specifically proscribing “sexual assault on a child by one in a position of trust”); N.J. STAT. ANN. § 2C:14-2(a)(2)(b) (LexisNexis 2019) (“An actor is guilty of aggravated sexual assault if . . . [t]he actor has supervisory or disciplinary power over the victim by virtue of the actor’s legal, professional, or occupational status . . . .”); UTAH CODE ANN. § 76-5-404.1(1)(c) (LexisNexis 2019) (defining “position of special trust” to include several specific roles of authority—for example, “athletic manager who is an adult,” along with babysitter, coach, religious leader, and scout leader—and a catch-all that covers “any individual in a position of authority . . . which enables the individual to exercise undue influence over the child”).

117 See generally Blakemore et al., supra note 1 (noting the dearth of concrete evidence about prevalence, but collating rates related to abuse within religious institutions and assessing the abuse rates and impacts).
Section 213.8. Sexual Offenses Involving Minors

Each of the listed individuals is a person to whom a complainant entrusts the complainant’s own care and development, and in turn those positions offer to the complainant something critical in exchange (education, money, salvation or spiritual guidance, medical care, athletic development, etc.). It is this feature, more so than the corresponding features of emotional closeness or physical proximity, that “authority or supervision” is meant to cover.

Illustrations:

19. Complainant, who is 16, plays on a soccer team coached by Accused, who is 32. At the end of the season, Accused hosts a party to celebrate the team’s victories. After the party, Complainant stays behind to help Accused clean up. Accused grabs Complainant from behind, saying, “You’re my favorite player.” Complainant tries to wriggle from Accused’s grasp, saying, “That’s not true,” in a playful voice, but Accused says, “You know it’s true. And aren’t I your favorite coach?” Again, Complainant laughs nervously, saying, “You know you are!” while trying to return to cleaning. Instead, Accused says, “Show me,” and begins to kiss Complainant. Complainant, stunned, does not speak or resist. Complainant then follows Accused to the bedroom, where at Accused’s urging Complainant engages in an act of oral sex. Accused later testifies that Accused believed Complainant had a “crush” and that the sexual act was consensual; Complainant testifies that Complainant was unwilling. Based on these facts, Accused could be found guilty of a violation of Section 213.8(3), even if Accused was not aware of the risk that Complainant had not consented, as would be required to convict Accused of Sexual Assault Without Consent under Section 213.6. Accused knew that Complainant is under 18 years of age, that Accused is more than five years older than Complainant, and that Accused is Complainant’s coach. The offense is punishable as a fifth-degree felony under Section 213.8(3). Accused cannot be found guilty of violating the more serious offense under Section 213.8(1), because Complainant is not younger than 16 years old.

20. Same facts as in Illustration 19, except that Complainant is 15 years old. Accused may be found guilty of a violation of Section 213.8(3), which is a fifth-degree felony. But Accused is also guilty of 213.8(1), if the prosecution can prove that Accused knew or was aware of a risk that Complainant is between 12 and 16. Because Accused is older than 21, the offense is graded as a fourth-degree felony under Section 213.8(1).
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According to the principles of Section 1.07, the Accused may not be convicted of both offenses.

21. Same facts as in Illustration 19, except that Complainant is 16 and Accused is 20 years old. Accused cannot be found guilty under Section 213.8(1), because, even though Complainant is 16, Accused is not more than five years older than Complainant. Nor can Accused be found guilty under Section 213.8(3), even though Complainant is 16 and Accused is Complainant’s coach, because Accused is not more than five years older.

Finally, the 1962 Code extended liability in these situations to cover complainants until age 21, but that approach now seems unduly broad. As noted above, even though persons aged 18 to 21 are susceptible to abuse or intimidation, the probable independence and autonomy of such persons in most aspects of their lives counsels against criminalizing consensual sexual encounters, however ill-advised. To the extent that such encounters are coercive or nonconsensual, Sections 213.4 and 213.6 serve as adequate protection against an actor’s excessive influence.

4. Fondling the Genitals of a Minor – Section 213.8(4)

Section 213.8 departs from the 1962 Code, but is consistent with existing law, in expanding the scope of covered behavior with minors that is eligible for heightened punishment. The 1962 Code reserved its most serious penalties for vaginal or anal penetration and oral sex, as does most existing law. Section 213.0(2)(a) and (b) and Sections 213.1 through 213.6 follow that pattern, by imposing penalties for acts of penetration or oral sex involving force, coercion, or other conditions indicating lack of consent without regard to the age of the complainant. The 1962 Code also punished acts of offensive sexual contact, which covers acts as transient as a quick grope or as prolonged as extended fondling.

118 1962 Code Section 1.07. That section states: “When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if: (a) one offense is included in the other...” Included offenses in turn are defined as “established by proof of the same or less than all the facts required to establish the commission of the offense charged.” Proof of a violation of 213.8(1) requires proof of less than the facts required to prove 213.8(3): namely, 213.8(1) requires proof only of the Complainant’s age, the five-year age gap, and the pertinent mens rea. Section 213.8(3) adds an element, the actor’s position. Thus the prosecutor could pursue one or the other charge, but not both.

119 See supra Section 213.8, Comment 2.
Section 213.0(2)(c) and Section 213.7 likewise punish acts of sexual contact that fall short of sexual penetration or oral sex. Although some “grabs” of female genitalia may technically meet the definition of “sexual penetration,” which is satisfied if there is any penetration “however slight” of the vulva,¹²⁰ most “grabs” of female genitalia are likely to defined as sexual contact. In contrast, masturbation of female genitalia is likely to satisfy the requirement of penetration, and thus be eligible for more serious punishment.¹²¹ Yet even a prolonged masturbation of male genitalia may only ever constitute “sexual contact.” This disparity occurs because, as the Comment to Section 213.0(2)(a) explains, universal and longstanding practice has shown that the only workable penetration standard is one that defines the necessary amount of penetration as “however slight.”¹²² And this standard is essential in order to adequately penalize common, serious forms of sexual abuse, including acts of object and digital penetration.

The exclusion of fondling male genitalia from the category of sexual penetration offenses is justified when compared to the conduct covered by Sections 213.1 through 213.6, which primarily target adult complainants.¹²³ Brief fondling of the genitals of adults, although serious, is a less serious intrusion than an act involving penetration. A “grab” of genitalia—whether male or female—is an incursion on autonomy akin to other unwanted touches of intimate parts, rather than to an act involving penetration.

But whereas unwanted masturbation of the genitalia of adult males is adequately deterred and condemned by proscriptions governing unwanted sexual contact, the unwanted fondling of the genitalia of male minors by adults¹²⁴ is considerably more serious, as the minor is likely still in the

¹²⁰ See Section 213.0(2)(a), (b) & Comment. The nonconsensual fondling of female genitalia may in some cases technically satisfy the definition of vaginal penetration, because it follows the universal pattern of existing law in permitting liability for penetration “however slight.” As a practical matter, experience teaches that prosecutors often pursue cases involving genitalia “grabs” (or superficial fondling), whether male or female, as contact offenses rather than penetration offenses.

¹²¹ See Section 213.0(2)(c) & Comment.

¹²² See Section 213.0(2)(a) Comment & Reporters’ Note.

¹²³ 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 infra note 126.

¹²⁴ One study found that the majority of all victims of sexual assaults involving sexual penetration or forcible fondling were minors; specifically, 14 percent of victims were aged 0 to 5, 20.1 percent were 6 to 11, and 32.8 percent were 12 to 17. SNYDER, supra note 34, at 2 tbl.1. The most common charge across penetration and fondling categories was forcible fondling—it was the most serious charge in 45 percent of all sexual assault cases reported to law enforcement between 1991 and 1996. Id. at 2.
Section 213.8. Sexual Offenses Involving Minors

An adult who masturbates a boy or young man, like an adult who masturbates a young girl or woman, takes advantage of the minor’s youth and inexperience, and causes potential damage to the minor’s emotional and sexual development.

Similarly, although fondling and masturbation of a minor’s female genitalia may possibly meet the criterion of “sexual penetration,” such liability may be difficult to establish, given that young minors often lack sophisticated understandings of their genitalia and thus may have trouble explaining the nature and extent of the touch to the factfinder. In addition, the severe penalties for acts of penetration may be excessive when the allegations involve groping over the clothing. But punishing such acts at the low level of ordinary contact offenses may also be insufficient. In sum, there are several reasons to elevate the punishment for acts of fondling or masturbation of the genitalia of minors above the punishment for the same behavior in the sexual-contact offense defined by Section 213.7.

Illustrations:

22. Complainant, who is 10 years old, is in the bathroom of the public library when Patron, who is 42, approaches and tells Complainant, whom Patron knows to be younger than 12, to enter one of the stalls. Complainant initially refuses, but then Patron says, “Trust me—I have a great surprise for you!” Complainant agrees and enters the stall. Patron puts a hand inside of Complainant’s pants and masturbates Complainant for several minutes. After Patron leaves, Complainant tells the library staff what happened. Based on these facts, the factfinder could find Patron guilty of violating Section 213.8(4), punishable for a fourth-degree felony, because the minor is younger than 12 and the Patron is more than five years older, and is older than 21.

125 Rebecca L. Moles & John M. Leventhal, Editorial, Sexual Abuse and Assault in Children and Teens: Time to Prioritize Prevention, 55 J. ADOLESCENT HEALTH 312, 312 (2014) (“[M]ost of the sexual abuse or assault reported through the age of 17 did not include penetration. Many state statutes include more stringent penalties for penetration versus genital touching, which may contribute to the perception that penetration is somehow more “wrong” than other sexual contact or touching. One longitudinal study of outcomes of sexual abuse found an increased rate of psychopathology in survivors of any type of sexual abuse or assault, with a tendency toward even higher rates in those who had experienced penetration as part of the abuse. It is important to recognize that all forms of child abuse and neglect have been linked to poor medical and psychiatric health outcomes; the biologic and epigenetic bases of the outcomes are being uncovered and are beginning to be applied to public policy development. Penetration should not be viewed as the sole marker of severity of abuse or predictor of long-term outcomes for the survivors.”).
Section 213.8. Sexual Offenses Involving Minors

23. Same as in Illustration 22, except that the Complainant is 13 years old. Based on these facts, the factfinder could find Patron guilty of Section 213.8(4) and punishable for a fifth-degree felony. The minor is older than 12, and the Patron is more than seven years older.

For the reasons given in the Comments to Section 213.8(1), this provision follows the pattern of imposing liability separately for minors younger than 12 and those ages 12 through 15. It also follows the pattern of providing for an age gap, and in heightening punishments for actors 21 years old or older. In the case of minors younger than 12, the gap is five years; for minors 12 through 15, it is seven years. Slightly more generous gaps are warranted given the nature of the conduct, which is more akin to sexual contact than penetration in that same-aged peers are more likely to engage in fondling in a consensual exploratory encounter that should not be penalized criminally.

Illustration:

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

The penalties that attach to a violation of Section 213.8(4) reflect the seriousness of the offense on a continuum with acts of sexual penetration or oral sex at one extreme and acts of sexual contact at the other. Specifically, Section 213.8(4) provides that the offense is a felony of the fourth degree if the complainant is under 12 years of age and the actor is 21 years or older, and a felony of the fifth degree if the actor is younger than 21, or if the complainant is aged 12 through 15.
5. Aggravated Offensive Sexual Contact with a Minor – Section 213.8(5)

Section 213.8(5) and (6) sets out separate provisions for contact offenses involving minors. As with the penetration offenses, the general provisions of Article 213 governing sexual contact, defined in Section 213.7, apply equally to sexual contact with minors. Section 213.7(1) defines as a felony of the fifth degree the actor’s use of physical force or surreptitious impairment to engage in unwanted sexual contact. Section 213.7(2) punishes as a petty misdemeanor sexual contact that occurs under circumstances akin to Sections 213.3 through 213.6.

Although these punishments are serious, enhanced penalties are appropriate for actors who use force, extortion, exploitation, or a special vulnerability to engage in acts of sexual contact with a minor. Enhanced penalties are also warranted for sexual contact that occurs in the context of certain close familial relationships, as defined by 213.8(2), or special relationships of authority as defined by Section 213.8(3).

Section 213.8(5) provides for enhanced punishment for actors who use physical force, restraint, or coercion, or who exploit a status of trust, to engage in sexual contact with minors younger than 18. This provision responds to two concerns. First, although abusive sexual contact with minors often takes place without any added element of force or coercion, suggesting that such enhancements may be unnecessary, there remains strong evidence that some adults use coercive means, including acts or threats of physical violence, to engage in acts of sexual contact short of penetration or oral sex with minors of all ages. Another all-too-common scenario involves acts of sexual contact with minors perpetrated by persons in charge of their care and custody or religious or educational formation. Yet without a special provision addressed to those circumstances, such behavior would be punished as equivalent to a single act of sexual contact undertaken without that context, because Section 213.7 does not address situations involving incest or exploitations of minor. For the same reason, there would also be no heightened punishment for

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126 See SNYDER, supra note 34, at 2-3 (reporting high rates of forcible sexual offenses against minors, as distinguished from statutory offenses); Giroux et al., supra note 2, at 227-228 (finding that 56.7% of child sexual abuse complainants and 74% of adolescent complainants reported violence). But see WORLD HEALTH ORGANIZATION [WHO], GUIDELINES FOR MEDICO-LEGAL CARE FOR VICTIMS OF SEXUAL VIOLENCE 76 (2003), https://www.who.int/violence_injury_prevention/publications/violence/med_leg_guidelines/en (describing “[t]he 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”).

127 See, e.g., Blakemore et al., supra note 1, at 36 (studying the impact of “child sexual abuse perpetrated in schools, foster care and out-of-home care, residential schools and care facilities, sporting organizations, hospitals and religious institutions”).
complainants over 16 but younger than 18. But the harm of the exploitative behavior merits both additional punishment and deterrence.

Second, Section 213.8(6), like Section 213.8(1), outlines the penalties for sexual contact with minors under 12 and with minors aged 12 to 15. It does not provide liability for sexual contact with minors aged 16 to 17, instead leaving those acts to coverage under the general provisions of Section 213.7. That distinction is justified for the same reason it is justified in Section 213.8(1): an ordinary consent framework is functional as regards older minors, who have both the capacity and sexual sophistication to make independent, if not always wise, judgments about their sexual activity. But when an actor uses a special status (such as a religious figure, coach, or parental figure), or uses or threatens physical force or restraint, or exploits a vulnerability of a minor, greater protection is warranted. Although older minors may be capable of a degree of sexual autonomy, they nonetheless are a vulnerable class still dependent in essential ways on the protection and shelter of adults. Thus, heightened punishment of a fourth-degree felony, as described in Section 213.8(5), is appropriate for an actor who uses impermissible means to engage in the act of sexual contact, even when the minor is otherwise at an age where consent to such contact would be legally cognizable.

Illustrations:

26.\(^{128}\) When Complainant was 13 years old, the 43-year-old sexual partner of Complainant’s parent, the Accused, moved into their home. From the beginning, Accused showered the Complainant with affection and attention, but over time the behavior became more physical. Accused started to stroke Complainant’s hair, kiss Complainant on the lips at night, and occasionally interrupt Complainant when Complainant was bathing or getting dressed. Based on these facts alone, the factfinder could not find Accused guilty under Section 213.8(5) or (6). Although Complainant is 13 and Accused is more than seven years older, Accused’s acts are not clearly covered by either subparagraph (i) or subparagraph (ii) of Section 213.8(6)(a). Although the prosecution might claim that the kisses involve touches to the mouth, as under Section 213.8(6)(a)(ii), there is insufficient evidence to establish beyond a reasonable doubt that the kiss involved a touch to the tongue, or that the

purpose of the kiss was sexual and not innocent affection. Stroking a child’s hair and interrupting the child in the bathroom or while dressing, without more, are not acts of “sexual contact” under Section 213.0(2)(c).

27. Same facts as in Illustration 26, except that eventually, Accused starts entering Complainant’s room in the middle of the night, rousing Complainant, and caressing Complainant’s breasts and buttocks. There is sufficient evidence for the factfinder to find a violation of Section 213.8(5). The caresses constitute “sexual contact” under Section 213.0(2)(c), because they involve touches to intimate areas for a sexual purpose. Moreover, such caresses appear to have no purpose other than sexual gratification. The contact would also have violated Section 213.8(2) if it were an act of sexual penetration or oral sex, because Accused is older than 18, Complainant is younger than 18, and Accused is the sexual partner of Complainant’s parent. Since Accused is more than five years older than Complainant and can be proved to be aware of each element, Accused may be found guilty of Aggravated Offensive Sexual Contact with a Minor, a fourth-degree felony.

28. Same facts as Illustration 26, except that Complainant is 16. Accused is not liable under Section 213.8(6), because Complainant is not younger than 16 years old. Accused might be liable under Section 213.7(2)(a), if the factfinder concludes that Complainant did not consent to the act. But Accused is liable under Section 213.8(5) without inquiry into consent. Accused engaged in sexual contact with a minor, aware that the minor was under 18 and Accused was more than five years older, and the sexual contact would have violated Section 213.8(2) for the reasons given in Illustration 27. Accused is thus liable for a fourth-degree felony.

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

Section 213.7(2) punishes sexual contact as a misdemeanor when it occurs without the consent of the other person and in specified circumstances that mirror those found in the provisions governing penetration and oral sex. This subsection arguably could apply to many instances of sexual contact between an adult and a minor. Under the definition of consent provided in Section 213.0(2)(d), a factfinder may infer lack of consent from the context of all the circumstances, even in the absence of resistance. For cases with very young minors, such as those under eight years of age, the simple fact of the child’s age might thus provide evidence of lack of consent.
At the same time, however, an inquiry into consent is misplaced when it comes to minors engaging in sexual activity with those much older. Very young minors lack the independence and autonomy necessary to engage in meaningful consent, particularly as regards an adult. A six-year-old cannot “consent” to the sexual approaches of a person much older, and a factfinding process that invites such inquiries brings disrepute to the law. And while older minors may have the capacity to consent to peers, questions of consent are likewise misguided when the actor is deemed too old to be an appropriate partner. A minor, whether as young as eight or as old as 15, may explicitly welcome the sexual advances of an adored adult out of genuine loyalty or affection, but penal law rightly ensures that an adults who make such requests are subject to criminal liability.

For these reasons, sexual contact with minors, even in the absence of the special circumstances outlined in Section 213.8(5), is commonly aggravated above an adult-oriented contact offense. At the same time, wide variation exists in the age required to trigger a particular punishment, in the tiers and thresholds for different degrees of punishments, and in the absolute punishments imposed. The cutoffs for jurisdictions with age distinctions for liability tend to hover around the ages of 12 and 15; less than a dozen jurisdictions have provisions that cover 16- and 17-year-olds. A small handful of jurisdictions have a single unitary scheme. Jurisdictions also vary markedly in the punishments authorized.

Section 213.8(6) imposes liability for sexual contact with minors, based solely on the age of the actor and the complainant rather than the presence or absence of nominal consent. The act is without effective consent because of the age of the minor and the age difference between the actor and the minor. Statutory liability for specified contact with minors achieves three objectives. First, as with the other offenses defined in Section 213.8, it protects minors from sexual exploitation without requiring additional proof of force, coercion, the absence of consent, or a particular vulnerability on the part of the complainant. Second, Section 213.8(6) widens the definition of prohibited behavior to include touches of the tongue with a sexual purpose. Although such conduct was deliberately omitted from the definition of sexual contact applicable to the

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129 See infra Reporters’ Note.

130 Nearly every jurisdiction punishes contact with a minor under the age of 12 as a felony; many of those also have age-gap requirements. However, those range from the most serious felonies to much lower degrees of felony. The penalty prescribed for impermissible sexual contact with minors 12 to 15 tends to split more evenly between misdemeanors and low-level felonies, although some statutes permit more stringent punishments. See infra Reporters’ Notes, note 3 and 4.
general contact offenses, primarily out of concern for overbreadth,\textsuperscript{131} it is appropriately included in a provision aimed at protecting minors. Third, the penalties found in Section 213.7 are at the lowest end of the spectrum, in keeping with the behavior addressed, which involves unwanted sexual contact. But the same behavior, when engaged in by an adult with a minor, deserves a more serious penalty. Each of these objectives is addressed in turn below.

**Age-based liability.** It is beyond question that the acts of sexual penetration and oral sex covered by Section 213.8(1) through 213.8(3) rank among the most emotionally powerful and intimate behaviors in which human beings can engage. But it is equally true that even lesser forms of intimacy, like those defined as “sexual contact,” can hold deep significance even if they also carry far less emotional and physiological risks. Protecting minors by ensuring that such rites of passage are not corrupted by exploitative older actors is a critical intention of this subsection.

At the same time, the central challenge in setting out age-based thresholds of liability is even more acute in the context of sexual-contact offenses than for the more intimate sexual acts covered by the preceding subsections. Sexual penetration and oral sex are behaviors appropriately engaged in, at the earliest, only by those nearing adulthood. But the kinds of sexual contact covered by Section 213.8(6) can appropriately occur at younger ages, even in a context involving sexual overtones. Engaging with mutual consent in the kinds of sexual contact covered by Section 213.8(6) is considered a rite of passage during youth and puberty, and it is an expected feature of sexual exploration as one matures. Even very young minors, motivated by sexual curiosity, may voluntarily undertake behavior that meets the definition of sexual contact. It may not be ideal that very young minors “play doctor,” but as long as such activity is nominally consensual and engaged in with age-appropriate partners, it is not a proper subject for penal law.

One manner of preventing overbreadth in the application of sexual-contact statutes, therefore, is found in Section 213.0(2)(f). That provision applies to these Sections, and thus an actor must be over 12 years of age in order to be chargeable with any contact offenses. Those under 12 are generally not competent to make responsible choices, and to the extent their actions cause harm, the state’s interest is in preventing, identifying, and remediating that harm—with regard to both the actor and any complainant—rather than in holding a young minor criminally responsible. Even blameworthy behavior by actors under 12, such as a playground bully who forcibly punches

\textsuperscript{131} See Comment to Section 213.7(2)(c).
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and then grabs another child, or touches the child intimately, should be handled outside of the penal law, either privately or within the educational or abuse-and-neglect system, as appropriate. Yet the penal law can and should address an older, more sexually sophisticated actor who abuses young minors, or seeks to exploit the sexual curiosity of a young minor. Young minors are likely to be trusting of those their senior, and less assertive in enforcing physical boundaries. Exploitation of these vulnerabilities by an older, sexually sophisticated actor for purposes of sexual gratification can sometimes warrant criminal law or juvenile justice intervention. The difficulty is in striking the right balance between leaving ordinary sexual exploration among age peers undisturbed, while proscribing sexually exploitative and predatory behavior by older actors.

Section 213.8(6)(b) thus sets out provisions of liability for sexual contact that roughly mirror those of Section 213.8(1) and (4) in that they distinguish between minors younger than 12 and those aged 12 to 15, and between actors younger and older than 21. Both provisions require that the actor be aware of, yet recklessly disregard, the risk that the minor is under the specified age, as stated in Section 213.8(6)(c). Acts of sexual contact with minors that involve aggravating elements, such as physical force, coercion, or exploitation, are punishable by Section 213.8(5). Section 213.8(6) is addressed to sexual contact or touches of the tongue with minors based only on the age of the minor and the age differential with the actor.

Consistent with the dominant trends in existing law, Section 213.8(6) prohibits sexual contact with minors under 12 when the actor is five or more years older. As with Section 213.8(1), this provision must be read consonant with both Section 213.0(2)(f), which defines an “actor” as a person more than 12 years of age, and with Section 4.10 of the 1962 Code, which precludes a person under 16 years of age from prosecution in criminal court, and presumes that those aged 16 and 17 will be handled in juvenile courts. Criminal liability under Section 213.8(6) thus, at the lowest threshold, attaches to a child 12 years and one day old who engages in proscribed sexual contact with a child aged seven or younger.

Section 213.8(6) also prohibits sexual contact with minors aged 12 through 15 years old, when the actor is seven or more years older than the minor and not the minor’s legal spouse. The wider age gap is important to protect against overbreadth in a demographic that may engage in behavior that, while ill-advised, ultimately should not be subject to penal sanction. To be clear: gropes, grabs, and other nonconsensual sexual contact remain covered by the provisions of Section 213.7(2), regardless of the age of the complainant. Section 213.8(6) thus applies when the conduct...
is nominally consensual, but occurs between persons within defined age classes. Because the complainant must be younger than 16, and the actor more than seven years older, all sexual touches of minors aged 12 to 15 by actors starting at ages 19 to 22, respectively, are penalized, although only those touches by actors 21 and older are eligible to be treated as a felony. To criminalize nominally consensual acts involving sexual contact by peers is unwarranted, given the far less intrusive nature of the sexual behavior at issue.

Illustrations:

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

30. Same as in Illustration 29, except that Complainant, who is in a relationship with Accused, reciprocates with enthusiasm. Based on these facts, Accused is not liable for any offense. Accused is not liable under Section 213.8(6) for the reason given in Illustration 29. Nor is Accused liable under Section 213.7, because Complainant’s actions indicate consent.

Prohibited behaviors. Section 213.8 expands the scope of prohibited conduct beyond that of Section 213.7. Section 213.7 applies only to “sexual contact,” which is defined by Section 213.0(2)(c) as limited to contact with intimate parts such as the genitalia, anus, groin, buttocks, inner thigh, or breast. It does not include touches to the mouth, lips, or tongue, for reasons explained in the Comment to Section 213.0(2)(c).
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Section 213.8(6)(a)(ii), however, includes not just “sexual contact” but also “act[s] involving the touching of the 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.” The inclusion of the tongue is necessary to ensure that this lesser, but still egregious, form of child exploitation does not go unpunished. Research suggests that more serious forms of child sexual abuse are often preceded by a “grooming” period in which a potential actor secures the trust of and continued access to a child. There is considerable debate in the literature about the precise contours of “grooming” behavior, the frequency with which actors employ it, and the ability of outsiders to distinguish between grooming and innocent acts of affection. But there is a general consensus that actors often “gradually increase physical contact in order to desensitize the child to touch” or engage the child in “educational” acts intended to remove the child’s fear of greater intimacy. Of course, adults may kiss a child or teen for innocuous reasons. Thus, the provision applies only to knowingly touching the tongue, which is far less likely to be innocent, and also requires that the contact be for a sexual purpose.

Illustrations:

31. Complainant is nine years old and Teacher is a 28-year-old teacher in Complainant’s class. Complainant often stays after school in Teacher’s class, because Complainant’s guardian frequently gets caught at work and Teacher had offered to watch Complainant until the guardian is able to arrive. Over time, Teacher gradually began raising sexually explicit topics with Complainant, and then started showing Complainant images and videos of acts of oral sex. One day, Teacher says, “You should try it out—doesn’t it look fun?” and tells Complainant to open Complainant’s mouth. Teacher inserts several fingers into Complainant’s mouth, and instructs Complainant to treat it “like a popsicle.” Complainant complies and sucks on Teacher’s fingers, but later alerts the principal. Based on this evidence, the factfinder could find a violation of Section 213.8(6), and punishable


133 Id. at 726.

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as a fifth-degree felony. Complainant is under 12, as Teacher knows, and Teacher is more than five years older and over 21. The factfinder could conclude that the touch between Teacher’s fingers and Complainant’s tongue was for a sexual purpose, as required by Section 213.8(6)(a)(ii). Teacher is not guilty of Section 213.8(5), however, because even though Teacher holds a position of authority over Complainant, touches to the tongue are not included in the definition of “sexual contact,” but rather are covered only under Section 213.8(6)(a)(ii).

32. Same facts as in Illustration 31, except that Complainant is 17. These facts do not support liability under Section 213.8 or any other provision of Article 213. Complainant is not under 16 and thus does not fall within the class protected by Section 213.8(6). Similarly, Section 213.8(4), which applies to exploitative acts by those in authority, only addresses acts of sexual penetration or oral sex. And the act of inserting fingers into another person’s mouth does not meet the definition of “sexual contact” described in Section 213.0(2)(c); thus there can be no liability under Section 213.7 or Section 213.8(5). If the act was not consensual, Complainant may be subject to prosecution under ordinary assault-and-battery law.

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

Misdemeanor penalties for contact offenses with minors are evident in existing law, although in a minority of jurisdictions and chiefly for contact with an adolescent complainant.135

135 See, e.g., IOWA CODE ANN. § 709.12 (LexisNexis 2019) (defining sexual contact by actors 18 or older with a child as a misdemeanor offense, as well as providing juvenile courts jurisdiction for cases where the actor is 16 or 17 and the contact occurs with a child at least five years younger); MICH. COMP. LAWS SERV. §§ 750.520c(1)(a), (2)(a), .520e(1)(a), (2) (LexisNexis 2019) (defining sexual contact as a felony punishable by 15 years’ imprisonment where the complainant is under 13, and as a misdemeanor where the complainant is 13 to 16 and the actor is five or
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At the same time, the majority of provisions punish sexual contact with adolescents as a low-level felony, and there is also support for far more extreme sanctions. A precise sense of the actual degree of liability is at times difficult to discern because some of those provisions cover acts of both penetration and contact. Existing law exhibits both the practice of setting a single penalty applicable to several age-based thresholds and the practice of providing for harsher penalties.
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based on the age of the actor in relation to the age of the complainant. Also, many jurisdictions have multiple options for different degrees of liability for essentially identical conduct, which leads to uncertainty in how actual sentencing practices likely unfold.

The penalties applicable to Section 213.8(6) reflect the judgment that sexual contact with minors of any age, by actors significantly older, merits serious punishment. However, Section 213.8(6) distinguishes between the degree of punishment appropriate as both a deterrent and a retributive matter when the minor is older as opposed to a minor too young to comprehend or nominally consent to even the most superficial sexual acts, and when the actor is a sexually mature adult as opposed to an adolescent or young adult who is still in the throes of development. The punishment also reflects the structure of Section 213.8, which departs from the dominant approach in existing law by separating out the most intimate form of sexual contact, fondling of genitals, for enhanced punishment. Accordingly, actors of any age who engage in illicit sexual contact with minors 12 through 15 years old are punishable by up to one year’s incarceration, as are actors under 21 who engage in sexual contact with a minor outside the peer group. Actors aged 21 years or older who engage in illicit sexual contact with minors younger than 12 years old are punishable with up to three years’ imprisonment. Both punishments exceed the petty misdemeanor applicable to offensive sexual contact, as proscribed by Section 213.7(2).

7. Absence of Effective Consent – Section 213.8(7)

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

See, e.g., KY. REV. STAT. ANN. §§ 510.110-20 (LexisNexis 2019) (defining sexual contact with a complainant under 12 or with a complainant under 16 where the actor is 21 or older as a felony, and defining sexual contact by an actor aged 18 to 21 where the complainant is younger than 16 as a misdemeanor, though allowing a defense for actors less than five years older than a complainant 14 or older); W. VA. CODE ANN. §§ 61-8B-7, -9 (2019) (categorizing sexual contact with a complainant younger than 12 by an actor who is 14 or older as a felony with a maximum imprisonment of five years, but extending that maximum to 25 years when the actor is 18 or older, and categorizing sexual contact with a complainant younger than 16 by actor four or more years older as a misdemeanor offense).

Compare D.C. CODE § 22-3010.01(a) (2019) (authorizing a six-month penalty for “sexually suggestive contact with [a] child or minor” by a person 18 or older, when the actor is more than four years older or “in a significant relationship with a minor”), with id. § 22-3009 (authorizing a 10-year penalty for any person who “engages in sexual contact with [a] child” where the actor is at least four years older). Each jurisdiction also has a misdemeanor contact offense, see Reporters’ Note to Section 213.7, which also could be used in cases involving minor complainants.
8. Calculation of Ages – Section 213.8(8)

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

The first approach, probably closest to our colloquial sense but widely rejected by the courts, would treat age “in whole integers of years.”142 Under this whole-years approach, sometimes called the “Birthday Rule,” persons are considered only as old as they were on their last birthday: that is, individuals are deemed 19 years old until they turn 20. In other words, a complainant aged 15 years, two months, and eight days would be considered 15, just as a defendant aged 19 years, seven months, and five days would be considered only 19, making the statutory difference between their ages exactly four years (and hence not more than the four years often required by statute).

A still more extreme version of a whole-integers approach involves a “calendar year” calculation, according to which the age gap is measured by the number of whole calendar years separating the defendant’s and victim’s years of birth.143 On this approach, “a defendant born on January 2, 1990,” would be considered only four years older than a victim “born on December 30, 1995,” despite being nearly six years older in fact, “because there are only four calendar years between their births (1991, 1992, 1993, 1994).”144 As with the whole-years approach, the only courts that have considered this “calendar year” interpretation have rejected its results as “absurd.”145

At the other extreme is an approach measuring the difference in age down to the exact hour of birth.146 So far it appears that only one court has accepted this hourly interpretation, and then

143 See People v. Costner, 870 N.W.2d 582, 587-588 (Mich. Ct. App. 2015) (rejecting the defendant’s argument that “years” should be interpreted as “calendar years,” which is defined as 12 “calendar months beginning January 1 and ending December 31”); accord State v. Jason B., 729 A.2d 760, 769 (Conn. 1999) (rejecting the defendant’s argument that the statutory reference to “years” should be interpreted as full “calendar years”).
144 Costner, 870 N.W.2d at 588 n.3.
145 Id. at 588; Jason B., 729 A.2d at 769.
146 See Commonwealth v. Price, 189 A.3d 423, 431-432 (Pa. Super. Ct. 2018) (setting aside twin brothers’ convictions under Pennsylvania’s statutory rape law, requiring at least a four-year age gap between the actor and complainant, because both were some three years, 364 days, and 10 hours older than their alleged victim, and thus arguably not the full four years required by the statute).
only under the rule of lenity, to resolve the ambiguity created by the “unique” circumstances of
that case.147 That court also did not confront the conflict between its approach and the longstanding
common-law rule “that fractions of a day are not considered when computing time.”148

Nearly all courts to consider the issue reject these three approaches and instead adopt a
method nicknamed the “days-and-months approach.”149 According to this approach, what matters
is “a calculation of time, not of age.”150 And “common sense dictates that in comparing the relative
ages of individuals, the difference in their ages is determined by reference to their respective birth
dates,” measured, that is, to the day.151

The “days-and-months” approach is the most widely adopted, and most logical. Subsection
213.8(8) prescribes this method. Thus, for example, where Section 213.8 requires a difference of
more than five years between perpetrator and victim, as in subsections (1)(b)(ii) and (3)(c), the age
difference must be at least five years and one day. An actor aged 20 years, seven months, and 10
days who engages in sexual activity with a minor aged 15 years, five months, and five days, is five
years, two months, and five days older than the minor, and therefore would be considered more
than five years older, satisfying the age-gap requirement of subsections (1)(b)(ii) and (3)(c).

147 Id. at 432; cf. United States v. Brown, 740 F.3d 145, 150 n.10 (3d Cir. 2014) (declining to address this
very situation under the federal Sex Offender Registration and Notification Act (“SORNA”) because it seemed “highly
unlikely that a prosecution will ever be brought on the basis that someone who is exactly 4 years older than another
by birth-date will be prosecuted under SORNA on the theory that, by hours or minutes, the offender was ‘more than
4 years older’”).

312 (Ohio 1943)); accord Mason v. Bd. of Educ., 826 A.2d 433, 436 (Md. 2003) (“Although the fiction that a day has
no fractions has been contested on several occasions, no majority opinion has chosen to do away with the assumption
for the purpose of calculating a person’s age.”); Commonwealth v. Iafrate, 594 A.2d 293, 295 (Pa. 1991) (noting that
“[s]ince as early as 1908 courts of [the] Commonwealth [of Pennsylvania] have adhered to” the same computational
rule of disregarding fractions of a day, though also holding the rule inapplicable for “determining juvenile court
jurisdiction”).

149 United States v. Doutt, 926 F.3d 244, 247 (6th Cir. 2019).


the calendar year approach as “fl[y]ing in the face of common sense,” and adopting the alternative approach for
Michigan’s sex-offender registry); State v. Parmley, 785 N.W.2d 655, 662 (Wis. Ct. App. 2010) (adopting “[the days
and months] commonsense approach of calculating who is ‘not more than 4 years older’ than the victim” for
Wisconsin’s registry); see also Doutt, 926 F.3d at 247 (citing Commonwealth v. Price, 189 A.3d 423, 431-432 (Pa.
Super. Ct. 2018)) (adopting the same “straightforward days-and-months approach” to interpret 18 U.S.C. § 2243(a),
a federal sexual-abuse statute, but not ruling out the hourly approach in Price); United States v. Black, 773 F.3d
1113 (10th Cir. 2014) (“This court concludes the Third Circuit’s analysis [applying the days-and-months approach to
SORNA] is entirely convincing and hereby adopts it as our own.”); Brown, 740 F.3d at 150 & n.10 (applying the days-
and-months approach to SORNA while declining to reach the hourly interpretation, as “an extreme hypothetical”).
REPORTERS’ NOTES

1. Sexual victimization of minors

Robust data regarding the sexual victimization of minors has only recently been collected, analyzed, and published.\(^\text{152}\) As with studies of adult sexual offenses, studies of offenses against minors often are subject to various criticisms, including how offenses are defined and categorized, and the enduring problem of underreporting. Nonetheless, some general conclusions may be drawn from the existing data.

