

Submitted by the Council to the membership of  
The American Law Institute  
for consideration at the 2022 Annual Meeting on May 16–18, 2022

THE AMERICAN  
LAW INSTITUTE | 100

MODEL PENAL CODE:  
SEXUAL ASSAULT AND RELATED OFFENSES

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*Tentative Draft No. 6*

(April 2022)

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**MATERIALS INCLUDED**

- ARTICLE 213** Selected Black Letter and Comments Requiring Membership Approval,  
with Related Reporters' Notes
- APPENDIX A** Pertinent 1962 Code Provisions
- APPENDIX B** Complete Black Letter of Article 213
- APPENDIX C** Comparison of Black Letter – Tentative Draft No. 5 to  
Tentative Draft No. 6

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

Comments and Suggestions Invited

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**Model Penal Code:  
Sexual Assault and Related Offenses  
(as of April 15, 2022)**

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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.

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

**Tentative Draft No. 6**

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## **PROJECT STATUS AT A GLANCE**

Section 213.0(2)(e) (formerly Section 213.0(3) in T.D. No. 2) – approved at 2016 Annual Meeting; amendments approved by Council in 2016 and 2022

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

Part I, Grading, and Part II, consisting of black letter and commentary of Sections 213.0 through 213.11J (other than previously approved portions of Section 213.0(2)(a), (b), and (e)) – approved at 2021 Annual Meeting; amendments approved by Council in 2022

## Foreword

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

The MPC was a forward-looking document that withstood the test of time remarkably well. But, inevitably, revisions eventually became necessary. In 2001, the Institute launched a review of the Sentencing provisions; this project is now nearing completion. In 2009, following a report to the Council, the Institute withdrew the death-penalty provision. And, in 2012, it launched a review of the provisions on Sexual Assault and Related Offenses. This difficult project, which deals with some of the most controversial matters on the current public agenda, is under the very able hands of Reporter Stephen J. Schulhofer and Associate Reporter Erin E. Murphy, both of New York University School of Law. Professor Murphy has been on leave from the project since September 2021, when she became senior policy advisor for criminal justice for the White House Domestic Policy Council.

This project was first discussed at the 2013 Annual Meeting and has subsequently been before the membership in 2014, 2015, 2016, and 2017, resulting in the approval of important definitional provisions, including the definition of "Consent." The full draft was approved by the membership at the Annual Meeting in 2021, but the membership adopted some substantive motions, which modified the draft that had been approved by the Council.

The Council then considered and approved language consistent with these motions. During the past year, we also received a number of additional comments, which the Reporter considered, consistent with our practice for projects that have not received a final approval vote by both the Council and the membership. A few of these comments led to some changes in the draft, resulting in an edit to the definition of consent that removed repetitive language, and to some modifications of Section 213.9 (Sex Trafficking), Section 213.11 (Collateral Consequences), and the grading classifications in a few Sections. These changes have been approved by the Council. At this Annual Meeting, the membership will be asked to approve the substantive changes made after the 2021 Annual Meeting. The approval of this draft will mark the completion of the project.

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

RICHARD L. REVESZ  
*Director*  
*The American Law Institute*

April 20, 2022

## Model Penal Code: Sexual Assault and Related Offenses

### Tentative Draft No. 6

Stephen J. Schulhofer, *Reporter*

April 15, 2022

#### REPORTER'S MEMORANDUM

At the Annual Meeting in June 2021, the membership discussed black letter and Commentary for the entirety of revised *Article 213 of the Model Penal Code*, as presented with Council approval in Tentative Draft No. 5. The membership approved that Draft, subject to a number of amendments. The Council had not yet reviewed those amendments, which therefore required Council approval.

Most of the amendments suggested a direction for revision rather than a definitive text; the task of translating each amendment into language that could be integrated into the final black letter was left to the Reporter.\* Subsequently, the Reporter, together with ALI staff, especially Law Fellow Ben Brady, completed that process, consulting with sponsors of the amendments when necessary, drafting final language, and integrating it into the black letter in Council Draft No. 12. The draft also included Boskey-compliant editorial revisions. It was presented to the Council for review at its meeting in January 2022.

On the eve of the Council's January meeting, it received comments on the Draft from Deputy Attorney General Lisa Monaco, as well as from the Department of Justice's Office of Legal Policy, the National Association of Attorneys General (NAAG), and the National Center for Missing & Exploited Children (NCMEC), among other groups. The comments focused in particular on Section 213.0's definition of consent, Section 213.9's provisions relating to sex trafficking, and Section 213.11's provisions relating to sex-offense registration and other collateral consequences. The Council deferred consideration of CD 12 until its meeting in March 2022, to permit the Reporter and ALI staff to meet with these groups and consider their concerns and to give Council members more time to consider the comments.

After extended conversations with these groups, the Reporter, working with ALI staff, especially Law Fellow Harry Larson, proposed a number of revisions to the original black letter of CD 12. The text of revised CD 12, was posted on the project's website prior to the March meeting, where the Council approved it along with several additional (largely editorial) amendments.

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\* Associate Reporter Erin Murphy is currently on leave from the project and did not participate in preparing Council Draft No. 12 or this Tentative Draft No. 6. She expects to return to the project in the Fall of 2022.

As in other aspects of this project, the aim was not to win the support of any group for its own sake, but only to produce the substantively strongest possible product. With that in mind, it was valuable to sit down (remotely) with leaders of these groups to explore their concerns. In the end, however, it was not possible to accept the great majority of their priority objections, which proved incompatible with judgments to which the membership and the Institute are strongly committed—for example, the Institute’s rejection of: (i) mandatory minimum sentences; (ii) prevalent punishment levels for sexual offenses; (iii) broad, indiscriminate definitions of offenses like Sex Trafficking; (iv) registration for a broad range of nonviolent and less aggravated sexual offenses; and (v) registry obligations cast in burdensome, long-lasting terms that prevent the registrant’s reintegration into society for many years after the offense.

None of the objections raised with us was more forcefully pressed than these groups’ support for a public website listing persons who have been convicted of sexual offense and virtually unrestricted public access to much of the personal information maintained in local sex-offense registries. In each of our meetings, spokespersons for these groups stressed (as did some experts we had previously consulted) their strong belief in the importance of these measures. We are grateful for the time and attention generously given to us and our project by these leaders, including Assistant Attorney General Dellinger and many others. We should not and did not ignore the expertise of these professionals, who feel strongly about the need for maximum efforts to prevent such heartbreaking tragedies as, for example, the severe sexual abuse of a young child. And these discussions offered valuable insight into practical considerations worth taking into account. Yet in the end, the points raised with us in this regard did not persuade us to overturn the previous, considered judgment, based on extensive research and wide consultation with other experts by the Reporters, the Council, and the membership, which has led to our conclusion that these public-access policies are unjust and counterproductive, even in terms of the public-safety goals they purport to serve. We had hoped to find some common ground, but ultimately it was simply not justified to modify the central judgments to which these groups most strongly objected.

The remaining point to note in connection with this overview is that the discussions of the past four months, along with the further research and further reflection that they prompted, did produce a number of less central, but nonetheless significant substantive revisions. The remainder of this memo summarizes these modifications, which TD 6 presents for membership consideration.