First, persons under 18 are common targets of sexual abuse. One review of incident reporting data showed that juveniles comprise 66 percent of all sex-crime victims.\(^\text{153}\) Another study confirms that “crimes against juvenile victims are the large majority (67%) of sexual assaults handled by law enforcement agencies.”\(^\text{154}\) According to one review, among victims of completed rape, roughly a third to one-half were first victimized while under the age of 18.\(^\text{155}\) For female victims of sexual violence, 42.2 percent experienced a completed rape by age 18—29.9 percent between 11 and 17 and 12.3 percent at or before age 10.\(^\text{156}\) For male victims, 27.8 percent experienced a completed rape at or before age 10.\(^\text{157}\)

The pattern of sexual victimization varies for juveniles by age and gender. The majority of victims are female, but minors tend to include a greater fraction of male victims than in the adult context.\(^\text{158}\) Studies indicate that juveniles also make up significant proportions of victims of other sexual offenses. Juveniles are 73 percent of female victims of forcible fondling, 63 percent of female victims of sexual assault with an object, 62 percent of victims of forcible sodomy, 46 percent of victims of forcible rape, and 63 percent of all female victims of sex offenses. Juveniles are 86 percent of male victims of forcible fondling, 76 percent of male victims of sexual assault with an object, 78 percent of male victims of forcible sodomy, 75 percent of male victims of forcible rape, and 84 percent of all male victims of sex offenses.\(^\text{159}\)

\(^{152}\) See DAVID FINKELHOR & ANNE SHATTUCK, CRIMES AGAINST CHILDREN RESEARCH CTR., CHARACTERISTICS OF CRIMES AGAINST JUVENILES 1 (2012) (“Statistics on crimes against children have not been 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.”).

\(^{153}\) Id. at 2. By comparison, juveniles make up two to 16 percent of victims for typical non-sex offenses. Id.

\(^{154}\) SNYDER, supra note 34, 12.


\(^{156}\) Id.

\(^{157}\) Id.

\(^{158}\) Specifically, the proportion of female victims is: 69 percent of victims under six; 73 percent of victims under 12, and 82 percent of victims under 18. This study defined sexual assault to include rape, sodomy, assault with an object, and forcible fondling. SNYDER, supra note 34, at 4.

\(^{159}\) Id.
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One survey also found that, although most juvenile sex-offense victims are 12 or over, there are significant rates of victimization for those younger than 12. Another study concluded that 46 percent of all juvenile victims of forcible sexual offenses are under 12, roughly a quarter of forcible fondling, sexual assault with an object, and sodomy victims were under six, and another quarter to a third in each category were six to 11 years old. Nearly two-thirds of victims of incest are under 12.

In addition, the vast majority of perpetrators of sexual crimes against juveniles are persons known to the juvenile. Roughly 33 percent are family members, and another 58 percent are acquaintances. Only four percent are identified as strangers. Another study found that 14 percent of offenders were strangers to the victim; for victims under six, just three percent of offenders were strangers, and for victims six to 12, just five percent were strangers.

The majority of perpetrators of sexual offenses against juveniles are adults (roughly 64 percent), but a significant minority are themselves juveniles (36 percent). Another study found that almost all offenders were male, and roughly 35 percent of offenders were under the age of 18. The vast majority of incidents involved no weapon; a firearm was involved in only two

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160 See, e.g., SNYDER, supra note 34, at 2 & tbl.1 (reporting that 14 percent of child sexual-assault victims were aged 0 to 5, 20.1 percent were 6 to 11, and 32.8 percent were 12 to 17, and that forcible fondling is the most common charge—45 percent of all sexual assaults reported to law enforcement in between 1991 and 1996).

161 FINKELHOR & SHATTUCK, supra note 152, at 1.

162 Id. at 5 fig.8.

163 Id.

164 In one study, 74 percent of adolescents (aged 12 to 17) surveyed who stated they had been sexually assaulted reported that the assailant was someone they knew. Over two-thirds of assaults occurred within the complainant’s home (30.5 percent) or neighborhood (23.8 percent) or school (15.4 percent). KILPATRICK ET AL., supra note 34, at 5; see also Finkelhor et al., supra note 1, at 331 tbl.1 (finding that the lifetime rate of sexual abuse by family and acquaintances is three to five times the rate by strangers, depending on gender and age of the victim).

165 FINKELHOR & SHATTUCK, supra note 152, at 5 fig.9. The figures reported for “sex offenses” included data for forcible offenses as well as statutory rape and incest, and further noted that the relationship between the victim and offender was unknown in five percent of cases. Id. Across all offense types, victims under six are most likely to be victimized by family members. As the minor ages, acquaintances are more likely to be the perpetrators, and make up 70 percent of perpetrators for victims over 12. Id. at 6 fig.11.

166 SNYDER, supra note 34, at 10 tbl.7.

167 FINKELHOR & SHATTUCK, supra note 152, at 6 fig.10.

percent of sexual-assault victimization of minors.\(^{169}\) Sexual offenses against minors are more likely to result in arrest than those against adults, but rates are comparable.\(^{170}\)

The deleterious effects of sexual victimization on the growth and well-being of a minor are self-apparent, but studies confirm significant increases in mental-health issues,\(^{171}\) likelihood of developing substance-abuse problems,\(^{172}\) and delinquent acts.\(^{173}\) Studies suggest that victims of child sexual abuse are more likely to undertake sex work, have difficulty forming interpersonal relationships, engage in compulsive behaviors, and have various immediate and chronic health problems.\(^{174}\) In sum, “victimization by sexual assault is clearly associated with dramatic increases in the rates of each negative outcome among both boys and girls.”\(^{175}\)

### 2. Minors who commit sexual offenses

Section 213.0(2)(f) defines “actor” as a person more than 12 years of age. Section 4.10 of the 1962 Model Penal Code set the age of criminal responsibility at 16, and assumed that most minors—even those as old as 17—would have allegations of their misconduct adjudicated by juvenile courts.\(^{176}\) Existing law shows far greater tolerance for treating minors more like adults. The 1990s ushered in a period of harsh treatment of all persons alleged to have engaged in criminal activity, including juveniles.\(^{177}\) This trend had two prongs. First, courts and legislators increasingly allowed young persons accused of misbehavior to be transferred for disposition in criminal court, rather than adjudicated in a juvenile court proceeding. Second, courts and legislators increasingly exposed even very young minors to legal responsibility for their actions, whether in juvenile or adult court.

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\(^{169}\) Snyder, supra note 34, at 6. This study also indicated that there was “information on the most serious weapon used” in 93 percent of sexual assault victimizations, and in 77 percent of these cases, no weapons other than “hands, feet, or fists” were used. Id. Violence and threats are more likely to be present with regard to older adolescent victims. Giroux, supra note 2, at 228 tbl.1.

\(^{170}\) See Snyder, supra note 34, at 11 (finding that 29 percent of juvenile victim cases resulted in an arrest, whereas 22 percent of adult reported cases did). These numbers vary according to age; only 19 percent of cases involving victims under six led to arrest, whereas roughly a third of those with victims aged six to 17 did. Id.

\(^{171}\) Kilpatrick et al., supra note 34, at 9 (reporting “a four- to fivefold increase in the prevalence rate of PTSD” among juvenile victims of sexual offenses).

\(^{172}\) Id. at 10 (reporting a roughly fourfold increase of the rate of “substance abuse or dependence” among male juvenile victims of sexual assault and a roughly fivefold increase in that rate among female victims).

\(^{173}\) Id. at 10 (reporting a roughly threefold increase of the rate of “delinquent acts” among male juvenile victims of sexual assault and a fivefold increase in that rate among female victims).

\(^{174}\) See Nor Shafrin Ahmad & Rohnny Nasir, Emotional Reactions and Behavior of Incest Victims, 5 PROCEED. SOC. & BEHAV. SCI. 1023, 1026 (2010) (citing studies on incest and other child sexual-abuse victims).

\(^{175}\) Kilpatrick et al., supra note 34, at 10.

\(^{176}\) Model Penal Code Section 213.1 Comment at 340 (AM. L. INST., Official Draft & Revised Commentaries, Pt. II, Vol. 1, 1980). Of course, even an actor over 12 years old must also be found to meet a threshold standard of adjudicative competence. See infra text accompanying note 194.

\(^{177}\) Elizabeth S. Scott & Laurence Steinberg, Rethinking Juvenile Justice 88-99 (2008) (discussing “the collapse of the rehabilitative model” that began in the 1960s and intensified in the 1990s).
In the case of sexual offenses, the consequence of these trends is particularly important. Because statutory rape liability is predicated only upon a showing of age, and does not involve any proof of nonconsent or force, expanded nets of liability made it possible for a young person to engage in unlawful behavior, even if both parties were peers who considered the activity consensual sexual conduct. Courts thus had to decide whether to permit a prosecutor to pursue charges against only one of two parties to a consensual encounter, even when both were within the age range of the protected class. Courts also had to determine whether prosecutors could charge even very young minors who engaged in clearly nonconsensual activity (for instance, a nine-year-old who digitally penetrated a four-year-old), given that these “perpetrators” are so young that the law deems them incapable of consenting to sex themselves (and thus they are arguably a “victim” of their own crime).

Many courts have met the first challenge—involving nominally consensual sex between two underage participants—by refusing to apply statutory rape laws to actors within the protected age class. But some courts have signaled greater willingness to apply statutory rape laws to situations in which the allegations involve nonconsensual sex, even if both parties are within the protected class. In order to determine the proper treatment of sexual offenses committed by minors against other minors, it is helpful to identify distinctions between adult and juvenile actors.

178 See, e.g., Commonwealth v. Wilbur W., 95 N.E.3d 259, 270-271 (Mass. 2018) (collecting cases in which “peer-aged minors” were not prosecuted for consensual sexual encounters); In re B.A.M., 806 A.2d 893, 898 (Pa. Super. Ct. 2002) (setting aside adjudications because both boys were “willing participant[s]”); State ex rel. Z.C., 165 P.3d 1206, 1207, 1213 (Utah 2007) (setting aside the delinquency adjudication of a 13-year-old girl who had a nominally consensual sexual encounter with a 12-year-old boy, finding it “absurd” when both were “victims” as much as perpetrators of the offense); In re G.T., 758 A.2d 301, 309 (Vt. 2000) (reading the state’s statutory rape law to be “inapplicable in cases where the alleged perpetrator is also a victim under the age of consent”).

179 State v. Colton M., 875 N.W.2d 642, 649 (Wis. Ct. App. 2015) (finding that the prosecution “provided a rational and proper basis for its decision to charge” the actor in a nonconsensual sexual encounter but not the victim when both were underage); State v. R.R.S., 597 S.W.3d 835, 842 (Tex. 2020) (upholding liability for 13-year-old adjudicated delinquent based on sexual acts with 5-year-old brothers, stating that “whether a child’s legal inability to consent to sex renders the child incapable of committing a particular offense depends on whether the accused’s consent is an element of the offense, not whether the victim’s consent may provide a defense.”).

180 In general:

Juveniles are more likely to offend in groups (24 percent with one or more co-offenders versus 14 percent for adults). They are somewhat more likely to offend against acquaintances (63 percent versus 55 percent). Their most serious offense is less likely to be rape (24 percent versus 31 percent) and more likely to be sodomy (13 percent versus 7 percent) or fondling (49 percent versus 42 percent). They are more likely to have a male victim (25 percent versus 13 percent).

. . . .

Juvenile sex offenders are also much more likely than adult sex offenders to target young children as their victims. . . . [Thus,] children younger than age 12 have about an equal likelihood of being victimized by juvenile and adult sex offenders, but adult offenders predominate among those who victimize teens.

FINKELHOR ET AL., supra note 168, at 4-5.
Importantly, “[v]ery few juveniles of any age commit sex offenses.” And an even smaller number of juveniles younger than age 12 commit sexual offenses—roughly one in eight of all juvenile offenders (who themselves are only one-fourth of all perpetrators of sexual offenses). The offending rate “rises sharply around age 12 and plateaus after age 14”; according to this study, 38 percent of juvenile sex offenders are 12 to 14, and 46 percent are 15 to 17. Notably, “teenage sex offenders are predominantly male (more than 90 percent), whereas a [more] significant number of preteen offenders are female.” Juvenile sex offenders are also much “more likely than adult offenders to commit illegal sexual behavior in groups.”

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

Some juvenile sex offenders appear primarily motivated by sexual curiosity. Others have longstanding patterns of violating the rights of others. Some offenses occur in conjunction with serious mental health problems. Some of the offending behavior is compulsive, but it more often appears impulsive or reflects poor judgment. However, “[a]mong preteen children with sexual behavior problems, a history of sexual abuse is particular prevalent.” In other words, a significant number of minors, and especially younger minors, who perpetrate sex crimes are themselves victims of sex crimes.

That said, the vast majority of abused children do not grow up to abuse others. Moreover, although popular imagination holds that juvenile sexual offenders are likely to continue to commit sexual offenses into adulthood, the research does not bear that out. “Multiple short- and long-term

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181 Id. at 8.
182 Id. at 2-3. One scholar reports that, “in 2012, forty children under ten-years-old and 461 children between the ages of eleven and sixteen were adjudicated guilty of statutory rape.” Cynthia Godsoe, Recasting Vagueness: The Case of Teen Sex Statutes, 74 WASH. & LEE L. REV. 173, 205 (2017).
183 FINKELHOR ET AL., supra note 168, at 4.
184 Id. at 2 (estimating that females are seven percent of all juvenile sex offenders).
185 Id. at 9.
186 Id. at 3.
187 Id.; see Leach et al., supra note 46, at 145 (citing studies that indicate a link between “child maltreatment and later offending”). See also Ashley F. Jesperson, Martin L. Lalumiere & Michael C. Seto, Sexual Abuse History Among Adult Sex Offenders and Non-Sex Offenders: A Meta-Analysis, 33(3) Child Abuse & Neglect 179 (2009).
188 See Leach et al., supra note 46, at 150 (finding that “proportionally few sexually abused boys—just three percent—were found to have committed any sexual offense”). The effect is measurable both ways: how many persons sexually abused as minors go on to abuse minors when they are adults, and how many persons who sexually abuse minors have a history of having been abused themselves as minors. One overview of the literature found studies that reported that as few as 27% and as many as 70% of persons who sexual abused minors had themselves also been abused as minors. Jesperson, Lalumiere & Seto, supra note 187, at 185 tbl.2 (citing studies with percentages as low as 4%, but those studies asked only about sexual abuse by parents). Importantly, that study reiterated that “[t]he large majority of sexually abused children do not go on to offend.…” Id. at 190 (highlighting, for instance, that a significant number of sexually abused children are female, and yet the large majority of sexual offenders are male).
clinical followup studies of juvenile sex offenders consistently demonstrate that a large majority (about 85-95 percent) of sex-offending youth have no arrests or reports for future sex crimes.”

In the words of one scholar,

“[C]urrent clinical typologies and models emphasize that this retrospective logic has obscured important motivational, behavioral, and prognostic differences between juvenile sex offenders and adult sex offenders and has overestimated the role of deviant sexual preferences in juvenile sex crimes. More recent models emphasize the diversity of juvenile sex offenders, their favorable prognosis suggested by low sex-offense-recidivism rates, and the commonalities between juvenile sex offending and other juvenile delinquency . . . .”

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

Both statutory and case law support the intuition that juvenile sex offenders should be distinguished from adult offenders. Many jurisdictions have statutes that, like Section 4.10 of the Model Penal Code, foreclose criminal liability under a certain age. And, in many jurisdictions, courts have found the application of a statutory-rape provision unconstitutional when used to prosecute an actor who is himself or herself younger than the age threshold. Similarly, the Restatement on Children and the Law describes the standard for adjudicative competency in juvenile justice proceedings; another section sets 10 as the minimum age for delinquency, as a “juvenile under the age of 10 is unlikely to be sufficiently competent to participate in a delinquency proceeding.” Indeed, research has shown that significant numbers of minors under 16

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189 FINKELHOR ET AL., supra note 168, at 3. Those that are rearrested tend to be arrested for other, nonsexual crimes. Id.

190 Id. at 2-3.

191 Id. at 10.

192 See MODEL PENAL CODE Section 4.10 (AM. L. INST., Proposed Official Draft 1962) (setting age for criminal liability at 16); see also Comment to Section 213.0(2)(f).

193 See, e.g., In re D.B., 950 N.E.2d 528, 533 (Ohio 2011) (“[W]hen two children under the age of 13 engage in sexual conduct with each other, each child is both an offender and a victim, and the distinction between those two terms breaks down.”). But see United States v. JDT, 762 F.3d 984, 996-999 (9th Cir. 2014) (rejecting a vagueness challenge to the delinquency adjudication of a then-10-year-old boy alleged to have abused younger children, even though the statute applied to all children under 12).

194 RESTATMENT OF THE LAW, CHILDREN AND THE LAW § 15.30 & Comments a-c, at 219-223 (AM. L. INST., Tentative Draft No. 2, 2019); see id. § 15.30 Comment a, at 220-221 (“[S]tate courts and legislatures that have considered the issue have almost uniformly concluded that . . . a youth facing delinquency adjudication must be capable of understanding the proceeding and assisting counsel.”); see also id. § 15.30 Comment c, at 225 (recognizing that such understanding might vary according to the complexity of the case).

195 Id. § 15.30 Comment b, at 222.
“performed as poorly on standard competence measures as adults found incompetent to stand trial.”

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

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

In a comprehensive article, one scholar notes that an overbroad statutory-rape provision invites exercises of discretion and “imposes mainstream morals on a small group of offenders selected for illegitimate reasons.” This discretion starts with the way in which these complaints enter the system: “Parents tend to report most often, and, concomitantly, prosecutions proceed most often, against minors who do not conform to gender and sexuality or other norms.” Specifically, minors are disproportionately prosecuted for same-sex consensual sexual activity; the designation of offender and victim “reinforces aggressive male and passive female gender roles”; experimentation that is not “typical” is more likely to be punished; and young men of...
color are more likely to be targeted for prosecution in interracial relationships.\textsuperscript{203} In one prominent case, a 17-year-old young Black adolescent was convicted and sentenced to 10 years in prison for engaging in consensual oral sex with a 15-year-old white adolescent; after public backlash, he was released early.\textsuperscript{204}

Litigants have also presented courts with similar challenges. For instance, in Commonwealth v. Bernardo B., the Supreme Judicial Court granted a discovery request, having found that the minor met the threshold showing for a selective-prosecution claim.\textsuperscript{205} The minor was a 14-year-old entering ninth grade; two complainants were 12 and a third was about to turn 12, all entering sixth grade. The record supported a finding that the sexual activity was consensual—“all of the children mutually agreed to it, and [] all were under the age of consent.”\textsuperscript{206}

In sum, even if a statutory-rape provision can technically withstand a constitutional-vagueness or selective-enforcement challenge, it should be drafted with specificity in order to minimize the probability of arbitrary or biased application.


A comprehensive review of all existing law governing sexual offenses committed by and against minors, as well as of secondary sources compiling and analyzing this material, reveals a body of law that defies logic. Jurisdictions exhibit marked variation in the structure of their schemes, the ages for liability, the use of defenses versus elements in defining applicable age thresholds and age gaps, the penalties imposed, the use of specialized statutes (such as “continuous sexual abuse”) and the manner in which prohibited behavior is defined. One difficulty of this examination is that many statutory regimes reproduce or separately define offenses against minor complainants that parallel force, coercion, or other nonconsent provisions. Thus, in assessing the state of the law for the purposes of Section 213.8, it is imperative to separate out the provisions of liability that apply on the basis of age alone.

This Note attempts to provide only a rough sketch, using illustrative examples, of the range of existing regimes. Generally speaking, nearly all statutory schemes for penetration offenses distinguish between sexual acts with pre-pubescent complainants and post-pubescent

\textsuperscript{203} See id. at 226-227 (citing data that show that Black and Latino youths are disproportionately represented in prosecutions for statutory rape).

\textsuperscript{204} Id. at 226-227 (discussing the case of Genarlow Wilson); see also Michele Goodwin, Law’s Limits: Regulating Statutory Rape Law, 2013 Wis. L. REV. 481, 495-498 (describing the racialized history and enduring racial taint of statutory rape).


\textsuperscript{206} Id. at 838.
complainants. The most common pre-pubescent threshold age is 12, although some jurisdictions
set the age at 13 and at least one sets the age at 11. The post-pubescent range is typically 12 to 16,
although some jurisdictions narrow the range to 11 to 15, 13 to 17, 14 to 17, or even 16 to 18. A
handful of states impose liability for all sexual acts under a certain age, even as high as 17 or 18,
although they may diminish the punishment or provide an affirmative defense for actors who are
peers within a few years.\footnote{207 See, e.g., TEX. PENAL CODE ANN. § 22.011(a)(2), (c)(1), (e) (LexisNexis 2019) (defining the offense of knowing penetration of a child, which is defined as a person younger than 17, and providing an affirmative defense where the actor is not more than three years older than the victim at the time of the offense, and the victim is a child 14 or older).}
The penalty ranges for penetration offenses vary markedly. Generally, the most severe penalties apply to older actors who commit offenses against young complainants,\footnote{208 See, e.g., MONT. CODE ANN. § 45-5-503(4)(a)(i) (imposing a 100-year felony for sexual penetration of a complainant under 12 by an actor 18 or older).} whereas misdemeanor liability may apply when complainants are older.\footnote{209 See, e.g., 720 ILL. COMP. STAT. ANN. 5/11-1.50(c) (LexisNexis 2019) (defining criminal sexual abuse when a “person commits an act of sexual penetration or sexual conduct with a victim who is at least 13 years of age but under 17 years of age and the person is less than 5 years older than the victim” as a misdemeanor).}

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

Colorado has a general sexual assault provision that punishes sexual penetration of a person
younger than 15 where the actor is four years older, or 15 to 17 where the actor is at least 10 years
older.\footnote{210 COLO. REV. STAT. § 18-3-402(1)(d)-(e) (2018).} The under-15 offense is a felony punishable by up to six years in prison; the 15-to-17 offense is a misdemeanor.\footnote{211 Id. § 18-3-402(2)-(3); see id. § 18-1.3-401(1)(a)(V)(A.1) (setting the maximum penalty for a class 4 felony at six years’ imprisonment).} The state punishes sexual contact with a minor under 15, where the actor is four or more years older, with up to six years in prison.\footnote{212 Id. § 18-3-405(1)-(2); see id. § 18-1.3-401(1)(a)(V)(A.1).} Colorado courts have upheld
strict liability for age-based offenses.\footnote{213 People v. Salazar, 920 P.2d 893, 895-896 (Colo. App. 1996).}

Pennsylvania punishes sexual penetration with a complainant younger than 13 as a 40-year
felony.\footnote{214 18 PA. CONS. STAT. § 3121(c), (e)(1), 3123(b), (d)(1) (2019) (determining that rape and “involuntary deviate sexual intercourse” of a person “less than 13 years of age” carries a maximum sentence of 40 years’ imprisonment).} It punishes intercourse with a complainant younger than 16, where the actor is 11 or
more years older, as a 20-year felony, and where the actor is four to 11 years older as a 10-year
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felony. Sexual contact with a complainant under 13 is punishable as a first-degree misdemeanor, and contact with a complainant younger than 16 by an actor more than four years older is punishable as a second-degree misdemeanor.

Montana provides that persons younger than 16 are generally incapable of consent. It then penalizes sexual intercourse with a person younger than 16. If the actor is 18 or older, and the complainant 12 or younger, the offense is a 100-year felony. If the complainant is at least 14 and the actor is 18 or younger, then the offense is a five-year felony. The statutory scheme also penalizes sexual contact with a person younger than 14 by an actor three or more years older as a six-month misdemeanor. The scheme also punishes incest, which includes siblings of the whole or half-blood, ancestors, descendants, and stepchildren, as well as adoptive relationships, with life imprisonment or 100 years. Consent is a defense to incest but only for sexual relationships with stepchildren; it is ineffective if the child is younger than 18 and the stepparent is four or more years older. Montana permits a defense of reasonable mistake for statutory cases that depend on the victim being younger than 16, but forecloses it if the complainant is younger than 14.

Delaware provides that generally children under 16 cannot consent to a person more than four years older, and that children under 12 cannot consent at all. Generally there is no mistake-of-age defense, but an actor within four years of a complainant aged 12 to 16 may offer a defense

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215 Id. §§ 1103, 3122.1, 3125(a)(7), (a)(8), (c) (2019) (defining “statutory sexual assault” as a felony of the first degree where the actor is more than 11 years older and a felony of the second degree where the actor is four to 11 years older, and defining “aggravated indecent assault” against a child as a felony of the second degree, where felonies of the first degree carry a maximum imprisonment of 20 years and imprisonment of 10 years for felonies of the second degree).

216 Id. § 3126(a)(7)-(8), (b) (2019). A first-degree misdemeanor carries a five-year maximum penalty, and a second-degree misdemeanor carries a two-year maximum penalty. Id. § 1104(1)-(2) (2019). Statutory provisions commonly overlap inasmuch as the language of the statute provides, for instance, that “the complainant is less than 13 years of age” in one provision and “the complainant is less than 16 years of age and the person is four or more years older than the complainant” in a separate provision. Id. § 3126(a)(7), (8). The penalty clauses then may authorize different degrees of punishment, and the prosecutor may exercise discretion as to which offense to charge.


218 Id. § 45-5-503(1). The base offense is punishable “by life imprisonment or by imprisonment in the state prison for a term of not more than 20 years.” Id. § 45-5-503(2).

219 Id. § 45-5-503(4)(a)(i).

220 Id. § 45-5-503(5).

221 Id. § 45-5-502(2)(a), (5)(a)(ii).

222 Id. § 45-5-507(1), (3).

223 Id. § 45-5-507(2)(a). There is also a defense for actors under 18 where the other person is four or more years older than the actor, in which case the younger actor is also considered a victim. Id. § 45-5-507(2)(b).

224 Id. § 45-5-511(1).

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of the complainant’s consent.\textsuperscript{226} The most serious statutory offense permits a life maximum for intercourse with a complainant under 12 by an actor 18 or older under specific aggravating circumstances.\textsuperscript{227} Next is a 25-year felony for sexual penetration of a complainant under 12 by an actor 18 or older,\textsuperscript{228} as well as for intercourse between a complainant not yet 16 with an actor 10 years older, or a complainant not yet 14 with an actor 19 or older;\textsuperscript{229} then a 15-year felony for intercourse or penetration of a complainant under 16, or intercourse with a complainant not yet 18 and an actor 30 or older.\textsuperscript{230} Two contact offenses apply to either persons under 13 (an eight-year felony), or persons under 18 (a three-year felony).\textsuperscript{231} Incest is a misdemeanor, handled in family court.\textsuperscript{232}

Finally, Utah has a complex and dense scheme, which includes a specific provision titled “Unlawful adolescent sexual activity.”\textsuperscript{233} That provision is a catch-all that appears to effectively govern sexual activity between nominally consenting persons aged 12 to 18.\textsuperscript{234} It then has an eight-part penalty scheme, ranging from punishment of an adolescent 17 years of age who engages sexually with a 12- or 13-year-old with a five-year felony, to punishment of an adolescent 14 years of age with a 13-year-old with a 90-day misdemeanor.\textsuperscript{235}

Generally speaking, state schemes also contain a wide array of specialty offenses, such as continuous abuse provisions, provisions for recidivist sex offenders, and an array of exploitation, enticing, and indecency provisions. Many states have provisions specifically tailored to situations in which the actor is in a position of trust.\textsuperscript{236}

Every state has also has at least one statute specifically addressing sexual contact with a minor. Many states have multiple overlapping provisions. A handful of states single out fondling

\textsuperscript{226} Id. § 762(a), (d). Notwithstanding this general rule, any sexual offense against complainants under 14 also permits a mistake of age defense that the actor thought the complainant was older than 16. Id. § 777(a).

\textsuperscript{227} Id. § 773(a)(5), (c).

\textsuperscript{228} This felony specifically, rape in the second degree, also carries a minimum sentence of 10 years. Id. § 772(a)(2)(g), (c); see id. § 4205(b)(2) (setting the “term of incarceration” for a class B felony at 2 to 25 years).

\textsuperscript{229} Id. § 771(a)(1).

\textsuperscript{230} Id. § 770; see id. § 4205(b)(3) (setting the maximum sentence for a class C felony at 15 years).

\textsuperscript{231} Id. §§ 768-69; see id. § 4205(b)(2) (setting the maximum sentence for class D and F felonies at 8 and 3 years, respectively).

\textsuperscript{232} Id. § 766.

\textsuperscript{233} UTAH CODE ANN. § 76-5-401.3 (LexisNexis 2019).

\textsuperscript{234} See id. § 76-5-401.3(1)(b) (applying the provision to “sexual activity between adolescents under circumstances not amounting to” several specific offenses in the Utah Criminal Code, including rape, sodomy, sexual abuse, and other similar offenses).

\textsuperscript{235} Id. § 76-5-401.3(2); see id. §§ 76-3-203(3), -204(3) (penalizing third degree felonies with five years’ imprisonment, and class C misdemeanors with 90 days’ imprisonment).

\textsuperscript{236} See, e.g., ARK. CODE ANN. § 5-14-124 (2019) (defining certain specific situations in which the actor “is in a position of trust or authority over the victim” as sexual assault in the first degree); COLO. REV. STAT. § 18-3-405.3 (2018); 720 ILL. COMP. STAT. ANN. 5/11-1.20(a)(4) (LexisNexis 2019).
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for special treatment, although others fold it into general contact offenses,\(^237\) and one specifically includes it in the definition of penetration.\(^238\)

\textbf{a. Mens rea}

Roughly two-thirds of states do not require proof of mens rea for statutory rape.\(^239\)

However, roughly 16 states allow for a mistake-of-age defense to at least a charge of statutory rape.

\(^{237}\) See, e.g., GA. CODE ANN. § 16-6-4(a)(1) (2020) (defining child molestation as “any immoral or indecent act to or in the presence of or with any child under the age of 16 years” when done with sexual intent); IND. CODE ANN. § 35-42-4-3(b) (LexisNexis 2019) (“A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching . . . with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Level 4 felony.”); IOWA CODE ANN. § 709.8(1)(a)-(b), (2)(a) (LexisNexis 2019) (defining “lascivious acts with a child” as a class C felony where actors 16 or older who perform certain acts with a child, including “fondling[ing] or touch[ing] the pubes or genitals of a child” or having the child fondle the actor’s genitals); KAN. STAT. ANN. § 21-5506(b)(3), (c)(2)-(3) (2018) (defining “aggravated indecent liberties with a child” under 14 as “[a]ny lewd fondling or touching of the person of either the child or the offender” done with sexual purpose, and is a level 3 felony, or an “off-grid person felony” where the actor is 18 or older); MISS. CODE ANN. § 97-5-23(1) (2019) (providing that “hand[ling], touch[ing] or rub[bing] with hands or any part of his or her body or any member thereof, or with any object” any child under 16 with sexual purpose is punishable by two to 15 years’ imprisonment).

\(^{238}\) See ARIZ. REV. STAT. ANN. § 13-1401(3)(a), (4) (LexisNexis 2020) (defining “sexual contact” to include “fondling or manipulating of any part of the genitals, anus or female breast,” and “sexual intercourse” to include “masturbatory contact with the penis or vulva”); cf. OHIO REV. CODE ANN. § 2907.05(B) (LexisNexis 2020) (specifically proscribing touches of a child’s genitalia).

\(^{239}\) See ALA. CODE § 13A-6-62 cmt. (LexisNexis 2020) (explaining that “the defendant’s mistaken belief as to the victim’s age or mental deficiency is no defense” under Alabama law); D.C. CODE § 22-3011(a) (2019) (“Neither mistake of age nor consent is a defense to a prosecution under [the D.C. statutory rape provisions].”); KAN. STAT. ANN. § 21-5204(b) (2018) (providing that for Kansas’s statutory rape law, “[p]roof of a culpable mental state does not require proof . . . that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which the accused is charged.”); N.J. STAT. ANN. § 2C:14-5(c) (LexisNexis 2019) (providing, for purposes of New Jersey’s statutory rape provisions, that “[i]t shall be no defense to a prosecution for [such] a crime . . . that the actor believed the victim to be above the age stated for the offense, even if such a mistaken belief was reasonable”); TENN. CODE ANN. § 39-11-506, -522 (2019) (defining various degrees of impermissible sexual contact with children based on the age of the child); UTAH CODE ANN. 1953 § 76-2-304.5 (LexisNexis 2019) (providing that it is no defense to any of Utah’s provisions addressing the sexual abuse of minors “that the actor mistakenly believed” the minor to be of age or was otherwise “unaware of the victim’s true age”); State v. Blake, 777 A.2d 709, 713 (Conn. App. Ct. 2001) (“All a person need do to violate [Connecticut’s statutory rape law] is to (1) engage in sexual intercourse (2) with a person between the ages of thirteen and fifteen, and (3) be at least two years older than such person.”); Pritchard v. State, No. 280, 2003, 2004 Del. LEXIS 61, at *4 (Feb. 4, 2004) (explaining that Delaware’s statutory rape law “precludes a defense based on the defendant’s reasonable belief that the victim had reached the age of consent”); Hodge v. State, 866 So. 2d 1270, 1273 (Fla. Dist. Ct. App. 2004) (noting the “earlier caselaw” in Florida “finding that crimes against underage persons fall within the category of crimes in which, on grounds of public policy, certain acts are made punishable without proof that the defendant understands the facts that give character to his act . . . and proof of an intent is not indispensable to conviction” (quoting Simmons v. State, 10 So. 2d 436, 438 (Fla. 1942))); Haywood v. State, 642 S.E.2d 203, 204 (Ga. Ct. App. 2007) (“With regard to statutory rape . . . , the defendant’s knowledge of the age of the female is not an essential element of the crime [under Georgia law] . . . and therefore it is no defense that the accused reasonably believed that the prosecutrix was of the age of consent.”) (quoting Tant v. State, 281 S.E.2d 357, 358 (Ga. Ct. App. 1981))); State v. Buch, 926 P.2d 599, 607 (Haw. 1996) (holding, based on legislative history, that “a defendant is strictly liable with respect to the attendant circumstance of the victim’s age in a sexual assault” under Hawaii law); State v. Stiffler, 788 P.2d 220, 221 (Idaho 1990) (concluding that “mistake of age is not a defense to a charge of statutory rape” under Idaho’s statutory rape statute); State v. Tague, 310 N.W.2d 209, 212 (Iowa 1981) (holding that “[m]istake of fact is not a defense” to a charge of statutory rape); State v. Sims, 195 So. 3d 441, 444 (La. 2016) (“Although strict liability criminal offenses are generally disfavored, this Court has recognized a legislature’s authority to exclude the element of knowledge or intent in defining a criminal offense . . . .”)
[including in Louisiana’s] “law prohibiting carnal knowledge of a juvenile . . . .”); Walker v. State, 768 A.2d 631, 633, 635 (Md. 2001) (concluding that, as with Maryland’s statute dealing “with victims age thirteen and younger,” “the availability of a defense of reasonable mistake of age cannot be read into carnal knowledge between a fourteen or fifteen year old victim and a defendant who is age twenty-one or older”); Commonwealth v. Montalvo, 735 N.E.2d 391, 393 (Mass. App. Ct. 2000) (“It is immaterial [for the crime of statutory rape in Massachusetts] that the defendant reasonably thought the victim was sixteen or older. . . . The same is true of the related crime of indecent assault and battery on a child under the age of fourteen . . . .”); People v. Cash, 351 N.W.2d 822, 826 (Mich. 1984) (“The vast majority of states, as well as the federal courts . . . do not recognize the defense of a reasonable mistake of age to a statutory rape charge. For the reasons discussed below, [Michigan] agree[s] with the majority’s position.”); Collins v. State, 691 So. 2d 918, 923 (Miss. 1997) (“There is simply no indication by our legislature or by this Court that the defendant’s knowledge the child’s age is a factor to be considered [under Mississippi’s statutory rape statute]. Rather, the knowledge or ignorance of the age of the child is irrelevant.”); State v. Navarrete, 376 N.W.2d 8, 11 (Neb. 1985) (“[M]istake or lack of information as to the victim’s chastity is no defense to the crime of statutory rape [under Nebraska law].” (quoting State v. Vicars, 183 N.W.2d 241, 243 (Neb. 1971))); Elder v. State, No. 55111, 2010 Nev. LEXIS 2409, at *X (Sept. 9, 2010) (declining to overrule the Nevada Supreme Court’s decision in Jenkins v. State, 877 P.2d 1063 (Nev. 1994) “that a reasonable mistake regarding the age of a victim is [not] a defense to the crime of statutory sexual seduction”); State v. Holmes, 920 A.2d 632, 636 (N.H. 2007) (declining to overrule the New Hampshire Supreme Court’s earlier decision in Goodrow v. Perrin, 403 A.2d 864, 866 (N.H. 1979) upholding the state’s law “making statutory rape a strict liability crime”); People v. Dozier, 72 A.D.2d 478, 486 (N.Y. App. Div. 1980), aff’d, 417 N.E.2d 1008 (N.Y. 1980) (“Mens rea is simply not an element of New York’s statutory rape statute.”); State v. Anthony, 516 S.E.2d 195, 199 (N.C. Ct. App. 1999) (“Just as consent is not a defense [to a charge of statutory rape], for the same reasons, mistake of age is not a defense [under North Carolina law].”); Starkey v. Okla. Dep’t of Corr., 305 P.3d 1004, 1026-1027 (Okla. 2013) (explaining that “[s]tatutory rape does not require scienter [under Oklahoma law] because it is not a defense that a defendant did not know the victim was under the age of consent”); State v. Yanez, 716 A.2d 759, 766 (R.I. 1998) (declining to “interfere [with Rhode Island’s child sexual assault statutes] by engrafting a mens rea requirement where one was not intended”); Toomer v. State, 529 S.E.2d 719, 720-721 (S.C. 2000) (explaining that, under South Carolina law, “[w]here the female is under the age of fourteen and unmarried, the only other element necessary to be proven in order to establish the crime of Rape is the fact that the defendant had sexual intercourse with her” (quoting State v. Whitener, 89 S.E.2d 701, 716 (S.C. 1955))); State v. Jones, 804 N.W.2d 409, 416-417 (S.D. 2011) (explaining that under South Dakota case law, “[i]n a prosecution for alleged statutory rape a defendant’s knowledge of the age of the girl involved is immaterial and his reasonable belief that she is over the age of eighteen years is no defense” (quoting State v. Fulks, 160 N.W.2d 418, 420 (S.D. 1968))); Fleming v. State, 455 S.W.3d 577, 583 (Tex. Crim. App. 2014) (upholding Texas’s statutory rape provision, over a Due Process challenge, despite the law’s failure to “require the State to prove that the defendant had a culpable mental state regarding the victim’s age” or “to recognize an affirmative defense based on the defendant’s belief that the victim was 17 years of age or older”); State v. Seales, 621 A.2d 1281, 1283 (Vt. 1993) (declaring “to imply knowledge of age as an element of, or reasonable mistake of age as a defense to, sexual assault of a minor” under Vermont’s statutory rape law); Rainey v. Commonwealth, 193 S.E. 501, 501-502 (Va. 1937) (holding under Virginia law “that if the sexual act had taken place, without actual force, a conviction of statutory rape would have been warranted because the girl was between the ages of fourteen and sixteen years and her consent to the act could not operate to prevent it from being a crime”); State v. Jadowski, 680 N.W.2d 810, 815-816 (Wis. 2004) (“An actor’s ability to raise mistake regarding his belief about the age of a minor as a defense is explicitly negated” by Wis. STAT. ANN. § 939.43(2) (1999-2000)).
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involving an older complainant; and three states permit the defense of reasonable mistake of age for any sexual offense involving a minor. At least one state appears to require proof of a

240 See ARIZ. REV. STAT. ANN. § 13-1407(A) (LexisNexis 2020) (“It is a defense to a prosecution pursuant to [Arizona’s sexual offense provisions] in which the victim’s lack of consent is based on incapacity to consent because the victim was fifteen, sixteen or seventeen years of age if at the time the defendant engaged in the conduct constituting the offense the defendant did not know and could not reasonably have known the age of the victim.”); ARK. CODE ANN. § 5-14-102(c)-(d) (2019) (providing, for certain sexual offenses under Arkansas law where the “criminality of the conduct depends on a child’s being below a critical age,” that “the actor may be guilty of the lesser offense defined by the age that the actor reasonably believed the child to be”); Colo. Rev. Stat. § 18-1-503.5(1) (2018) (providing that, where “the criminality of conduct depends on a child being younger than eighteen years of age and the child was in fact at least fifteen years of age, it shall be an affirmative defense that the defendant reasonably believed the child to be eighteen years of age or older”); 720 ILL. COMP. STAT. ANN. 5/11-1.70(b) (LexisNexis 2019) (“It shall be a defense under [Illinois’ criminal sexual abuse provisions] that the accused reasonably believed the person to be 17 years of age or over.”); Me. Rev. Stat. Ann. tit. 17-A, § 254 (LexisNexis 2019) (providing “a defense to a prosecution under” certain conduct that constitutes sexual abuse of minors “that the actor reasonably believed the other person is at least 16 years of age”); Minn. Stat. § 609.344(1)(b) (2019) (providing that, where “the complainant is at least 13 but less than 16 years of age and . . . the actor is no more than 120 months older than the complainant, it shall be an affirmative defense, which must be proved by a preponderance of the evidence, that the actor reasonably believes the complainant to be 16 years of age or older”); Mo. Ann. Stat. § 566.020(2) (LexisNexis 2019) (“Whenever in this chapter [dealing with sexual offenses] the criminality of conduct depends upon a child being less than seventeen years of age, it is an affirmative defense that the defendant reasonably believed that the child was seventeen years of age or older.”); Mont. Code Ann. § 45-5-511(1) (2019) (“When criminality [under Montana’s sexual offense chapter] depends on the victim being less than 16 years old, it is a defense for the offender to prove that the offender reasonably believed the child to be above that age. The belief may not be considered reasonable if the child is less than 14 years old.”); N.D. CENT. CODE § 12.1-20-01(1)-(2) (2019) (providing that “[w]hen the criminality of conduct depends on a child’s being below the age of fifteen, it is no defense that the actor did not know the child’s age, or reasonably believed the child to be older than fourteen,” but when “criminality depends on the victim being a minor, it is an affirmative defense that the actor reasonably believed the victim to be an adult”); Ore. Rev. Stat. Ann. § 163.325(2) (LexisNexis 2019) (“When criminality depends on the child's being under a specified age other than 16, it is an affirmative defense for the defendant to prove that the defendant reasonably believed the child to be above the specified age at the time of the alleged offense.”); 18 Pa. Cons. Stat. § 3102 (2019) (providing, when “the criminality of conduct depends on a child being below the age of 14 years,” that “it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older,” but when the “critical age [is] older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age”); Wash. Rev. Code Ann. § 9A.44.030(2) (LexisNexis 2020) (providing that, for certain statutorily defined ages, “it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be the [prescribed] age . . . based upon declarations as to age by the alleged victim”); W. Va. Code Ann. § 61-8B-12(a) (LexisNexis 2019) (“In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age . . . it is an affirmative defense that the defendant, at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.”); Wyo. Stat. Ann. § 6-2-308 (2019) (providing, when “criminality of conduct [for certain sexual offenses] in this article depends on a victim being under sixteen (16) years of age,” that “it is an affirmative defense that the actor reasonably believed that the victim was sixteen (16) years of age or older,” when the victim is under 12 or 14 years, “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”); Perez v. State, 803 P.2d 249, 251 (N.M. 1990) (explaining that, “[w]hile a child under the age of thirteen requires the protection of strict liability” under N.M. Stat. Ann. § 30-9-11 (1990), “the same is not true of victims thirteen to sixteen years of age,” because actors in that case may assert a “defense of mistake of fact”); see also People v. Soto, 245 P.3d 410, 422 n.11 (Cal. 2011) (explaining that, pursuant to People v. Hernandez, 393 P.2d 673, 677 (Cal. 1964), the court “recogniz[es] 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).
culpable mens rea for cases involving older complainants.\(^{242}\) In two jurisdictions, courts have even imposed strict liability notwithstanding statutory language that suggests a mens rea is required.\(^{243}\)

The traditional justifications for strict liability involve protecting children from exploitation and the inherent wrongfulness of sexual conduct with young persons. Until recently, the drive to protect children from exploitation was expressly framed as the need to protect the chastity of young girls prior to marriage.\(^{244}\) That purpose manifests most evidently in the

\(^{241}\) See ALASKA STAT. ANN. § 11.41.445(b) (2019) (providing an “affirmative defense” to all statutory-rape charges “that, at the time of the alleged offense, the defendant (1) reasonably believed the victim to be that age or older; and (2) undertook reasonable measures to verify that the victim was that age or older”); KY. REV. STAT. ANN. § 510.030 (LexisNexis 2019) (providing for sexual offenses that “the defendant may prove in exculpation that at the time of the conduct constituting the offense he or she did not know of the facts or conditions responsible for such incapacity to consent,” including the victim’s age); Lechner v. State, 715 N.E.2d 1285, 1288 (Ind. Ct. App. 1999) (declining “to limit the availability of the statutory mistake of fact defense” provided by IND. CODE ANN. § 35-42-4-3(c) (West 1978) “to those defendants whose reasonable belief was that the victim was at least 16 years old,” and instead “hold[ing] that the defense is available to any defendant who reasonably believes the victim to be of such an age that the activity engaged in was not criminally prohibited”).

\(^{242}\) See, e.g., OHIO REV. CODE ANN. § 2907.04(A) (LexisNexis 2020) (“No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard.”) (emphasis added); Phipps v. State, 107 N.E.3d 754, 759 (Ohio Ct. App. 2018) (observing that OHIO REV. CODE ANN. § 2907.04(A) (2017) “requires a mens rea of knowing or reckless as to the age of the victim for a conviction,” and therefore “does not impose strict liability”). But see OHIO REV. CODE ANN. § 2907.02(A)(1)(b) (LexisNexis 2020) (forbidding any person from “engag[ing] in sexual conduct with another who is . . . less than thirteen years of age, whether or not the offender knows the age of the other person,” unless the minor is a spouse living with the offender).

\(^{243}\) See COLO. REV. STAT. § 18-3-405(1) (2018) (“Any actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child if the victim is less than fifteen years of age and the actor is at least four years older than the victim.”) (emphasis added). Yet despite that wording, the Colorado courts have read the provision as “a strict liability offense,” holding proof of mens rea unnecessary as to the victim’s age. People v. Salazar, 920 P.2d 893, 895-896 (Colo. App. 1996). As the Salazar court explained, that was at least partly because the legislature “specifically considered and rejected a[n] other provision that would have allowed the defense of ‘reasonable mistake of age’.” Id. at 895. On the same basis, the Tenth Circuit has also read Colorado’s general sexual assault law as “a strict liability statute” with respect to victims who are “at least fifteen years of age but less than seventeen years of age.” United States v. Wray, 776 F.3d 1182, 1190-1191 (10th Cir. 2015) (quoting COLO. REV. STAT. § 18-3-402(1)(e) (2014)). The same is true of Arizona’s statutory-rape law as well. Compare ARIZ. REV. STAT. ANN. § 13-1405(A) (LexisNexis 2020) (“A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse . . . with any person who is under eighteen years of age.”) (emphasis added), with State v. Gamez, 258 P.3d 263, 268 (Ariz. Ct. App. 2011) (finding that “nothing in the plain language of the statute . . . requires proof that the perpetrator engaged in the sexual act while also knowing that the person was under 18,” and that “[h]ad the legislature intended to require the state in this context to prove that a defendant knew the victim was under 18, it would have said so” explicitly).

\(^{244}\) See Russell L. Christopher & Kathryn H. Christopher, The Paradox of Statutory Rape, 87 IND. L.J. 505, 509 (2012) (relating this history of chastity framing). “Because their chastity was considered particularly precious,” as Justice Brennan recounted, “young women were felt to be uniquely in need of the State’s protection.” Michael M. v. Superior Court, 450 U.S. 464, 494-495 (1981) (Brennan, J. dissenting). California’s statutory-rape law was at one time expressly upheld by the Supreme Court in California’s “obvious purpose . . . [of] protecting from violation the virtue of young and unsophisticated girls.” Id. at 495 n.10 (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 182, at 494 (“[P]rotecting the
traditional availability of a “promiscuity defense.” Namely, the complainant’s “unchaste”
character was recognized as a complete defense to statutory rape.245 Viewed this way, statutory
rape was considered as almost regulatory in nature, and thus strict liability could be justified as
consistent with social-welfare purposes.246

The more contemporary view of statutory rape rejects a chastity defense, and focuses on
the protection of all children from sexual exploitation. As the Texas Court of Criminal Appeals
recently explained in upholding that state’s statutory-rape law, “[t]he statutory prohibition of an
adult having sex with a person who is under the age of consent” is no longer about protecting only
girls, let alone girls’ chastity, but instead “serves to protect young people from being coerced by
the power of an older, more mature person.”247

Similarly, statutory-rape laws were once predicated on the idea that sexual activity with
obviously underage persons is inherently wrongful. In the traditional formulation, the mere ability
to access a minor supported an inference of wrongfulness—there was simply no legitimate
circumstance in which a man should take away a young woman from her family over the family’s
objection.248 Similarly, in an era with strong prohibitions on sexual relations outside of marriage,
the act itself was illegal; the age was only an aggravating factor.249 In the contemporary version,
the concept applies only to the act of engaging sexually with a partner obviously too young to

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.”).

245 Christopher & Christopher, supra note 244, 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.”).

246 See CAROLYN E. COCCA, JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES 11
(2004) (discussing the history of statutory rape laws and the defense “that the victim was sexually experienced”);
Carpenter, supra note 15, at 317 (describing the so-called “public-welfare offense” model of statutory rape).

“place[d] the burden on the adult”—as presumably able to know better—“to ascertain the age of a potential sexual
partner and to avoid sexual encounters with those who are determined to be too young to consent to such encounters.”
Id. And so it places the risk on the adult, again as a presumably responsible party, “that he or she may be held liable
for the conduct if it turns out that the sexual partner is under age” if he or she “chooses not to ascertain the age of a
sexual partner.” Id.; see also id. at 581 (“While it is indeed widely known that ‘16 will get you 20,’ and precocious
young girls have commonly been referred to as ‘jail bait,’ such colloquialisms address only the understanding that
even consensual sex with someone underage is a violation.”). But see Goodwin, supra note 182, at 499 (arguing that
statutory rape in the mid-20th century remained motivated by racial and class concerns, citing data that 75 percent of
statutory-rape complaints in California in 1963 were against black men, often raised by welfare case workers); id. at
505 (citing instances in which the laws are applied to peers, undermining the claim that statutory-rape laws target
pedophiles).

C.C.R. 154 (Eng.)) (noting that Prince idea of “lesser legal wrong” is founded in the notion that taking a “daughter,
even one over 16, from her father’s household” is a wrong—which no longer holds true today); see also Note,
Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex, 104 Harv. L. Rev. 1660,
1661 n.9 (collecting fornication and adultery statutes).

249 Cf. Collins v. State, 691 So. 2d 918, 923 (Miss. 1997) (citing United States v. Ransom, 942 F.2d 775, 777
(10th Cir. 1991)) (“[T]he defendant’s intent to commit statutory rape can be derived from his intent to commit the
morally or legally wrongful act of fornication.”).
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consent. To quote one legislative body, it is fair to “designate[] as rape sexual conduct with a pre-
puberty victim . . . regardless of whether the offender has actual knowledge of the victim’s age,”
because “the physical immaturity of a pre-puberty victim is not easily mistaken, and engaging in
sexual conduct with such a person indicates vicious behavior on the part of the offender.”

But neither rationale withstands scrutiny in a modern statutory scheme, for two reasons.
First, many statutory-rape schemes apply to complainants much older than the obviously pre-
pubescent victims envisioned in the original rationale. A minor who is 16 may indeed be readily
and fairly mistaken for a person of legal age. Second, many statutory-rape schemes do not specify
the age of the actor. Thus, it is hardly the case that the only perpetrators of the offense will be
those clearly “preying” on a person much younger.

In United States v. Murphy, the Second Circuit rejected strict liability for a federal statute
that imposed liability for transporting a minor for the purpose of engaging in a sexual act that was
illicit because the minor was between 12 and 16 and the actor was four or more years older.
The defendant was 25, and the complainant was 14; they met on a dating website where the defendant
claimed to be 19 and the complainant’s profile listed her age as 19 but she later claimed to be 16.
The court’s reasoning was based primarily upon a textual analysis of the statutes and their
interoperability. But the court also noted that reading out any requirement of mens rea led to
“absurdity,” citing an example of a 15-year-old convincingly posing as a 21-year-old.

4. Grading

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

First, the grading scheme sharply distinguishes between the punishment authorized for
actors who victimize young minors (those under 12), and actors who victimize older minors, aged
12 through 15. This distinction is well supported in existing law, which views actors who victimize
very young minors as worthy of serious punishment. It also reflects the intuition that, for teenage
complainants, the existence of offenses punishing sexual activity by means of force, coercion,

250 OHIO REV. CODE ANN. § 2907.02 cmt. (LexisNexis 2020). The House Report accompanying the federal
sexual abuse statute, 18 U.S.C. § 2241(c) (1986), likewise explains that the statutory rape provision there was included
because there is simply “no credible error of perception [that] would be sufficient to recharacterize a child of such

251 Courts at times have confronted cases in which the accused falls within the statutorily protected age-group.
adjudication of an 11-year-old boy for statutory rape, that “both boys [in the encounter] were willingly participants
and [the other boy] was not victimized by the experience,” while adding that “[t]he law was not intended to render
criminal per se the experimentation carried on by young children, even where the acts may evoke disapprobation or
censure”); State ex rel. Z.C, 165 P.3d 1206, 1207, 1213 (Utah 2007) (vacating the delinquency adjudication of a 13-
year-old girl who had “consensual” sex with a 12-year-old boy because “no true victim or perpetrator [could] be identified”).

252 United States v. Murphy, 942 F.3d 73, 79-82 (2d Cir. 2019) (interpreting 18 U.S.C. § 2243(a)-(b) (2018)).

253 Id. at 80.
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exploitation, deception, or lack of consent serves as a backstop of liability that ensures the availability of severe punishments for actors who use those illicit means to obtain the minor’s sexual submission. As a result, the punishments prescribed for older complainants reflect the judgment that the encounter between the complainant and actor is more akin to sex by exploitation, rather than force. When a complainant did not consent to the encounter, whether expressly or circumstantially, other provisions of Article 213 apply.

And while technically Sections 213.1 through 213.7 apply equally to complainants under 12 as to older complainants, experience teaches that an actor may not have to resort to force or coercion in order to compel a younger complainant to submit to unwanted sexual activity. The younger the age of the complainant, the greater the probability that even nominal consent fades. And eventually, the prospect of nominal consent altogether disappears; whereas a misguided 11-year-old may believe himself or herself to be “consenting” to the advances of a flattering adult, a five-year-old lacks even the capacity for that nominal degree of autonomy. The same is true for instances of incest, where the familial bond makes any notion of meaningful consent or willingness moot. As a result, sexual encounters with young children are more properly punished at a level akin to offenses involving force or coercion, rather than just nonconsent.

Second, the grading scheme distinguishes between actors who, like the complainants, are themselves young minors; actors who are older minors and young adults engaging in inappropriate behavior with nominally consenting partners who may be peers; and adult actors who exploit young children or minors. These distinctions receive less support in existing law, although there are clear traces. More commonly, statutes either preclude liability for peer-range actors, either on their face or by providing for an affirmative defense, or dramatically reduce the punishment when the actor is also a minor. Relatively few statutes draw finer distinctions, such as by diminishing punishment for actors within a certain age range of the complainant. Instead, schemes tend to either permit or preclude liability, not base liability on the size of the age gap between the actor and the complainant.

Section 213 rejects this approach, choosing instead to calibrate punishment more finely according to the degree of deviance suggested by the behavior. Although a 12-year-old minor who sexually abuses a six-year-old child, or a 16-year-old who abuses a 10-year-old, may be a worthy subject of state interest via the juvenile-justice system, the authorized punishment for those offenses should not treat the minor actor’s culpability as equivalent to that of an adult actor three times older. An adult who has reached full maturity is distinguishable from a preteen or teenager in cognitive, social, and especially sexual development. An adult is also likely less amenable to.

254 That said, although the use of actual physical violence is uncommon as regards very young complainants, data suggests that actors more commonly use threats or other coercive measures that could satisfy the elements of other subsections of Article 213. Michele Elliott et al., Child Sexual Abuse Prevention: What Offenders Tell Us, 19 CHILD ABUSE & NEGLECT 579, 582 tbl.1 (1995) (reporting data from interviews with child sex offenders, 44 percent of whom use “coercion and persuasion,” and 19 percent of whom used physical force).

255 See, e.g., GA. CODE ANN. § 16-6-2(d) (2020) (punishing oral or anal sex between a person at least 13 but less than 16 as a misdemeanor when the actor is 18 or younger and no more than four years older).
re-integrative rehabilitation. Lastly, far greater degree of deviance is suggested by an adult’s interest in, and willingness to impose upon, a minor with little to no sexual experience than by the same actions done by a minor close in age and with similar relative inexperience.

This distinction is supported by social science research into juvenile development, as well as by recent case law embracing that research. In a series of recent cases, the Supreme Court has recognized that the maximum sentences for juveniles who commit crimes—even older juveniles—should take into account the cognitive and emotional immaturity of the juvenile mind as compared to adults who engage in the same antisocial behaviors.\(^{256}\) A significant body of research shows that minors do not suddenly acquire adult cognitive capacities at the age of 18, but rather that an adolescent’s impulse control, decisionmaking ability, and reasoning are still in development until the early 20s, when clear physiological shifts occur.\(^{257}\) In other words, “[t]here is now incontrovertible evidence that adolescence is a period of significant changes in brain structure and function.”\(^{258}\) And in particular, changes during puberty and early adolescence involve “the density and distribution of dopamine receptors,” which in turn “plays a critical role in how humans experience pleasure” and “have important implications for sensation-seeking”—specifically including sexual pleasure.\(^{259}\) In fact, a distinct body of research has explored the relationship between risky sexual behavior—such as unprotected sex—and adolescents’ neural and cognitive capacities.\(^{260}\)

\(^{256}\) See, e.g., Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) (finding that prior cases “drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption” in deciding appropriate penalties); Miller v. Alabama, 567 U.S. 460, 480 (2012) (requiring sentencers to “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison”); Graham v. Florida, 560 U.S. 48, 92 (2010) (finding that the defendant’s “youth and immaturity . . . suggest that he was markedly less culpable than a typical adult who commits the same offenses”); Roper v. Simmons, 543 U.S. 551, 578-579 (2005) (holding death penalties for offenders who were under the age of 18 at the time of the crime to be unconstitutional).

\(^{257}\) See, e.g., Alexandra O. Cohen et al., *When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 PSYCHOL. SCI. 549, 550 (2016) (citing studies showing that “structural and functional development of limbic and prefrontal circuitry are implicated in motivated behavior and its control, respectively, and may lead to a propensity toward risky and impulsive actions”).

\(^{258}\) Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 28 ISSUES SCI. & TECH. 67, 67 (2012) (adding that “important changes in brain anatomy and activity take place far longer into development than had been previously thought,” such as into the early 20s); see also Laurence Steinberg, *Adolescence* 56-65 (10th ed. 2013) (“Experts in cognitive development explain that intellectual capacities such as working memory, logical reasoning, general knowledge, and information processing do not mature until mid-adolescence.”).

\(^{259}\) Steinberg, supra note 258, at 67; see also id. at 71 (noting that the general band of full maturity runs from 15 at the low end to 22 at the high end).

\(^{260}\) See, e.g., Sarah W. Feldstein Ewing, *Developmental Cognitive Neuroscience of Adolescent Sexual Risk and Alcohol Use*, 20 AIDS & BEHAV. S97, S98 (2016) (“An inherent challenge in this work is that the cognitive processes involved in adolescent sexual decision-making are highly complex; involving everything from navigating emergent basic biological drives to procreate, the high potential natural rewards of the behavior, higher-order cognitive processes requisite within weighing costs/benefits, and charting new emotional, social, and affective waters”).
Section 213.8. Sexual Offenses Involving Minors

The grading structure of Section 213.8 takes both the legal and scientific developments in our understanding of juvenile misconduct into account in setting maximum punishments. For this reason, actors below the age of 21 are treated with substantially more leniency than are actors older than 21 who engage in identical behavior. Section 213.8 also treats young adults—actors under the age of 21, with considerable more leniency when the offense involves sexual behavior with a complainant 12 or older.

Lastly, in affixing penalties, even for the most egregious offenses defined by Article 213.8 such as abuse of young children by adults, and abuse of minors by parental figures, the scheme embraces the principles and the overall grading objectives of Articles 6 and 7. In so doing, Article 213 does not intend to minimize or dismiss the serious harms caused by child sexual abuse. The provisions of Article 213 governing adult sexual imposition on minors, especially those very young or in a child–caregiver relationship with the actor, are among the most serious crimes defined in a criminal code. Therefore, the grading of offenses in Article 213 harmonizes with the penalties for offenses of analogous severity in other provisions of the Article and throughout the Code.

The resulting scheme therefore authorizes punishments equivalent to the most serious forms of aggravated forcible rape for adult actors who engage in sex with minors under 12 or parental figures who abuse their children and wards, and the next most serious level of punishment for adult actors who engage sexually with minors aged 12 to16. The scheme penalizes, but at much reduced levels, young adults and minors who engage in sexual activity with inappropriately young partners—punishing teenagers who sexual abuse young children as felons, but at a lower level, and young adults who engage with teenagers as misdemeanants.

With regard to the specific sentences authorized for each grade of an Article 213 offense, the harsh penal approaches of recent decades—characterized by casual dismissals a sentence of a year imprisoned as inconsequential—have more recently given way to deeper understanding of the many costs imposed by imprisonment on the actor, the actor’s family and community, and all of society. Such considerations must count heavily in all judgments assigning specific authorized sentence ranges to the relative grading categories specified for the offenses defined by Section 213.8.

261 See generally MARC MAUER & ASHLEY NELLIS, THE MEANING OF LIFE: THE CASE FOR ABOLISHING LIFE SENTENCES (2018) (noting use of life sentences for sex crimes, including statutory prohibition on early release for persons committed for sex offenses, in the course of arguing against the American exceptionalism that favors the use of long term, harsh sentences like life in prison); NAT’L RESEARCH COUNCIL, supra note 84, at 4-7 (detailing increasing harshness of penal sanctions and the costs to communities and society, specifically noting that the “incremental deterrent effect of increases in lengthy prison sentences is modest at best” and that “[i]ncarceration is strongly correlated with negative social and economic outcomes for former prisoners and their families”).

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SECTION 213.11. COLLATERAL CONSEQUENCES OF CONVICTION

Collateral consequences of conviction applicable specifically to persons convicted of a sexual offense, including a person’s obligation to register as a sex offender, associated duties, restrictions on employment and place of residence, and other collateral consequences applicable specifically to persons convicted of a sexual offense, are defined and their scope and implementation are delineated as follows:

(1) The person’s duty to register for law-enforcement purposes is governed by Section 213.11A.

(2) Notification of the person’s duty to register and associated duties is governed by Section 213.11B.

(3) The time of initial registration is governed by Section 213.11C.

(4) The information required upon registration is specified in Section 213.11D.

(5) The duty to keep registration current is specified in Section 213.11E.

(6) The duration of the registration requirement is specified in Section 213.11F.

(7) Penalties for failure to register are governed by Section 213.11G.

(8) Access to registry information is governed by Section 213.11H.

(9) Collateral consequences of conviction, other than the duty to register for law-enforcement purposes, are governed by Section 213.11I.

(10) Standards and procedures for relief from the duty to register, associated duties, and additional collateral consequences applicable specifically to persons convicted of a sexual offense are governed by Section 213.11J.

REPORTERS’ NOTES

1. Introduction: Sex-Offense Collateral Consequences Generally.

Every state currently has legislation requiring persons convicted of a sexual offense, on release from custody, to register with local authorities in their place of residence, to keep authorities informed of changes in their address, and to observe a variety of other restrictions, including (in many states) limits on places where they can live or work. This legislation makes their personal information available to law enforcement and typically permits the general public to access these registries under various circumstances. Many of these laws also establish a regime of community notification—a requirement that local authorities take affirmative steps to inform
the public about the names and addresses of persons convicted of a sexual offense who are living, working, or studying in the area. Federal law not only establishes a nationwide, internet-accessible registry of this information but also requires every state, as a condition of receiving certain federal funds, to maintain its own registry of persons convicted of a sexual offense, with specific minimum features. Although originally inspired by concern over violent recidivists, these laws now apply even to first offenders convicted of a broad range of sexual offenses, including possession of child pornography and statutory rape (sometimes including statutory rape in which victim and perpetrator are close in age).

Collateral consequences of conviction are not confined to the sex offenses, and in recent years they have proliferated across broad swaths of the criminal law, prompting several prominent law-reform bodies to address collateral sanctions applicable to offenders in general. These initiatives have considered under one umbrella virtually the entire gamut of collateral sanctions triggered by conviction not only of sexual offenses but also offenses ranging from homicide to drug crimes, securities fraud, and drunk driving; likewise they seek to cover not only registration and community notification, but also such sanctions as disenfranchisement, ineligibility for public housing, loss of other public benefits, barriers to occupational licensing, and the like.

These efforts mainly aim to identify general principles and corresponding statutory language suitable for application to any collateral consequence associated with conviction for any offense. Because they cover so much terrain, they cannot delve into the substantive question of when a given sanction should be available for a given offense. Rather, of necessity they focus on general principles of coherence, notice, and procedural fairness that can be cast in broadly applicable terms—for example, requiring that the sentencing judge explain applicable collateral consequences to defendants prior to entry of a guilty plea and at sentencing; that appropriate authorities compile in one place a list of the jurisdiction’s collateral sanctions; that jurisdictions allow offenders to seek relief from inappropriate collateral sanctions; and that sentencing commissions develop guidelines for courts to use in making substantive decisions about whether to impose a given collateral sanction or grant relief from it. These treatments inevitably stop short of the sustained attention to the range of issues that arise in the context of collateral sanctions applicable specifically to the sexual offenses.

These issues are not only important in their own right, but they also have important implications for the substantive definition of the sexual offenses. In deciding the proper scope of

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2 See, e.g., MODEL PENAL CODE: SENTENCING, supra note 1.
penal prohibitions, legislative bodies must consider the severe collateral consequences typically triggered by state offenses denominated as “rape” or “sexual assault.” Concerns of this nature presumably shaped the Institute’s original decision, in 1962 MPC Section 213.5, to address matters of procedure and evidence distinctive to rape that go beyond mere substantive crime definition. Sections 213.11A-213.11J likewise reflect the judgment that sound treatment of the sexual offenses in Article 213 cannot confine itself to offense definitions alone but must also address collateral sanctions authorized or required upon conviction.

Note 2 examines the historical development of collateral consequences applicable to persons convicted of a sexual offense. Note 3 surveys practices abroad with respect to sex-offense collateral consequences. Note 4 provides a brief overview of the policy concerns surrounding these laws and the Institute’s perspective on the underlying issues. Note 5 describes the restrictions and disabilities in question and variation in the relevant state and federal legislation, with respect to both registration regimes and other collateral consequences applicable to persons convicted of a sexual offense. Note 6 examines in detail the policy goals of this kind of legislation and assesses the evidence bearing on its effects, both intended and unintended. Note 7 explains the approach of Article 213 with regard to collateral consequences applicable to persons convicted of a sexual offense.

2. Historical Background.

Since the 1930s and before, persons convicted of a sexual offense have faced a variety of special sanctions, including mandatory sterilization and indefinite commitment for psychiatric treatment. But these measures had relatively little visibility or importance when the Model Penal Code was originally drafted. That picture changed dramatically in the early 1990s, when public interest in identifying persons previously convicted of a sexual offense emerged with new intensity following several highly publicized murders of young children. In 1993, 12-year-old Polly Klaas was kidnapped, raped, and murdered by a man with a prior record for the commission of serious violent crimes. The next year, seven-year-old Megan Kanka was sexually assaulted and killed by a person who lived across the street and had previously been convicted of multiple sexual offenses. Several similar incidents were widely publicized during the 1990s and shortly thereafter. The legislative reaction to the Klaas killing focused on the “three-strikes-and-you’re-out” solution, which mandates extended terms of imprisonment for offenders previously convicted of two serious

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4 See generally LOGAN, supra note 3, at 49-108; Terry & Ackerman, supra note 3, at 74-94.

5 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.
or violent felonies. In New Jersey, Megan Kanka’s murder prompted a different response, imposing registration requirements applicable only to persons convicted of a sexual offense. Within weeks of the killing, the state assembly declared a legislative emergency, and a sex-offender registration law passed, without committee hearings, about two months later.

In 1990, Patricia Wetterling responded to the murder of her 11-year-old son Jacob by establishing a foundation to press for the enactment of registration laws applicable to persons convicted of a sexual offense. A year after New Jersey’s enactment of Megan’s Law, her efforts bore fruit when Congress, as part of the Violent Crime Control and Law Enforcement Act of 1994, enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, which required all states, on pain of loss of federal funding, to establish a system of registration for all persons convicted of a sexually violent offense or any criminal offense against a minor.

Congress subsequently repealed that statute and replaced it with a broader law—the Sex Offender Registration and Notification Act of 2006 (“SORNA”). SORNA establishes a national registry, publicly available on the Internet, for persons convicted of a sexual offense; directs each state to maintain its own registry; and requires states to create a criminal offense, punishable under state law by more than a year’s imprisonment, for a person convicted of a sexual offense who fails to register or meet a deadline for updating required registry information. After the passage of SORNA, many states expanded their own registration requirements and enacted other special restrictions. In addition, it is a federal crime, punishable by up to 10 years in prison, for a person convicted of a state-law sex offense to travel interstate without maintaining an up-to-date registration with state authorities.

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8 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.


11 34 U.S.C. § 20913(e).

Section 213.11. Collateral Consequences of Conviction


Many places outside the United States, including the United Kingdom (UK), Canada, and the European Union (EU), require persons who have been convicted of a sexual offense to register with law enforcement or other official authority. Like the United States, these jurisdictions have faced pressure to make sex-offense registry information readily available to the general public, but unlike the United States, they have generally declined to do so. Typically, they do not permit public access to registry information at all, or they permit disclosure to the public only in limited circumstances. One fundamental reason is that other nations generally treat criminal-history information as confidential, in order to protect the privacy of those who have been convicted of crime and aid their rehabilitation. A global survey conducted by the U.S. Department of Justice found that virtually no foreign countries have adopted the prevalent U.S. practice of proactive notification of sex-offense registry information to unlimited community organizations and the general public.

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14 See, e.g., James B. Jacobs & Elena Larruri, Are Criminal Convictions a Public Matter?: The USA and Spain, 14 PUNISHMENT & SOC’Y 3, 12-14 (2012). On respect for this principle in countries outside the United States, see note 15 and text accompanying notes 16-60, infra.


More recently, at least two Latin American nations have enacted sex-offense registry laws. They too reject the prevalent U.S. practice of proactive community notification; access to sex-offense registry information is largely restricted to law enforcement, with limited exceptions. See Misterio Público, El Reglamento del Registro Nacional de Agresores Sexuales del Misterio Público (May 14, 2018), available at https://consultasmp.mp.gob.gt/docs_download/Reglamento%20del%20RENAS.pdf (Guatemala); Artículo 3, D-1954432, Ley que Establece las Medidas de Protección a la Sociedad contra Agresores Sexuales, promulgated July 28, 2020, http://silpy.congreso.gov.py/expediente/118670 (Paraguay). As of December 2019, no other Latin American country appeared to have a national-level sex-offense registry at all; registry systems were proposed but not yet enacted in Argentina and Mexico. See Creacion del Registro Nacional de Delincuentes Sexuales (RENADESE), 1617-D-2015 (Argentina); Rolando Ramos, Buscan fichar a agresores sexuales, EL ECONOMISTA, Dec. 30, 2019, https://www.eleconomista.com.mx/politica/Buscan-fichar-a-agresores-sexuales-20191230-0067.html (Mexico); Ley de Registro de Agresores Sexuales en la CDMX incluirá nombre, la foto, alias y ADN, INFOBAE, Dec. 3, 2019, https://www.infobae.com/america/mexico/2019/12/03/ley-de-registro-de-agresores-sexuales-en-la-cdmx-incluire-nombre-la-foto-alias-y-adn-de-los-agresores-sexuales (visited...
Section 213.11. Collateral Consequences of Conviction

a. United Kingdom. The disabilities imposed on persons who have been convicted of a sexual offense are far more limited in the UK than in the United States, largely because of concern that widespread dissemination of criminal history and burdensome disabilities can undermine the rehabilitation of ex-offenders.16

The UK first implemented a sex-offense registry through the Sex Offenders Act of 1997, later superseded by the Sex Offences Act of 2003.17 England/Wales, Scotland, and Northern Ireland each have separate registry systems,18 but because those of Scotland and Northern Ireland largely build on and mirror the regime for England/Wales, this summary of the provisions applicable in England is approximately accurate for the rest of the UK as well. Upon release from custody, persons convicted of a sexual offense must report to local police, provide certain personal details (for example, birthday, national insurance number, names used, and where they are living or planning to travel), and keep these details current for as long as they remain on the registry. Registrants must also provide notice when they travel abroad or stay in a house with children, and must provide a DNA sample, fingerprints, and a current photograph.19 The Violent and Sex

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Sep. 6, 2020) (discussing proposed registry for ex-offenders residing in Mexico City and noting that access will be limited to public officials or persons authorized by judicial authorities).

16 See Jacobs & Blitsa, supra note 13.


Offenders Register (ViSOR) allows law enforcement to access information in the registry and to track offenders within their jurisdiction.\textsuperscript{20} Parliament originally mandated “an indefinite period” of registration for offenders “sentenced to imprisonment or detention for 30 months or more.”\textsuperscript{21} However, in R(F) v. Sec’y of State for the Home Dep’t,\textsuperscript{22} the UK Supreme Court held that provision invalid. The court ruled it a “disproportionate interference” with offenders’ rights to privacy under the European Convention on Human Rights, because it made “no provision for individual review of its requirements.”\textsuperscript{23} Parliament, responding in 2012, amended the applicable statute to provide a mechanism by which registrants subject to lifetime registration could have that requirement reviewed and, in some cases, lifted.\textsuperscript{24} Early relief from the registration requirement apparently has become more the norm than the exception. Between 2016 and 2018, 72 percent of the registrants who asked to be taken off the registry had their requests granted.\textsuperscript{25}

\textsuperscript{20} See Jack O’Sullivan et al., Understandings, Implications and Alternative Approaches to the Use of the Sex Offenders Register in the UK, 13 IRISH PROBATION J. 84, 86 (2016); McCartan et al., supra note 18, at 212.

\textsuperscript{21} See R(F) v. Sec’y of State, supra note 19, at ¶ 10 (reviewing Sexual Offences Act 2003, § 82).

\textsuperscript{22} Id. at ¶ 58.

\textsuperscript{23} Id.


\textsuperscript{25} Jim Norton, Sex Offenders Allowed to Sign Off Danger List, THE DAILY MAIL, Jan. 3, 2020, https://www.dailymail.co.uk/news/article-7846583/Sex-offenders-allowed-sign-danger-list.html (reporting that over the three-year period, 1,288 applications had been filed seeking removal from the registry, and only 363 had been refused).
Unlike the United States, England does not permit unlimited public access to registrant information. Instead, England provides for “controlled disclosure” of information about certain registrants, but only if they have been convicted of a sex offense against a child. Under that regime, known as Sarah’s Law, members of the public may inquire whether a specific individual poses an ongoing risk to their child. Before disclosure is made, the application by the parent or guardian is subject to an apparently rigorous series of reviews. The official assessing the disclosure application must consider whether a registered ex-offender “wishes to make representations in order to ensure that the [official] has all the information necessary to conduct the balancing exercise he is required to perform justly and fairly.” Disclosure “must be … limited to very...
pressing cases”; otherwise, “the presumption is against disclosure.” The low reported rates of disclosure seem to bear out the apparently restrictive character of this standard. And when disclosure is permitted, Home Office Guidance requires all persons receiving a disclosure to “sign an undertaking that they agree that the information is confidential and they will not disclose this information further” and warns them that “legal proceedings could result if this confidentiality is breached.”