## **1. Definition of Consent (Section 213.0)**

The Department of Justice, among others, criticized two features of the Draft’s definition of consent—the provisions stating that both a complainant’s “inaction” and a complainant’s failure to resist may be considered in determining whether consent is present. This language, the Department of Justice argued, “would effectively place the onus on the victim to manifest physical or verbal non-consent, rather than on the actor to secure the victim’s consent, creating the risk that factfinders will erroneously conclude that a victim who was frozen by fear was communicating consent.”

The judgment that inaction can sometimes, in the context of all the circumstances, be relevant evidence of consent was intensely debated by the Institute. It is central to the multifaceted definition of consent that a majority of the membership ultimately supported, and it

cannot be reconsidered without reopening a contentious issue that has been considered on multiple occasions and then settled. However, the language stating that *in addition*, failure to resist can also be considered, seems either redundant or potentially—and unnecessarily—misleading. TD 6 therefore simplifies the wording of Section 213.0(2)(e). It removes the language drawing heightened attention to failure to resist but continues to make clear that inaction can be considered, and of course inaction includes a failure to resist.

## 2. Sex Trafficking (Section 213.9)

### A. *Fraud.*

Many comments criticized the Draft’s rejection of the Federal Trafficking Victims Protection Act (TVPA) provision that treats every instance of fraud as a covered form of coercion. That approach is incompatible with MPC principles. The reach of fraud in a sexual context makes it unacceptably broad and vague as a basis for liability, as the Comments to Section 213.9 fully explained. TD 6 preserves the Draft’s more limited approach to liability in cases of fraud.

### B. *Persons who advertise the availability of commercial sex with a trafficking victim.*

Many comments criticized the Draft’s failure to mention advertising as a basis for a Sex Trafficking conviction, and some comments incorrectly inferred that the Draft conferred immunity on advertisers. In fact, other provisions of the MPC do punish “Promoting Prostitution” (Section 251.2(2)). But since many readers will look upon Article 213 as a free-standing proposal, there is merit in making this theory of liability explicit within Section 213.9.

The critics insisted that Section 213.9 should, like the federal TVPA, treat the advertiser as guilty of the primary Sex Trafficking offense. But MPC principles of proportionality argue against equating the guilt of someone who advertises sexual services with the person who (for example) recruits or harbors the trafficking victim. The revised draft therefore imposes liability for advertising, but only when the advertiser knows the trafficked status of those being advertised, and only as a separate offense which, unlike Sex Trafficking itself, is not registrable.

### C. *Persons who patronize a trafficking victim.*

Many comments criticized the Draft’s failure to include patronizing (as does the Federal TVPA) as sufficient to support a conviction for Sex Trafficking. The problem is somewhat similar to that presented by the advertiser. Other provisions of the MPC do punish (albeit in outdated, unacceptable language) the offense of “Patronizing Prostitutes” (Section 251.2(5)). But many readers will look upon Article 213 as a free-standing proposal. It is therefore worth making this theory of liability explicit within Section 213.9. But TD 6 rejects the critics’ proposal to follow the federal TVPA in placing within the same offense the “john” and those who, for example, directly engage in recruiting or harboring the trafficking victim. Instead, Section 213.9(4) makes patronizing a separate offense, graded at a lower level and not subject to registration. And of course the “john” could be punishable under other provisions of Article 213 if aware that the other person was coerced or underage.

### D. *Complicity.*

The apparent absence of this basis for liability was another frequent criticism, prompted by unfamiliarity with the structure of the MPC, which provides for accomplice liability in

connection with all substantive MPC offenses. Here too there is merit in making this theory of liability explicit, which TD 6 does in revised Section 213.9(5). That offense is graded at a lower level than the primary offense of Sex Trafficking and is not subject to registration.<sup>1</sup>

### 3. Grading

The discussions described above, together with further reflection and study, identified four instances (three of them involving offenses against minors) in which the grading classifications in TD 5 understated the appropriate grading of the offense:

*a. Sexual Assault of a Legally Restricted Person (Section 213.3(3)):* TD 5 classified this offense as a felony of the fifth degree (benchmark three-year maximum), a judgment that can be legitimately criticized as deprecating the seriousness of this offense. Accordingly, TD 6 raises the grade of the offense to that of a fourth-degree felony (five-year maximum).

*b. Sexual Assault of a Minor (Section 213.8(1)):* TD 5 classified this offense, which involves sexual penetration or oral sex, as a fifth-degree felony (three-year maximum) in the case of actors younger than 21. This understates the gravity of the offense when the actor is mature and the minor victim is a very young child. TD 6 therefore raises the grade to that of a fourth-degree felony (five-year maximum) when the actor is more than 10 years older than the child (for example, when the child is 6 and the actor is 17), and it raises the grade to that of a third-degree felony (10-year maximum) when the child is 11 or younger and the actor is 18, 19, or 20 (not just when the actor is 21 or older, as TD 5 required for grading at the third-degree felony level).

*c. Fondling a Minor (Section 213.8(4)):* Fondling is an exceptionally serious form of sexual contact, involving prolonged contact with or manipulation of the genitals of a child under 16. TD 5 classified this offense as a fifth-degree felony (three-year maximum) for all instances involving an actor younger than 21. This understates the gravity of the offense when the actor is mature and the minor victim is a very young child. TD 6 therefore raises the grade to that of a fourth-degree felony (five-year maximum) when the actor is more than 10 years older than the child (for example, when the child is 6 and the actor is 17), and when the child is 11 or younger and the actor is 18, 19, or 20 (not just when the actor is 21 or older, as TD 5 required for grading at the fourth-degree felony level).

*d. Offensive Sexual Contact with a Minor (Section 213.8(6)):* TD 5 treated this offense as a misdemeanor (one-year maximum) when the actor is younger than 21. Again, this classification understates the gravity of the offense when the actor is mature and the minor victim is a very young child. TD 6 therefore raises the grade to that of a fifth-degree felony (three-year maximum) when the child is 11 or younger and the actor is 18, 19, or 20 (not just when the actor is 21 or older, as TD 5 required for grading at the felony level).

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<sup>1</sup> A person convicted as an accomplice under MPC Section 2.06 is subject to the same punishment as that which applies to the substantive offense that the accomplice aided or encouraged. But Section 2.06 requires proof of a mens rea of purpose, while the mens rea under the new Complicity provision of Section 213.9(5) is set at the lower level of knowledge. As a result, the lower level of punishment under Section 213.9(5) would apply unless the prosecution can successfully obtain a conviction of complicity through Section 2.06 by proving that the actor's mens rea rose above the level of knowledge to purpose.