Other mechanisms for disclosure outside the domain of law enforcement are likewise limited in scope. Multi-Agency Public Protection Arrangements (MAPPA) require police, prison, and probation authorities to work with other agencies to manage the risk posed by persons who have been convicted of a sexual offense. MAPPA allows authorities to disclose registrant information when necessary to protect a child from serious harm. English employers and volunteer organizations are permitted to check the criminal history of individuals who apply for positions that afford close contact with children and other especially vulnerable groups, such those who are elderly or disabled; indeed, they have a legal obligation to do so. A public agency determines which forms of private employment should be closed to persons who have been convicted of a sexual offense.

31 X (South Yorkshire), supra note 30, at ¶ 70.

As of 2015, English, Welsh, and Scottish authorities had received 5,357 disclosure applications and had made disclosure in only 877 cases (roughly 16%). See Martin Evans, Sarah’s Law is ‘not working’, NSPCC warn, THE TELEGRAPH (Jul. 30, 2015). See also Details of 700 paedophiles disclosed since Sarah’s Law launched, THE GUARDIAN (Dec. 23, 2013) (reporting 15% disclosure rate as of end of 2013); More recent data apparently are not available.

33 CSOD Guidance, supra note 27, § 5.2.12. Stressing the gravity of this commitment to confidentiality, the CSOD Guidance adds “that it is an offence under Section 55 of the Data Protection Act 1998 for a person to knowingly or recklessly obtain or disclose personal data without the consent of the data controller (i.e. the agency holding the information that will be disclosed, which in most cases will be the police).” Id.

34 See CSOD Guidance, supra note 27, at 65; Blacker & Griffin, supra note 19, at 995-996.

35 Criminal Justice Act, 2003, c. 44, Pt. 13 § 327A (Eng.).

36 See TERRY THOMAS & KEVIN BENNETT, EMPLOYMENT SCREENING AND NON-CONVICTION INFORMATION: A HUMAN RIGHTS PERSPECTIVE 1-27 (2019); CSOD Guidance, supra note 27, at 66-68.

37 Id.
b. Canada. The sex-offense registration system in Canada is similar to that in the UK. Registry information is available to law enforcement for the purpose of investigating and preventing sexual offenses but generally is not available to the public.38

Following a high-profile abduction and murder, the province of Ontario created a sex-offense registry (OSOR) in 2001. When other provinces prepared to follow suit, Canada in 2004 adopted a National Sex Offender Registry (NSOR), administered by the Royal Canadian Mounted Police.39 Whereas registration in Ontario (under the OSOR) is required automatically upon conviction, the original 2004 legislation placed offenders on the national registry (NSOR) only by court order at the prosecutor’s request, which the judge could reject if it was found not to be in the public interest.40 Subsequently, registration was made mandatory for all those convicted (or found not criminally responsible by virtue of mental disability) of any of the particularly serious sex offenses designated by the Act.41

National sex-offense registry information in Canada is available only to the police, but individual provinces have established separate community-notification schemes to notify the public about high-risk registrants.42 In 2015, the Tougher Penalties for Child Predators Act enacted the High Risk Child Sex Offender Database Act, to create a national database centralizing information about high-risk registrants, but it includes only information that the police or other authority has previously disclosed publicly (though often just locally).43

c. Australia and New Zealand. Beginning with New South Wales in 2001, each Australian state and territory has created a sex-offense registry linked to an Australian National Child Offender Register (ANCOR).44 In 2012, Western Australia became the only Australian state to

38 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).

39 See Lisa Murphy, J. Paul Fedoroff & Melissa Martineau, Canada’s Sex Offender Registries: Background, Implementation, and Social Policy Considerations, 18 CANADIAN J. OF HUMAN SEXUALITY 61, 62-63 (2009).

40 Id. at 63, 65.


43 See Tougher Penalties for Child Predators Act § 29(5).

44 See S. Caroline Taylor, Community Perceptions of a Public Sex Offender Registry Introduced in Western Australia, 18 POLICE PRACTICE AND RESEARCH 275, 279-280 (2017).
allow public access. Its three-tier system (1) publicizes missing sex offenders who have not complied with reporting obligations, (2) allows members of the public to search for high-risk offenders in their local area, and (3) allows members of the public to inquire whether a particular person in contact with their child is a sex-offense registrant, a system similar to the CSODS in the UK. In 2016, New Zealand created a sex-offense registry that is not publicly available.

d. European Union. EU regulations require specific safeguards to protect the confidentiality of criminal-history information and stipulate that registries of criminal convictions “may be kept only under the control of official authority.” Sex-offense registries therefore are not precluded, and the EU’s directive on child sexual abuse states that Member States “may consider” adopting measures “such as the registration in sex offender registers of persons convicted of [sex] offences.” But with its overriding commitment to privacy and the rehabilitation of ex-offenders, the EU generally forbids public disclosure of registry information. The directive on child sexual abuse adds that “[a]ccess to those registers should be subject to limitation in accordance with national constitutional principles and applicable data protection standards, for instance by limiting access to the judiciary and/or law enforcement authorities.”

The EU has modified that background presumption only to the extent of seeking to bar persons from working with children if they have previously been convicted of a sexual offense against a child and seeking to make convictions for sexual offenses against children available to employers whose staff serve that clientele. The EU relies on each of its Member States to

45 Id.


48 European Parliament & Council, European Union Directive 95/46/EC, 24 Oct. 1995, art. 8(5). The EU’s General Data Protection Regulation (2016) protects the confidentiality of criminal conviction records and likewise permits processing of such records “only under the control of official authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects.” European Parliament & Council, Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, Regulation 2016/679, 27 April 2016, 2016 O.J. (L 119) 1, art. 10.


50 Id.

51 Id.
implement this obligation, and most have established such screening systems. National laws generally limit employer access to conviction records to protect the rights of those who have been convicted. Some EU members, including France and Portugal, have established sex-offense registries that are available to law enforcement but closed to the public. Some EU states require screening for a broad range of professional or voluntary activities, but most require screening only for specific activities (e.g., childcare or public-sector employees). While it is sometimes possible for employers to access criminal records directly (usually for employers directly involved in education or childcare), generally, job applicants themselves present their criminal record to employers. A few states require employers to check with a dedicated screening agency, like the Disclosure and Barring Service in England.

The number of Member States with such registries has increased in recent years, but many states within the EU do not have any sex-offense registration requirements. Poland is in the minority that discloses information on certain high-risk ex-offenders on a publicly available website. It maintains both a “Restricted Access Register” and a “Public Register.” The former contains information on the perpetrators of all sexual crimes. Access to it is limited in three ways: First, all individuals have the right to know if data about themselves is included in the Register. Second, courts, prosecutors, police and other authorized official authorities have access to information from the Register when their mission requires. Finally, employers and those


55 Id.

56 Id.

57 Scherrer & van Ballegooij, supra note 52, at 44.

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responsible for activities related to upbringing, education, recreation, treatment or childcare are
required (on pain of criminal sanctions) to check whether data pertaining to a future employee or
person admitted to that activity is included in the Register. The Public Register is available to
everyone on the Internet, but it contains information only about the most dangerous perpetrators
of sexual crimes, such as individuals who have raped children or committed rapes with
“extraordinary cruelty.” The courts determine which offenders qualify for inclusion on the Public
Register.58

Public interest in greater access to information about persons who have been convicted of
a sexual offense has prompted efforts to establish a sex-offense registry for the EU as a whole. But
given that rehabilitating ex-offenders and protecting personal data remain European priorities,
these efforts to date have not succeeded.59 Instead of an EU-wide sex-offense registry, the EU has
emphasized the need to improve information sharing between authorities across national borders.60

4. Overview of Policy Concerns and the Judgments Underlying Sections 213.11A-
213.11J.

Laws of this kind pose several distinct policy issues: What, precisely, is their underlying
justification? Does their adverse impact on the convicted person’s prospects for gainful
employment and reintegration into the community outweigh their potential contribution to social
protection and public peace of mind? Do registries in fact provide such peace of mind, and how
might they be structured for optimal effect?

Despite their prevalence in the United States, registration and other collateral-consequence
laws targeting persons convicted of a sexual offense rest on highly contested premises. The best
available studies discredit many of their central justifications. At the same time, the research
provides strong evidence of unintended negative impacts, including tendencies (especially for the
broadest of these laws) to aggravate recidivism and jeopardize public safety, the very opposite of
the results that lawmakers and the general public expect registration and community notification
to accomplish.

This realization is now widespread among criminal-justice professionals, even those who
otherwise disagree about almost all other policies relating to sexual offenses. Notably, the critics

58 On all the above points, see Polish Ministry of Justice, Sex Offenders Register,

59 See Commission Reply to Petition No 2147/2014 by Jos Aalders (Dutch), On Registration of
576744_EN.pdf?redirect; see also Sarah Hilder, Managing Sexual and Violent Offenders Across EU
Borders, in 2 CONTEMPORARY SEX OFFENDER MANAGEMENT 95-96 (Hazel Kemshall & Kieran McCartan,
eds., 2017).

60 See Scherrer & van Ballegooij, supra note 52, at 44-47.
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of registration, community notification, residency and employment restrictions, and the like include substantial numbers of victim advocates, who see harsh collateral consequences as major contributors to the frequent reluctance of police and prosecutors to properly charge serious sex offenders, and to the frequent reluctance of judges and juries to support justified convictions.61 The U.S. Department of Justice now grants states considerable leeway to sidestep some of the ostensibly mandatory federal requirements and, in acknowledging their unintended consequences, the Department cautions against any expansion of these regimes.62 In candid moments, many state lawmakers, even while supporting this legislation themselves, describe it as overbroad and largely counterproductive, but politically impossible to oppose.63

Mindful of these assessments, Sections 213.11A-213.11J authorize measures that are substantially more restricted than those found in currently prevalent state and federal legislation. Positions supported by strong currents of public opinion and widely endorsed in the political process cannot be ignored, and Article 213 does not lightly depart from them. At the end of the day, however, the Model Code must be guided by the best available evidence and judgments not deformed by known imperfections in the relevant political deliberations.

Sections 213.11A-213.11J therefore limit collateral consequences applicable to persons convicted of a sexual offense to the domains most likely to offer public-safety benefits, without strong counterproductive side effects. It does so through four distinct mechanisms.

First, the relevant provisions sharply distinguish registration for law-enforcement purposes from other burdens and restrictions, including community notification, residency and employment limitations, and other measures applicable specifically to those who have been convicted of a sexual offense. Up-to-date registration with local law-enforcement authorities can serve legitimate law-enforcement purposes and is far more cost-effective than other burdens and restrictions widely imposed on those who have been convicted of a sexual offense. Moreover, so long as the confidentiality of these records is preserved, registration exclusively for law-enforcement purposes poses relatively few dangers to public safety and to the welfare of registrants themselves. Other measures applicable to persons convicted of a sexual offense, in contrast, impose steep implementation cost for law enforcement and entail other significant, well-documented

61 See text at notes 116-126, infra.

62 See text at note 163, infra.

63 See Mary Katherine Huffman, Moral Panic and the Politics of Fear: The Dubious Logic Underlying Sex Offender Registration Statutes and Proposals for Restoring Measures of Judicial Discretion to Sex Offender Management, 4 VA. J. CRIM. L. 241, 248-249 (2016) (arguing that “sex offender registration and notification laws proceed from emotion and political posturing to ensure re-election …, rather than from empirical data. The intersection of public fear, a ratings-driven media, and lawmakers motivated by personal aggrandizement has led to the present, popular yet ill-conceived, political and legislative responses to sex offending.”).
difficulties\textsuperscript{64}; accordingly they must be targeted and managed with particular care. Sections 213.11A, 213.11D, and 213.11E therefore require all adults convicted of a registrable offense to provide up-to-date registry information to local law-enforcement authorities, but Section 213.11H imposes on those authorities a strong obligation to preserve the confidentiality of that information, and Section 213.11I strictly limits community notification and other burdens applicable specifically to persons convicted of a sexual offense.

Second, Section 213.11A sharply restricts the class of individuals to whom the threshold duty to register applies. It precludes registration of nearly all juveniles, and for adults, it imposes the threshold duty to register only upon conviction of offenses that most strongly arouse public concern.

Third, the registration framework shortens in two ways the duration of required registration. The serious offenses that require registration under Section 213.11A would, under federal and most state law, trigger an obligation to register for life. In contrast, Section 213.11F limits to 15 years the registrant’s duty to keep registry information current and provides for automatic termination of that duty at an earlier date if the registrant meets specified rehabilitative goals during the initial registration period; in either case the registrant is removed from the registry at the end of the applicable period. In addition, Section 213.11J permits the registrant to apply for early removal from the registry or relief from some or all of the duties associated with registration upon an appropriate showing of rehabilitation.

Fourth, Section 213.11I tightly constrains, and in most cases eliminates, other burdens and restrictions applicable specifically to persons convicted of a sexual offense, such as community notification and limits on residency, employment, internet access, and the like. In current law, community notification is widely required for a long list of sex-related offenses, and a wide range of other burdens, though not mandated by federal law, is also commonly imposed. In contrast, Section 213.11I permits community notification and other measures targeting persons convicted of a sexual offense only when an individual, case-by-case risk assessment strongly supports the need for such measures, to an extent that outweighs their potential for costly, counterproductive, and criminogenic effects.


As discussed above, federal SORNA requires each state, on pain of losing federal funds, to maintain a registry applicable to persons convicted of a sexual offense and specifies many parameters that state registration regimes must satisfy to comply with the federal mandate, including the offenses that must trigger the obligation to register, the information states must include in their registries, the duration of a registrant’s duties, and the frequency with which registrants must provide updates. Separately, SORNA requires states to make it a criminal offense, punishable by at least a year in prison, for a designated offender to fail to register or miss a deadline

\textsuperscript{64} See text accompanying notes 128-131 & 160, infra.
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for updating registry information. Beyond federal mandates pertaining to the registry system itself, Federal SORNA directs states to afford public access to their registry and establish a program for promptly notifying concerned entities and individuals in the community about any change in information pertaining to registrants in the area. Federal SORNA does not seek to dictate state approaches to other measures that target persons convicted of a sexual offense, such as GPS monitoring and limits on residency, employment, and internet usage.

All states have a registration regime applicable to persons convicted of a broad list of sexual offenses. But states vary considerably in the extent to which they conform to federal SORNA expectations with respect to many of the ostensibly mandated details, particularly with regard to triggering offenses, public access, and community notification. States also vary in the extent to which they impose other burdens applicable specifically to persons convicted of a sexual offense.

a. Which Offenders? Federal SORNA requires states to impose the obligation to register as a sex offender and meet other requirements on anyone convicted of a broad list of sexual offenses, both felonies and misdemeanors. Juvenile delinquency adjudications based on comparable sexual misconduct are included if the minor was at least 14 years old at the time of the offense. The designated offenses range from the most violent sex crimes to any offense of coerced sexual contact, solicitation of a minor to engage in any sexual conduct, possession of child pornography, “video voyeurism” (defined as photographing or filming the private area of an individual without the individual’s consent), and any other “sexual act” not involving consenting adults, even low-level misdemeanors such as public indecency. For example, for an offense comparable to MPC Section 251.1, the petty misdemeanor of committing “any lewd act which [the actor] knows is likely to be observed by others who would be affronted,” SORNA requires mandatory registration, public access, and community notification under the “sex offender” label.

Federal SORNA establishes a three-tier offender-classification system based solely on the seriousness of the sex offense and whether it was the defendant’s first. All persons convicted of a qualifying sex offense, regardless of classification, must (to comply with SORNA) face at minimum all of the measures detailed in Note 4(d) below with respect to registration, public access to registry information, and community notification—that is, proactive law-enforcement measures to alert schools, other local agencies, and the general public to the identify of registered sex offenders present in the area. The three tiers differ only in the length of time the individual is subject to the restriction and the accompanying duty to keep registration information current (15

65 Federal SORNA § 20913(e).


67 SORNA § 20911.

years for the least serious offenders, life for the most), and the frequency with which the registrant
must appear personally to confirm the required information (once a year for the least serious
offenses, quarterly for the most).

Many states likewise automatically impose the burdens of registration and related collateral
consequences on all persons convicted of any of a broad array of sex-related crimes. The triggering
offenses typically include all felonies and misdemeanors, however classified, that fall within the
purview of Article 213, as well as many offenses that do not—for example, possession of child
pornography, solicitation to practice prostitution, sexual performance involving a minor, and
exhibitionism. In some states, the list of covered misconduct includes as many as 40 distinct
offenses.69 In some of these jurisdictions, the burdens of a sex-offense conviction automatically
extend not only to registration, often for life, but also to stringent residency restrictions.70 Some
states grade offenders according to tiers of seriousness, but as under federal SORNA, their tiers
are determined solely by prior record and the nature of the offense of conviction.

Other state regimes are more nuanced. Many exclude young offenders from registration
and other obligations.71 Many states further narrow the universe of affected offenders by using a
ranking system to vary the scope of the collateral burdens as a function of the intensity of perceived
need.72 One common approach eschews categorization based solely on the conviction offense and
prior record. Instead, many states classify persons convicted of a sexual offense on the basis of an
individualized risk assessment that considers a variety of factors pertinent to the nature and
seriousness of the risk posed, such as whether the victim of the offense was a minor, and the age
difference and relationship between victim and offender.73 In New York, the level of assessed risk

69 See, e.g., UTAH CODE ANN. § 77-27-21.5(g), (n) (2011) (listing 29 registerable offenses); L.A.
REV. STAT. ANN. § 15:541(24)(a) (2011) (listing 26 registerable offenses); N.Y. CORRECT. LAW § 168-a
(2011) (listing over 40 registerable offenses).

70 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).

71 See, e.g., Lisa Ann Minutola & Riya Saha Shah, A Lifetime Label: Juvenile Sex Offender
Registration, 33 DEL. LAW. 8, 12 (2015).

72 See text at notes 73-77, 222-224, infra.

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affects the duration of the obligation to remain registered and the type of information that can be publicly released.\textsuperscript{74} Minnesota and New Jersey, among other states, rely on actuarial assessment to distinguish persons convicted of a sexual offense on the basis of risk and assign more serious collateral consequences to offenders who pose the greatest danger to the public.\textsuperscript{75} In Georgia, a “Sex Offender Registration Review Board”\textsuperscript{76} uses research-based assessments to assign “points” that are used to compute a score indicating a high, moderate, or low risk of reoffending; sexual attacks against strangers and a history of multiple offenses are among the factors considered indicative of high risk.\textsuperscript{77}

\textit{b. Which Burdens?}

All states require registrants to update their registry information periodically and authorize criminal punishment for failing to register or keep registry information up to date.\textsuperscript{78} And the great majority permit public access to registry information on an essentially unlimited basis.\textsuperscript{79} Similarly, most states, at their own initiative, regularly distribute registry information to the entire community or to pertinent government agencies and to private organizations where contact with children or other vulnerable individuals might occur.

Nearly all states bar persons convicted of a sexual offense from working as teachers, as security guards, and in other sensitive occupations, but many exclude these persons from

\textsuperscript{74} See [N.Y.] Div. of Crim. Just. Services, “Risk Level & Designation Determination,” \url{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”).

\textsuperscript{75} See text at notes 222-224, infra.


\textsuperscript{79} For details, see Reporters’ Note to Section 213.11H, infra. See also “Collateral Consequences,” \textit{ABA CRIMINAL JUSTICE SECTION}, http://www.abacollateralconsequences.org/search/?jurisdiction=37.
numerous additional occupations. Persons convicted of a sexual offense are commonly prohibited from living near schools, parks, and other places where children congregate. And even when these offenders are not formally excluded from living or working at a certain place, community notification can create almost insuperable barriers to finding a landlord or employer willing to deal with them. Limits on using the Internet, once common, are now prohibited by the First Amendment. Other burdens, less common for the time being, range from GPS monitoring (now required by more than 45 states) to chemical castration.

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80 See id.; Sara Geraghty, Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner’s Perspective, 42 HARV. C.R.-C.L. L. REV. 513, 515 (2007).

81 Id., at 514-515 (summarizing states’ residency-restriction laws). For further detail, see notes 151-152, 264-274, infra.


84 See A. McJunkin & J.J. Prescott, Fourth Amendment Constraints on the Technological Monitoring of Convicted Sex Offenders, 21 NEW CRIM. L. REV. 379 (2018) (noting that “[m]ore than forty U.S. states currently track at least some of their convicted sex offenders using GPS devices.”); Kamika Dunlap, Sex Offenders After Prison: Lifetime GPS Monitoring?, FINDLAW BLOTTER, Feb. 1, 2011; Michelle L. Meloy & Shareda Coleman, GPS Monitoring of Sex Offenders, in WRIGHT, supra note 3, at 243 (reporting that as many as 46 states use GPS monitoring to track persons convicted of a sexual offense under some circumstances).


85 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.
6. Results.

Because most states have implemented simultaneously a package of diverse duties and restrictions applicable to persons convicted of a sexual offense, much of the data-driven research cannot tease out the separate effects of registration alone or of other common elements of sex-offense policy. Other research methodologies do shed some light on that question, but the overall picture is best understood by beginning with what is known about the impact of sex-offense collateral consequences generally. This Note then focuses on the likely benefits and costs of their individual components, and the Notes to Sections 213.11H and 213.11I return to that question, with more sustained attention to the impact of collateral consequences other than law-enforcement registration alone.

a. Intended Effects and Inherent Limitations. The various collateral-consequence measures (registration, public access, notification, residential restrictions, employment restrictions, and the like) differ substantially in the burdens they impose on offenders, but broadly speaking they share the same two goals—to reduce recidivism and to facilitate self-protective measures on the part of the public. A collateral aim, no doubt, is to alleviate public fear, even if the measures have no concrete effect on the behavior of offenders or law-abiding citizens. Some state legislators have occasionally articulated a third objective that is specific to residency restrictions—the goal of making life so difficult for persons convicted of a sexual offense that they will simply choose to leave the state.86

The success of sex-offense collateral-consequence laws in reducing recidivism has been extensively studied, and there is also significant research examining how members of the public alter their behavior in response to these laws. The research consistently establishes four points. First, in terms of the primary objective—reducing recidivism—the studies conducted to date are either inconclusive or establish that pertinent gains were not achieved. Similarly, with respect to the aim of enhancing citizen self-protection, research has detected no significant measurable benefits and powerfully counterproductive side effects: community notification, unrestricted citizen access to registry information, and restrictions on residency and employment are associated with strongly negative impacts on offenders, including great difficulty reintegrating into society and significantly enhanced rates of recidivism.87 Third, there is an inherent mismatch between the risks that different sorts of offenders pose and the restrictions to which they are subject. Finally, the laws are expensive to implement. These four points are discussed in turn.

86 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”).

87 See Reporters’ Notes, infra.
(i) *Reducing Recidivism.* The Supreme Court, echoing a commonly held view, has stated that “[t]he risk of recidivism posed by sex offenders is ‘frightening and high’.” 88 There is little to no evidence to support this assumption, which has been thoroughly debunked. 89 Recidivism in this group of offenders is not unusually elevated; the available research strongly suggests the opposite—that “[s]ex offenders have some of the lowest recidivism rates of any class of criminal.” 90 In a 2002 Department of Justice study, sex crimes were one of the offense categories for which convicted offenders had the lowest rates of rearrest for any new offense, and only 2.5 percent of released rapists were rearrested for a new rape, while 13.4 percent of released robbers were rearrested for a new robbery and 22 percent of offenders convicted of a nonsexual assault were rearrested for a new assault. 91

Importantly, recorded recidivism rates for sex offenses are deflated by exceptionally low rates of reporting, arrest, and conviction for these crimes. 92 A number of methodologies have been used to control for this difficulty. But recidivism is surely a greater concern than the data imply, and awareness of this distortion arguably bolsters the case for registration and related policies to

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90 Stuart A. Scheingold et al., Sexual Violence, Victim Advocacy, and Republican Criminology: Washington State’s Community Protection Act, 28 LAW & SOC’Y REV. 729, 743 (1994) (noting that “as few as 5.3% [of sex offenders] re-offend within three years, according to the Bureau of Justice Statistics, as opposed to rates in the 65 to 80% range for drug offenders and thieves.” See also Katherine K. Baker, Once a Rapist? Motivational Evidence and Relevancy in Rape Law, 110 HARV. L. REV. 563, 578 (1997) (noting evidence that convicted rapists are less likely to reoffend than convicted burglars and thieves); WESLEY G. JENNINGS, RICHARD TEWKSBURY & KRISTEN ZGOBA, SEX OFFENDERS: RECIDIVISM AND COLLATERAL CONSEQUENCES, available at https://www.ncjrs.gov/pdffiles1/nij/grants/238060.pdf (2011).

91 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 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.

92 See, e.g., Belleau v. Wall, supra note 84.
strengthen prevention of crimes that are more frequent than might appear.\footnote{Id., at 933-934 (lengthy discussion of recidivism statistics for sex offenders, stressing that rampant underreporting of sex crimes has substantial distorting effect on those statistics).} But low rates of reporting, arrest, and conviction also mean that the great majority of those who commit sex offenses are not convicted in the first place, so they are not on a registry when they commit their subsequent offenses. Registry regimes cannot help prevent this large chunk of recidivist sex offenses. Indeed, many professionals believe they actually impede effective enforcement by focusing attention on a relatively small population of unlikely recidivists, at the expense of attention to the much larger population of potential offenders not yet caught and therefore not yet on any registry.

Misunderstandings about the data on these points are sufficiently widespread to warrant further discussion. On several occasions, the Supreme Court has stated that “convicted sex offenders are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.”\footnote{Smith, supra note 88, 538 U.S. at 103 (quoting McKune, supra note 88, 536 U.S. at 33).} The claim is literally true but misleading. It relies on a Bureau of Justice Statistics finding that a convicted rapist is more likely than someone convicted of some other crime (e.g., bank robbery) to be arrested subsequently for rape;\footnote{U.S. Dept. of Justice, Sex Offenses and Offenders, supra note 91, at 27.} it does not find that rapists, as compared to other offenders, have a higher rate of recidivism for their offense of conviction or for subsequent crime generally. Indeed, a Justice Department analysis of prisoners released in 1994 found that among 1,717 ex-prisoners subsequently arrested for rape, less than five percent had previously been convicted of that offense.\footnote{U.S. Dept. of Justice, Recidivism of Prisoners Released in 1994, supra note 91, at 9-10.} Properly understood, in other words, the data invoked to support registration and other collateral consequences that target persons convicted of a sexual offense paradoxically show how misdirected these laws are: By focusing attention on offenders previously convicted of rape, such legislation risks diverting attention from the vastly larger pool of individuals who will eventually commit that crime—individuals who were previously convicted of other offenses or not previously convicted of any crime at all.

Although persons convicted of a sexual offense, therefore, are not more likely than other offenders to reoffend, collateral-consequence legislation arguably could be defended on the basis that sex crimes, being distinctively harmful and unsettling, warrant special effort to prevent them.\footnote{See, e.g., Belleau v. Wall, supra note 84, at 933-934 (court, in holding that GPS monitoring of sex offender was “reasonable” under Fourth Amendment, commented, “Readers of this opinion who are parents of young children [should] ask themselves whether they should worry that there are people in their community who have ‘only’ a 16 percent or an 8 percent probability of molesting young children—bearing in mind the lifelong psychological scars that such molestation frequently inflicts.”).}
The crucial question, then, is whether registration and other collateral-consequence measures have succeeded in doing so. Most studies suggest that they have not.

Before-after studies have found no significant correlation between recidivism rates and the passage of registration laws, public registries, and community notification. A regression analysis found that registration alone, by keeping police informed about persons in the area who had been convicted of a sexual offense, tended to reduce the frequency of reported sex offenses against

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98 For New Jersey, a statewide study found a long-term downward trend in sex-offense rates, with an acceleration of the trend when Megan’s Law passed in 1994. But when disaggregated to the county level, that effect became negligible; in six counties (of 21 studied) there was no statistically significant change in the long-term downtrend, and in six others, the acceleration of that trend preceded passage of Megan’s Law. Kristen Zgoba & Philip Witt, Megan’s Law: Assessing the Practical and Monetary Efficacy, N.J. Dep’t of Corrs. (Dec., 2008), available at https://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf. The New Jersey study based sex-offending rates on arrest data, a potential source of bias, either because registered offenders were more easily targeted and arrested (an effect that would generate arrest statistics higher than the actual rate of reoffending post-1994), or because law-enforcement arrest efforts slackened in a false-sense-of-security effect (which would generate arrest statistics lower than the actual rate of reoffending post-1994). Whatever the bias, it would seem that any positive effect on recidivism was too slight to be detected in any but very subtle analysis. In a different research sample, the New Jersey researchers tracked persons convicted of a sexual offense following their release from prison between 1990 and 2000; the researchers found a significant drop in reoffending post-1994 (from 50 percent to 41 percent), but the drop cut across all offenses, with no statistically significant drop for sexual offenses, with respect either to likelihood of rearrest or time from prison release to rearrest. Id. at 21-32.

A before-after study of community notification in the state of Washington produced similar findings: no significant drop in the rate of rearrest for sex crimes, and a slightly larger but still statistically insignificant drop in the rate of rearrest for crimes generally. Donna D. Schram & Cheryl Darling Milloy, Community Notification: A Study of Offender Characteristics and Recidivism 17, 19, Washington State Institute for Public Policy (Oct., 1995), available at http://www.wsipp.wa.gov/rptfiles/chrrrec.pdf. In the case of crimes generally, there was a substantial difference in the time to the first rearrest (a median of only 25 months for the notification group but much better—62 months—for the control group); nonetheless, this difference could have been due to the use of arrest statistics as a proxy for reoffending rates, and in any case the difference was observed only in rearrests for crimes generally, not in rearrests for sex crimes.

A study relying on three distinct data sets and three outcome measures (crime rates for sex offenses, recidivism rates for sex offenders, and location-specific incidence of offenses) found “[n]o support [for] the hypothesis that sex-offender registries are effective tools for increasing public safety.” Amanda Y. Agan, Sex Offender Registries: Fear without Function?, 54 J. L. & ECON. 207, 207 (2011). See also J.J. Prescott, Portmanteau Ascendant: Post-Release Regulations and Sex Offender Recidivism, 48 CONN. L. REV. 1035 (2016) (noting that “empirical researchers to date have found essentially no reliable evidence that these laws work to reduce sex offender recidivism (despite years and years of effort), and some evidence (and plenty of expert sentiment) suggests that these laws may increase sex offender recidivism.”)
neighbors of the offender (but not against family members or more distant strangers). Notification laws had some apparent crime-reduction effect by deterring nonregistered offenders from committing offenses that would render them eligible for this sanction, but community notification also tended to increase recidivism among offenders who were registered. As a result, “any beneficial effect of registration on recidivism is dampened by the use of notification, and [thus] . . . the punitive aspects of notification laws may have perverse consequences.”

Overall, the available research does not conclusively exclude the possibility that registration, notification, restricted residency, and similar collateral consequences could potentially contribute to public safety. But after two decades of experience with such laws, and with the considerable body of evidence that experience has generated, their beneficial effects (if any) have yet to be discerned.

One reason for this inability to detect public-safety benefits may be that some benefits were realized but were offset by the negative consequences for public safety that these laws also entail. That possibility is examined in Note 5(b) below.

(ii) Transparency and Self-Protection. Public access and community notification give the public and organizations responsible for the welfare of vulnerable populations an ability to take precautions. Indeed, the perception of transparency and empowerment seems to follow almost axiomatically from public access and community notification. But their effects have been decidedly mixed. The evidence is discussed in the Reporters’ Note to Section 213.11H, which addresses the specifics of public access to registry information. Overall, the research suggests that public awareness typically prompts few self-protective measures, and that the very existence of these regimes tends to divert attention away from much more significant sexual dangers.

(iii) Mismatch. The collateral-consequence laws under consideration here were initially prompted by cases like Megan Kanka’s: a young child sexually assaulted by a stranger with a prior

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100 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 nonpunitive; that classification is the foundation for an extensive Supreme Court jurisprudence holding that these “regulatory” measures are not subject to the post factum prohibition. E.g., Smith v. Doe, supra note 88, at 92-96; Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1 (2003).


102 See Reporters’ Note to Section 213.11H, infra.
history of sexual offenses who was, unbeknownst to her parents, living nearby. Nonetheless, from
the start these laws extended their reach to offenses against adults and to offenders who were well
known to their victims. Such expansive conceptions of the offenders to be targeted are
understandable and potentially justified, but they sweep within the single rubric of the “sex
offender” individuals who may present different risks that, if so, call for different measures of
social protection. Persons convicted of a sexual offense can be distinguished on three especially
important dimensions. But those differences are not necessarily stable. A fourth problem is that
not all offenders “specialize” in a particular type of victim or a sexual offense. Instead, research
finds significant rates of “cross-over” sexual offending (“polymorphism” in the language of
behavioral science). These four “mismatch” concerns are crucial for sound registration policy.

First is the “stranger danger” myth. Though contemporary sex-offense registration regimes
grew out of highly publicized stranger crimes, most sexual assaults—by a wide margin—involv
family members or acquaintances. In a Wisconsin sample of 200 recidivists previously convicted
of a sexual offense, none had perpetrated crimes against strangers; a more comprehensive Justice
Department study found that among child victims of sexual abuse, 34 percent had been molested
by family members and an additional 25 percent by close acquaintances. Moreover, despite
important qualifications in the “cross-over” literature discussed below, perpetrators who molest a
family member seldom go on to target strangers. It should be superfluous to point out that the
needs for notification and residency restrictions are quite different (if they apply at all) when a
parent is convicted of molesting the parent’s own child; yet stranger assaults and acquaintance
assaults are legally identical offenses. That means that in the prevalent state and federal approach,
classifying offenders automatically based on the legal offense of conviction, stranger and
acquaintance offenses entail precisely the same collateral consequences.

Second, the “child victim” concern is not a myth, but it involves a distinctive set of
behavioral and rehabilitative issues. Offenders who target young, preadolescent children usually
present different risks from those of the offender who has assaulted an adult. Many classification
regimes automatically place offenses against minors in a more serious category, but some do not.
And even where that distinction is drawn, it is often insufficiently discriminating. Classifications
often fail to take into account the age of the minor victim or to differentiate between adults who
target young, preadolescent children and offenders who are themselves teenagers who had
consensual sex with other teens who were close or identical in age.

Third is the mismatch between risks and remedies. Often offenses involving adult victims,
even those in the least serious category, nonetheless remain subject to almost all the collateral
consequences applicable to offenses against children. In the federal regime, for example, the only

103 See Jill Levenson, Sex Offender Residence Restrictions, in WRIGHT, supra note 3, at 267, 275;
PATRICIA TJADEN & NANCY THOENNES, FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN
respect in which those consequences differ from those applicable to offenses against children is in
the length of the registration period (merely 15 years rather than 25 years or life). Yet many of the
required collateral consequences—such as the federal mandate to notify day-care centers and
common state mandates barring residence close to school zones (not to mention prohibitions on
living near a school-bus stop)—apply even though the necessity for these measures is different or
nonexistent when the offender is an employer who groped an adult employee in the store room or
a person who raped an adult stranger but shows no indication of being attracted to preadolescent
children.104

Fourth, “cross-over” offending complicates this picture. Although in conventional wisdom,
the person who sexually molests a young child and the person who forcibly rapes an adult are often
assumed to harbor different sexual proclivities, this is not uniformly true. One recent study of the
issue found that among recidivist offenders, 37 percent of those who initially raped or sexually
assaulted an adult subsequently committed a sexual offense against a prepubescent child.105
Research finds similar, though less pronounced, polymorphism across the stranger-acquaintance
divide. In one study of sexual recidivists, over 25 percent had sexually assaulted both strangers

104 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
80, at 516.

105 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,
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; researches
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%.”).
and nonstrangers, but other studies find recidivist targeting patterns to be “highly stable” in
terms of victim-offender relationship (i.e., stranger vs. acquaintance vs. intrafamilial) as well as
the victim’s gender. Cross-over offending cautions against narrowly matching collateral
sanctions to the character of the triggering offense. But because baseline rates of recidivism for
sexual offenses are quite low (less than 5 percent in one Department of Justice study), cross-
over offenses by previously convicted recidivists represent a small sliver of the total problem,
arguably not enough to justify the law-enforcement effort and expense devoted to the issue. And
some aspects of cross-over offending actually reinforce these reasons to restrict rather than extend
the scope of registration and notification. One study of recidivist sex offenders released on parole
found that 4.5 percent had been arrested only for sex offenses. The others had heterogeneous prior
records—they had either committed a nonsexual offense first (and hence would not have been on
a registry prior to committing their sexual offense) or they committed a sex offense first (and hence
would have been on a registry subject to law-enforcement attention in that regard, but then went
on to commit a nonsexual offense).

(iv) Cost. Legislators sometimes assume that registration, residency restrictions, and other
collateral burdens imposed on persons convicted of a sexual offense are virtually cost-free so far
as the state itself is concerned. But these measures are expensive to implement, especially when
(as is typical) the requirements target a large, heterogeneous group of offenders. Recording and
updating the required information and installing the requisite website technology can cost each
jurisdiction millions of dollars per year, without even counting the resulting need for law-
enforcement personnel to reduce the time they can devote to responding to emergencies and other
duties.

This experience raises great doubt about whether these measures are fiscally viable and
worth their direct costs to state and local government. Many state criminal-justice agencies, after

106 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.