#### 4. Collateral Consequences – Obligation to Register (Sections 213.11 & 213.11A)

As discussed above, the revised Draft rejects the strongly pressed argument that the Draft should endorse a public website listing persons convicted of sexual offenses and unrestricted public access to much of the personal information held in sex-offense registries. Instead, the Draft preserves TD 5's commitment to eliminating community notification and unrestricted public access, so that the function of the largely confidential registry would be limited almost entirely to aiding law enforcement investigation of sexual crimes. To the extent that this approach can win acceptance, registration by itself will impose far fewer burdens on registrants, and the obligation to register, though by no means inconsequential, will be a far less momentous consequence of conviction. But it could jeopardize that acceptance to preclude, as did TD 5, registration of persons who commit certain very serious sexual offenses. Therefore, although TD 6 continues to preclude across-the-board registration of all Article 213 offenses, as federal law and the law of most states do, it extends the obligation to register to persons convicted of the following serious sexual offenses that were not classified as registrable in TD 5:

- a. *Sexual Assault by Physical Force or Restraint (Section 213.2)*: This offense previously was registrable only after a prior felony sex-offense conviction. Yet this violent offense always involves proof of an actor's conscious awareness of using a threat of physical force or restraint to pursue a sexual objective not welcomed by the other person. Accordingly, registration—but solely for the use of law enforcement—is appropriate, even upon the first conviction for this offense.
- b. *Sexual Assault of an Incapacitated or Vulnerable Person (Section 213.3(1) & (2))*: In TD 5, Sexual Assault of an Incapacitated Person was classified as registrable only after a prior felony sex-offense conviction, and Sexual Assault of a Vulnerable Person was never registrable. Yet both offenses demonstrate a callous willingness to exploit the incapacity or vulnerability of another person, and therefore registration—but solely for the use of law enforcement—is appropriate for both offenses.
- c. *Aggravated Offensive Sexual Contact (Section 213.7)*: Under TD 5, this offense was never registrable, even when the sexual contact was perpetrated through use of aggravated physical force, such as force that is capable of inflicting death or serious bodily injury. This is a legitimately criticized judgment, given the seriousness of the underlying offense conduct. Although that conduct involves only sexual contact short of penetration or oral sex, the behavior targeted is just as violent or abusive as that covered by Sections 213.1, 213.2, 213.3(1), and 213.3(2), all of which are registrable. TD 6 therefore classifies this offense as registrable when it involves physical force, physical restraint, an incapacitated person, or a vulnerable person under circumstances that would violate Sections 213.1, 213.2, 213.3(1), or 213.3(2) in a case of sexual penetration or oral sex.
- d. *Sexual Assault of a Minor (Section 213.8(1))*: Under TD 5, this offense was registrable only when at the time of the offense the actor was 21 or older and the minor victim was under 12. This restrictive approach to registration is subject to legitimate criticism as applied to cases not meeting these requirements when the actor nonetheless is much older than the minor victim, and when, for example, the victim is only 11 years old. Therefore, TD 6 classifies this offense as registrable when, in addition to the circumstances covered in TD 5, it involves an actor who is

- more than 10 years older than the minor, or at least 18 when the victim is a child younger than 12.
- e. *Exploitative Sexual Assault of a Minor (Section 213.8(3))*: Under TD 5, this offense was never registrable. Yet it involves seriously concerning behavior—sexual penetration or oral sex when the minor victim is under 18, the actor is more than five years older, and the actor holds a formal position of authority that impairs the minor’s ability to form an independent judgment whether to consent. The highly publicized incidence of this kind of conduct among, for example, coaches responsible for training young athletes illustrates the legitimacy of treating this offense as registrable, as TD 6 now does.
  - f. *Fondling a Minor (Section 213.8(4))*: Fondling is an exceptionally serious form of sexual contact, involving prolonged contact with or manipulation of the genitals of a child under 16. Under TD 5, it was never registrable. This is a legitimately criticized oversight as applied to cases in which the actor is considerably older than a young child. The seriousness of the offense justifies making it registrable, as TD 6 now does, in cases where the actor was at least 10 years older than the child, or was at least 18 when the child was 11 or younger.
  - g. *Aggravated Offensive Sexual Contact with a Minor (Section 213.8(5))*. This offense involves sexual contact short of penetration or oral sex, when the minor is under 18, the actor is at least five years older, and the conduct would have violated Sections 213.1, 213.2, 213.3, 213.4, 213.5, 213.8((2), or 213.8(3) if it had involved sexual penetration or oral sex. Under TD 5 it was never registrable. Yet by definition it includes only conduct that involves physical violence or exploitation of an especially vulnerable minor. As such, it is appropriately classified as a registrable offense.
  - h. *Sex Trafficking (Section 213.9(2))*: Registration is typically viewed as a measure to permit heightened surveillance of persons who have been convicted of sexually motivated offenses. Under TD 5, Sex Trafficking was not classified as a registrable offense, primarily because the perpetrator’s motivation usually is more financial than directly and personally sexual. However, the covered behavior is always callously coercive or exploitative. Moreover, a common practice among persons convicted of this offense is to troll for potential victims at locations frequented by people who are underage or otherwise vulnerable to exploitation. There is therefore a legitimate justification for requiring registration, as TD 6 now does, in order to facilitate heightened law enforcement attention to persons who may return to this behavior when they reenter society after serving a sentence for this offense.

## 5. Collateral Consequences – Confidentiality (Section 213.11H)

Section 213.11H of TD 5 permitted disclosure of registry information only to law enforcement agencies that request the information in connection with the investigation of a specific criminal offense. The discussions described above focused intensively on critics’ view that confidentiality was appropriate only for small categories of unusually sensitive information (e.g., the registrant’s social security number and the names of victims); critics sought to replace the Draft’s presumption of confidentiality with a general preference for unimpeded public access to extensive amounts of registry information. As explained above, that approach is incompatible with policy judgments central to the Draft and its underlying research and analysis. Nonetheless,

the discussions drew attention to three discrete situations in which limited exceptions to confidentiality are justified and can be permitted without threatening the Draft's overall objective of eliminating the unjust and counterproductive effects of registration as currently administered in the United States. Accordingly Section 213.11H, as revised in TD 6, now permits narrow exceptions to confidentiality in these three limited situations:

*a. To Victims (Section 213.11H(1)(a)(ii)).* If the registrant, for residence, work, or study, moves into a locality where the victim of the registrant's offense (or the parent or guardian of a minor victim of the offense) also resides, works, or studies, this new provision requires the law enforcement authority responsible for the registry in that locality to notify the victim (or the victim's parent or guardian in the case of a minor victim) of the fact that the registrant who committed the offense resides, works, or studies in that locality.

This exception to confidentiality responds to the legitimate concern on the part of victim advocates that unawareness of this information, and the surprise that can result from unexpectedly encountering the perpetrator in the area, poses a threat to the victim's sense of security and psychological well-being. Authorities may routinely provide this kind of information to victims in other ways (for example, at the time of release on parole), but that solution would not cover cases when (for example) the perpetrator of the offense initially settles in an area far from the victim and later moves into the area where the victim lives. The exception is a narrow one: The disclosure must extend no further than to the limited fact that the perpetrator of the offense is present in the locality; it must not include other details, such as the address where the registrant resides, works, or studies.

This limited disclosure authority permits the Draft to meet an objection that has wide appeal, without compromising its commitment to confidentiality generally.

*b. To the United States Marshal's Service (Section 213.11H(1)(a)(iii)).* TD 6 now permits sharing with the United States Marshal's Service the international travel plans of any registrant convicted of a sexual offense involving a minor, in order not to impede the Service's responsibilities under International Megan's Law. Even though the Marshal's Service is a law enforcement agency, such disclosure would fall outside the scope of the limited law-enforcement disclosures permitted by TD 5, where Section 213.11H permitted disclosure only "to aid in the investigation of a specific criminal offense." This new exception to confidentiality is nonetheless consistent with the original intent of Section 213.11H and the balance it strikes, because it permits this law-enforcement-related function, to which the U.S. government and many other nations are committed, without creating the unduly wide disclosure loophole that would arise if Section 213.11H's confidentiality principle were made inapplicable to sharing of registry information with law enforcement agencies generally for any purpose.

*c. To State Entities to Facilitate Criminal-History Background Checks (213.11H(1)(a)(iv)).* Private-sector organizations and individuals that serve vulnerable populations have a justifiable need (and often a legal duty) to obtain criminal-history background information on potential employees and volunteers. TD 5 aroused passionate opposition from many who held the erroneous (but hard to dislodge) perception that the

Draft would pose an insurmountable obstacle to meeting this legitimate need. There is little public appreciation of the fact that sex-offense registries are ill-suited to serving as a background-check mechanism and that other, more effective regimes are generally available.

Nonetheless, public concern about this perceived need is strong, and if the Draft were silent on the subject, it could leave an impression of a major weakness in Article 213's confidential registry system. Moreover, for a state where existing background-check procedures have significant gaps, Article 213 would be incomplete if it simply told the state to fill those gaps without showing specifically how this should be done.

For that reason, subparagraph (1)(a)(iv) creates a narrow background-check exception to confidentiality. It does not permit disclosure of registry information directly to private-sector organizations and individuals, even those who have a legitimate need to know. Instead, it provides that registry information can be conveyed to an appropriate state background-check agency. That agency in turn will perform the necessary background-check investigation in accordance with specific protocols for which subparagraph (1)(a)(iv), together with its Annex, offers a comprehensive template. The state agency is then charged with passing on the background-check results to prospective employers and/or those who apply for relevant positions as employees or volunteers. The Annex shows, and the accompanying Reporters' Notes explain, how this system would provide thorough and complete background-check information, extending to all offenses of potential concern, while preserving the maximum feasible degree of privacy for affected registrants.

**ARTICLE 213**  
**BLACK LETTER**  
**SECTIONS/SUBSECTIONS REQUIRING MEMBERSHIP APPROVAL**

1 **SECTION 213.0. GENERAL PRINCIPLES OF LIABILITY; DEFINITIONS**

\*\*\*\*

2 **(2) Definitions**

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

\*\*\*\*

4 **(e) “Consent”**

5 **(i) “Consent” for purposes of Article 213 means a person’s willingness**  
6 **to engage in a specific act of sexual penetration, oral sex, or sexual contact.**

7 **(ii) Neither verbal nor physical resistance is required to establish that**  
8 **consent is lacking. Consent may be express or it may be inferred from**  
9 **behavior—both action and inaction—in the context of all the circumstances.**

10 **(iii) Notwithstanding subsection (2)(e)(ii) of this Section, consent is**  
11 **ineffective when given by a person incompetent to consent or under**  
12 **circumstances precluding the free exercise of consent, as provided in Sections**  
13 **213.1, 213.2, 213.3, 213.4, 213.5, 213.7, 213.8, and 213.9.**

14 **(iv) Consent may be revoked or withdrawn any time before or during**  
15 **the act of sexual penetration, oral sex, or sexual contact. A clear verbal**  
16 **refusal—such as “No,” “Stop,” or “Don’t”—establishes the lack of consent or**  
17 **the revocation or withdrawal of previous consent. Lack of consent or**  
18 **revocation or withdrawal of consent may be overridden by subsequent consent**  
19 **given prior to the act of sexual penetration, oral sex, or sexual contact.**

\*\*\*\*

20 **(h) “Registrable offense”**

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

1                   (ii) No offense is a registrable offense under this Article unless (a) that  
2                   person was convicted in this jurisdiction of an offense under this Article and  
3                   the offense is specifically designated in this Article as a registrable offense; or  
4                   (b) the person was convicted in another jurisdiction of an offense that is  
5                   currently a registrable offense under the law of that jurisdiction and would be  
6                   a registrable offense under this Article in this jurisdiction if the person had  
7                   been convicted of that offense in this jurisdiction.

\*\*\*\*

8   **Comment:**

9                   1. *Consent.*

10                  “Consent” is the principal concept used to distinguish lawful from unlawful sexual conduct.  
11                  Throughout the law, there is debate about whether consent is best understood as a matter of  
12                  subjective attitude or overt behavior—whether it is something a person feels or something a person  
13                  does. Section 213.0(2)(e) specifies how Article 213 takes each of these perspectives into account.

14                  The general Model Penal Code provision relating to consent, Section 2.11, inclines toward  
15                  the behavioral view, describing consent as something that “is given.” See Section 2.11(3)(a), (b),  
16                  and (c). To avoid tension between the two provisions, Section 213.0(1)(a) stipulates that the  
17                  language of Section 2.11 does not apply to Article 213.

18                  Subsection (2)(e)(i) defines consent as a person’s willingness to engage in a specific act of  
19                  sexual penetration, oral sex, or sexual conduct. Subsection (2)(e)(ii) specifies that consent may be  
20                  express or it may be inferred from behavior. The behavior can take the form of words, acts,  
21                  omissions, and other behavior that, in the context of all the circumstances, indicates assent to a  
22                  specific act of sexual penetration, oral sex, or sexual contact.

23                  Subsection (2)(e)(ii) makes explicit that neither verbal nor physical resistance is required to  
24                  establish the absence of consent. Thus, in contrast to an approach that was once common in  
25                  American law, there is no requirement that a person resist a forcible sexual advance in order for the  
26                  prosecution to establish the lack of consent. Even in the absence of physical force or coercive  
27                  threats, an unwilling person is not required to protest physically or verbally at the time of a sexual  
28                  advance; silent acquiescence does not automatically establish consent. But if a sexual act is clearly  
29                  foreshadowed and nothing suggests an impediment to the other person’s ability to object to it, the  
30                  totality of that person’s conduct, including both acts and omissions, can be considered in

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1 determining whether that person consented. In any case, under subsection (2)(e)(i), a complainant's  
2 testimony that the complainant was not willing for the sexual act to occur, if believed by the trier  
3 of fact, is sufficient to establish the absence of consent beyond a reasonable doubt.

4 Under Section 213.0(2)(e), consent is defined as the *presence* of willingness, not merely the  
5 *absence* of demonstrated unwillingness. This provision does not adopt the version of “affirmative  
6 consent” that is sometimes understood to require an explicit word (“yes”) or specific behavior  
7 (active cooperation) to communicate formal “agreement” to the specific sexual act. That standard  
8 may result in convictions for sexual encounters involving informal assent to an expected action in  
9 situations commonly understood as consensual. Nor, at the opposite end of the spectrum, does this  
10 Section assume that consent is present in the absence of physical or verbal resistance. That once-  
11 common approach precluded convictions for sexual acts now understood to be unwelcome.

12 In contrast to these sharply divergent alternatives, the contextual consent standard of Section  
13 213.0(2)(e) takes into account the complexities of sexual interactions, while endorsing the  
14 prevailing norm of requiring each party to be alert to the other's wishes. Rather than prescribing  
15 specific behavior that must be present to satisfy consent, contextual consent requires the trier of fact  
16 to examine the parties' observable behavior together with testimony about the complainant's  
17 subjective willingness or unwillingness, in the context of all the circumstances leading up to and  
18 during the sexual act, as the best way to determine whether a party consented to that act and whether  
19 the defendant exceeded lawful limits with a culpable mens rea. In making these judgments, the  
20 factfinder's examination of the totality of the circumstances may include the nature, duration, and  
21 quality of the parties' relationship, any history of sexual activity between them, the actor's  
22 awareness of any limits on the other's capacity to consent, and other relevant circumstances.