107 Stephens, et al., supra note 105, at 41 (finding rates of polymorphism below 10% for victim
gender and below 20% in terms of victim-offender relationship).

108 See text at note 96, supra. On the inferences to be drawn from the fact that exceptionally low
conviction rates for sex offenses artificially deflate these recidivism figures, see text at note 92, supra.

109 See Jeffrey Lin & Walter Simon, Examining Specialization Among Sex Offenders Released from

110 See text accompanying notes 128-131, infra. See also Hinton, supra note 77, at 2.

111 See Geraghty, supra note 80, at 518.
careful assessment, have concluded that they are not, especially when more selective approaches can achieve most or all of the benefits at considerably lower cost.\footnote{112 See text accompanying notes 128-131, infra.}

\textit{b. Unintended Effects.} In contrast to the intended benefits of collateral sanctions, for which empirical measures of success are disappointing or nonexistent, unintended negative side effects are well-documented. This is particularly true with respect to burdens that extend beyond the disclosure of registry information to law-enforcement agencies themselves—burdens such as public access, community notification, and restrictions on residency and employment. The issue is discussed in more detail in the Reporters’ Note to Section 213.11I, which addresses the specifics of collateral consequences additional to the duty to register with law enforcement.\footnote{113 See Reporters’ Note to Section 213.11G, infra.}

The negative impacts on offenders include difficulty in obtaining housing and employment, psychological stigma, and physical abuse by misguided members of the public.\footnote{114 See, e.g., E.B. \textit{v. Verniero}, 119 F.3d 1077, 1102 (3d Cir. 1997) (‘‘The record documents that registrants and their families have experienced profound humiliation and isolation as a result of the reaction of those notified. Employment and employment opportunities have been jeopardized or lost. Housing and housing opportunities have suffered a similar fate. Family and other personal relationships have been destroyed or severely strained. Retribution has been visited by private, unlawful violence and threats. . . .’’). See also Jill S. Levenson \textit{et al.}, \textit{Grand Challenges: Social Justice and the Need for Evidence-based Sex Offender Registry Reform}, 43 J. SOC. & SOC. WELFARE 3, 11-12 (noting that the challenges of reintegration after conviction of a criminal offense are especially pronounced for persons placed on a sex-offense registry).}

These consequences in turn mean negative impacts for public safety because the adverse personal impacts for offenders impede their reintegration into society and aggravate their risks of reoffending.\footnote{115 Prescott & Rockoff, supra note 99, at 181.}

It could be that the intuitively plausible law-enforcement benefits of these laws partially or fully offset these negative consequences for public safety, a result that would explain the inability of researchers to detect any net gain in reoffending rates. If so, the resulting symmetry is a poor one, taking no account of the human consequences for registrants and their families, and achieving a public-safety equilibrium only by driving up law-enforcement effort and expense to a sufficient extent to counterbalance the \textit{increased} dangerousness of potential offenders.

Perhaps unexpectedly, victim advocates and organizations actively engaged in providing support services for rape survivors share these concerns and have been forceful critics of registration and other collateral consequences. A recurring grievance is the way that registration and notification have “done a disservice by . . . the construction of sexual assault risk—who poses it, who faces it, and how to mitigate it—and [by] the reinforcement of a victim hierarchy that
demeans most victims.”

Victim services organizations like state-based Coalition[s] Against Sexual Assault (CASA’s) repeatedly elaborate on this theme. A victim advocate affiliated with a CASA in the Northeast explained that these laws “have confused the public by emphasizing the least common offender.” At another CASA, an advocate noted that “Vulnerability [for sexual abuse] is actually reinforced by these laws because it turns the attention [of the public and the criminal justice system towards] one-percent of the crime.”

Advocates similarly object that sex-offense collateral-consequence laws “reinforce a narrow [view] that only forced sexual contact with a stranger that results in grave bodily harm is a ‘real’ assault, and that only child victims are ‘real victims’”; that view in turn “makes it harder [for victims] to come forward [because the laws] reinforce the notion that [the justice system, the public, and service providers] are only interested in a specific offender type.”

Another prominent concern for victim advocates has been that expensive initiatives to impose collateral-consequence restrictions on offenders have been coupled with “absolutely no corresponding increase in material support for victim services.” Further, “[a]ccording to several CASAs, these expensive laws have demonstrated little to no discernable impact on reducing recidivism. Instead, they eat up scarce resources, scare victims into not reporting [an abusive] loved one, and reinforce to the public stereotypes about what violence is and who perpetrates it. One advocate summarizes that “[t]hese policies are about a sense of safety, not real safety.”

Patricia Wetterling, the mother of a murder victim, is widely credited with playing a pivotal role in enactment of SORNA’s predecessor, the first federal legislation mandating the creation of state regimes for registering persons convicted of a sexual offense. Wetterling continues to support registration as a useful law-enforcement tool, along with notification when it is carefully

116 Rachel Kate Bandy, The Impact of Sex Offender Policies on Victims, in WRIGHT, supra note 3, at 491.

117 Id. (quoting CASA interviewee).

118 Id (quoting CASA interviewee located on West coast).

119 Id., at 493.

120 Id., (quoting CASA interviewee based in Southeast).

121 Id., at 502 (reporting views of a West Coast CASA).

122 Id., at 505.

123 505 (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.”).

124 See text at notes 8-9, supra.
done ("the way we do it in Minnesota"), but she has come to regret much of the overextended legislation that her initiative spawned. She describes residency restrictions as "ludicrous," noting that "most sex offenses are committed by somebody that gains your trust, or is a friend or relative.... [N]one of these laws address the real [problem] that nobody wants to talk about." Registration of juveniles convicted of a sexual offense has had distinctly harsh consequences, and assessments of its value have been especially negative. The relevant research is discussed in the Reporters’ Note to Section 213.11A(3), which imposes special limits on juvenile registration.

7. The Model Code: Sections 213.11A-213.11J. A regime to govern sex-offense collateral consequences must address a dense thicket of substantive and procedural issues. Distinctive features of local law necessarily affect the appropriate statutory structure and language dealing with operational detail. Thus, many facets of scope and implementation do not lend themselves to treatment in a Model Code intended for a multi-jurisdictional audience. Crucial issues of drafting and policy, however, are common to all jurisdictions and can be addressed in universal terms: Which offenses and which offenders should ever be subject to restrictions specific to persons convicted of a sexual offense? How much information should be publicly accessible? Should particular collateral sanctions (for example, limits on where an offender can live) ever be imposed upon conviction of a sexual offense? If so, which sex offenses should trigger exposure to that sanction, and should it be imposed automatically or only after an individualized assessment of benefits and costs? What should be the duration of the measure in question? What procedural safeguards should attend the determination of whether a particular person should be subject to a particular measure or whether a previously imposed burden should be lifted? Sections 213.11A-213.11J address broadly relevant issues of this kind.

Sections 213.11A-213.11J do not accept the federal framework as a given and instead reconsider the federal baseline on its merits, for two reasons. First, the federal “mandate” is quite weak, because noncompliance causes states to lose only 10 percent of their federal law-enforcement grants. By comparison, the costs of compliance typically are many times greater. For example, in California, the state’s Sex Offender Management Board estimated that complying with federal SORNA would cost the state at least $38 million, as against a loss of only $2.1 million in federal funds. For Texas, comparable figures were assessed at a cost of $39 million for

125 In Minnesota, the extent of community notification depends on an assessment of the registrant’s dangerousness and the degree of community members’ need to know. See text at notes 222-223, infra.

126 Patricia Wetterling & Richard G. Wright, The Politics of Sex Offender Policies: An Interview with Patricia Wetterling, in WRIGHT, supra note 3, at 101-103. For further discussion of Wetterling’s further criticism of residency restrictions, see Reporters’ Note to Section 213.11H, infra.


SORNA compliance, as against a loss of only $1.4 million in federal funding.\textsuperscript{129} In Colorado, the state estimated that the federal funds lost ($240,000) would suffice to implement SORNA only in a single mid-size law-enforcement agency.\textsuperscript{130} As a result, in most states, SORNA is seen as an unfunded mandate of considerable proportions.\textsuperscript{131}

Second, and partly as a consequence of the first point, as of August 2019, only 22 states had complied with the federal mandate.\textsuperscript{132} All states have some system for registering persons convicted of a sexual offense, but the majority have chosen to go their own way, adopting more flexible approaches, even at the cost of losing some federal funds. The collateral burdens imposed on persons convicted of a sexual offense vary widely, exceeding the federal minimum in some jurisdictions but falling below it in others. This pattern suggests widespread dissatisfaction with the federal regime, whether because of fiscal or policy concerns.

For these reasons, Sections 213.11A-213.11J, while targeting issues that the federal mandate currently leaves to the discretion of the states, also evaluate, and in part reject, approaches that current federal law seeks to mandate nationwide. The potential benefits of sex-offense


\textsuperscript{131} See Dylan Scott, States Find SORNA Non-Compliance Cheaper, Nov. 7, 2011, available at http://www.governing.com/blogs/fedwatch/States-Find-SORNA-Non-Compliance-Cheaper.html#; Levenson, supra note 114, at 15 (noting that “[m]ore than half of states have elected not to comply with the AWA due to the financial burden it placed on them, because the loss of federal dollars was estimated to be less than the costs of implementing new mandates.”).

collateral consequences become attenuated, and costs together with negative side effects dominate decisively when—as under currently prevalent law—the obligation to register applies indiscriminately to offenders of widely divergent culpability and future risk; when public access to registry information is essentially unlimited; and when special measures go beyond registration to include affirmative community notification, occupational and residency restrictions, and the like. The broad, inflexible sweep of collateral-consequence sanctions under federal SORNA and under the legislation of most states is unjust and counterproductive. On this point, well-considered arguments for a more limited approach have won a positive reception in the legislatures and law-enforcement agencies of a significant minority of the states, even in the face of considerable political risk. By delineating a balanced, discriminating approach, Sections 213.11A-213.11J offer a template for legislatures willing to consider much-needed reform in this area. The Article 213 offense definitions limit eligibility for collateral sanctions of any sort, and for eligible offenses, Sections 213.11A-213.11J provide a structure for selectively assessing the need to burden the offender with particular sorts of collateral consequences beyond the threshold requirement of registration itself. These provisions require restraint in imposing registration, community notification, residency restrictions, and related collateral consequences, in light of the public-policy costs of such sanctions that, although not readily apparent to the general public, are nonetheless substantial and well-documented in all the relevant research.

Section 213.11A establishes the scope of the threshold duty to register. Issues relevant to implementing that duty are discussed in the Reporters’ Notes to Section 213.11B (for the notice offenders must receive), Section 213.11C (for the time when the obligation to register ripens), Section 213.11D (for the information registrants and states themselves must provide), Sections 213.11E and 213.11F (for the registrant’s duty to periodically update registry information and the duration of that duty), and Section 213.11G (for penalties applicable to failure to register or update registry information as required). Consequences other than registration are discussed in more detail in the Reporters’ Notes to subsequent Sections, which restrict, substantively and procedurally, the offender’s exposure to other collateral consequences. Section 213.11H strictly limits public access to registry information. Section 213.11I establishes a formal procedure for deciding on the need for additional obligations or disabilities; identifies factors the authorized official must weigh in determining whether a particular offender should incur such consequences; and requires a written explanation of the reasons why any additional collateral consequence is justified in the interest of public safety, after due consideration of its impact on the offenders prospects for successful reintegration into law-abiding society. Finally, Section 213.11J addresses procedures by which registrants can obtain early relief from sex-offense duties and disabilities, including the duty to keep registry information current.

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133 See note 277, infra.
SECTION 213.11A. REGISTRATION FOR LAW-ENFORCEMENT PURPOSES

(1) Offenses Committed in This Jurisdiction

(a) Except as provided in subsection (3), every person convicted of an offense that is designated a registrable offense in this Article must, in addition to any sanction imposed upon conviction, appear personally and register as a sex offender with the law-enforcement authority designated by law in the [county] where the offender lives.

(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 oblige the offender to register as a sex offender with law enforcement or other governmental authority, unless that offense is designated a registrable offense under this Article.

(2) Offenses Committed in Other Jurisdictions

(a) Duty to register and related duties. Every person currently 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, must register with the law-enforcement authority designated by law and comply with the requirements of Sections 213.11A-213.11J, provided that the offense committed in the other jurisdiction is comparable to an offense that would be registrable under this Article if committed in this jurisdiction.

(b) Place of registration. If the person who is required to register under subsection (2)(a) lives in this jurisdiction, registration must be accomplished in the [county] where the person lives. If the person who is required to register under subsection (2)(a) does not live in this jurisdiction, but works in this jurisdiction, registration must be accomplished in the [county] where the person works; if the person does not live or work in this jurisdiction but studies in this jurisdiction, registration must be accomplished in the [county] where the person studies.

(c) Determining the comparability of in-state and out-of-state offenses

(i) Standard. An offense committed in another jurisdiction is comparable to a registrable offense under this Article if and only if the elements of the out-of-state offense are no broader than the elements of that registrable offense. When, regardless of the conduct underlying the out-of-state conviction, the out-of-state offense can be committed by conduct that is
not sufficient to establish a registrable offense under this Article, the two offenses are not comparable.

(ii) Procedure. Before determining that an offense committed in another jurisdiction is comparable to a registrable offense under this Article, the authority designated to make that determination must give the person concerned notice and an opportunity to be heard on that question, either orally or in writing.

(d) Notwithstanding any other provision of law, no conviction for an offense in another jurisdiction shall require the offender to register as a sex offender with law enforcement or other governmental authority in this jurisdiction, unless that conviction currently obligates the offender to register as a sex offender in that jurisdiction and the conviction is for an offense comparable to an offense that would be registrable 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 213.11I, on the basis of a criminal conviction for an offense committed when the person was under the age of 18, or on the basis of an adjudication of delinquency based on conduct when the person was under the age of 18; provided, however, that this subsection (3) shall not apply to a person convicted of a criminal offense of Sexual Assault by Aggravated Physical Force or Restraint if the person was at least 16 years old at the time of that offense.

Comment:

1. Offenses Committed in This Jurisdiction. Section 213.11A(1) applies to collateral consequences potentially applicable on the basis of an offense committed in this jurisdiction.

a. Subsection (1)(a). In order to serve law-enforcement purposes, subsection (1)(a) obliges a person convicted of a sexual offense to register as a sex offender and fulfill related duties when this Article designates it as a registrable offense.

The following offenses are the only offenses designated as registrable under this Article:

(i) Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint.

(ii) Section 213.2. Sexual Assault by Physical Force, but only when committed after the offender had previously been convicted of a felony sex offense.
(iii) Section 213.3(1). Sexual Assault of an Incapacitated Person, but only when committed after the offender had previously been convicted of a felony sex offense.

(iv) Section 213.8(1). Sexual Assault of a Minor Younger than 12, but only when the minor is younger than 12 years old and the actor is 17 years old or older.

(v) Section 213.8(2). Incestuous Sexual Assault of a Minor, but only when the minor is younger than 16 years old.

Subsection (1)(a) requires offenders convicted of any of these designated offenses to register with law-enforcement authorities in the [county] where the offender resides. Municipal organization and local logistical capabilities will determine for each state the official agency and jurisdictional level where the registration obligation is centered. But because registration in the scheme of Article 213 is designed to serve primarily law-enforcement objectives, the agency must in any event be one with a law-enforcement mission. For example, in California, persons required to register must do so "with the chief of police of the city in which he or she is residing, or the sheriff of the county if he or she is residing in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California, the California State University, or community college if he or she is residing upon the campus or in any of its facilities." 134 In Pennsylvania, persons required to register must do so with an appropriate official of the correctional facility where incarcerated prior to release, with the Pennsylvania Board of Probation and Parole, or with the Pennsylvania state police, depending on the circumstances. 135

b. Subsection (1)(b). Existing sex-offense registration requirements and related provisions are codified in diverse places within the corpus of state law. In addition, many jurisdictions impose registration and related obligations on the basis of sexual offenses other than rape and sexual assault—including sex-related offenses that fall outside the scope of Article 213 such as exhibitionism, stalking, and possession of child pornography. Section 213.11A(1)(b) provides that an obligation to register as a sex offender, related duties, and other collateral consequences

134 CAL. PENAL CODE § 290(b) (2019).

135 42 PA. CONS. STAT. ANN. § 9799.19 (2019)
applicable specifically to persons convicted of a sexual offense may not be imposed on an offender on the basis of any offense committed in this jurisdiction that is not defined by Article 213 and designated a registrable offense under this Article.

Subsection (1)(b) therefore makes clear that the registration provisions of Section 213.11A supersede prior law governing sex-offender registration and other sex-offense collateral consequences in the jurisdiction. Once enacted, the Article 213 designation of offenses that are registrable, and the provisions of Sections 213.11A-213.11J specifying the scope and limits of collateral consequences applicable specifically to persons convicted of a sexual offense constitute the exclusive source of law applicable to these collateral consequences in the jurisdiction. Obligations and restrictions incident to a suspended sentence, probation, or parole, and collateral consequences not applicable specifically to persons convicted of a sexual offense—that is, obligations or restrictions applicable both to persons convicted of sexual offenses and to persons convicted of other offenses, such as disqualifications from voting, jury service, or eligibility for public benefits—are governed by Model Penal Code: Sentencing and are not affected by the provisions of Sections 213.11A-213.11J.

2. Offenses Committed in Other Jurisdictions. Section 213.11A(2) applies to sex-offense collateral consequences potentially applicable when a person enters this jurisdiction to live, work, or study after having been convicted of a sexual offense in another jurisdiction.

   a. Duty to Register. Under subsection (2)(a), an out-of-state conviction triggers the registration obligations of Section 213.11A if and only if the person in question is currently obliged to register as a sex offender in the jurisdiction where the offense was committed and the offense is comparable to one that would be registrable if committed in this jurisdiction. Altogether, therefore, there are four situations in which an out-of-state conviction does not require a person to register or face other sex-offense collateral consequences in this jurisdiction when subsequently living, working, or studying in this jurisdiction: (1) the out-of-state conviction is for an offense that is not registrable in either jurisdiction; (2) the out-of-state conviction is for an offense that is registrable where committed but would not be registrable if committed in this jurisdiction; (3) the out-of-state conviction is for an offense that would be registrable if committed in this jurisdiction but is not registrable where committed; and (4) the out-of-state conviction is for an offense that is registrable in both jurisdictions, but the person concerned is not currently obligated to register in the out-of-state jurisdiction because the person has received a full pardon, the conviction has been
expunged, or the person’s obligation to register in the out-of-state jurisdiction has terminated in any other way.

b. Place of Registration. When a person required to register under subsection (2)(a) lives in this jurisdiction, registration must be accomplished in the [county] where the person lives. When that person works in this jurisdiction but does not live in this jurisdiction, registration must be accomplished in the [county] where the person works; if the person does not live or work in this jurisdiction but studies in this jurisdiction, registration must be accomplished in the [county] where the person studies.

c. Comparability. The facts underlying the particular conviction for the out-of-state offense in question are not relevant in determining comparability. Instead, subsection (2)(c)(i) provides that an offense committed in another jurisdiction is considered “comparable” when and only when the elements of the out-of-state offense are no broader than the elements of an offense that is registrable under this Article. And because substantial liberty interests are implicated in a decision that triggers duty to register, subsection (2)(c)(ii) provides that the authority designated to determine comparability must give the affected person notice and an opportunity to be heard on that question, either orally or in writing. Subsection (2)(c)(ii) does not resolve the question whether the affected person, if indigent, must be afforded counsel at state expense. When necessary, courts must resolve that question in light of the seriousness of the registration consequences and the complexity of the legal question specific to the particular case.

This elements-only standard ensures that comparability decisions will not turn on elusive inquiries into the particular facts underlying an out-of-state conviction; rather, those decisions can be made by comparing the definitional elements of the relevant Article 213 offense to those of the out-of-state offense, as clarified by applicable case law. This standard also ensures that once the comparability or noncomparability of two offenses is established, the issue will be settled for all other cases involving those two offenses; the decisionmaking authority will not have to revisit the

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136 See, e.g., Meredith v. Stein, 355 F. Supp. 3d 355 (E.D.N.C. 2018) (determination that an out-of-state conviction was “substantially similar” to a registrable state offense, without providing the affected person an opportunity to be heard, held to violate procedural due process); Creekmore v. Attorney General of Texas, 341 F. Supp. 2d 648, 666 (E.D. Tex. 2004) (same).
issue *de novo* and delve into underlying facts case by case in future situations involving the same
two offenses.

As a result, when the definition of the out-of-state offense permits conviction in
circumstances that are insufficient to establish a registrable offense under this Article, the two
offenses are not comparable. For example, if negligence suffices to establish the mens rea element
of the out-of-state offense while the relevant Article 213 offense requires proof of recklessness,
the two offenses are not comparable, even though the facts proved at trial or admitted on a guilty
plea might establish that the defendant in the actual case acted recklessly or even purposely.
Conversely, if a knowing mens rea or specific intent is required to establish the mens rea element
of the out-of-state conviction while the relevant Article 213 offense requires only recklessness,
and if there is no other difference between the elements of the two offenses, then the two offenses
are comparable, because any conviction for the out-of-state offense necessarily establishes that the
person concerned could have been convicted of the relevant Article 213 offense if the conduct in
question had occurred in this jurisdiction.

3. Juvenile Offenders. Subsection (3) protects juveniles from the obligation to register and
from other collateral consequences specific to persons convicted of sexual offenses, regardless of
whether the potential trigger for those consequences is an adjudication of delinquency or a criminal
conviction under this Article, except that juveniles convicted of a criminal offense of Sexual
Assault by Aggravated Physical Force or Restraint remain subject to the requirements of Section
213.11A if they were at least 16 years old at the time of that offense.

**REPORTERS’ NOTES**

The findings canvassed in the Reporters’ Notes to Section 213.11 above cast considerable
doubt on the efficacy and wisdom of nearly all the common collateral-consequence requirements
enacted for sex offenses since the early 1990s. One response to that assessment would be to discard
registration-related practices entirely and treat persons convicted of sexual offenses who live in
the community no differently from anyone else who has a criminal record. That approach,
however, gives insufficient weight to legitimate social interests, especially the law-enforcement
interests that a local registry can serve.

To be sure, law-enforcement officials can readily retrieve criminal-history information,
regardless of the jurisdiction where the conviction occurred, when they need background on a
person of interest in a particular criminal investigation. But that option is more cumbersome than
the ability to quickly determine through a local registry whether that individual has a serious sex-
offense record. And a search of the national data base for the criminal history of an individual
suspect is beside the point when there is an effort to identify the unknown perpetrator of a serious
Section 213.11A. Registration for Law-Enforcement Purposes

1. Section 213.11A(1): Adults Convicted of Sex Offenses in This Jurisdiction. The Article 213 offense definitions classify as “registrable,” and therefore capable of triggering sex-offense collateral consequences, only those sexual offenses most likely to signal a propensity for dangerous predatory sexual behavior. The following Article 213 offenses are classified as registrable:

   (i) Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint. This, the most serious sexual offense, involves exceptionally aggressive sexual abuse that clearly justifies special concern about the danger of violent recidivism.

   (ii) Section 213.2. Sexual Assault by Physical Force. This offense covers a wide range of sexual misconduct, from that involving force just short of “aggravated physical force” to many lesser degrees of force and threat, including any amount physical force that is more than negligible,

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137 Leakage of ostensibly confidential information was a problem for registry information even before the Internet. See Logan, supra n.3, at 229 n.218.

138 Cf. R(F) v. Sec’y of State for the Home Dep’t, [2010] UKSC 17, ¶ 58 (holding mandatory registration a “disproportionate interference” with offenders’ rights to privacy, and therefore a violation of the European Convention on Human Rights, because it made “no provision for individual review of its requirements.”).
provided of course that the offender has the necessary culpable awareness of causing sexual
submission to or performance of penetration or oral sex without consent by those forcible means.
So defined, the offense includes within its reach misconduct that, while very serious, does not
necessarily mark the offender as a threat to children or a potentially violent predator. To require
registration for all such persons would therefore be overbroad. Section 213.2 therefore classifies
the offense as registrable only when the offense conduct occurs after the offender had previously
been convicted of a felony sex offense.

(iii) Section 213.3(1). Sexual Assault of an Incapacitated Person. This offense similarly
covers a wide range of sexual misconduct. The conduct within its reach, while very serious, does
not necessarily mark the offender as a threat to children or a potentially violent predator. To require
registration for all such persons would therefore be overbroad. A sexual offense against an
incapacitated person does, however, support a stronger concern about potential recidivism when
the perpetrator has a history of one or more previous convictions for serious sexual assault. Section
213.3(1) therefore classifies the offense as registrable only when the assault occurs after the
perpetrator had previously been convicted of a felony sex offense.

(iv) Section 213.8(1). This offense involves sexual penetration or oral sex with a victim
under the age of 12 by an offender who is 17 years old or older. This is predatory sexual abuse of
exceptionally serious nature, justifying the special precautions that the sex-offense registry
permits.

(v) Section 213.8(2). This offense involves sexual penetration or oral sex with a victim
under the age of 16 by a person who is a parent, guardian, or other adult in a similarly direct
position of trust and responsibility for the victim’s welfare. This is exceptionally serious sexual
misconduct, involving exploitation and abuse of trust that calls for the special precautions that the
sex-offense registry permits.

The one comparably dangerous Article 213 offense not classified as registrable is the
offense of Sex Trafficking under Section 213.9. Like the registrable offenses, it is an especially
serious felony involving predatory behavior and exploitation of vulnerable victims. But as its
motivation is primarily economic, it calls for a different kind of law-enforcement attention. Unless
its perpetrators are themselves guilty of other Article 213 offenses, they do not warrant inclusion
in a sex-offense registry that aims to identify a different sort of offender.

The other Article 213 offenses all involve serious crimes, and their perpetrators
undoubtedly may include a number of potential recidivists. But the empirical research and
experience detailed above makes clear that the currently prevalent approach, which seeks to cast
the widest conceivably defensible net is unjust, costly, and counterproductive. With respect to the
Article 213 offenses not designated as registrable, the social harms of registration demonstrably
outweigh its potential benefits. Making this judgment explicit, Section 213.11A(1)(b) stipulates
that no conviction for any other criminal offense under Article 213 can be the basis for requiring
sex-offender registration or any other obligation applicable specifically to persons convicted of a
sexual offense, other than obligations incident to a suspended sentence, probation, or parole.
Section 213.11A. Registration for Law-Enforcement Purposes

Several states extend their sex-offense registry systems to nonsexual offenses that arguably pose similar risks (for example, kidnapping a child). Given the limited value and substantial social costs of registration even in the case of explicitly sexual crimes, and the dangers of mission creep if registries begin to sweep nonsexual crimes within their purview, there is strong reason to limit a registration regime to the serious sexual offenses that fall within the scope of Article 213. Accordingly, Section 213.11A(1)(b), reflecting the majority view among the states, stipulates that no conviction for a criminal offense in this jurisdiction can trigger an obligation to register or any other obligation applicable specifically to persons convicted of a sexual offense, unless the offense is a registrable offense under this Article.

2. Section 213.11A(2): Adults Convicted of Sex Offenses in Other Jurisdictions. In virtually all jurisdictions, a person’s conviction for a sexual offense can sometimes trigger an obligation to register when the person moves elsewhere to live, work, or study. Many states require sex-offense registration for a much broader array of offenses than those that trigger registration obligations under Article 213, including, in some states, nonsexual offenses. The policy judgment underlying Section 213.11A—that sex-offense registration should be carefully targeted—obviously makes registration inappropriate in such cases.

The converse situation is less straightforward. A person may have committed an offense that would be registrable if committed in this jurisdiction but is not registrable in the jurisdiction where it was committed. That situation will seldom arise in practice, because few states if any restrict the registration obligation more narrowly than does Article 213. In such an event, however, the policy underlying Section 213.11A arguably might call for the public-safety measures that


140 See Reporters’ Notes to Section 213.11, supra.

141 See note 139 supra.
Sections 213.11A-213.11J contemplate. Nonetheless, since the offense was not registrable where committed, the offender would not receive registration-related notice at the time of conviction. It is therefore neither practical nor fair for that offender to face Section 213.11A requirements when subsequently entering this state.

A related situation in which the registration obligations of this jurisdiction could be broader than that of another jurisdiction can arise when the person concerned, after meeting all registration-related obligations in that jurisdiction, has been removed from its registry. Or similarly, a person nominally subject to registration in the other state for an offense that is registrable in this jurisdiction may receive a pardon or succeed in having the out-of-state conviction expunged. The Department of Justice reports that “[o]n occasion, offenders have had their convictions expunged, but still might face registration requirements in other states.”\(^{142}\) In these cases as well, the policy judgment underlying Section 213.11A—that sex-offense registration should be carefully targeted—makes registration inappropriate.

For those reasons, Section 213.11A(2)(a) provides that the out-of-state offense triggers the registration obligations of Sections 213.11A-213.11J if and only if two requirements are met: the person must be currently obliged to register as a sex offender in the jurisdiction where the offense was committed and the offense must be one that would be a registrable offense if committed in this jurisdiction. As a corollary, Section 213.11A(2)(d) makes explicit that no conviction for an offense that would not be registrable if committed in this jurisdiction can be the basis for imposing sex-offense registration requirements or any other obligation that this jurisdiction applies specifically to persons convicted of a sexual offense.

Section 213.11A(2)(b) explains where that person must register. If the person lives in this jurisdiction, registration must be accomplished in the [county] where the person lives. If the person does not live in this jurisdiction, but works in this jurisdiction, registration must be accomplished in the [county] where the person works. If the person does not live or work in this jurisdiction but studies in this jurisdiction, registration must be accomplished in the [county] where the person studies.

Section 213.11A(2)(c) explains the standard and procedures for determining whether an out-of-state offense triggers a duty to register. The required procedure is straightforward: Under subsection (2)(c)(ii), the decisionmaking authority must give the affected person notice and an opportunity to be heard on the comparability question, either orally or in writing.

The standard for determining comparability requires more extended discussion. States typically provide that a person’s out-of-state conviction triggers an obligation to register as a sex offender if:

\(^{142}\) U.S. Dep’t of Just., Sex Offender Registration and Notification in the United States: Current Case Law and Issues (2019), at 2 (noting that “at least one state has [determined] that ‘out-of-state offenders whose convictions have been expunged must register … [so long as] they were required to register’ in another jurisdiction as a sex offender”).
Section 213.11A. Registration for Law-Enforcement Purposes

offender only when that offense “is ‘comparable,’ ‘similar’ or ‘substantially similar’ to one or more of the receiving jurisdiction’s registerable offenses.” Most states designate a central authority to make that determination, but some do not.  

Comparability issues arise with some frequency, because of a lack of congruence between the out-of-state offense and the nearest equivalent registrable offense in the receiving state. Under current law, that issue is easily resolved when the question is whether comparability should be determined by the names of the two offenses or instead by their facts and definitional elements. The label itself is not relevant; two offenses can be comparable, even when they have different names or captions, if their elements are identical. For example, assume that a person has been convicted of “child molestation,” an offense that is registrable where committed but that does not exist under that name in the jurisdiction to which the person subsequently moves. If that offense, as defined, requires proof of sexual contact with a minor under the age of 14 and if that conduct is sufficient to establish a registrable offense (perhaps labeled “sexual abuse of a minor”) in the receiving jurisdiction, the latter jurisdiction can justifiably conclude that the two offenses are comparable and that the person concerned must register in the place where that person moves. Conversely, offenses sometimes are not comparable even though they carry the same label. Assume that (1) two states have a registrable offense of “sexual abuse of a minor,” (2) the out-of-state registrable offense requires proof of sexual contact with a minor under the age of 16, (3) the receiving state’s registrable offense requires proof of sexual contact with a minor under the age of 14, and (4) the victim of this particular offense was 15 years old. The two offenses are not comparable, even though they carry identical names, because neither the elements of the out-of-state offense nor the underlying facts in the particular case suffice to establish a registrable offense in the receiving jurisdiction.  

Greater difficulty arises when the formal elements of the offense and the conduct underlying the conviction point in different directions. Assume that (1) an out-of-state offense of “child molestation,” registrable where committed, requires proof of sexual contact with a minor

143 Id.  

144 Id. In several states, a local sheriff’s determination that an out-of-state conviction was “substantially similar” to a registrable state offense, without providing the affected person an opportunity to be heard, was held to violate procedural due process. See Meredith v. Stein, 355 F. Supp. 3d 355 (E.D.N.C. 2018); Creekmore v. Attorney General of Texas, 341 F. Supp. 2d 648, 666 (E.D. Tex. 2004).  

145 E.g., WYO. STAT. ANN. § 7-19-301(a)(viii)(B) (2019) (out-of-state conviction is registrable when “containing the same or similar elements … as sufficient to prove a Wyoming registrable sex offense”).  

146 E.g., State v. Duran, 967 A.2d 184 (Md. 2009) (out-of-state conviction for indecent exposure not registrable in Maryland because lewdness element of out-of-state offense could be satisfied by nonsexual as well as sexual conduct).
under the age of 16, (2) this state’s nearest equivalent registrable offense (“aggravated sexual abuse of a minor”) requires proof that the victim was under 12, and (3) the victim of this particular offense was 10 years old. Judged by the underlying facts, the out-of-state offense is comparable to this state’s registrable offense of “aggravated sexual abuse of a minor.” But judged only by its definitional elements, the out-of-state offense is not comparable because some conduct falling within its scope (e.g., sexual abuse of a 15-year-old) does not trigger registration duties in this state. 147

No uniform approach has emerged to resolve this issue. When the elements of the out-of-state offense cover some conduct that is registrable in the receiving state and some that is not, many jurisdictions limit the inquiry to the formal elements of the offenses in question. 148 Elsewhere, statutes or case law requires or permits the authorized authority to determine comparability by looking to the facts underlying the conviction in the particular case. 149 This

147 Cf. State v. Hall, 294 P.3d 1235 (N.M. 2013) (holding that California conviction for annoying or molesting children not registrable in New Mexico without evidence of actual conduct comparable to the registrable New Mexico offense).

148 E.g., State v. Doe, 425 P.3d 115, 119-121 (Alaska 2018) (Washington crime of communicating with a minor for immoral purposes and California crime of molesting any child under age 18 years held not similar to Alaska offense of attempted sexual abuse of a minor because “it is the law that must be similar …. [This] does not mean that the elements of the offense must be identical or even substantially equivalent, but the elements do have to be categorically alike with no significant differences …. [We] employ a categorical approach by looking to the statute . . . of conviction, rather than to the specific facts underlying the crime.”); State v. Duran, 967 A.2d 184 (Md. 2009) (out-of-state conviction for indecent exposure not registrable in Maryland because lewdness element of the offense could be satisfied by nonsexual as well as sexual conduct); Doe v. Sex Offender Registry Bd., 925 N.E.2d 533 (Mass. 2010) (Board may not consider facts underlying the conviction); Commonwealth v. Sampolski, 89 A.3d 1287 (Pa. Super. Ct. 2014) (determination must be based on elements of the offense).

149 E.g., WYO. STAT. ANN. § 7-19-301(a)(viii)(B) (2019) (treating out-of-state convictions as registrable where “containing the same or similar elements, or arising out of the same or similar facts or circumstances” as sufficient to prove a Wyoming registrable sex offense); United States v. Byun, 539 F.3d 982 (9th Cir. 2008) (conviction for alien smuggling properly triggered registration where underlying facts involved sex trafficking); State v. Hall, 294 P.3d 1235 (N.M. 2013) (California conviction for annoying or molesting children not registrable in New Mexico if underlying conduct not comparable to New Mexico registrable offense; “courts must look beyond the elements of the conviction to the defendant’s actual conduct.”); North v. Bd. of Exam’rs of Sex Offenders, 871 N.E.2d 1133, 1139 (N.Y. 2007) (“[W]here the offenses overlap but the foreign offense also criminalizes conduct not covered under the New York offense, the Board must review the conduct underlying the foreign conviction to determine if that conduct is, in fact, within the scope of the New York offense.”); State v. Lloyd, 132 Ohio St. 3d 135, 970 N.E.2d 870 (“If the out-of-state statute defines the offense in such a way that the court cannot discern from a comparison of the statutes whether the offenses are substantially equivalent, a court may . . . rely on a limited portion of the record in a narrow class of cases where the factfinder was required to find all the elements essential to a
approach is not intrinsically unworkable when the relevant facts are stipulated (as they might be
when the conviction is by guilty plea) or otherwise clearly established by the record. But some
jurisdictions permit wide-ranging inquiry into the circumstances underlying the out-of-state
conviction, a potentially complex factfinding process with significant possibilities for
unfairness. Some jurisdictions, acknowledging this difficulty, permit inquiry into the underlying
facts only when the statutory elements are “substantially similar” (an elusive inquiry in itself),
or when a formal record readily establishes those facts. Even this narrower approach means that
the comparability of an in-state offense to an out-of-state offense is never categorically resolved;
rather, that issue always depends on the facts underlying the out-of-state conviction in each case.

See also Sam Ashman, Note, The Danger in New Mexico’s Method of Deciding Whether an Out-
of-State Conviction is a Registrable Sex Offense, 49 N.M. L. REV. 354 (2019).

150 E.g., State v. Orr, 304 P.3d 449, 451-452 (N.M. Ct. App. 2013) (“Although we do not have a
sufficient record on appeal, the State has indicated that during the pendency of this appeal, it obtained
several documents from the district attorney’s office and court in North Carolina, including an investigation
report, grand jury indictment, transcript of plea, prior convictions for sentencing, and judgment and
commitment, to understand the underlying facts and procedural posture of Defendant’s conviction in North
Carolina. Accordingly, we remand this case to the district court for further proceedings ….”).

and circumstances underlying the foreign conviction [could be considered] only after determining that the
elements of the two statutes were objectively substantially similar, although not identical …. For a foreign
statute to be substantially similar to a [registrable] offense, ‘the elements being compared … must display
a high degree of likeness, but may be less than identical.’ … [E]xcept in unusual cases, the elements of the
relevant offenses [must] be compared for substantial similarity without regard to individual facts and
circumstances.”)