23 Subsection (2)(e)(iii) reflects the ordinary understanding that apparent willingness, even  
24 when clearly expressed, does not qualify as legally effective consent when it occurs in  
25 circumstances that involve conduct (such as force or coercion) or conditions (such as a person's  
26 incapacity) that render such expressed willingness inauthentic. Subsection (2)(e)(iii) makes this  
27 proviso explicit. To avoid the vagueness of simply requiring consent to be “voluntary” or “freely  
28 given,” subsection (2)(e)(iii) specifies that apparent willingness is ineffective only under the  
29 conditions specifically identified in the provisions of Article 213 that are enumerated in subsection  
30 (2)(e)(iii). Of course, in making the contextual assessment of whether willingness is present, all  
31 circumstances remain relevant, as specified in subsection (2)(e)(ii).

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1 Subsection (2)(e)(iii) also provides that a verbal expression of unwillingness establishes  
2 the lack of consent as a matter of law, in the absence of subsequent words or conduct indicating  
3 assent. The application of this “no’ means no” principle is more fully explained in the Comment  
4 to Section 213.6.

5 Subsection (2)(e)(iv) provides that consent may be revoked or withdrawn at any time  
6 before or during the act of sexual penetration, oral sex, or sexual contact. Conversely, the absence  
7 of consent or revocation or withdrawal of consent may be overridden by subsequent consent. In  
8 either case, the subsequent behavior can involve either words, conduct, or both, but to override the  
9 *status quo ante*, such behavior must be a sufficiently clear indication of the change from  
10 unwillingness to assent or vice versa. In any case, a person who has consented cannot withdraw  
11 that consent retroactively with respect to sexual acts that occurred before consent was revoked.

12 One qualification must be taken into account. A significant number of adults voluntarily  
13 engage in sex practices in which one party agrees to submit to force, threats, restraints, or other  
14 forms of control by another party; and permits the other party to ignore protests; but retains the  
15 right to terminate the submissive relationship in a particular, pre-agreed way.

16 Ordinarily, consent cannot be given freely in coercive conditions. And in any event,  
17 consent would be revoked by language of protest, such as “Stop!” But as long as that encounter is  
18 on terms accepted by consenting adults, does not involve serious bodily injury,<sup>1</sup> and can be  
19 terminated by either party at any time, criminal prohibition is unwarranted. The problem, largely  
20 one of precise drafting, is to ensure this result without weakening the principle that force, coercion,  
21 or verbal protests ordinarily invalidate consent. Section 213.10 addresses this concern by affording  
22 an affirmative defense for sexual encounters involving explicit prior permission, under conditions  
23 specified in that Section.

24 Section 1.12(1) of the Model Penal Code states that no person may be convicted of an  
25 offense unless the prosecution proves each element of that offense beyond a reasonable doubt. The  
26 prosecution has the burden throughout the case, including the burden to prove, beyond a reasonable  
27 doubt, the lack of consent and the defendant’s culpable awareness that the victim did not consent.  
28 The burden does not shift, including when the issue is whether there was consent that was later

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<sup>1</sup> Cf. MPC § 2.11(2)(a) (consent to conduct that causes or threatens bodily harm is a defense if “the bodily harm consented to or threatened . . . is not serious.”)

1 withdrawn. The requirement that the prosecution prove every element necessary for liability is  
2 familiar in the Model Penal Code and criminal law generally.<sup>2</sup>

3 Concrete illustrations of the application of Section 213.0(2)(e) are provided in the  
4 Comment to Section 213.6, which defines the offense of Sexual Assault in the Absence of Consent.

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

6 Section 213.0(2)(h), in conjunction with Section 213.11 (Sentencing and Collateral  
7 Consequences of Conviction), specifies which Article 213 offenses are “registrable” under the  
8 regime established by Section 213.11–213.11J. Section 213.0(2)(h) limits the scope of registration  
9 by providing that a conviction for an Article 213 offense can trigger registration requirements only  
10 when the Section defining that offense specifically states that the offense is registrable. This limit  
11 has no substantive implications in itself, but it serves the important purpose of emphasizing that  
12 registration requirements ought to be imposed only after a deliberate legislative judgment that the  
13 underlying offense is sufficiently serious to warrant this exceptional measure.

**REPORTERS’ NOTES**

14 **1. Consent.**

15 “Consent” plays a central role in distinguishing lawful from unlawful sexual conduct. In  
16 giving precision to the concept, a threshold question, much debated by the Institute, is whether  
17 consent is a feeling or an action. “Is it something that S subjectively experiences ... [or] is it  
18 something that S objectively performs? ... Does it lie in S’s mind? Or in S’s expressive acts?”<sup>3</sup>  
19 Both approaches are seen in ordinary language, in philosophical writing, and in law. Often usage  
20 is ambiguous, and often a choice between them simply does not matter: consent will either be  
21 present or absent from both perspectives. Nonetheless, when a person’s observable behavior and  
22 the person’s subjective attitude arguably diverge, the choice between perspectives could be  
23 decisive, and a factfinder must know which of them controls.

24 *Current law and practice.* Ordinary English usage leans toward seeing consent as  
25 willingness that a person *communicates*, either by *giving* consent or by other observable conduct,  
26 including the behavior of not objecting when the opportunity to do so arises. In its verb form, the  
27 leading definition of consent is “to *express* a willingness,”<sup>4</sup> and a prominent dictionary labels the

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<sup>2</sup> In theft offenses, for example, the element of unlawful taking typically requires the prosecution to prove beyond a reasonable doubt that the owner had not consented. See also Model Penal Code § 212.1 (1962) (defining kidnapping, a felony of the first degree, to include “removal or confinement . . . of a person who is under the age of 14 . . . accomplished without the consent of a parent”).

<sup>3</sup> PETER WESTEN, THE LOGIC OF CONSENT 139-140 (2004).

<sup>4</sup> Webster’s Third New International Dictionary of the English Language Unabridged 482 (1993) (emphasis added) (defining the verb as “to express a willingness . . . give assent or approval”).

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1 contrasting, subjective conception (“to be in harmony or concord”) as “*archaic*.”<sup>5</sup> As a noun, the  
2 principal definition of consent is stated as “permission” or “agreement”—something that (unlike  
3 willingness) is typically indicated by behavior, rather than simply felt.<sup>6</sup> Similarly, Black’s Law  
4 Dictionary primarily endorses the behavioral conception, defining consent as “[a] voluntary  
5 yielding to what another proposes or desires; *agreement, approval, or permission* regarding some  
6 act or purpose, esp. *given* voluntarily by a competent person.”<sup>7</sup> The 1962 Model Penal Code treats  
7 consent as something that “is given.”<sup>8</sup> English, Scottish, and Australian law define consent as a  
8 matter of external, observable behavior.<sup>9</sup> On the other hand, consent is defined as subjective  
9 willingness in the Restatement of Torts<sup>10</sup> and in Canadian criminal law.<sup>11</sup>  
10 American penal codes, if they define consent at all, almost uniformly use behavioral  
11 language.<sup>12</sup> A precise tally of the majority view, however, is complicated by the fact that many

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<sup>5</sup> Id.

<sup>6</sup> Id. (defining the noun as “compliance[,], approval[,], acquiescence or permission . . . capable, deliberate, and voluntary agreement to or concurrence in some act or purpose”). The term “agreement” is by no means unambiguous; it could be understood as referring either to an act or a state of mind. In discussions about sexual consent, however, advocates on all sides usually see the term “agreement” as evoking a behavioral requirement, and supporters of the subjective approach thus typically object to “agreement” as a term associated with overt “affirmative consent.” Webster’s gives three alternative definitions with a clear subjective focus: “harmony, concurrence”; “the being of one mind”; and “opinion, feeling.” It labels the first two “*archaic*” and the third “*obs. [obsolete]*.” Id.

<sup>7</sup> Black’s Law Dictionary (10th ed. 2014), consent (emphasis added).

<sup>8</sup> Model Penal Code § 2.11(3)(a), (b) & (c) (Proposed Official Draft, 1962).

<sup>9</sup> In England “a person consents if he agrees by choice, and has the freedom and capacity to make that choice.” Sexual Offences Act (2003), pt. 1, § 74. See also Sexual Offences (Scotland) Act 2009, (ASP 9), Part 2, § 12 (2016) (defining “consent” as “free agreement”); Crimes Act 1900 (New South Wales), as amended 1981, §61 - HA (2) (2016) (“A person ‘consents’ to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse.”); 1958 Crimes Act (Victoria), as amended 2007, § 34(C) (2016) (defining “consent” as “free agreement”). The laws of Northern Ireland, the Republic of Ireland and New Zealand apparently do not define consent.

<sup>10</sup>American Law Institute, Restatement 3d of Torts § 112. Preliminary Draft No. 3 of the current project to revise the Restatement of Torts maintains this distinction: “A person actually consents to an actor’s otherwise tortious intentional conduct if the persona is subjectively willing for that conduct to occur. Such consent can be express or it can be inferred from the facts. Actual consent ordinarily is, but need not be, communicated to the actor.” American Law Institute, Preliminary Draft No. 3, Restatement of the Law Third Torts: Intentional Torts to Persons, § 112(a), at p.117.

<sup>11</sup> In Canadian law consent means that “the complainant in her mind wanted the sexual touching to take place.” But a mens rea defense is available only in terms of affirmative consent: the “*mens rea* of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying ‘no’, but is also satisfied *when it is shown that the accused knew that the complainant was essentially not saying ‘yes’*.” Id. (emphasis added). R. v. Ewanchuk [1999] 1 S.C.R. 330, 1999 CanLII 711 (S.C.C.).

<sup>12</sup> Of the 29 relevant definitions of consent to be found in 28 American jurisdictions, at least 20 unambiguously rely on a behavioral focus. See text accompanying notes 15-17, *infra*. In many of these jurisdictions, the emphasis on behavior is unmistakable in language requiring, for example, “words or overt actions,” “affirmative and freely given permission,” “freely given agreement,” or “actual words or conduct.” See note 17 *infra*. Where jurisdictions use the word “agreement” without specifying that it must be “overt” or “given,” there is room to argue that a subjective attitude alone could qualify. Nonetheless, the term “agreement” is typically associated with strong behavioral notions of “affirmative consent.” See note 6, *supra*. In the remaining nine American jurisdictions, the statutory language arguably leaves room for subjective considerations but ultimately specifies that willingness must be judged by the complainant’s conduct under the totality of the circumstances. See note 17, *infra*.

Even where statutory language has a clear behavioral focus, judicial decisions sometimes seem to bring subjective considerations into the analysis, so a rigorous count of the subjective/objective divide can become debatable. That said, where a focus on either a subjective or objective conception can be discerned from the statutory language, the objective conception clearly predominates. See text accompanying notes 15-17, *infra*.

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1 states treat consent as a decisive offense element but do not define it, while some of the other states  
2 have different definitions of consent for different sexual offenses.<sup>13</sup>

3 At present, of the 53 most relevant American jurisdictions (the 50 states and the D.C., U.S.,  
4 and military codes), 19 provide no definition of consent at all. That approach provides no fair  
5 warning to actors of expected behavior and no guidance to factfinders who must resolve individual  
6 cases. It leaves unacceptable room for inconsistent, overbroad extensions of the criminal law in  
7 some cases and poses an unjustified obstacle to warranted convictions in other cases.

8 Of the 34 jurisdictions that define consent, only a few (six states) adhere to the older view  
9 that consent exists until negated by physical or at least verbal resistance.<sup>14</sup> The remaining 28  
10 jurisdictions are the ones we must look to in order to ascertain the prevailing conception of consent  
11 in American law. All 28 of these jurisdictions define consent in terms of behavior: More than half  
12 (15 jurisdictions) use an explicitly behavioral definition, stated variously as words or actions  
13 communicating permission, agreement, or concurrence.<sup>15</sup> Five additional jurisdictions, though less  
14 explicit, lean toward a focus on behavior, for example defining consent in terms of “express or  
15 implied acquiescence.”<sup>16</sup> Nine others at first blush appear to define consent as a matter of  
16 subjective willingness, but all nine stipulate that willingness must be judged by the complainant’s  
17 observable conduct.<sup>17</sup>

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<sup>13</sup> E.g., N.Y., Montana.

<sup>14</sup> ALASKA STAT. ANN. § 11.41.470(8); DEL. CODE ANN. tit. 11, § 761; MONT. CODE ANN. § 45-5-501; NEB. REV. STAT. § 28-318(8); TEX. CODE ANN. § 22-011(b); UTAH CODE ANN. § 76-5-406. Montana, like California, provides a statutory definition of consent that applies to certain especially serious penetration offenses. Like California, however, Montana also defines a misdemeanor sexual contact offense, for which a different definition applies (which in both states constitutes a form of willingness, per case law). Double-counting California (its statutory and judicial definitions, which apply to different offenses) does not cause any obvious problems, because both definitions require positive willingness. But because Montana’s statutory definition is so visibly at odds with its judicial definition (again, each of which explicitly applies to different offenses), the discrepancy is more apparent.

<sup>15</sup> These 15 jurisdictions are: California, Colorado, D.C., Florida, Hawaii, Illinois, Kansas, Minnesota, Nebraska, New Jersey, New York, Vermont, Washington, Wisconsin, and the UCMJ. See, CAL. PENAL CODE § 261.6 (“positive cooperation”); COLO. REV. STAT. ANN. § 18-3-401(1.5) (“cooperation in act or attitude pursuant to an exercise of free will”); D.C. CODE § 22-3001(4) (“words or overt actions indicating a freely given agreement”); FLA. STAT. ANN. § 794.011 (“intelligent, knowing, and voluntary consent”); HAW. REV. STAT. § 707-700 (2011) (“absence of consent”—in *State v. Adams*, 880 P.2d 226 (Haw. Ct. App. 1994), the court held consent is “voluntary agreement or concurrence”); 720 ILL. COMP. STAT. ANN. 5/11-1.70 (“freely given agreement”); *State v. Blount*, 770 P.2d 852 (Kan. Ct. App. 1989) (“capable, deliberate, and voluntary agreement to or concurrence in”); MINN. STAT. ANN. § 609.341, subdiv. 4 (“words or overt actions by a person indicating a freely given present agreement”); NEB. REV. STAT. § 28-318 (8) (2021): “Without consent means ... the victim expressed a lack of consent through words [or] conduct....” *State in the Interest of MTS*, 609 A.2d 1266 (N.J. 1992) (“affirmative and freely given permission”); N.Y. PENAL LAW § 130.05(2)(d) (lack of consent requires that “the victim clearly expressed that he or she did not consent . . . and a reasonable person in the actor’s situation would have understood such person’s words and acts as an expression of lack of consent to such act under all the circumstances.”); VT. STAT. ANN. tit. 13, § 325 (“words or actions by a person indicating a voluntary agreement”); WASH. REV. CODE ANN. § 9A.44.010(7) (“actual words or conduct indicating freely given agreement”); WIS. STAT. ANN. § 940.225(4) (“words or overt actions . . . indicating a freely given agreement”); 10 U.S.C. § 920(8) (“freely given agreement”).