152 E.g., CAL. PENAL CODE § 290.005(a) (West 2018) (treating out-of-state convictions as
registrable “based on the elements of the convicted offense or facts admitted by the person or found true by
the trier of fact”); State v. Lloyd, 132 Ohio St. 3d 135, 970 N.E.2d 870 (“court may … rely on a limited
portion of the record in a narrow class of cases where the factfinder was required to find all the elements
essential to a conviction under the listed Ohio statute.”); State v. Werneth, 197 P.3d 1195, 1198 (Wash. Ct.
App. 2008) (Georgia conviction for child molestation held not registerable in Washington: “[T]he out-of
state court did not necessarily find each fact essential to liability for the proposed Washington counterpart.
[Therefore,] Mr. Werneth’s Georgia crime cannot count as Washington’s crime of attempted second degree
child molestation ‘without more.’ ‘More’ means proof that the Georgia court entered findings of fact that
support the additional elements of the Washington offense.”) (emphasis added).
Accordingly, subsection (2)(c) provides that comparability must be determined solely by comparing the definitional elements of the two offenses. An offense is comparable to a registrable offense under Article 213 if and only if the elements of the out-of-state offense are no broader than the elements of an offense that is registrable under this Article. When, regardless of the conduct underlying the out-of-state conviction, the out-of-state offense can be committed by conduct that is not sufficient to establish a registrable offense under this Article, the two offenses are not comparable. This definitional-elements standard avoids the inconvenience for the decisionmaker and the risk for the person concerned when the judgment about comparability requires determining the specific facts underlying each out-of-state conviction. It also serves the goal of judicial economy in that it permits the comparability of two offenses to be definitively resolved for all future situations implicating those offenses, even when cases potentially involve different underlying facts.


Under current law, many states impose duties to register and other sex-offense collateral consequences for a long list of sexual offenses even when the perpetrator was a minor at the time of the misconduct. Registration is widely required, often for life, not only when the youth is convicted of a criminal offense as an adult but also in many circumstances where the offense was the basis for an adjudication of delinquency. Federal SORNA seeks to require states to extend registration to juveniles adjudicated delinquent if they were at least 14 years of age at the time of the offense and the offense was comparable to or more severe than the federal crime of aggravated sexual abuse or an attempt or conspiracy to commit that offense.153

The research is replete with heartbreaking stories of the unnecessarily cruel, life-destroying impact of placing individuals on a sex-offender registry for offenses committed as minors.154 The impact has been not only harsh but exceptionally counterproductive. Patricia Wetterling is especially outspoken in condemning juvenile registration. “I don’t see any, not one redeeming quality in doing that... Registering juveniles is ludicrous and wrong always.” Noting that she objected to the language covering juveniles when the Jacob Wetterling bill was being drafted, she recalls that she “kept raising questions about treating juveniles the same way we treat adults. It makes no sense at all... I was told not to worry about the juvenile provisions because that would get thrown out. I was told there was no way that it would pass... and yet [it did].”155

Victim advocates report that “juvenile offender registration [has] inadvertently created a disincentive for victims to disclose [their victimization].”156 They say their clients “fear that there are no intermediate interventions available,” and that when abused at the hands of a juvenile, “they

153 SORNA § 20911(8) (2019).

154 HUMAN RIGHTS WATCH, RAISED ON THE REGISTRY (2013).

155 Wetterling & Wright, supra note 126, at 99, 101.

156 Bandy, supra note 116, at 471, 488.
fear that the youth will be required to register as a sex offender and will, therefore, be ‘branded’ 
for life despite being potentially amenable to treatment.”  

Apart from the vivid anecdotal evidence, systematic research consistently tells a similarly 
negative story. Findings suggest that registration of juveniles has no preventive effect\textsuperscript{158} and 
substantial criminogenic consequences,\textsuperscript{159} with overall effects that are unambiguously counter-
productive for the individual concerned and for society as a whole. One quantitative study 
estimates that juvenile registration alone saddles the public with social costs, net of benefits, 
amounting to at least $40 million per year, and that community notification pertaining to offenders 
placed on a registry as minors generates net social costs of at least $10 billion per year.\textsuperscript{160} 

Studies from other methodological perspectives regularly reach qualitatively similar 
results.\textsuperscript{161} In 2016, the Federal Advisory Committee on Juvenile Justice, in recommendations to 
the Justice Department’s Office of Juvenile Justice and Delinquency Prevention, reported that 
juvenile sex-offender registration laws “are inconsistent with research and evidence-based practice 
and undermine positive outcomes.” The Committee urged rejection of the registration approach 

\textsuperscript{157} Id. 

\textsuperscript{158} Elizabeth J. Letourneau et al., \textit{Juvenile Registration and Notification Policy Effects: A Multistate 
al., \textit{Adolescent Sex Offender Registration Policy: Perspectives on General Deterrence Potential from 
Criminology and Developmental Psychology}, 22 PSYCHOL., PUB. POL’Y, & L. 114 (2016). 

\textsuperscript{159} Catherine L. Carpenter, \textit{Throwaway Children: The Tragic Consequences of a False Narrative}, 

\textsuperscript{160} See Richard B. Belzer, \textit{The Costs and Benefits of Subjecting Juveniles to Sex-Offender Registration and 
Notification}, 41 R STREET POL’Y STUDY (2015), https://www.rstreet.org/wp-
content/uploads/2015/09/RSTREET41.pdf. See also Levenson, supra note 131, at 15 (explaining that “[t]he 
expenditures of registry programs include local police surveillance and compliance verification of RSOs, 
costs associated with non-compliance, such as courts and incarceration, and expenses for continuous 
technological improvements to build and maintain online registries and to seamlessly update and connect 
registry systems with other databases … When quantifiable costs are summed, they are estimated to range 
from $10 billion to $40 billion nationally per year.”). 

\textsuperscript{161} See, e.g., J.C. Sandler, et al., \textit{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., \textit{Juvenile Registration and Notification Policies Fail to Prevent First-Time Sexual 
Offenses: A Replication Study} (manuscript under review, 2019); A.J. Harris, et al., \textit{Collateral 
Consequences of Juvenile Sex Offender Registration and Notification: Results from a Survey of Treatment 
Providers}, 28 SEXUAL ABUSE: A J. OF RES. AND TREATMENT 770 ((2016); Najdowski et. al., supra note 
158.
for juveniles in preference to using “evidence-based, community based and family-focused responses.”162 Largely concurring in this recommendation, the Justice Department’s official guidance on the subject noted that “[j]uvenile cases have been pled to non-registration offenses at the expense of the juvenile not being eligible for treatment,” even though “[c]ost-benefit analysis demonstrates that sex-offender treatment programs for youth can provide a positive return on taxpayer investment.” The Department concluded that “[f]urther expansion of SORN [Sex Offender Registration and Notification] with juveniles is not recommended.”163

Responding in part to these assessments, several state courts have held that mandatory registration of juveniles convicted of a sexual offense as sex offenders is unconstitutional because it lacks an individualized assessment of risk.164 At a minimum, the research suggests, juvenile registration must be reserved for “situations where either unique risk or needs are clearly associated with the commission of a crime”165 and individuals convicted (or adjudicated delinquent) for conduct as minors must have viable opportunities to terminate their registration duties at an early date. But even a limited period on a sex-offense registry leaves a youthful offender’s sex-offense record widely available through public and private databases, in effect creating long-term


165 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).
punishment and leading many to argue that minors should be exempt from registration and notification requirements entirely.\textsuperscript{166} Eleven states specifically exclude minors from their state sex-offender registries, despite the federal mandate to the contrary.\textsuperscript{167}

Reflecting these persuasive assessments, Section 213.11A(3) rejects registration and all associated disabilities for juveniles—that is, offenders under the age of 18 at the time of their offense—regardless of the underlying offense, except in the case of offenders over 16 who are criminally convicted of a sexual assault involving aggravated physical force or restraint, in violation of Section 213.1.

SECTION 213.11B. 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 person 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 person must appear to register as required by Section 213.11A;

   (ii) the duty to report to that office or agency periodically in person, as required by Section 213.11E(1); and

   (iii) the duty to promptly notify at least one of the local jurisdictions where the person is registered of any change in the registry information pertaining to that person, as required by Section 213.11E(2);

(c) notify the person of the right to petition for relief from those duties as provided in Section 213.11J;


\textsuperscript{167} Minutola & Shah, supra note 71, at 8.
(d) confirm that defense counsel has explained those duties and the right to petition for relief to that person;
(e) confirm that the person understands those duties and that right;
(f) require the person to read and sign a form stating that defense counsel and the sentencing judge have explained the applicable duties and the right to petition for relief from those duties, and that the person understands those duties and that right;
(g) ensure that if the person convicted of a sexual offense cannot read or understand the language in which the form is written, the person will be 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 Model Penal Code Section 7.04(1). [Model Penal Code: Sentencing, Section 7.04(1) (Proposed Final Draft (2017)].

(2) At the time of sentencing, the convicted person shall receive a copy of the form signed pursuant to subsection (1)(f) of this Section.

(3) If the convicted person is sentenced to a custodial sanction, an appropriate official shall, shortly before the person’s release from custody, again inform the person of the registration requirement, explain the rights and duties associated therewith, including the right to petition for relief from those duties, and require the person to read and sign a form stating that those rights and duties have been explained and that the person understands those rights and duties. At the time of release from custody, the person concerned shall receive a copy of that form.

Comment:

Subsection (1) specifies the procedures for notifying persons convicted of a sexual offense of applicable registration rights and duties and also details the information that must be included in that notification. Subsection (2) requires the sentencing judge to provide the person a copy of the form signed pursuant to subsection (1). For a person who is incarcerated after conviction, subsection (3) specifies the procedures for again notifying an incarcerated person of applicable registration rights and duties prior to that person’s release from custody.
Section 213.11C. Time of Initial Registration

REPORTERS’ NOTES

The notification provisions of federal SORNA are stated in the briefest terms, requiring only that an appropriate official “inform the sex offender of the duties of a sex offender …[,] explain those duties; [and] require the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement.”\(^{168}\)

Subsection (1) adds specificity by building on the notification protocols applicable to collateral consequences generally under the sentencing provisions of the Model Penal Code.\(^{169}\)

Going beyond those protocols:

(a) subsection (1)(b), consistent with federal SORNA, requires the sentencing judge to explain the required information to the person concerned;\(^{170}\)

(b) subsection (1)(d) requires the judge to ensure that defense counsel has also explained that information,

(c) subsection (1)(e) requires the judge to ensure that the person understands that information;

(d) under subsection (1)(f), the judge must, consistent with federal SORNA, require the person concerned to read and sign a form stating that defense counsel and the judge have explained the relevant information and that the person understands it; and

(e) subsection (1)(g) calls attention to the need to communicate effectively with convicted persons who cannot read or understand the language in which notification is given.

SECTION 213.11C. TIME OF INITIAL REGISTRATION

A person subject to registration shall initially register:

(a) if incarcerated after sentence is imposed, then within three business days after release; or

(b) if not incarcerated after sentence is imposed, then not later than five business days after being sentenced for the offense giving rise to the duty of registration.

\(^{168}\) SORNA § 20919(a).


\(^{170}\) MPCS requires the sentencing judge to provide that information to the person in writing but does not explicitly require the judge to explain it or assure that the person understands.
Section 213.11C. Time of Initial Registration

Comment:

Section 213.11C specifies the time when the obligation to register ripens.

REPORTERS’ NOTES

Federal SORNA requires persons who must register to do so within a strict time frame. If they have been incarcerated, they must register “before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement.”171 Those who were not sentenced to a term of imprisonment must register “not later than 3 business days after being sentenced for that offense.”172 These deadlines are unnecessarily tight and a considerable challenge to meet. Not all incarcerated offenders will know prior to release exactly where they will be living, and even when their new address is known in advance, incarcerated offenders can hardly be expected to travel to their new residence before release and then appear in person at the designated local agency, as federal SORNA and most state registry regimes require.173 Taken literally, these provisions guarantee that incarcerated offenders subject to registration will commit a crime the moment they step outside the prison gate. To avoid this absurd result, several jurisdictions designate an authority to register affected individuals prior to release.174 SORNA authorizes the Attorney General to prescribe rules for registering those who are unable to comply with these deadlines,175 but to date no federal solution to this problem has yet taken effect.176 And the three-day time limit for persons required to register but not sentenced to incarceration, though not inherently ridiculous, is also unnecessarily tough to meet.

Section 213.11C sets more realistic deadlines that adequately meet any realistic public-safety concern—a deadline of three business days after release for persons required to register who

171 SORNA § 20913(b)(1) (emphasis added).

172 SORNA § 20913(b)(2).

173 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.


175 SORNA § 20913(d) (authorizing Attorney General to prescribe rules for the registration of persons who are unable to comply with the deadlines prescribed in § 20913(b)).

176 See Registration Requirements, supra note 174, at § 72.7(a)(2) (proposing rule that would allow individuals in this situation to comply with SORNA by registering within three business days of entering a jurisdiction following release from custody).
Section 213.11D. Information Required in Registration

(1) A person subject to registration pursuant to Section 213.11A shall provide the following information to the appropriate official for inclusion in the sex-offense registry:

(a) the name of the person (including any alias used by the person);
(b) the Social Security number, if any, of the person;
(c) the address of each place where the person resides or expects to reside;
(d) the name and address of any place where the person works or expects to work;
(e) the name and address of any place where the person is a student or expects to be a student;
(f) the license-plate number and a description of any vehicle owned or regularly operated by the person.

(2) Supplementary Information. The local jurisdiction in which a person registers shall ensure that the following information is included in the registry for that person and kept up to date:

(a) the text of the provision of law defining the criminal offense for which the person is registered;
(b) the person’s criminal history, including the date and offense designation of all convictions; and the person’s parole, probation, or supervised-release status;
(c) any other information required by law.

(3) Registrants Who Lack a Stable Residential Address. If a person required to register lacks a stable residential address, the person shall, at the time of registration, report with as much specificity as possible the principal place where the person sleeps, instead of the information required under subsection (1)(c).

(4) The local jurisdiction in which a person registers shall promptly provide the information specified in subsections (1), (2), and (3) of this Section to an appropriate law-enforcement authority in each jurisdiction in which the registrant works, studies, or expects to work or study.
(5) *Correction of Errors.* Each locality where a person 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.

Comment:
Subsections (1) and (2) specify the information that the registrant and the registering authority itself must provide. They require the disclosure of considerable detail, as do all existing sex-offense registration regimes, consistent with their perceived public-safety objectives. Subsection (3) explains the information to be provided, instead of the location of the person’s residence, when the registrant lacks a stable residential address. Subsection (4) obliges each locality where a person registers to inform the registrant, at the time of registration, how to seek correction of registry information that the registrant considers erroneous. It does not specify any particular correction procedures but leaves those details to each local jurisdiction, subject to the requirement that the procedures afforded be reasonably user-friendly and offer expeditious means to determine the validity of a registrant’s complaint and to correct information found to be erroneous.

**REPORTERS’ NOTES**

1. *Subsections (1) and (2): The Required Information.* Federal SORNA directs states to obtain from each person required to register a long list of personal information, including the registrant’s name, address, and Social Security number; the location of the registrant’s current employment or school; and the license-plate number and description of any vehicle owned or operated by the registrant. In addition, states must themselves provide to the directory the registrant’s criminal history, physical description and a current photo, fingerprints, palm prints, a DNA sample, and a photocopy of the registrant’s driver’s license or identification card.\(^{177}\) States vary considerably in the information that registrants must provide.\(^{178}\) Subsections (1) and (2) follow federal SORNA requirements with respect to the information required to be reported.

\(^{177}\) SORNA § 20914.

2. **Subsection (3): Registrants Who Lack a Stable Residential Address.** Nineteen states and the District of Columbia provide no statutory guidance on how registrants who lack a stable residential address can satisfy their obligation to report their place of residency. Federal SORNA is silent on this issue as well. Subsection (3) provides that a person required to register who lacks a stable residential address can instead report with as much specificity as possible the principal place where the person sleeps.

3. **Subsection (4): Sharing Information with Other Law-Enforcement Authorities.** Subsection (4) requires the jurisdiction in which a person first registers to provide the registry information concerning that person to an appropriate law-enforcement authority in each jurisdiction in which the registrant works, studies, or expects to work or study.

4. **Subsection (5): Correction of Errors.** Federal SORNA contains no mandate that states put in place any process to correct erroneous registry information, and many states likewise fail to do so. Subsection (5) requires states to provide this essential safeguard and ensures that the registrant will be made aware of the available procedures. Each locality where a person registers must inform the registrant, at the time of registration, how to seek correction of erroneous registry information. It does not lay down the details that an appropriate system must include, since those matters depend in large measure on local logistics, customs, and agency procedures. But the correction processes afforded must be reasonably user-friendly; they must ensure that complaints will be resolved promptly and that information found to be erroneous will be corrected without unnecessary delay.

**SECTION 213.11E. DUTY TO KEEP REGISTRATION CURRENT**

1. **(1) Periodic Updates.** A person who is required to register under Section 213.11A shall, not less frequently than once every year, appear in person in at least one jurisdiction where the person is required to register, verify the current accuracy of the information provided in compliance with Section 213.11D, allow the jurisdiction to take a current photograph, and report any change in the identity of other jurisdictions in which the person is required to register.

2. **(2) Change of Circumstances**

   (a) Except as provided in paragraph (b) of this subsection, a person subject to registration under Section 213.11A shall, not later than five business days after each change of name and each change in the location where the person lives, works, or studies, notify at least one local jurisdiction specified in Section 213.11A of:

   (i) all changes in the information that the person is required to provide under Section 213.11D, and
Section 213.11E. Duty to Keep Registration Current

(ii) the identity of all other jurisdictions in which the person is required to register.

(b) Registrants who lack a stable residential address, and therefore report instead the principal place or places where they sleep, as provided in Section 213.11D(3), must confirm or update those locations once every 90 days but need not do so more often.

(c) Each jurisdiction that maintains a sex-offense registry must permit registrants to notify the jurisdiction, by means of U.S. mail, submission of an appropriate form online, or other reliable, readily accessible means of communication of the jurisdiction’s choosing, of any change of name, residence, employment, student status, or vehicle regularly used, and any change in the identity of all other jurisdictions in which the person is required to register.

(d) Each jurisdiction where a person registers pursuant to Section 213.11A must advise the registrant, at the time of registration, of the registrant’s option to utilize the means of communication established under subsection (2)(c), rather than appearing personally for that purpose, if the registrant so chooses.

(3) The local jurisdiction notified of any changes pursuant to subsections (1) and (2) must promptly provide the registrant a written receipt confirming that the updated information has been provided, and shall provide that information to all other jurisdictions in which the person is required to register.

Comment:

Subsection (1) requires periodic re-registration in person once a year.

In Subsection (2), paragraph (a) requires registrants to report more promptly—within five business days—any changes to a registrant’s name, residence, place of work, place of study, or vehicle regularly used and to inform the jurisdiction notified about all other jurisdictions in which the person is required to register. Paragraph (b) applies to registrants who lack a stable residential address and therefore instead report on registration the principal place or places where they sleep. It requires registrants in that position to update the relevant information once every 90 days, but does not require them to report a change of residence more often, even when a registrant has relocated more frequently during that period.
Subsection (2)(c) requires jurisdictions to permit registrants to report changed circumstances by one or more readily utilized means of communication of the jurisdiction’s choosing, and subsection (2)(d) requires jurisdictions to advise registrants of their ability to use that option, if they prefer, rather than reporting the change of information in person.

Subsection (3) requires the jurisdiction initially notified of any changes pursuant to subsections (1) and (2) to provide the updated information promptly to all other jurisdictions in which the person is required to register.

**REPORTERS’ NOTES**

1. **Periodic Updates.** Federal SORNA requires registrants to appear periodically in person in at least one jurisdiction where they are required to register, allow that jurisdiction to take a current photograph, and verify the current accuracy of the registry information pertaining to them. The required frequency of these periodic updates under federal SORNA varies from quarterly to yearly, depending on the seriousness of the offense that triggers the registration duty. But updates only on an annual or semiannual basis are permitted only for lower-level offenses that Section 213.11A does not treat as registrable at all. Federal SORNA requires updates at least every three months for all of the offenses that are registrable under Article 213.

   Such frequent re-registration in person is unnecessarily burdensome and in effect punitive, because registrants are in any event required to notify the pertinent local agency within a matter of days whenever there is a change in the registrant’s name, residence, vehicle, or place of work or study. Absent such a change of circumstances, reporting in person serves only to assure the current accuracy of the offender’s personal appearance as recorded in the photograph on file, and that need is adequately met on an annual basis. Therefore, absent a change in circumstances, Section 213.11E requires periodic re-registration in person only once a year.

2. **Change of Circumstances.** Under federal SORNA, state registration regimes must require registrants to appear in person before appropriate state authorities, not later than three business days after any change of name, residence, and place of work or study, in order to update the pertinent information. Requiring the registrant to provide these updates in person and to do so within three days is unnecessarily burdensome and in effect punitive because, with respect to information of this nature, in-person appearance provides no assurance of accuracy that cannot be

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179 Federal SORNA permits annual updates for Tier I offenses and semiannual updates for Tier II offenses.

180 Federal SORNA does not treat a registrant’s deliberate alteration of personal appearance (for example, by changing hair style or hair color) as a change of circumstance requiring immediate notification, so even the most frequent periodic update required by federal SORNA (once every three months) does not effectively guard against a predator who alters personal appearance to evade SORNA surveillance.
achieved by requiring submission of appropriate documentation in writing, whether by U.S. mail, completion and internet transmission of suitable fill-in forms made available online, or other means of efficient communication. Several jurisdictions disregard these SORNA requirements by allowing more time for information updates and permitting updated information to be submitted by mail or the internet rather than in person.181

In accord with these sensible, more flexible approaches, subsection (2)(a) requires registrants to provide the necessary notice within five business days rather than just three, subsection (2)(b) requires each jurisdiction to permit registrants to report these changes by any reliable, readily accessible means of communication of the jurisdiction’s choosing, and subsection (2)(c) requires jurisdictions to advise registrants of that option.

Nineteen states and the District of Columbia provide no statutory guidance on how registrants who lack stable living arrangements can satisfy their obligation to report and continuously update their information pertaining to their place of residency. Federal SORNA is silent on this issue as well. Among states that address the problem, periodic update requirements range from 90 days (Arizona, California, New York) to a month (Texas), a week, or even every three days (Georgia, North Dakota).182 In Florida, registrants who provide a “transient residence” when they register “must report in person every 30 days to the sheriff’s office in the county in which [they are] located” even when they remain at the same transient address.183 But all registrants in Florida must “within 48 hours after vacating the permanent, temporary, or transient

181 See ANDREW J. HARRIS & CHRISTOPHER LOBANOV-ROSTOVSKY, NATIONAL SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA) IMPLEMENTATION INVENTORY: PRELIMINARY RESULTS 24-25 (2016), https://www.ncjrs.gov/pdffiles1/nij/grants/250132.pdf (citing as an example that Iowa gives offenders five days to update information and noting that SORNA’s mandate for registrants to update their information in person is one of the most frequent reasons for state noncompliance with SORNA; giving Massachusetts, Alaska, and Arkansas as examples of states that do not require in-person updates of registrant information).

182 See ARIZ. REV. STAT §13-3822(A) (person who registers as a transient must report and re-register every 90 days); CAL. PENAL CODE § 290.012(b) (West 2017) (same); N.Y. CORRECT. LAW § 168-f(3) (McKinney 2012) (same); TEX. CODE CRIM. PROC. ANN. art. 62.051(j)(1)–(2) (West 2017) (transient must report every 30 days); E. Esser-Stuart, Note, “The Irons Are Always in the Background”: The Unconstitutionality of Sex Offender Post-Release Laws as Applied to the Homeless, 96 TEX. L. REV. 811 (2018).

183 FL. STAT. ANN. 943.0435(4)(b)(2).
Section 213.11F. Duration of Registration Requirement

(1) Subject to the provisions of Section 213.11J, a person required to register must keep the registration current for a period of 15 years, beginning on the date when the registrant is released from custody after conviction for the offense giving rise to the registration requirement; or if the registrant is not sentenced to a term of incarceration, beginning on the date when the registrant was sentenced for that offense.

184 FL. STAT. ANN. 943.0435(4)(b)(1).

185 Compare State v. Burbey, 403 P.3d 145 (Ariz. 2017) (rejecting argument that state’s 72-hour notice requirement is triggered whenever a transient changes his or her transient location; instead transient must re-register only once every 90 days).


188 See note 182, supra.
Section 213.11F. Duration of Registration Requirement

(2) At the expiration of that 15-year period, the duty to keep that registration current will terminate; the person who had been registered will not be subject to any further duties associated with that registration requirement; and no public or private agency other than a law-enforcement agency shall thereafter be permitted access to the person’s registry information.

(3) Early relief from the duty to keep registry information current and other associated duties and consequences is governed by Section 213.11J.

(4) When a person’s duty to register terminates under subsection (2) or (3), the law-enforcement agency in the local jurisdiction where the person resides will, upon the person’s request, notify all other jurisdictions in which the person is registered that the person’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.

Comment:

Section 213.11F(1) specifies the duration of the registration requirement, including the duration of the regissant’s continuing obligation to keep registry information current. Subsection (2) provides that the duty to keep registration information current and all other duties associated with registration terminate after 15 years. It also specifies that no public or private agency other than a law-enforcement agency may thereafter access the person’s registry information.

Subsection (3) makes explicit the possibilities for early termination of registration duties and associated consequences, as provided in Section 213.11J.

Subsection (4) provides that when the regissant’s registration duties terminate under subsection (2) or (3), the agency in the local jurisdiction where that person resides must, upon the regissant’s request, report that termination to all other jurisdictions where the person is registered and caution those jurisdictions that no public or private agency other than a law-enforcement agency may have access to that registry information.

REPORTERS’ NOTES

Federal SORNA specifies the duration of registration and the accompanying duty to keep information current—15 years for Tier I offenses (the least serious); 25 years for Tier II offenses; and life for Tier III offenses, which include offenses comparable to the offenses registrable under
Section 213.11F. Duration of Registration Requirement

Article 213. The statute affords only limited opportunity for early relief from these obligations. For persons convicted of Tier I offenses who maintain a clean record for 10 years, registry obligations terminate at the end of that period, that is, five years early. For persons adjudicated delinquent on the basis of Tier III offenses who maintain a clean record for 25 years, registry obligations terminate at the end that period, rather than remaining in effect for life. Under federal SORNA, no other registrants are eligible for early relief from registry obligations. Thus, even a juvenile registrant must remain on the registry for at least 25 years, and Tier III adult registrants must be retained for life on the registry, with all its attendant obligations, even if they remain entirely crime-free for decades.\(^{189}\)

States vary considerably in the duration of the registrant’s obligation to keep registry information current, but lifetime registration is widely required for the most serious offenses, such as those that are registrable under Article 213. Early relief also varies considerably but many states, including the 22 that are SORNA compliant, impose inescapable lifetime registration on persons convicted of the most serious sexual offenses.\(^{190}\)

There is no plausible justification for maintaining the registry obligation for such an extended period, without regard to the registrant’s subsequent behavior. Among the minority of registrants who recidivate at all, nearly all do so within five or at most 10 years of release from custody.\(^{191}\) Together with the natural decay of offending rates by age, a crime-free period of 10 years provides strong assurance that the likelihood of the registrant’s committing a new sexual offense is remote, certainly no higher than the risk that a person of the same age with no previous sex-offense record will commit a new sexual offense. Although the possibility of a false negative cannot be excluded, that vanishingly small risk must be weighed against the substantial costs to law enforcement itself—in terms of required personnel, attention and, resources—of maintaining and constantly updating registry information on thousands of ex-offenders who will never pose any threat to public safety.

Accordingly, Section 213.11F sets the duration of the obligation to register and its associated duties at 15 years. Section 213.11J provides a procedure under which a person concerned can petition for discretionary early relief at any time, and in addition, Section 213.11J(7)

\(^{189}\) 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 ….”.

\(^{190}\) See Carpenter & Beverlin, supra note 66, at 1078 (2012).

\(^{191}\) See generally R. Karl Hanson et al., \textit{Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender}, 24 PSYCHOL. PUB. POL’Y AND L. 48, 57 (2017).
Section 213.11F. Duration of Registration Requirement

provides for automatic early termination of those obligations after 10 years for registrants who maintain a clean record throughout that period. In the event that the registrant does commit a new sexual offense during that period, of course, the registrant will face a new criminal sentence, along with whatever additional registry obligations are triggered by the new offense.

SECTION 213.11G. FAILURE TO REGISTER

(1) Failure to Register. A person required to register under Section 213.11A is guilty of Failure to Register, a misdemeanor, if that person knowingly fails to register 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.

Comment:

Section 213.11G defines the misdemeanor offense of Failure to Register, applicable to a person required to register who knowingly fails to do so or knowingly fails to update required registry information. It provides an affirmative defense for a person who cannot comply with required registration obligations because of circumstances beyond that person’s control, provided that the person did not voluntarily contribute to creating those circumstances in reckless disregard of the requirement to comply and subsequently complied as soon as reasonably feasible. A person convicted of a misdemeanor “may be sentenced … to a term of incarceration … [that] shall not exceed [one year].”192

192 MODEL PENAL CODE: SENTENCING Section 6.06(7)(a) (AM. L. INST., Proposed Final Draft 2017). 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., Section 6.06, Comment k, p. 157.
Federal SORNA requires states to make it a criminal offense, punishable by “a maximum term of imprisonment that is greater than 1 year,” for a person who is required to register to fail to do so or to miss a deadline for updating any change of the required information. In addition, federal law makes it a crime, punishable by up to 10 years in prison, to travel interstate after knowingly failing to register or update a required registration.

State statutory offenses for failure to register and for failure to fulfill related duties vary widely. In some states, failure to register carries a sentence equivalent to the potential punishment for the sexual offense that triggered the underlying registration requirement. In other states, the sanction can be even greater. In Ohio and Washington State, for example, a conviction for failing to register can increase the risk classification level that determines the scope and duration of the registrant’s registration-related duties, including the registrant’s eligibility to be placed on the public online registry. Only four states reportedly restrict the penalty or failure to register to a misdemeanor. In contrast, 35 states reportedly classify even a first conviction for failure to register as a felony, with authorized penalties varying from just one year’s incarceration to prison terms ranging from five to 10 years and higher. Regardless of the additional prison time a failure-to-register conviction carries, it often extends the registrant’s registration period and adds to the associated duties.

The need to ensure an adequate incentive for compliance obviously requires that failure to register and failure to comply with associated duties carry some sanction. But the harsh penalties

193 SORNA § 20913(e).
195 One of those, Louisiana, limits to six months the length of time a registrant can be incarcerated for the offense of failing to register. The others treat only the first failure-to-register offense as a misdemeanor, and registrants who are repeatedly convicted of failing to register face escalating consequences. Massachusetts, for example, imposes mandatory minimum sentences rising from six months for the first offense to five years’ incarceration after multiple convictions for failing to register. In Washington State, registrants convicted of failing to register face imprisonment for up to 57 months, depending on the number of previous failure-to-register convictions. It is worth repeating though that offenders charged with their first FTR violation still risk being charged with a felony if the underlying conviction was for a felony sex offense. Until 2008 (when the state supreme court held the provision unconstitutional), Georgia imposed a life sentence for sex-offense registrants convicted of a second failure-to-register offense, a law which was ultimately deemed unconstitutional.

196 E.g., Kansas, South Dakota, Tennessee, and New York; Arkansas, Hawaii, and North Dakota.
prescribed by currently prevalent state laws are almost entirely counterproductive. Studies find that noncompliance with registration duties does not signal an increased risk of committing a new sexual offense; instead noncompliance typically reflects the registrant’s underlying social, economic and psychological deficits, such as cognitive impairment and poor capacity for self-control.\textsuperscript{197} As a result, the added burdens triggered by a prosecution for noncompliance tend to make failure to keep up with registration requirements even more likely in the future.\textsuperscript{198} Recognizing this difficulty, the offense under Section 213.11G requires a mens rea of knowledge and makes the offense punishable only as a misdemeanor.

\textbf{SECTION 213.11H. ACCESS TO REGISTRY INFORMATION}

\textit{(1) Confidentiality}

(a) Each local jurisdiction in which a person is registered must exercise due diligence to ensure that all information in the registry remains confidential, except that:

(i) information about a specific registrant must be made available upon request to any law-enforcement agency in connection with the investigation of a criminal offense; and

(ii) when an individual or entity has given a person a conditional offer of employment, subject only to a satisfactory background check, for work involving contact with or access to minors, persons with mental disabilities, elderly persons, or others who are vulnerable, the local jurisdiction must, on request, disclose to that individual or entity:

(A) whether the person offered employment is registered in the jurisdiction as a sex offender;

(B) the registrable offense or offenses for which the registrant was convicted;

\textsuperscript{197} See Mary Katherine Huffman, \textit{Moral Panic and the Politics of Fear: The Dubious Logic Underlying Sex Offender Registration Statutes and Proposals for Restoring Measures of Judicial Discretion to Sex Offender Management}, 4 VA. J. CRIM. L. 241, 260 (2016).

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(C) the date of the conviction or convictions;
(D) the sentence or sentences imposed; and
(E) the date or dates of the registrant’s release from custody for
the offense or offenses.

(b) Any disclosure pursuant to subsection (1)(a) shall include a warning that:
   (i) the law-enforcement agency or other individual or entity receiving
the information must exercise due diligence to ensure that the information
remains confidential;
   (ii) such information may be disclosed and used as provided in
paragraph (a)(i) and (ii), but otherwise must not be disclosed to any person or
public or private agency;
   (iii) such information may be used only for the purpose requested;
   (iv) such information may not be used to injure, harass, or commit a
crime against the registant or anyone else; and
   (v) any failure to comply with the terms of subsection (2)(b) could result
in civil or criminal penalties.

(2) Unauthorized Disclosure of Registry Information. An actor is guilty of
Unauthorized Disclosure of Registry Information if:

(a) the actor, having received registry information in an official capacity or as
provided in subsection (1), knowingly or recklessly discloses that information, or
permits that information to be disclosed, to any person not authorized to receive it;
or

(b) the actor obtains access to registry information by computer trespassing or
otherwise in violation of law and subsequently knowingly or recklessly discloses that
information, or permits that information to be disclosed, to any person.

Unauthorized Disclosure of Registry Information under subsection (2) of this Section
is a felony of the fourth degree.

Comment:

Section 213.11H seeks to insure that registry information be reserved for law-enforcement
use and rarely made available for other purposes. Subsection (1) requires that registry information
be disseminated no more widely than necessary to serve direct law-enforcement objectives
Section 213.11H. Access to Registery Information

(paragraph (a)(i)), together with well-defined needs for background information on a specific person who has already received a conditional offer of employment (paragraph (a)(ii)).

Under subsection (2), Unauthorized Disclosure of Registry Information is a misdemeanor, and the offense becomes a felony of the fourth degree when an actor obtains the information illegally and subsequently disseminates it for commercial gain. Under the sentencing provisions of the Model Penal Code, a misdemeanor is punishable by imprisonment for a term that “shall not exceed [one year],” and a felony of the fourth degree is punishable by imprisonment for a term that “shall not exceed [five] years.” These maximum terms are in brackets because the Code “does not offer exact guidance on the maximum prison terms that should be attached to different grades of … offenses.”

REPORTERS’ NOTES

Federal SORNA and most state registration regimes contemplate largely unrestricted public access to registry information. The federal statute requires states to post on the Internet and make available to the general public, in conveniently searchable form, all information included in the registry, subject to specified exceptions. States are required to withhold from the public the registant’s Social Security number, the names of victims, and all information about arrests that did not result in conviction. In addition, states are permitted to withhold information concerning registants convicted of certain low-level offenses, when the victim of the offense was an adult. For the more serious offenses, and for all covered offenses involving a victim who is a minor, states are permitted to withhold (in addition to Social Security number and records of arrests not resulting in conviction) only the name and location of a registant’s employer or (for a student) place of study. In other words, for registants convicted of more serious offenses, and for any registant convicted of a covered offense involving a victim who is a minor, states must make available to any member of the public the registant’s current address, physical description, current photo, a photocopy of the registant’s driver’s license, and identifying information for any vehicle the registant uses. In addition, the state information must be submitted to the Attorney General, who maintains a national registry of the same information, also accessible in searchable form on the

199 Model Penal Code: Sentencing Sections 6.06(6)(d), 7(a) (Am. L. Inst., Proposed Final Draft 2017). 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., Section 6.06, Comment k, p. 157.

200 Id., Section 6.06, Comment k, p. 157.
Internet, subject to the same restrictions.\(^{201}\) Though many foreign countries maintain sex-offense registries of some sort, such largely unrestricted public access to registry information is virtually unheard of outside the United States.\(^{202}\)

A large majority of the states comply with federal SORNA’s public-access requirement by maintaining registries readily accessible to any member of the general public.\(^{203}\) But a few states, resisting the broad mandate of federal SORNA, permit public access to their registries only with respect to registrants determined to present a particularly high risk of reoffending.\(^{204}\) In Massachusetts, a sex-offense registry board classifies registrants by assessing the risk of reoffending in accordance with criteria outlined by statute.\(^{205}\) Prior to 2013, only Level 3 offenders were listed on the Massachusetts registry’s public website; a 2013 enactment extended public access to registrants classified at Level 2 after that date.\(^{206}\) In Minnesota, a committee assesses reoffense risk on a case-by-case basis,\(^{207}\) and the state’s website lists only registrants classified as level 3 sex offenders.\(^{208}\) New Jersey posts information on high-risk and some moderate-risk offenders.\(^{209}\) In New York a board of examiners classifies registrants based on risk of reoffending,\(^{210}\) and only Level 2 and Level 3 offenders are listed on the state’s public website.\(^{211}\)

Public access, however, is only the beginning of a pervasive system for raising community awareness and sensitivity with regard to the persons in the area who have been previously convicted of a sexual offense. Federal SORNA requires each local jurisdiction to employ active measures to alert interested individuals and public and private agencies when a such a person

\(^{201}\) SORNA § 20918.