<sup>16</sup> ALA. CODE § 13A-6-70; KY. REV. STAT. ANN. § 510.020; ME. REV. STAT. ANN. tit. 17-A, § 255-A(1)(B); N.Y. PENAL LAW § 130.05(2); W. VA. CODE ANN. § 61-8B-2(3). In three of these five, the absence of consent, so defined, is sufficient (together with penetration) to constitute a criminal offense. See ME. REV. STAT. ANN. tit. 17-A, § 255-A; KY. REV. STAT. ANN. § 510.130; N.Y. PENAL LAW § 130.55. In the remaining two (Alabama and West Virginia), criminality requires some element in addition to the absence of consent, such as incapacity, an age gap, or other vulnerabilities.

<sup>17</sup> ARIZ. REV. STAT. § 13-1401 (as interpreted in *State v. Witwer*, 175 Ariz. 305 (Ariz. Ct. App. 1993)); *State v. Meyers*, 799 N.W.2d 132 (Iowa 2011); MO. ANN. STAT. § 556.061(5) (“consent or lack of consent may be expressed or implied”); *State v. Stevens*, 53 P.3d 356 (Mont. 2002); *McNair v. State*, 108 Nev. 53 (1992); *State v. Miller*, 220 S.E.2d 326, 343 (N.C. 1975); OR.

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1           *Assessment.* Considerations offered in favor of each approach (behavioral and attitudinal)  
2 are both theoretical and practical. A leading theoretical argument for the subjective focus is that  
3 individuals who are subjectively willing to have sex are not *wronged*, regardless of what they may  
4 have overtly done or said. Those on the other side in this debate argue that unlike tort law, the  
5 criminal law (and the Model Penal Code in particular) are not confined to situations in which actual  
6 harm results—witness the law of attempts, reckless endangerment and other areas where criminal  
7 liability attaches even though no victim suffers an injury compensable in tort.<sup>18</sup> At least since the  
8 year 1576, English law has punished sexual penetration of a child as rape *per se*<sup>19</sup> because the  
9 offense presents intolerable risks of sexual and psychological injury, a danger that fully justifies  
10 punishment regardless of whether the particular child initiated or welcomed the encounter and  
11 regardless of whether the prosecution can prove that the particular child was demonstrably harmed  
12 by it. Those who favor a focus on overt behavior also argue that a person who engages in an act of  
13 sexual penetration without having a behavioral basis to believe that the other person is willing *does*  
14 wrong the other person, regardless of how that person might secretly feel—just as a person feels  
15 wronged when a friend takes money from the person’s wallet without asking, even if the person  
16 would have willingly given the money to the friend if asked.<sup>20</sup>

17           In practical terms, a subjective approach may benefit *either* prosecution or defense,  
18 depending on the circumstances. Suppose, for example, that a complainant’s behavior signaled  
19 lack of consent, but the defendant was able to muster other evidence showing actual willingness—  
20 for example, text messages to friends after the encounter. In that scenario, an entirely subjective  
21 focus allows the defendant to argue that internal willingness was present, despite appearances to

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REV. STAT. 163.315(2); 18 PA. CONS. STAT. ANN. § 3107 (applied in *Commonwealth v. Prince*, 719 A.2d 1086 (Pa. Super. Ct. 1998), which approves notion that consent is “willing to engage in these activities *and makes her willingness known* to the defendant by words or behavior”) (emphasis added); TENN. CODE ANN. § 39-13-503(2). New Hampshire presents a borderline case. The statute, N.H. REV. STAT. § 632-A:2(I)(m), penalizes an act of penetration “[w]hen at the time of the sexual assault, the victim indicates by speech or conduct that there is not freely given consent to performance of the sexual act,” but does not otherwise define consent. In *State v. Lisasuain*, 117 A.3d 1154 (N.H. 2015), the court applied a totality of the circumstances test to uphold the conviction, noting that “legislature did not enact a statute that makes passive silence stand for lack of consent.” California also could be included in this count, as courts have held that its misdemeanor offense should be assessed in language that sounds akin to a totality of the circumstances. See, e.g., *People v. Babaali*, 90 Cal. Rptr. 3d 278, 282, 287 (Cal. App. 2009); *infra* note 65.

Note that these classifications sum to 29, rather than 28, because Montana has two divergent definitions, which depend on the offense, and so is counted twice. See *supra* note 14.

<sup>18</sup> Contributory negligence—a partial or complete defense to recovery in tort—is never a defense in criminal law. E.g., *Dickerson v. State*, 441 So. 2d 536 (Miss. 1983). Similarly, a homeowner who deploys an automatic “trap gun” to protect the residence from burglary may escape tort liability—but not criminal liability—in the case of an injured intruder who had entered illegally, because “whatever may be thought in torts, the foregoing rule setting forth an exception to liability for death or injuries inflicted by such devices [upon a wrongdoer] ‘is inappropriate in criminal law for it is obvious that it does not prescribe a workable standard of conduct; liability depends upon fortuitous results.’” *People v. Ceballos*, 526 P.2d 241, 244-245 (Cal. 1974) (quoting Model Penal Code, Tent. Draft No. 8, § 3.06, cmt. 15).

<sup>19</sup> 18 Eliz. ch. 7 § 4.

<sup>20</sup> See Westen, *supra* note 3, at 149-150 (“[R]egardless of how S may secretly feel about having sexual intercourse with A, she suffers an indignity when A proceeds to have sexual intercourse without his having reason to believe that S is subjectively and voluntarily choosing it for herself.”). Westen nonetheless goes on to argue in favor of the subjective view. In contrast, Alan Wertheimer, in the other leading book-length analysis of the issue, concludes that only an objective, performative conception of consent is sustainable. ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* (2003) 146-148 (“[I]f the point of consent is to alter our normative relations with *others*, then I would insist that some public indication of our will is required.”).

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1 the contrary. That conclusion, however, is subject to an important proviso where, as in Section  
2 213.0(2)(e), the concept of consent as subjective willingness is combined with the stipulation that  
3 a clear verbal refusal establishes lack of consent as a matter of law. Under the qualified subjective  
4 approach that Section 213.0(2)(e) endorses, a defendant cannot argue that internal willingness was  
5 present, despite appearances to the contrary, when the external appearances included the  
6 complainant's clear verbal refusal.

7 In other circumstances, the subjective approach more directly favors the prosecution. In  
8 virtually any prosecution, the complainant will testify emphatically, usually in highly emotional  
9 terms, that the sexual encounter was *definitely not* wanted. The defendant can testify at first hand  
10 to the complainant's observable behavior, but the defendant may find it difficult to challenge the  
11 complainant's testimony about what the complainant subjectively felt. If the jury therefore finds  
12 this complainant testimony credible, that testimony by itself establishes the key actus reus  
13 element—absence of consent—beyond a reasonable doubt. As a result, under the subjective  
14 approach to defining consent, the principal line of defense in situations like this will usually have  
15 to be the absence of mens rea—that the complainant's observable behavior led the defendant to  
16 make a good faith mistake about consent. From the defense perspective, therefore, the applicable  
17 mens rea requirement assumes great importance.