\(^{202}\) See text accompanying notes 15-60, supra.


\(^{204}\) See Wayne A. Logan, Sex Offender Registration and Notification, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 397, 404 (Erik Luna ed., 2017) (citing Massachusetts, New York, and Minnesota as states that follow this approach).

\(^{205}\) Mass. Gen. Laws Ann. ch. 6, § 178K.

\(^{206}\) See id. § 178D; Moe v. Sex Offender Registry Bd., 467 Mass. 598 (2014) (holding that the 2013 statute extending public access from level 3 to level 2 offenders cannot have retroactive application).

\(^{207}\) Minn. Stat. Ann. § 244.052 subd. 3.

\(^{208}\) Id. subd. 4b.


\(^{210}\) N.Y. Correct. Law § 168-l.

\(^{211}\) N.Y. Correct. Law § 168-q.
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registers in the area. Most states take similar steps with regard to public access and community notification. And in any event, all state registry information, once transmitted to the Attorney General, becomes readily accessible nationwide through the national registry available on the internet.

Section 213.11H deals with access to registry information by interested parties who seek it, while Section 213.11I (Additional Collateral Consequences of Conviction) addresses (along with a variety of other collateral consequences) proactive measures to alert individuals and organizations in the community. Accordingly, details particular to community notification are discussed in the Reporters’ Note to Section 213.11I. Many issues, however, are common to public access and community notification; these are discussed here.

Open records and government transparency are bedrock, if oversimplified, values in American political culture. In addition, both public access and community notification can enable citizens to feel a sense of empowerment with regard to crimes that many consider especially sinister, unpredictable, and frightening. Payoffs of this kind are arguably important even if such laws have no effect on actual recidivism rates.

But the empirical research shows that actual effects are complicated, even with respect to these seemingly inherent benefits. Public access to registry information and indiscriminate community notification designed to alert the population to the presence in its midst of a person who has been convicted of a sexual offense have been responsible for unwarranted public alarm at the same time that they generate acutely counterproductive side effects.

Studies in Ohio and Minnesota found no statistically significant relationship between being notified about a high-risk registrant in the neighborhood and taking steps to protect oneself (such as installing better locks or lighting). But among residents who were parents, those receiving notification in both states were more likely to take steps to protect their children, such as warning them not to talk to strangers and not to let unknown persons into the home.

Of course, such warnings should be routine for all children; it would be worrisome if some parents not receiving notification and finding nothing of note at their own initiative neglected to warn their children out of a false sense of security (false because children are equally if not more vulnerable to attack by individuals with no prior sex-offense record and recidivist sex offenders not living in their own neighborhoods). It would be similarly worrisome if parents who receive


213 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).

214 Bandy, supra note 213, at 249, 255; Beck, et al., supra note 213, at 163. See also Levenson, supra note 114, at 6-7 (noting that “[f]ew people seem to utilize registries with any regularity or take preventive measures after searching a registry”).
notification tend to emphasize the dangers of stranger abuse at the expense of warnings and protective measures appropriate with respect to the even-higher risk of abuse at the hands of relatives, teachers, and other acquaintances. In any case, without minimizing the importance of such warnings, it is safe to say that state and local law enforcement could easily use other public-education measures, where necessary, to encourage wise child-protection behavior on the part of parents and teachers, without incurring the direct costs (and indirect consequences for registrants) entailed in public registries and community-notification laws.

Negative impacts on persons registered as sex offenders are convincingly documented in an extensive literature. They include a high incidence of joblessness, social isolation, homelessness, suicide, and on occasion even physically violent victimization at the hands of self-appointed vigilantes or psychologically unstable citizens who object to having a sex offender nearby.215 Because these powerfully criminogenic effects hinder the registant’s rehabilitation and make recidivism more likely, they offset to some extent and probably outweigh the potential public-safety benefits of self-protection and the enhanced possibilities for surveillance and deterrence of registrants.216

The strongest case for public access is presented when a school, day-care center, or other organization or person has a justified need to perform a background check on an individual being considered for a position involving contact with any member of a vulnerable population. But the national data base affords a readily available and more efficient means to perform background checks on known individuals, without need to access a local registry that can too easily be misused.

In light of these considerations, Section 213.11H marks a major departure from the prevalent American approach that currently invests considerable resources in the effort to maximize public awareness of registry information. Both to promote just treatment of persons convicted of sexual offenses and, importantly, to further public-safety goals rather than impeding them, Section 213.11H seeks to ensure maximum feasible confidentiality for registry information.217

215 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 . . . .”).

216 Prescott & Rockoff, supra note 99, at 181.

217 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.
SECTION 213.11I. ADDITIONAL COLLATERAL CONSEQUENCES OF CONVICTION

(1) Definition. For purposes of this Section, the term “additional collateral consequence” means any government action or government-imposed burden, restriction, or requirement applicable specifically to persons convicted of a sexual offense, 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 213.11A. Those additional collateral consequences include any government-imposed restriction upon the convicted person’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 person 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, as defined in subsection (1), unless that person has been convicted of a registrable offense and is required to register as a sex offender under Section 213.11A.

(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 213.11A must not be subject to any additional collateral consequence, as defined in subsection (1), unless an official designated by law, after affording the person notice and an opportunity to respond concerning the proposed additional collateral consequence, determines that the additional collateral consequence is manifestly required in the interest of public safety, after due consideration of:

(a) the nature of the offense;

(b) all other circumstances of the case;

(c) the person’s prior record; and

(d) the potential negative impacts of the burden, restriction, requirement, or government action on the person, on the person’s family, and on the person’s prospects for rehabilitation and reintegration into society.
(4) *Limitations*. The 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 213.11B;

(b) is authorized by law;

(c) is drawn as narrowly as possible to achieve the goal of public safety;

(d) is accompanied by a written statement of the official approving the additional collateral consequence, explaining the need for 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 213.11F.

**Comment:**

Section 213.11I determines when conviction for a sexual offense can trigger obligations in addition to the basic duties to register with law enforcement and to keep the registry information up to date.

Subsection (1) defines the operative term “additional collateral consequence” and makes clear that it includes any government action or government-imposed burden or limitation applicable specifically to persons convicted of a sexual offense, other than the sentence of fine, probation, supervised release, or incarceration imposed upon conviction, and the basic duties associated with registration itself. The additional collateral consequences referenced include such common sex-offense restrictions as limits on a registant’s employment, education, internet access, and residency. Also included is the widespread practice of notifying community organizations and private citizens that a person previously convicted of a sexual offense is present in the area; notification and disclosure are permitted only when authorized under the conditions specified in subsections (3) and (4).

Because the “additional collateral consequences” governed by Section 213.11I include only burdens applicable specifically to sex offenses as such, Section 213.11I does not affect collateral consequences imposed on the basis of wider categories of offenses, such as the
restrictions that many jurisdictions impose on ex-offenders’ rights to vote, serve on juries, or receive public benefits.

Subsection (2) stipulates that “additional collateral consequences,” as defined, are categorically precluded in the case of persons who are not subject to registration under Section 213.11A. For persons who are subject to registration, additional collateral consequences may be imposed only in compliance with the standards and procedures specified in subsections (3) and (4). The person concerned must have notice of the additional collateral consequences proposed and an opportunity to respond. Thereafter, the official designated to make the determination may authorize one or more additional collateral consequences, but only upon finding that each additional consequence is manifestly required in the interest of public safety, after considering all relevant circumstances, including the nature of the offense, the person’s prior record, the potential negative impacts of the additional restriction, disability, or government action on the person, the person’s family, and the person’s prospects for rehabilitation and reintegration into society.

Subsection (4) further limits the imposition of additional collateral consequences by requiring that they be authorized by law, drawn as narrowly as possible, and accompanied by a written statement explaining the need for the additional restriction, disability, or government action; its evidentiary basis; and the reasons why a more narrowly drawn additional consequence would be inadequate. In addition, no additional collateral consequence may be imposed for a period that exceeds the duration of the person’s registry obligations under Section 213.11F.

REPORTERS’ NOTES

Section 213.11I establishes standards and procedures for imposing additional collateral consequences, beyond those delineated in Sections 213.11A-213.11H. These consequences can include community notification, restrictions on employment, residency, and internet access, GPS monitoring, and a number of other restrictions and disabilities.

Regarding community notification, federal SORNA not only requires states to make registry data publicly available on the Internet but also, at their own initiative, to take active steps to alert individuals or organizations about the presence of sex-offense registrants in their communities. Direct notification of information pertaining to registrants who reside, work, or study in the locality (other than information exempted from public access, such as registrants’ Social Security numbers) must be given regularly to schools, public-housing agencies, and:218

218 SORNA § 20923(b).
“Any agency responsible for conducting employment-related
background checks …[;]
“Social service entities responsible for protecting minors in the child
welfare system[;] and
“Volunteer organizations in which contact with minors or other
vulnerable individuals might occur.

Beyond those organizations with a potential need to know, federal SORNA also requires the
appropriate local agency to provide direct notification of registrant information to “[a]ny
organization, company, or individual who requests such notification …. Moreover, federal
SORNA allows any concerned organization or individual to opt to receive this notification as
frequently as once every five business days.219 As in the case of the ability of private individuals
and organizations to access to registry information at their own initiative, such widespread
proactive community notification is virtually unheard of outside the United States.220

A few states, in disregard of the federal mandate, notify only certain groups, rather than to
the entire community at large. In New Mexico, the county sheriff must actively notify “every
licensed daycare center, elementary school, middle school and high school within a one-mile
radius of the sex offender’s residence,” but any member of the public can request registrant
information or view it on the internet.221 In Minnesota, the extent of community notification varies
as a function of “[the level of danger posed by the offender, … the offender’s pattern of offending
behavior, and … the need of community members for information to enhance their individual and
collective safety.”222 Thus, for Level 1 offenders, Minnesota law enforcement has discretion to
notify other law-enforcement agencies, victims, and witnesses; for Level 2 offenders, law
enforcement may notify, in addition, any agencies that serve a population at risk of victimization
that are located near the offenders’ home, such as educational institutions or day-care centers, as
well as individuals likely to be victimized by the offender; for Level 3 offenders, law enforcement
may also notify other members of the community whom the offender is likely to encounter.223 The
New Jersey scheme is similar: County prosecutors classify registrants into one of three tiers
according to the risks they pose. For Tier 1 (low-risk) offenders, only law-enforcement agencies
are notified. For Tier 2 (moderate-risk) offenders, schools, licensed day-care centers, summer

219 SORNA § 20923(c).

220 See text accompanying notes 15-60, supra.


222 MINN. STAT. ANN. § 244.052 subd. 4(a).

223 Id. subd. 4(b).
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camps, and registered community organizations are also notified. For Tier 3 (high-risk) offenders, the general public is notified as well.\(^{224}\)

Most states, however, comply with the federal community-notification mandate, essentially notifying the entire community at large. They automatically notify any organization or individual who requests notice about new registrants in the area and other new registry information, without requiring a showing of any particular need to know.\(^{225}\) For example, in Pennsylvania, the state maintains a website listing all registered persons who have been convicted of a sexual offense, with their home and work addresses, the license-plate number of their car, and their sex-offender classification. The website advises those who visit it that the information it provides “could be a significant factor in protecting yourself, your family members, or persons in your care” from the “recidivist acts” of those listed.\(^{226}\) In a recent year, three million people accessed the site.\(^{227}\) To further enhance public awareness, the Pennsylvania State Police send out “red alerts” by email to all persons who ask to be informed whenever a registrant in their area adds or deletes a home, work, or school address; in a recent year the State Police sent out almost four million of these red alerts.\(^{228}\)

Limits on employment and residency are not addressed in federal SORNA, and state approaches vary widely. Nearly all states bar persons who have been convicted of a sexual offense from working in particularly sensitive areas of employment (such as teachers, security guards), but the list of excluded occupations is far from uniform.\(^{229}\) At least 27 states and many municipalities prohibit some (or all) persons who have committed a sexual offense from living within 500, 1,000, or 2,000 feet of schools, parks, playgrounds and day-care centers.\(^{230}\) In densely populated counties,

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\(^{225}\) See “Collateral Consequences,” supra note 79. States use different approaches to community notification. Louisiana, for example, requires offenders themselves to notify their neighbors through the mail. La. Stat. Ann. § 15:542.1. In New York, law-enforcement authorities have discretion to share the information more widely. N.Y. Correct. Law § 168-l.

\(^{226}\) See https://www.pameganslaw.state.pa.us/.


\(^{228}\) Id.

\(^{229}\) See “Collateral Consequences,” supra note 79; Geraghty, supra note 80, at 515 (2007).

\(^{230}\) Id., at 514-515 (summarizing states’ residency-restriction laws); accord, Jill Levenson, Sex Offender Residency Restrictions, in WRIGHT, supra note 3, at 267, 268 (stating that 30 states impose residency restrictions); “Collateral Consequences,” supra note 79 (indicating 22 states that impose residency restrictions). In some states, residency restrictions imposed by municipalities have been held

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such residency restrictions can make it virtually impossible for persons who have been convicted
of a sexual offense to live anywhere in the jurisdiction.\textsuperscript{231} Some states bar persons who have been
convicted of a sexual offense from living close to school-bus stops, a requirement that can preclude
them, even in rural areas, from residing almost anywhere in the county.\textsuperscript{232} Compounding the
burden of such restrictions, parolees are often required as a condition of their parole (and on pain
of parole revocation), to obtain employment within 45 days of release (even though community
notification puts employers on alert not to hire them)\textsuperscript{233} or to reside in a particular county (even
though virtually no housing may be available to them there).\textsuperscript{234}

At least 17 states require persons who have been convicted of a sexual offense to wear a
GPS monitoring device that enables law enforcement to determine their location at all times.\textsuperscript{235}

Less common for the time being, but worthy of note, are statutes in at least three states (Indiana,
Louisiana, and Nebraska) that prohibit persons who have been convicted of a sexual offense from
using the Internet to engage in social networking.\textsuperscript{236} Instead of imposing a categorical ban on

\textsuperscript{231} See, e.g., Williams v. Dep’t of Corr. & Cmty. Supervision, 979 N.Y.S.2d 489 (N.Y. Sup. Ct.
2014) (upholding constitutionality of condition that paroled sex offender not live within 1,000 feet of a
school or other places where children congregate; the restriction ruled out virtually all of Manhattan and
the Bronx, but court noted that large areas of Brooklyn and Queens remained available). Compare In re
Taylor, 343 P.3d 867 (Cal. 2015) (holding that California voter initiative barring all persons who have been
convicted of a sexual offense from living within 2,000 feet of schools and playgrounds was unconstitutional
as applied to parolees living in San Diego County, because the restriction placed more than 97\% of the
county’s affordable housing off limits).

\textsuperscript{232} Richard Tewksbury, \textit{Exile at Home: The Unintended Collateral Consequences of Sex Offender

\textsuperscript{233} See, e.g., State v. Dull, 351 P.3d 641 (Kan. 2015) (considering burden of requirement to secure
employment within 45 days as a factor rendering mandatory lifetime supervision unconstitutional as applied
to juvenile sex offender).

\textsuperscript{234} See text at notes 265-267, infra.

\textsuperscript{235} See Kamika Dunlap, \textit{Sex Offenders After Prison: Lifetime GPS Monitoring?} FINDLAW
BLOTTER, February 1, 2011; Michelle L. Meloy & Shereda Coleman, \textit{GPS Monitoring of Sex Offenders}, in
WRIGHT, supra note 3, at 243 (reporting that as many as 46 states use GPS monitoring under some
circumstances to track persons who have been convicted of a sexual offense). Courts are split on the
question whether such monitoring violates the Fourth Amendment. See note 84, supra.

\textsuperscript{236} See Charles Wilson, \textit{Court Upholds Ind. Facebook Ban for Sex Offenders}, ASSOCIATED PRESS,
ban-sex-offenders-16642465#.T-ikN_LNnio (discussing cases in which courts have held bans on internet
use compatible with the First Amendment.
internet use, a California voter initiative required sex-offense registrants to provide to law
enforcement all their email addresses and user names, and to notify authorities within 24 hours of
any changes to that information.237 Alabama recently joined a small group of states taking the lead
in another area, imposing chemical castration as a condition of parole after conviction for certain
sex offenses.238

These burdens and limitations have prompted a host of constitutional challenges, with
frequently conflicting holdings and little prospect that litigation will abate any time soon.239 Even
where courts have found such restrictions constitutionally permissible, however, the cases have
underscored the overbreadth and unfairness that the restrictions can present both generally and as
applied to particular registrants, juveniles and elderly parolees in particular. Overall, the evidence
establishes with little doubt that indiscriminate community notification and restrictions on
residency and employment are responsible for wasted law-enforcement effort and misdirected
civilian efforts at self-protection, with little to no public-safety payoff, and harsh, criminogenic
impact on the registrants themselves. 240

**GPS monitoring** of sex-offense registrants has cost the state of California $60 million
annually.241 Monitoring costs for states and localities involve more than simply the additional
dollar outlays. In some jurisdictions, sheriff’s deputies and other government employees have had
to reduce the time they can devote to other duties, including 9-1-1 dispatch, in order to monitor
registrant residences and post eviction notices for those living in impermissible zones.242 GPS
locational monitoring requires law-enforcement agents to spend more time at their computers and
less time directly supervising parolees or carrying out other duties in the field.243 To make matters

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237 Doe v. Harris, 772 F.3d 563 (9th Cir. 2014) (upholding preliminary injunction against
enforcement of this restriction on ground of its likely unconstitutionality under the First Amendment).

238 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.

239 With respect to the constitutionality of mandatory lifetime GPS monitoring of sex offenders,
compare Belleau v. Wall, supra note 84 (upholding Wisconsin provision to that effect), with State v. Dykes,
728 S.E.2d 455 (S.C. 2012) (holding South Carolina provision to that effect unconstitutional as a violation
of due process).

240 See also Reporters’ Notes to Sections 213.11A & 213.11H, supra.

241 See Don Thompson, *California to Change Sex-Offender Tracking*, Associated Press, May 26,

242 See Geraghty, supra note 80, at 518.

243 See Thompson, supra note 241.
worse, 99 percent of the GPS alerts received in some jurisdictions have come from low-battery signals or other false alarms; only one percent indicated that a registrant had entered a restricted area. Of course, the low incidence of true alarms would be consistent with the hypothesis that GPS monitoring deters registrants from violating their restrictions, but even if this is the case, the frequency of false alarms means that any such gains come at a high price in terms of required law-enforcement attention.

With respect to residency restrictions, the evidence of possible benefit is similarly disappointing. The Minnesota Department of Corrections found that among persons rearrested after release from prison after serving a sentence for a sexual offense (seven percent of all sex offenders released, a figure far lower than the recidivism rate for other serious crimes), “[n]ot one . . . would likely have been deterred by a residency restriction law,” largely because “[those who] established direct contact with victims . . . were unlikely to do so close to where they lived.”

The Colorado Department of Corrections found that persons convicted of child molestation who reoffended did not live closer to child-care facilities and schools than first offenders arrested for similar crimes; the Department therefore concluded that “[p]lacing restrictions on the location of … supervised sex offender residences may not deter the sex offender from re-offending and should not be considered as a method to control sexual offending recidivism.” Other available evidence on the efficacy of residency restrictions is uniformly to the same effect.

These consequences in turn mean negative impacts for public safety because the adverse personal impacts for persons who have been convicted of a sexual offense impede their reintegration into society and aggravate their risks of reoffending. Successful reintegration and law-abiding behavior typically depend on stable living arrangements, supportive family relationships, and steady employment, while poor social support and psychological distress are important risk factors for sexual recidivism. Thus, any direct gains from greater law-

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244 Id.


247 See text at note 261 infra.

248 CUMMING & BUELL, SUPERVISION OF THE SEX OFFENDER (1997); Jill Levenson, Sex Offender Residence Restrictions, in WRIGHT, supra note 3, at 282-283; Elton, supra note 104, at 38 (“community reintegration, therapy, and stability help reduce recidivism among the majority of [sex] offenders”).

enforcement efficacy or from improved public awareness and self-protection may be outweighed by an increased likelihood of recidivism.250

In several widely reported incidents, persons who had been convicted of a sexual offense have been brutally attacked and even murdered by neighbors who learned of their presence through registration and notification programs.251 More systematic research has largely depended on registrant self-reports, arguably a reason to discount some of the unfavorable consequences described. Subject to that caveat, however, the studies find extensive evidence of worrisome impacts.

Among registrants subject to community notification in Connecticut and Indiana (an undifferentiated group of defendants convicted of any sex offense), 21 percent lost a job because a boss or co-worker learned of their status,252 21 percent were forced to move out of their residence because a landlord or neighbor found out, 10 percent had been physically assaulted after community notification had been given, and 16 percent of registrants reported that a member of their household had been threatened, harassed, or assaulted.253 Roughly half reported fearing for their safety, and a similar proportion said they felt alone and isolated because of community notification.254 On a more positive note, 22 percent of the registrants said registration and notification had helped them avoid reoffending, but a larger proportion expressed feelings of

250 Prescott & Rockoff, supra note 99, at 181.

251 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-offense registrants being subjected to grave physical assault, harassment, threats, loss of employment or loss of housing, including being driven into homelessness or moving out of state; the brief also describes many specific instances in which such laws drove a sex-offense registrant to suicide. Godfrey v. Doe, No. 01-729, October Term 2001, Brief Amicus Curiae of the Public Defender For The State of New Jersey, et al., at 7-21, 2002 WL 1798881 (July 31, 2002).


253 Id.

254 Id.
hopelessness, with 44 percent of the registrants agreeing with the statement that “no one believes I can change, so why even try.”255

Adverse impacts may be even more widespread among registrants in the highest risk categories.256 In a sample of high-risk sex-offense registrants in Wisconsin, all but one said that notification made it harder for them to reintegrate into the community.257 The study found that 83 percent had been excluded from a residence, and 57 percent had lost a job because of community notification.258 More than three-quarters reported being ostracized by neighbors and acquaintances, or either humiliated, harassed, or threatened by community residents or others.259 In two-thirds of the cases, adverse effects extended to the parents or children of registrants; relatives commonly experienced emotional distress and sometimes had been humiliated or ostracized by acquaintances.260 Similar findings recur throughout the literature. In a Florida study, 35 percent of the sex-offense registrants were forced to move, 27 percent had lost their jobs, and 19 percent had been harassed.261 In light of this research and their own on-the-ground experience, a number of states resist public demand for indiscriminate community notification and restrict that measure to a narrow category of registrants determined to be at highest risk of reoffending.262 In Washington, the state’s Sex Offender Policy Board unanimously recommended that “sex offender registration information should be exempt from public disclosure.” The Board noted that “this

255 Id.


257 Id. at 9.

258 Id. at 10.

259 Id. at 9.

260 Id.

261 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 Attitudes of Registered Female Sex Offenders, 68 FED. PROBATION 30, 31 (2004) (female sex-offense registrants experienced harassment, as well as loss of jobs, friendships, and residences); Richard Tewksbury & Matthew Lees, Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences, 26 SOC. SPECTRUM 309, 330-333 (2006) (78 percent of sex-offense registrants in Illinois said that restrictions had “impeded their ability to reintegrate into community life”).

262 See, e.g., text at notes 73-77, 222-224, supra.
information has been held from public disclosure for decades, and has proven to be in the best interests of the public, of victims of sexual assault, of community safety, and of registered sex offenders—both in terms of facilitating their successful reintegration into the community and in terms of their physical safety.”

The negative consequences of restricted living arrangements (whether as a direct consequence of residency prohibitions or an indirect effect of community notification) can be dramatic, because these limitations tend to push registrants into socially disorganized, economically disadvantaged communities. In Iowa, residency restrictions barred sex-offense registrants from 98 percent of one county’s housing units, and throughout the state many of them became homeless. In one Florida county, restrictions on living near a school-bus stop left only one percent of the county open to residency by sex-offense registrants. At the same time, “research provides little if any support for the effectiveness of residential restriction laws in deterring or preventing sexual offenses.”

In sum, registration, community notification, and residency restrictions have frequent, well-documented adverse impacts on registrants. And (other things being equal) these impacts tend to make recidivism more likely. Victim advocates add to these reservations. They list a wide range of harmful impacts for victims, for example, that “residency restrictions … have inadvertently created a disincentive for


264 Tewksbury, Experiences and Attitudes, supra note 261, at 533.


266 See Catherine Elton, Behind the Picket Fence, BOSTON GLOBE, May 6, 2007, at 38. See also Allison Frankel, Pushed Out and Locked In: The Catch-22 for New York’s Disabled, Homeless, Sex-Offender Registrants, 129 YALE L.J. F. 279, 285-286 (2019) (noting that because of “the abundance of schools and population density in New York City, … most of the City, and practically all of Manhattan, [are] off-limits to registrants.”)

267 See Tewksbury, Experiences and Attitudes, supra note 261, at 533.

268 Tewksbury, Residency Restrictions, supra note 232, 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 are counterproductive).
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victims to disclose [their victimization].”269 Victims informed about residency restrictions “rolled their eyes, seemingly in exasperation” at the irrelevancy of these laws to their situation.270

A state Coalition Against Sexual Assault reported that notification, GPS tracking, and residency restrictions “have actually impeded public safety because they have reinforced to the public grossly inaccurate depictions of the type of sexual assault risk one is most likely to face. . . . [b]y focusing on the ‘stranger danger’ myth, people are less aware of a more likely assailant: a person they know. These myths, in turn, have created a public demand for sexual assault risk mitigation (e.g. residency restrictions, offender registries and notification) aimed at particularly scary, but unlikely, threats.”271 Many of these coalitions have “publicly denounced residency restriction laws, describing them as ‘irresponsible’ and ‘counterproductive.’”272

Patricia Wetterling, one of the original leaders of the movement for registration and community notification, is equally emphatic. Residency restrictions, she says, are “wrong and ludicrous and make no sense at all. We’re putting all our energy on the stranger, the bad guy, and the reality is it’s most sex offenses are committed by somebody that gains your trust, or is a friend or relative, and so none of these laws address the real, sacred thing that nobody wants to talk about.”273 Wetterling adds, “When these guys are released from prison, we want them to succeed. . . . All of these laws they’ve been passing make sure that they’re not going to succeed. They don’t have a place to live; they can’t get work. Everybody knows of their horrible crime and they’ve been vilified. There is too much of a knee jerk reaction to these horrible crimes. . . . [T]here is no safe place for these guys. We have not built into the system any means for success . . . .”274

Unless carefully targeted, therefore, most of these measures almost inevitably aggravate the very dangers that they are intended to allay.

In light of these findings, Section 213.11I creates a strong presumption against limits on residency and employment, GPS monitoring, and other restrictive measures applicable to persons who have been convicted of a sexual offense, because these measures can only impede the registrant’s prospects for reintegration into society. The same presumption applies, for the same reason, against community notification as well, despite its firm pedigree in federal law and widespread acceptance in the states.

269 Bandy, supra note 156, at 471, 488.

270 Id., at 490.

271 Id., at 491-492 (paraphrasing CASA interviewee based in Southwest).

272 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”).

273 Id., at 101-103.

274 Id., at 107-108, 112.
Different issues are presented when community notification or a particular sex-offender restriction is deployed on a carefully targeted basis. An obvious example might be a nursery school’s request for affirmative notification in the event that a registered sex offender moves into its immediate neighborhood. To accommodate potentially legitimate needs of this sort, subsections (3) and (4) establish a framework for approving on a case-by-case basis specific collateral consequences, additional to those authorized by Sections 213.11A-213.11H. The official making that individual determination is required to give careful consideration to the public-safety need for the particular measure; to weigh that need against its impact on the registrant, the registrant’s family, and the registrant’s prospects for rehabilitation and reintegration into society; and to ensure that any measure approved is drawn as narrowly as possible to achieve the goal of public safety.

This standard will not open the door to routine imposition of community notification or other additional collateral consequences just because a community organization asserts a need to know, or because a particular registrant has been found guilty of a very serious offense. For example, an assisted-living facility seeking to avoid hiring an employee who has a prior conviction for a sexual offense does not require affirmative notification every time a new registrant moves into the area; ordinary background check procedures suffice for that purpose. In contrast, a commitment to notify a nursery school about any registrant in the area who has a serious record of prior convictions for molesting young children might be warranted, provided that such a decision is reached after carefully considering all the circumstances. And similarly, a registrant with a prior record of that nature might reasonably face a narrowly targeted restriction on living or seeking employment near schools and play areas where young children congregate, provided again that the restriction is imposed only after carefully considering all the circumstances.

The important point is that the interests in public safety and successful offender rehabilitation both require that the unintended harms of additional collateral consequences be fully appreciated and that their use accordingly be limited to a narrow range of specially compelling circumstances. Subsections (3) and (4) identify the factors that the sentencing judge or other authorized official must weigh in determining whether a particular person should incur such consequences.

275 See Reporters’ Note to Section 213.11H, addressing the related issue of whether organizations of this sort need access to registry information.


277 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
Section 213.11J. Relief from Obligation to Register, Associated Duties, and Additional Collateral Consequences

SECTION 213.11J. RELIEF FROM OBLIGATION TO REGISTER, ASSOCIATED DUTIES, AND ADDITIONAL COLLATERAL CONSEQUENCES

(1) Petition for Discretionary Relief. At any time prior to the expiration of the obligation to register, the associated duties, or any additional collateral consequences, the registrant 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. If the obligation to register arose because of an out-of-state conviction, the petition for an order of relief may be addressed to a court of general jurisdiction or other authority of this state in the place where the person concerned is registered.

(2) Proceedings on Petition for Discretionary Relief. The authority to which the petition is addressed may either dismiss the petition summarily, in whole or in part, or institute proceedings to rule on the merits of the petition. If that authority chooses to entertain submissions, hear argument, or take evidence prior to ruling on the merits of the petition, it must give the prosecuting attorney for the offense out of which obligation to register arose notice and an opportunity to participate in those proceedings. If the obligation to register arose because of an out-of-state conviction, that notice and that opportunity to participate must be addressed to the principal prosecuting attorney in the jurisdiction of this state where the authority to which the petition is addressed is located.

(3) Judgment on Proceedings for Discretionary Relief. Following proceedings for discretionary relief under subsection (2), the authority to which the petition is addressed may grant or deny relief, in whole or in part, from the obligation to register, any associated duties, and any additional collateral consequences. When that order terminates the registrant’s obligation to register and to keep registry information current, subsequent disclosure of 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., Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender, 24 PSYCHOL. PUB’Y AND L. 48 (2017); 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).
registry information is governed by subsection (9). An order granting or denying relief following those proceedings must explain in writing the reasons for granting or denying relief.

(4) Standard for Discretionary Relief. The authority to which the petition is addressed may grant relief if it finds that the obligation, duty, or consequence in question is likely to impose a substantial burden on the registrant’s ability to reintegrate into law-abiding society, and that public-safety considerations do not require continued imposition of the obligation, duty, or consequence after due consideration of:

(a) the nature of the offense;
(b) all other circumstances of the case;
(c) the registrant’s prior and subsequent criminal record; and
(d) the potential negative impacts of the burden, restriction, or government action on the registrant, on the registrant’s family, and on the registrant’s prospects for rehabilitation and reintegration into society.

Relief must not be denied arbitrarily or for any punitive purpose.

(5) Notice to Other Jurisdictions Concerning Discretionary Relief.

(a) When discretionary relief is granted under this Section, the authority granting the order of relief must, upon the registrant’s request, give notice of that order to any other jurisdiction where the person concerned is registered.

(b) When the other jurisdiction notified is a jurisdiction of this state, the notice must specify that the other jurisdiction must extend the same relief from registration-related duties and additional collateral consequences. When that order terminates the registrant’s obligation to register and to keep registry information current, that notice must also specify the limits on subsequent disclosure of registry information applicable under subsection (9).

(6) Proceedings Subsequent to Discretionary Relief. An order of discretionary relief granted under this Section does not preclude the authority to which the petition was addressed from later revoking that order if, on the basis of the registrant’s subsequent conduct or any other substantial change in circumstances, the authority finds by a preponderance of the evidence that public-safety considerations, weighed against the burden

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on the registrant’s ability to reintegrate into law-abiding society, no longer justify the order of relief.

(7) Automatic Relief. If, during the first 10 years of the period during which a person is required to keep registration information current, the person:

(a) successfully completes any period of supervised release, probation, or parole, and satisfies any financial obligation such as a fine or restitution, other than a financial obligation that the person, despite good-faith effort, has been unable to pay; and

(b) successfully completes any required sex-offense treatment program; and

(c) is not convicted of any additional offense under this Article, or any sexual offense in another jurisdiction that would be an offense under this Article if committed in this jurisdiction; then:

the duty to keep that registry information current will terminate; the person who had been registered will not be subject to any further duties associated with that registration requirement; and subsequent access to registry information will be governed by subsection (9).

(8) Notice to Other Jurisdictions Concerning Automatic Relief. When automatic relief takes effect under subsection (7), the sentencing court or other authority authorized by law must, upon the registrant’s request, notify any jurisdiction or jurisdictions where the person concerned is registered that the person’s duty to keep that registration current and all other duties associated with that registration requirement have terminated. That notice must also specify the limits on subsequent disclosure of registry information applicable under subsection (9).

(9) Access to Registry Information After Discretionary or Automatic Relief. When an order of discretionary relief terminates the registrant’s obligation to register and to keep registry information current, and when automatic relief takes effect, subsequent access to registry information is limited as follows:

(a) Registry information recorded as of the date when discretionary or automatic relief takes effect may remain available to any law-enforcement agency seeking disclosure of that information in compliance with Section 213.11H(1)(a)(i).
(b) Except as provided in paragraph (a), no public or private agency, including an agency seeking disclosure of registry information pursuant to Section 213.11H(1)(a)(ii), may thereafter be permitted access to registry information concerning the person to whom the discretionary or automatic relief pertains.

Comment:

Section 213.11J identifies the standards and procedures for relieving a registrant from the obligation to register, from the associated duties, or from any additional collateral consequences. It largely follows the framework applicable generally to petitions for relief from collateral consequences, as specified in the sentencing provisions of the Model Penal Code, with additional detail pertinent to sex-offense collateral consequences. It stipulates that when an order of relief terminates the registrant’s obligation to register and to keep registry information current, access to registry information is subsequently limited, in terms specified by subsection (9).

Subsections (5) and (8) aim to ensure that discretionary relief and automatic relief are communicated to all jurisdictions where a person is registered. Those jurisdictions in turn must extend similar relief, including the limits on access to registry information specified in subsection (9).

In deciding whether to grant discretionary relief, the sentencing judge or other official authorized to make the determination is instructed to consider all the circumstances of the case, with particular attention to the nature of the offense; the registrant’s prior and subsequent criminal record; and the potential negative impacts of the collateral consequence in question on the registrant, on the registrant’s family, and on the registrant’s prospects for rehabilitation and reintegration into society.

REPORTERS’ NOTES

Federal SORNA makes no provision for early relief from registration and its associated duties and restrictions, apart from affording registrants who maintain a “clean” record for at least 10 years a limited opportunity for early relief. More than half the states provide some opportunity for early termination of registration requirements, though in almost all cases the

278 See MODEL PENAL CODE: SENTENCING, supra note 1, Section 7.04(2) & (3).

279 See text at note 189, supra.
opportunity is limited to persons convicted of the least serious sexual offenses. Many states endorse criteria for relief similar to those specified in this section, but some offer even greater detail. Washington, for example, breaks down these general categories into twelve factors and adds that the court may also take into account “[a]ny other factors the court may consider relevant.”

For discretionary relief, Section 213.11J draws on the early relief provisions of Model Penal Code: Sentencing, Article 7 (“MPCS”), with additional provisions relevant to sex-offense collateral consequences, and with several adjustments to align these relief provisions with implementation details and policy considerations specific to this context:  

(a) MPCS directs that petitions for relief be addressed to the sentencing court, and this is a common approach among jurisdictions that authorize early relief from sex-offense registry obligations. However, many jurisdictions take a different approach. In some, petitions for relief must be addressed to a court in the jurisdiction where the registrant resides. In some states, the sentencing court acts on the advice on a board of experts; elsewhere the final decision is entrusted to an independent risk-assessment board. It seems appropriate to allow for local flexibility in this regard. Section 213.11J endorses that approach.

(b) MPCS imposes a daunting burden of proof: an offender subject to collateral consequences can obtain relief only by demonstrating by clear and convincing evidence that the criteria for relief are satisfied. The effect is to create a strong presumption in favor of sustaining a mandatory collateral consequence that by definition was not initially attuned to the situation of the individual offender. This high hurdle has drawn criticism as unduly difficult to meet with respect


281 WASH. REV. CODE ANN. § 9A.44.142 (2019).

282 The collateral-consequence provisions of MPCS were not intended to apply without exception to the unique circumstances of sex-offense collateral consequences. CITE pending.

283 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.

284 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).

285 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).

286 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).

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to collateral consequences generally. It is especially inappropriate in the context of sex-offense collateral consequences, because these duties and restrictions carry no strong presumption that they are likely to be sufficiently justified in the individual instance. To the contrary, the case for most sex-offense collateral consequences is mixed at best, particularly with the passage of time since the registrant’s initial registration. Accordingly, for sex-offense collateral consequences, the appropriate burden of proof is not a matter that can be suitably constrained in advance. Section 213.11J(3) does not specify a particular burden of proof and instead leaves this decision to the sound discretion of the decisionmaking authority.

(c) MPCS sets stiff criteria for granting relief. The offender must show that the collateral consequence in question is (i) not substantially related to the elements and facts of the conviction offense; (ii) likely to impose a substantial burden on the offender’s ability to reintegrate into society; and (iii) not required by public safety considerations. In the context of sex-offense collateral consequences, it will too often be impossible to demonstrate that all three of these criteria are met. Except in rare instances, sex-offense collateral consequences will be intrinsically related to the elements and facts of the underlying sexual offense, making the first essential criterion beyond reach in most cases, even when the balance of public-safety considerations and adverse impacts on the registrant clearly warrant relief. Accordingly, Section 213.11J(3) allows the decisionmaking authority to grant relief simply on the basis of a finding that the collateral consequence in question is likely to impose a substantial burden on the registrant’s ability to reintegrate into law-abiding society, and that public-safety considerations do not require its continued imposition.

(d) MPCS permits the decisionmaking authority to deny relief without making any specific finding that the evidence and the relevant criteria warrant that result. And when the decisionmaking authority does grant relief, MPCS does not expressly require that the necessary findings be explained in writing. Section 213.11J(2) specifies that when the decisionmaking authority institutes proceedings to rule on the merits of a petition for relief, an order granting or denying relief at the conclusion of those proceedings must explain in writing the reasons for granting or denying relief.

Section 213.11J(7) provides for automatic relief when a registrant successfully completes any period of supervised release, probation, or parole; satisfies related conditions; successfully completes any required sex-offense treatment program; and is not convicted of any new sexual offense for a period of 10 years from first being placed on the registry.

PERTINENT MODEL PENAL CODE PROVISIONS*

* Pertinent provisions of the 1962 Model Penal Code are reproduced below, numbered as they appear in that Code. These provisions of the 1962 Code are reproduced verbatim, except that the gendered language used in the 1962 Code has been replaced by gender-neutral terms used in the other parts of the 1962 Code, such as “the person” or “the actor.”

1.12 Proof Beyond a Reasonable Doubt; Affirmative Defenses; Burden of Proving Fact When Not an Element of an Offense; Presumptions

(1) No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed.

(2) Subsection (1) of this Section does not:

(a) require the disproof of an affirmative defense unless and until there is evidence supporting such defense; or
(b) apply to any defense that the Code or another statute plainly requires the defendant to prove by a preponderance of evidence.

1.13 General Definitions

In this Code, unless a different meaning plainly is required:

(5) “conduct” means an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions;
(6) “actor” includes, where relevant, a person guilty of an omission;

(9) “element of an offense” means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as

(a) is included in the description of the forbidden conduct in the definition of the offense; or
(b) establishes the required kind of culpability; or
(c) negatives an excuse or justification for such conduct; or
(d) negatives a defense under the statute of limitations; or
(e) establishes jurisdiction or venue;

(10) “material element of an offense” means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue, or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct;

(11) “purposely” has the meaning specified in Section 2.02 and equivalent terms such as “with purpose,” “designed” or “with design” have the same meaning;

(12) “intentionally” or “with intent” means purposely;

(13) “knowingly” has the meaning specified in Section 2.02 and equivalent terms such as “knowing” or “with knowledge” have the same meaning;

(14) “recklessly” has the meaning specified in Section 2.02 and equivalent terms such as “recklessness” or “with recklessness” have the same meaning;

(15) “negligently” has the meaning specified in Section 2.02 and equivalent terms such as “negligence” or “with negligence” have the same meaning;

(16) “reasonably believes” or “reasonable belief” designates a belief that the actor is not reckless or negligent in holding.

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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.
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(b) Knowingly.
A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of the person’s conduct or the attendant circumstances, the person is aware that the person’s conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of the person’s conduct, the person is aware that it is practically certain that the person’s conduct will cause such a result.

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

(d) Negligently.
A person acts negligently with respect to a material element of an offense when the person should be aware of a substantial and unjustifiable risk that the material element exists or will result from the person’s conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of the actor’s conduct and the circumstances known to the actor, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.

(3) Culpability Required Unless Otherwise Provided. When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.

(4) Prescribed Culpability Requirement Applies to All Material Elements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.
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(5) *Substitutes for Negligence, Recklessness and Knowledge.* When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

***

2.03 *Causal Relationship Between Conduct and Result; Divergence Between Result Designed or Contemplated and Actual Result or Between Probable and Actual Result*

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

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

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

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

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

(b) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just]¹ 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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¹ 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....”
Appendix A

(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 negatived 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;
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(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

Note: Revisions to black letter are still ongoing. Black letter below is reproduced from Tentative Draft No. 4 with few changes, except that black letter from Sections 213.8 and 213.11-213.11J is reproduced from this Preliminary Draft.

SECTION 213.0. GENERAL PRINCIPLES OF LIABILITY; DEFINITIONS

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

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

(b) Subsection (2) of Section 2.08 (Intoxication) does not apply to this article. Instead, the general provisions of the criminal law and rules of evidence of the jurisdiction govern the materiality of the actor’s intoxication in determining the actor’s culpability 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 the actor’s purpose is the sexual arousal, sexual gratification, sexual humiliation, or sexual degradation of any person:

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

* Approved by the membership, May 2017.
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(ii) touching any body part of any person with the clothed or unclothed genitalia, anus, groin, breast, buttocks, or inner thigh of any person; or

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

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

(d) “Consent”**

(i) “Consent” for purposes of Article 213 means a person’s willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact.

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

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

(iv) Notwithstanding subsection (2)(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.

** Approved by the membership, May 2016.
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(e) Force.

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

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

(f) “Actor” means a person more than 12 years old, except that “actor” includes a person younger than 12 years old when the charge is Sexual Assault by Aggravated Physical Force or Restraint (Section 213.1). “Actor” 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 213.11.

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

SECTION 213.1. SEXUAL ASSAULT BY AGGRAVATED PHYSICAL FORCE OR RESTRAINT

(1) Sexual Assault by Aggravated Physical Force or Restraint. An actor is guilty of Sexual Assault by Aggravated Physical Force or Restraint when the actor causes another person to submit to or perform an act of sexual penetration or oral sex and:
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(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. It is a felony of the third degree [10-year maximum], except that (1) the actor may be sentenced to an additional term of up to five years’ imprisonment, and (2) it is a felony of the second degree [20-year maximum] if the actor violates subsection (1) of this Section and in so doing:

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

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

(i) also engage in an act or acts of sexual penetration or oral sex with the same victim at the same place at a time contemporaneous with the actor’s violation of this Section, or

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

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

(3) Effective consent. Consent is ineffective 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 Explicit Prior Permission according to the terms of Section 213.10.
SECTION 213.2. SEXUAL ASSAULT BY PHYSICAL FORCE OR RESTRAINT

(1) Sexual Assault by Physical Force or Restraint. An actor is guilty of Sexual Assault by Physical Force or Restraint when 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

(b) the actor is aware of, yet 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 third degree [10-year maximum]. It is a registrable offense when the actor has previously been convicted of a felony sex offense.

(3) Effective consent. Consent is ineffective 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 Explicit Prior Permission under Section 213.10.

SECTION 213.3 SEXUAL ASSAULT OF A PERSON WHO IS INCAPACITATED, VULNERABLE, OR LEGALLY RESTRICTED

(1) Sexual Assault of a Person Who is Incapacitated. An actor is guilty of Sexual Assault of a Person Who is Incapacitated 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 sexual conduct of that person or the actor because of a substance administered to that person, without that person’s knowledge or consent; and the actor
administered the incapacitating substance, or knows that it was surreptitiously administered by another, for the purpose of causing that incapacity; and
(b) the actor is aware of, yet recklessly disregards, the risk that the other person is in that condition at the time of the act.

Sexual Assault of a Person Who is Incapacitated is a felony of the third degree [10-year maximum]. It is a registrable offense when the actor has previously been convicted of a felony sex offense.

(2) Sexual Assault of a Person Who is Vulnerable. An actor is guilty of Sexual Assault of a Person Who is Vulnerable 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 a mental illness that makes the person substantially incapable of appraising the nature of the sexual activity involved, or of understanding the right to give or withhold consent in sexual encounters, and the actor has no similarly serious disability; or
   (ii) is passing in and out of consciousness; or
   (iii) lacks substantial capacity to communicate lack of consent; or
   (iv) is wholly or partly undressed, or in the process of undressing, for the purpose of receiving nonsexual professional or commercial services from the actor and has not given the actor explicit prior permission to engage in that act; and
(b) the actor is aware of, yet recklessly disregards, the risk that the other person is in that condition at the time of the act.

Sexual Assault of a Person Who is Vulnerable is a felony of the fourth degree [five-year maximum].

(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
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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) in custody, incarcerated, on probation, on parole, under civil commitment, in a pretrial release or pretrial diversion or treatment program, or in any other status involving state-imposed restrictions on liberty; and

(ii) the actor is in a position of actual or apparent authority or supervision over the restriction on the other person’s liberty; and

(b) the actor knows at the time of the act that the conditions described in paragraph (a) exist.

Sexual Assault of a Person Subject to a State-Imposed Restriction on Liberty is a felony of the fifth degree [three-year maximum].

(4) Effective consent. Consent is ineffective 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
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(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 is aware of, yet 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 [five-year maximum].

(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 Explicit Prior Permission under Section 213.10.

SECTION 213.5. SEXUAL ASSAULT BY PROHIBITED DECEPTION

(1) An actor is guilty of Sexual Assault by Prohibited Deception when 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 knowingly caused the other person to believe falsely that the act had diagnostic, curative, or preventive medical properties; or

(ii) the actor knowingly caused the other person to believe falsely that the actor was someone else who was personally known to that person; and

(b) the actor knows that the other person submitted to or performed the act because of one or more of the circumstances set forth in paragraph (a).

(2) Grading. Sexual Assault by Prohibited Deception is a felony of the fifth degree [three-year maximum].

(3) Effective consent. Consent is ineffective 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 when 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 is aware of, yet 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 [three-year maximum], except that it is a felony of the fourth degree [five-year maximum] when:
   (a) the other person has, by words or actions, expressly communicated unwillingness to submit to or perform the act, or the act is so sudden or unexpected that the other person has no adequate opportunity to express unwillingness before the act occurs; and
   (b) the actor is aware of, yet recklessly disregards, the risk that a circumstance described in subparagraph (a) existed at the time of the act of sexual penetration or oral sex.

(3) If applicable, the actor may raise an affirmative defense of Explicit Prior Permission under Section 213.10.

SECTION 213.7. OFFENSIVE SEXUAL CONTACT

(1) Offensive Sexual Contact by Physical Force or Surreptitious Incapacitation. An actor is guilty of Offensive Sexual Contact by Physical Force or Surreptitious Incapacitation when the actor knowingly engages in an act of sexual contact with another person or knowingly causes another person to submit to or perform an act of sexual contact with any person and:
   (a) the act is without effective consent because the actor knowingly uses or explicitly or implicitly threatens to use physical force or restraint against any person;
and the actor knows that the person submitted to or performed the act of sexual contact because of the actor’s use of or threat to use physical force or restraint; or

(b) the other person lacks substantial capacity to appraise, control, or remember the sexual conduct of that person or the actor because of a substance administered to that person, without that person’s knowledge or consent; and the actor administered the incapacitating substance, or knows that it was surreptitiously administered by another, for the purpose of causing that incapacity.

Offensive Sexual Contact by Physical Force or Surreptitious Incapacitation is a felony of the fifth degree.

(2) Offensive Sexual Contact. An actor is guilty of Offensive Sexual Contact when the actor knowingly engages in an act of sexual contact with another person or knowingly causes another person to submit to or perform an act of sexual contact with any person, and:

(a) the other person did not consent to that act, and the actor is aware of, yet recklessly disregards, the risk that the other person did not consent to that act; or

(b) the other person is unaware that such act is occurring, and the actor is aware of, yet recklessly disregards, the risk that the other person is unaware; or

(c) that act is without effective consent because:

(i) the act would be an offense as defined by Section 213.3(2) and (3), involving vulnerable or legally restricted persons, had the act been one of sexual penetration or oral sex; or

(ii) the act would be an offense as defined by Section 213.4, involving extortion, had the act been one of sexual penetration or oral sex; or

(iii) the act would be an offense as defined by Section 213.5, involving prohibited deception, had the act been one of sexual penetration or oral sex.

Offensive Sexual Contact is a petty misdemeanor.

(3) Effective consent. Consent is ineffective when the other person submitted to or performed an act of sexual contact under any of the circumstances described in subsections (1)(a), (1)(b), (2)(b), or (2)(c). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring under a circumstance described in those subsections. If applicable, an actor charged with a violation
of subsections (1)(a), (2)(a), or (2)(c)(ii) may raise an affirmative defense of Explicit Prior Permission under Section 213.10.

SECTION 213.8. SEXUAL OFFENSES INVOLVING MINORS

(1) Sexual Assault of a Minor. An actor is guilty of Sexual Assault of a Minor when:
   (a) the actor knowingly engages in an act of sexual penetration or oral sex with a minor or 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 than 16 years old; and
       (ii) the actor is more than five years older than the minor and not the legal spouse of the minor; and
   (c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraph (b) exist.

Grading. Sexual Assault of a Minor is a felony of the fifth degree [three-year maximum] when at the time of the act the actor is younger than 21 years old and a felony of the fourth degree [five-year maximum] when at the time of the act the actor is 21 years old or older, except that it is a felony of the third degree [10-year maximum] and a registrable offense when at the time of the act the minor is younger than 12 years old, the actor is 21 years old or older, and the actor is aware of, yet recklessly disregards, the risk that the minor is younger than 12 years old.

(2) Incestuous Sexual Assault of a Minor. An actor is guilty of Incestuous Sexual Assault of a Minor when:
   (a) the actor knowingly engages in an act of sexual penetration or oral sex with a minor or causes a minor to submit to or perform an act of sexual penetration or oral sex; and
   (b) the actor is 18 years old or older, and the minor is younger than 18 years old; and
   (c) the act is without effective consent because the actor is:
       (i) a parent or grandparent of the minor, including a biological, step, adoptive, or foster parent or grandparent; or
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(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; and

(d) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (b) and (c) exist.

Incestuous Sexual Assault of a Minor is a felony of the third degree [10-year maximum]. It is a registrable offense when at the time of the act the minor is younger than 16 years old.

(3) Exploitative Sexual Assault of a Minor. An actor is guilty of Exploitative Sexual Assault of a Minor when:

(a) the actor knowingly engages in an act of sexual penetration or oral sex with a minor or 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 old; and

(c) the actor is more than five 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 holds a position of authority or supervision over the minor, including as a teacher, employer, religious leader, treatment provider, administrator, or coach; and

(e) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (b) through (d) exist.

Exploitative Sexual Assault of a Minor is a felony of the fifth degree [three-year maximum].

(4) Fondling the Genitals of a Minor. An actor is guilty of Fondling the Genitals of a Minor when:

(a) the actor knowingly fondles or engages in masturbatory contact with the genitalia of a minor, or causes a minor to submit to or perform an act of fondling or masturbatory contact with the minor’s own genitalia or the genitalia of any other person; and
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(b) the act is for the purpose of any person’s sexual arousal, sexual gratification, sexual humiliation, or sexual degradation; and

(c) the act is without effective consent because:

(i) the minor is younger than 12 years old and the actor is more than five years older than the minor; or

(ii) the minor is younger than 16 years old and the actor is more than seven years older than the minor and not the legal spouse of the minor; and

(d) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraph (c)(i) or (ii) exist.

Grading. Fondling a Minor is a felony of the fifth degree [three-year maximum], except that it is a felony of the fourth degree [five-year maximum] when at the time of the act the actor is 21 years old or older, the minor is younger than 12 years old, and the actor is aware of, yet recklessly disregards, the risk that the minor is younger than 12 years old.

(5) Aggravated Offensive Sexual Contact with a Minor. An actor is guilty of Aggravated Offensive Sexual Contact with a Minor when:

(a) the actor knowingly engages in an act of sexual contact with a minor or causes a minor to submit to or perform an act of sexual contact; and

(b) the minor is younger than 18 years old; and

(c) the actor is more than five years older than the minor; and

(d) the act, had it been an act of sexual penetration or oral sex, would be an offense as defined by Section 213.1, 213.2, 213.3, 213.4, 213.5, or 213.8(2) or (3); and

(e) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (b) and (c) exist.

Aggravated Offensive Sexual Contact with a Minor is a felony of the fourth degree [five-year maximum].

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

(a) the actor knowingly engages in with a minor, or causes a minor to submit to or perform:

(i) an act of sexual contact; or
(ii) an act involving the touching of the tongue of any person, to any body part or object, when that act is for the purpose of any person’s sexual arousal, sexual gratification, sexual humiliation, or sexual degradation; and (b) the act is without effective consent because:
   (i) the minor is younger than 12 years old, and the actor is more than five years older than the minor; or
   (ii) the minor is younger than 16 years old, and the actor is more than seven years older than the minor and is not the legal spouse of the minor; and (c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraph (b)(i) or (ii) exist.

Offensive Sexual Contact with a Minor is a misdemeanor [one-year maximum], except that it is a felony of the fifth degree [three-year maximum] when at the time of the act the actor is 21 years old or older, the minor is younger than 12 years old, and the actor is aware of, yet recklessly disregards, the risk that the minor is younger than 12 years old.

(7) Effective consent. Consent is ineffective when the circumstances described in any of the subsections (1) through (6) exist at the time of the act. Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring under the circumstances described in any of those subsections.

(8) Calculation of ages. The age of any person described in this Section should be calculated according to the “days-and-month” approach, which determines age with reference to the day, month, and year of that person’s birth, as measured in whole numbers.

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
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(b) the person is less than 18 years old and is being, or will be, caused to submit to or perform a commercial sex act; and the actor is aware of, yet recklessly disregards, the risk that the person is less than 18 years old and is being, or will be, caused to submit to or perform the commercial sex act.

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

(a) “Coercion” means:

(i) using or threatening to use physical force or restraint against 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 person of ordinary resolution who is of the same background, in the same circumstances, and in the same physical and mental condition as that person to submit to or perform a commercial sex act in order to avoid incurring that harm; or

(vi) any combination of these circumstances.

(b) “Commercial Sex Act” means any act of sexual penetration, oral sex, or sexual contact performed in exchange, or the expectation of exchange, for money, property, services, or any other thing of value given to or received by any person.
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(3) Grading. Sex Trafficking is a felony of the third degree [10-year maximum].

(4) Effective consent. Consent is ineffective 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 old. 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 Explicit Prior Permission under Section 213.10.

SECTION 213.10. AFFIRMATIVE DEFENSE OF EXPLICIT PRIOR PERMISSION

(1) Except as provided in subsection (3), it is an affirmative defense to a charge under this Article that the actor reasonably believed that, in connection with the charged act of sexual penetration, oral sex, or sexual contact, the other party personally gave the actor explicit prior permission to use or threaten to use physical force or restraint, or to inflict or threaten to inflict any harm otherwise proscribed by Sections 213.1, 213.2, 213.4, 213.7, or 213.9, or to ignore the absence of consent otherwise proscribed by Section 213.6.

(2) Permission is “explicit” under subsection (1) when it is given orally or by written agreement:

   (a) specifying that the actor may ignore the other party’s expressions of unwillingness or other absence of consent;

   (b) identifying the specific forms and extent of force, restraint, or threats that are permitted; and

   (c) stipulating the specific words or gestures that will withdraw the permission.

Permission given by gestures or other nonverbal conduct signaling assent is not “explicit” under subsection (1).

(3) The defense provided by this Section is unavailable when:

   (a) the act of sexual penetration, oral sex, or sexual contact occurs after the explicit permission was withdrawn, and the actor is aware of, yet recklessly disregards, the risk that the permission was withdrawn;

   (b) the actor relies on permission to use force or restraint or ignore the absence of consent at a time when the other party will be unconscious, asleep, or otherwise unable to withdraw that permission;
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(c) the actor engages in conduct that causes or risks serious bodily injury and in so doing is aware of, yet recklessly disregards, the risk of such injury; or

(d) at the time explicit permission is given, the other party is, and the actor is aware of, yet recklessly disregards, the risk that the other party is:

(i) less than 18 years old;

(ii) giving that permission while subjected to physical force or restraint;

(iii) giving that permission because of the use or 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, vulnerable, or legally restricted as defined by Section 213.3;

(vi) subject to prohibited deception, as defined by Section 213.5; or

(vii) subject to trafficking, as defined by Section 213.9(1).

SECTION 213.11. COLLATERAL CONSEQUENCES OF CONVICTION

Collateral consequences of conviction applicable specifically to persons convicted of a sexual offense, including a person’s obligation to register as a sex offender, associated duties, restrictions on employment and place of residence, and other collateral consequences applicable specifically to persons convicted of a sexual offense, are defined and their scope and implementation are delineated as follows:

(1) The person’s duty to register for law-enforcement purposes is governed by Section 213.11A.

(2) Notification of the person’s duty to register and associated duties is governed by Section 213.11B.

(3) The time of initial registration is governed by Section 213.11C.

(4) The information required upon registration is specified in Section 213.11D.

(5) The duty to keep registration current is specified in Section 213.11E.
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(6) The duration of the registration requirement is specified in Section 213.11F.
(7) Penalties for failure to register are governed by Section 213.11G.
(8) Access to registry information is governed by Section 213.11H.
(9) Collateral consequences of conviction, other than the duty to register for law-enforcement purposes, are governed by Section 213.11I.
(10) Standards and procedures for relief from the duty to register, associated duties, and additional collateral consequences applicable specifically to persons convicted of a sexual offense are governed by Section 213.11J.

SECTION 213.11A. REGISTRATION FOR LAW-ENFORCEMENT PURPOSES

(1) Offenses Committed in This Jurisdiction
   (a) Except as provided in subsection (3), every person convicted of an offense that is designated a registrable offense in this Article must, in addition to any sanction imposed upon conviction, appear personally and register as a sex offender with the law-enforcement authority designated by law in the [county] where the offender lives.
   (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 oblige the offender to register as a sex offender with law enforcement or other governmental authority, unless that offense is designated a registrable offense under this Article.

(2) Offenses Committed in Other Jurisdictions
   (a) Duty to register and related duties. Every person currently 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, must register with the law-enforcement authority designated by law and comply with the requirements of Sections 213.11A-213.11J, provided that the offense committed in the other jurisdiction is comparable to an offense that would be registrable under this Article if committed in this jurisdiction.
   (b) Place of registration. If the person who is required to register under subsection (2)(a) lives in this jurisdiction, registration must be accomplished in the [county] where the person lives. If the person who is required to register under
subsection (2)(a) does not live in this jurisdiction, but works in this jurisdiction, registration must be accomplished in the [county] where the person works; if the person does not live or work in this jurisdiction but studies in this jurisdiction, registration must be accomplished in the [county] where the person studies.

(c) *Determining the comparability of in-state and out-of-state offenses*

(i) *Standard.* An offense committed in another jurisdiction is comparable to a registrable offense under this Article if and only if the elements of the out-of-state offense are no broader than the elements of that registrable offense. When, regardless of the conduct underlying the out-of-state conviction, the out-of-state offense can be committed by conduct that is not sufficient to establish a registrable offense under this Article, the two offenses are not comparable.

(ii) *Procedure.* Before determining that an offense committed in another jurisdiction is comparable to a registrable offense under this Article, the authority designated to make that determination must give the person concerned notice and an opportunity to be heard on that question, either orally or in writing.

(d) Notwithstanding any other provision of law, no conviction for an offense in another jurisdiction shall require the offender to register as a sex offender with law enforcement or other governmental authority in this jurisdiction, unless that conviction currently obligates the offender to register as a sex offender in that jurisdiction and the conviction is for an offense comparable to an offense that would be registrable 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 213.111, on the basis of a criminal conviction for an offense committed when the person was under the age of 18, or on the basis of an adjudication of delinquency based on conduct when the person was under the age of 18; provided, however, that this subsection (3) shall not apply to a person convicted of a criminal offense of Sexual Assault by Aggravated Physical Force or Restraint if the person was at least 16 years old at the time of that offense.
SECTION 213.11B. NOTIFICATION OF THE OBLIGATION TO REGISTER AND ASSOCIATED DUTIES

(1) 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 person 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 person must appear to register as required by Section 213.11A;

   (ii) the duty to report to that office or agency periodically in person, as required by Section 213.11E(1); and

   (iii) the duty to promptly notify at least one of the local jurisdictions where the person is registered of any change in the registry information pertaining to that person, as required by Section 213.11E(2);

(c) notify the person of the right to petition for relief from those duties as provided in Section 213.11J;

(d) confirm that defense counsel has explained those duties and the right to petition for relief to that person;

(e) confirm that the person understands those duties and that right;

(f) require the person to read and sign a form stating that defense counsel and the sentencing judge have explained the applicable duties and the right to petition for relief from those duties, and that the person understands those duties and that right;

(g) ensure that if the person convicted of a sexual offense cannot read or understand the language in which the form is written, the person will be 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 Model Penal Code Section 7.04(1). [Model Penal Code: Sentencing, Section 7.04(1) (Proposed Final Draft (2017)).]
(2) At the time of sentencing, the convicted person shall receive a copy of the form signed pursuant to subsection (1)(f) of this Section.

(3) If the convicted person is sentenced to a custodial sanction, an appropriate official shall, shortly before the person’s release from custody, again inform the person of the registration requirement, explain the rights and duties associated therewith, including the right to petition for relief from those duties, and require the person to read and sign a form stating that those rights and duties have been explained and that the person understands those rights and duties. At the time of release from custody, the person concerned shall receive a copy of that form.

SECTION 213.11C. TIME OF INITIAL REGISTRATION

A person subject to registration shall initially register:

(a) if incarcerated after sentence is imposed, then within three business days after release; or

(b) if not incarcerated after sentence is imposed, then not later than five business days after being sentenced for the offense giving rise to the duty of registration.

SECTION 213.11D. INFORMATION REQUIRED IN REGISTRATION

(1) A person subject to registration pursuant to Section 213.11A shall provide the following information to the appropriate official for inclusion in the sex-offense registry:

(a) the name of the person (including any alias used by the person);

(b) the Social Security number, if any, of the person;

(c) the address of each place where the person resides or expects to reside;

(d) the name and address of any place where the person works or expects to work;

(e) the name and address of any place where the person is a student or expects to be a student;

(f) the license-plate number and a description of any vehicle owned or regularly operated by the person.
(2) Supplementary Information. The local jurisdiction in which a person registers shall ensure that the following information is included in the registry for that person and kept up to date:

(a) the text of the provision of law defining the criminal offense for which the person is registered;

(b) the person’s criminal history, including the date and offense designation of all convictions; and the person’s parole, probation, or supervised-release status;

(c) any other information required by law.

(3) Registrants Who Lack a Stable Residential Address. If a person required to register lacks a stable residential address, the person shall, at the time of registration, report with as much specificity as possible the principal place where the person sleeps, instead of the information required under subsection (1)(c).

(4) The local jurisdiction in which a person registers shall promptly provide the information specified in subsections (1), (2), and (3) of this Section to an appropriate law-enforcement authority in each jurisdiction in which the registrant works, studies, or expects to work or study.

(5) Correction of Errors. Each locality where a person 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 213.11E. DUTY TO KEEP REGISTRATION CURRENT

(1) Periodic Updates. A person who is required to register under Section 213.11A shall, not less frequently than once every year, appear in person in at least one jurisdiction where the person is required to register, verify the current accuracy of the information provided in compliance with Section 213.11D, allow the jurisdiction to take a current photograph, and report any change in the identity of other jurisdictions in which the person is required to register.
(2) Change of Circumstances

(a) Except as provided in paragraph (b) of this subsection, a person subject to registration under Section 213.11A shall, not later than five business days after each change of name and each change in the location where the person lives, works, or studies, notify at least one local jurisdiction specified in Section 213.11A of:

(i) all changes in the information that the person is required to provide under Section 213.11D, and

(ii) the identity of all other jurisdictions in which the person is required to register.

(b) Registrants who lack a stable residential address, and therefore report instead the principal place or places where they sleep, as provided in Section 213.11D(3), must confirm or update those locations once every 90 days but need not do so more often.

(c) Each jurisdiction that maintains a sex-offense registry must permit registrants to notify the jurisdiction, by means of U.S. mail, submission of an appropriate form online, or other reliable, readily accessible means of communication of the jurisdiction’s choosing, of any change of name, residence, employment, student status, or vehicle regularly used, and any change in the identity of all other jurisdictions in which the person is required to register.

(d) Each jurisdiction where a person registers pursuant to Section 213.11A must advise the registrant, at the time of registration, of the registrant’s option to utilize the means of communication established under subsection (2)(c), rather than appearing personally for that purpose, if the registrant so chooses.

(3) The local jurisdiction notified of any changes pursuant to subsections (1) and (2) must promptly provide the registrant a written receipt confirming that the updated information has been provided, and shall provide that information to all other jurisdictions in which the person is required to register.
SECTION 213.11F. DURATION OF REGISTRATION REQUIREMENT

(1) Subject to the provisions of Section 213.11J, a person required to register must keep the registration current for a period of 15 years, beginning on the date when the registrant is released from custody after conviction for the offense giving rise to the registration requirement; or if the registrant is not sentenced to a term of incarceration, beginning on the date when the registrant was sentenced for that offense.

(2) At the expiration of that 15-year period, the duty to keep that registration current will terminate; the person who had been registered will not be subject to any further duties associated with that registration requirement; and no public or private agency other than a law-enforcement agency shall thereafter be permitted access to the person’s registry information.

(3) Early relief from the duty to keep registry information current and other associated duties and consequences is governed by Section 213.11J.

(4) When a person’s duty to register terminates under subsection (2) or (3), the law-enforcement agency in the local jurisdiction where the person resides will, upon the person’s request, notify all other jurisdictions in which the person is registered that the person’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 213.11G. FAILURE TO REGISTER

(1) Failure to Register. A person required to register under Section 213.11A is guilty of Failure to Register, a misdemeanor, if that person knowingly fails to register 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 213.11H. ACCESS TO REGISTRY INFORMATION

(1) Confidentiality

(a) Each local jurisdiction in which a person is registered must exercise due diligence to ensure that all information in the registry remains confidential, except that:

(i) information about a specific registrant must be made available upon request to any law-enforcement agency in connection with the investigation of a criminal offense; and

(ii) when an individual or entity has given a person a conditional offer of employment, subject only to a satisfactory background check, for work involving contact with or access to minors, persons with mental disabilities, elderly persons, or others who are vulnerable, the local jurisdiction must, on request, disclose to that individual or entity:

(A) whether the person offered employment is registered in the jurisdiction as a sex offender;

(B) the registrable offense or offenses for which the registrant was convicted;

(C) the date of the conviction or convictions;

(D) the sentence or sentences imposed; and

(E) the date or dates of the registrant’s release from custody for the offense or offenses.

(b) Any disclosure pursuant to subsection (1)(a) shall include a warning that:

(i) the law-enforcement agency or other individual or entity receiving the information must exercise due diligence to ensure that the information remains confidential;

(ii) such information may be disclosed and used as provided in paragraph (a)(i) and (ii), but otherwise must not be disclosed to any person or public or private agency;
(iii) such information may be used only for the purpose requested;
(iv) such information may not be used to injure, harass, or commit a crime against the registant or anyone else; and
(v) any failure to comply with the terms of subsection (2)(b) could result in civil or criminal penalties.

(2) Unauthorized Disclosure of Registry Information. An actor is guilty of Unauthorized Disclosure of Registry Information if:

(a) the actor, having received registry information in an official capacity or as provided in subsection (1), knowingly or recklessly discloses that information, or permits that information to be disclosed, to any person not authorized to receive it; or

(b) the actor obtains access to registry information by computer trespassing or otherwise in violation of law and subsequently knowingly or recklessly discloses that information, or permits that information to be disclosed, to any person.

Unauthorized Disclosure of Registry Information under subsection (2) of this Section is a felony of the fourth degree.

SECTION 213.11I. ADDITIONAL COLLATERAL CONSEQUENCES OF CONVICTION

(1) Definition. For purposes of this Section, the term “additional collateral consequence” means any government action or government-imposed burden, restriction, or requirement applicable specifically to persons convicted of a sexual offense, 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 213.11A. Those additional collateral consequences include any government-imposed restriction upon the convicted person’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 person 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, as defined in subsection (1), unless that person has been convicted of a registrable offense and is required to register as a sex offender under Section 213.11A.

(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 213.11A must not be subject to any additional collateral consequence, as defined in subsection (1), unless an official designated by law, after affording the person notice and an opportunity to respond concerning the proposed additional collateral consequence, determines that the additional collateral consequence is manifestly required in the interest of public safety, after due consideration of:

(a) the nature of the offense;
(b) all other circumstances of the case;
(c) the person’s prior record; and
(d) the potential negative impacts of the burden, restriction, requirement, or government action on the person, on the person’s family, and on the person’s prospects for rehabilitation and reintegration into society.

(4) **Limitations.** The 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 213.11B;
(b) is authorized by law;
(c) is drawn as narrowly as possible to achieve the goal of public safety;
(d) is accompanied by a written statement of the official approving the additional collateral consequence, explaining the need for 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 213.11F.
SECTION 213.11J. RELIEF FROM OBLIGATION TO REGISTER, ASSOCIATED DUTIES, AND ADDITIONAL COLLATERAL CONSEQUENCES

(1) Petition for Discretionary Relief. At any time prior to the expiration of the obligation to register, the associated duties, or any additional collateral consequences, the registrant 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. If the obligation to register arose because of an out-of-state conviction, the petition for an order of relief may be addressed to a court of general jurisdiction or other authority of this state in the place where the person concerned is registered.

(2) Proceedings on Petition for Discretionary Relief. The authority to which the petition is addressed may either dismiss the petition summarily, in whole or in part, or institute proceedings to rule on the merits of the petition. If that authority chooses to entertain submissions, hear argument, or take evidence prior to ruling on the merits of the petition, it must give the prosecuting attorney for the offense out of which obligation to register arose notice and an opportunity to participate in those proceedings. If the obligation to register arose because of an out-of-state conviction, that notice and that opportunity to participate must be addressed to the principal prosecuting attorney in the jurisdiction of this state where the authority to which the petition is addressed is located.

(3) Judgment on Proceedings for Discretionary Relief. Following proceedings for discretionary relief under subsection (2), the authority to which the petition is addressed may grant or deny relief, in whole or in part, from the obligation to register, any associated duties, and any additional collateral consequences. When that order terminates the registrant’s obligation to register and to keep registry information current, subsequent disclosure of registry information is governed by subsection (9). An order granting or denying relief following those proceedings must explain in writing the reasons for granting or denying relief.

(4) Standard for Discretionary Relief. The authority to which the petition is addressed may grant relief if it finds that the obligation, duty, or consequence in question is likely to impose a substantial burden on the registrant’s ability to reintegrate into law-abiding society, and that public-safety considerations do not require continued imposition of the obligation, duty, or consequence after due consideration of:
(a) the nature of the offense;
(b) all other circumstances of the case;
(c) the registrant’s prior and subsequent criminal record; and
(d) the potential negative impacts of the burden, restriction, or government action on the registrant, on the registrant’s family, and on the registrant’s prospects for rehabilitation and reintegration into society.

Relief must not be denied arbitrarily or for any punitive purpose.

(5) Notice to Other Jurisdictions Concerning Discretionary Relief

(a) When discretionary relief is granted under this Section, the authority granting the order of relief must, upon the registrant’s request, give notice of that order to any other jurisdiction where the person concerned is registered.

(b) When the other jurisdiction notified is a jurisdiction of this state, the notice must specify that the other jurisdiction must extend the same relief from registration-related duties and additional collateral consequences. When that order terminates the registrant’s obligation to register and to keep registry information current, that notice must also specify the limits on subsequent disclosure of registry information applicable under subsection (9).

(6) Proceedings Subsequent to Discretionary Relief. An order of discretionary relief granted under this Section does not preclude the authority to which the petition was addressed from later revoking that order if, on the basis of the registrant’s subsequent conduct or any other substantial change in circumstances, the authority finds by a preponderance of the evidence that public-safety considerations, weighed against the burden on the registrant’s ability to reintegrate into law-abiding society, no longer justify the order of relief.

(7) Automatic Relief. If, during the first 10 years of the period during which a person is required to keep registration information current, the person:

(a) successfully completes any period of supervised release, probation, or parole, and satisfies any financial obligation such as a fine or restitution, other than a financial obligation that the person, despite good-faith effort, has been unable to pay; and

(b) successfully completes any required sex-offense treatment program; and
(c) is not convicted of any additional offense under this Article, or any sexual offense in another jurisdiction that would be an offense under this Article if committed in this jurisdiction; then:

the duty to keep that registry information current will terminate; the person who had been registered will not be subject to any further duties associated with that registration requirement; and subsequent access to registry information will be governed by subsection (9).

(8) Notice to Other Jurisdictions Concerning Automatic Relief. When automatic relief takes effect under subsection (7), the sentencing court or other authority authorized by law must, upon the registrant’s request, notify any jurisdiction or jurisdictions where the person concerned is registered that the person’s duty to keep that registration current and all other duties associated with that registration requirement have terminated. That notice must also specify the limits on subsequent disclosure of registry information applicable under subsection (9).

(9) Access to Registry Information After Discretionary or Automatic Relief. When an order of discretionary relief terminates the registrant’s obligation to register and to keep registry information current, and when automatic relief takes effect, subsequent access to registry information is limited as follows:

(a) Registry information recorded as of the date when discretionary or automatic relief takes effect may remain available to any law-enforcement agency seeking disclosure of that information in compliance with Section 213.11H(1)(a)(i).

(b) Except as provided in paragraph (a), no public or private agency, including an agency seeking disclosure of registry information pursuant to Section 213.11H(1)(a)(ii), may thereafter be permitted access to registry information concerning the person to whom the discretionary or automatic relief pertains.

SECTION 213.12. PROCEDURAL AND EVIDENTIAL PRINCIPLES APPLICABLE TO ARTICLE 213

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