18 Article 213's substantive offenses all require at least recklessness, and the subjective  
19 definition of consent makes it especially important that jurisdictions adopt the MPC approach in  
20 that regard. Currently, however, almost all American jurisdictions adhere to a *mens rea* standard  
21 no higher than negligence with respect to mistakes about sexual consent,<sup>21</sup> and several states  
22 impose strict liability.<sup>22</sup> If a jurisdiction accepts the Draft's definition of consent without changing  
23 its *mens rea* rules, a defendant could be convicted despite overt complainant behavior suggesting  
24 willingness, in a case where (1) the complainant convincingly testified that her subjective desires  
25 were otherwise, and (2) the jury believed that a reasonable person would have realized as much.

26 Recent cases applying a subjective conception of consent illustrate this dynamic. In *State*  
27 *v. Donahue*,<sup>23</sup> the complainant admitted that the defendant didn't use force and that she never  
28 indicated lack of consent, but the court affirmed the conviction, holding that complainant's  
29 testimony that defendant's actions were “[a]gainst [her] will” was sufficient by itself to prove  
30 absence of consent beyond a reasonable doubt. In *Commonwealth v. Hernandez*,<sup>24</sup> complainant  
31 AB and defendant were heavily intoxicated; both passed out right after their sexual encounter. AB  
32 admitted having no memory of intercourse or the events immediately preceding it, but testified  
33 that “she did not, and would not have consented to having sex with her own brother-in-law.”  
34 Moreover, “A.B.'s *reaction the following morning* [including] her shock and surprise to find

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<sup>21</sup> E.g., *State v. Smith*, 554 A.2d 713 (Conn. 1989). See Model Penal Code: Sexual Assault and Related Offenses, Preliminary Draft No. 5 (Sept. 8, 2015), at 169-170 & n. 493.

<sup>22</sup> See Model Penal Code, *supra* note 21, at 169-170 & n. 494 (citing seven U.S. jurisdictions that appear to permit strict liability, including four that punish merely on the basis of an absence of affirmative consent).

<sup>23</sup> 957 N.W.2d 1, 11 (Iowa 2021).

<sup>24</sup> 242 A.3d 452, 2020 Pa. Super. Unpub. LEXIS 3679.

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1 herself in a state of undress and Appellant naked ... is additional circumstantial evidence of her  
2 lack of consent.”<sup>25</sup> On this basis the court held: “[the prosecution] satisfied [its] burden of proving  
3 lack of consent beyond a reasonable doubt.”<sup>26</sup> The subjective approach to consent therefore poses  
4 a significant risk to the defense in jurisdictions that permit conviction on a mens rea less than  
5 recklessness.

6 In a jurisdiction that requires proof of a reckless *mens rea*, it might appear that the  
7 subjective approach must inevitably help the defense, because it offers “two bites at the apple”:  
8 the defendant can argue that the complainant was subjectively willing, but if the defendant loses  
9 that argument, the defense can still use the behavioral evidence to argue that the defendant *thought*  
10 the complainant was willing. In practice, trial dynamics can undercut this defense advantage and  
11 obscure any practical difference between the two “bites.” In the scenario where a complainant  
12 testifies to feelings of unwillingness, notwithstanding overt behavior that led the defendant to  
13 assume willingness (for example, a complainant who passively acquiesced to the defendant’s  
14 sexual aggressions), the subjective definition directs the jury’s attention to what the complainant  
15 felt and gives pivotal importance to testimony about internal emotions. If instead consent were  
16 defined solely in terms of observable conduct, the jurors would not be required to focus so centrally  
17 on whether they believe the complainant’s account of undisclosed feelings; testimony about  
18 internal feelings would have only indirect relevance to *behavioral* consent.

19 In sum, the subjective standard can benefit either the prosecution or the defense, depending  
20 on the circumstances.

21 *The Model Code.* Against the background of these considerations, Section 213.0(2)(e)  
22 adopts a blended approach. As a threshold matter, it defines consent as a person’s willingness to  
23 engage in a specific act of sexual penetration or sexual contact (Subsection (2)(e)(i)). Such  
24 willingness may be express or it may be inferred from behavior in the context of all the  
25 circumstances (subsection (2)(e)(ii)), and a clear verbal refusal—such as “No,” “Stop,” or  
26 “Don’t”—establishes a lack of consent (subsection (2)(e)(iv)).

27 Inevitably in any encounter, each party must focus on the other party’s behavior to  
28 understand that party’s intentions or feelings. In any subsequent prosecution, the factfinder must  
29 similarly focus on the parties’ behavior in the context of the surrounding circumstances, together  
30 with testimony directed to the complainant’s subjective feelings, in order to judge whether a person  
31 consented and whether the defendant was aware of that consent. As subsection (2)(e)(ii) makes  
32 clear, a complainant need not resist in order to establish that consent was absent; instead, the  
33 relevant behavior encompasses words, conduct, or any combination, including both acts and  
34 omissions, as assessed under the totality of the circumstances.

35 Some recent definitions of consent are described as adopting an “affirmative consent”  
36 approach, which in some of its versions is understood as requiring express words or positive acts  
37 giving permission for the sexual act at issue. In connection with sexual conduct, “affirmative

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<sup>25</sup> *Id.*, at \*7-8, \*11-12 (emphasis added).

<sup>26</sup> *Id.*

## Section 213.2. Sexual Assault by Physical Force or Restraint

1 consent” is often used in contexts outside criminal law, ranging from disciplinary proceedings for  
2 sexual misconduct on college or university campuses to personal judgments about best practices.  
3 Criminal law enforcement of this version of an “affirmative consent” standard risks convictions  
4 with severe penal sanctions for sexual encounters commonly thought to be consensual, such as in  
5 contexts involving continued acquiescence in gradually escalating intimacies or an unstated  
6 implicit assent between parties in longstanding relationships to engage in mutually familiar sexual  
7 acts. By contrast, under the contextual consent approach of Section 213.0(2)(e), consent is absent  
8 unless the person concerned is actually willing, and willingness can be confirmed by either a clear  
9 positive expression of assent or other words or conduct constituting consent in the context of all  
10 the circumstances. This standard can be described as falling in the middle of the range between  
11 requiring a positive attestation of agreement at one end of the spectrum, or explicit refusal or  
12 resistance at the other. Rather than prescribing the precise manner in which consent must be  
13 communicated, contextual consent under Section 213.0(2)(e) requires the factfinder to consider  
14 the complainant’s subjective willingness and observable words and conduct leading up to and  
15 during their encounter, in the context of all the circumstances, to determine whether a sexual  
16 encounter was consensual.<sup>27</sup>

### 17 **2. “Registrable offense” – Section 213.0(2)(h).**

18 The Reporters’ Notes for this definition are found in Section 213.11.

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## 19 SECTION 213.2. SEXUAL ASSAULT BY PHYSICAL FORCE OR RESTRAINT

20 **(1) *Sexual Assault by Physical Force or Restraint.* An actor is guilty of Sexual Assault**  
21 **by Physical Force or Restraint when:**

22 **(a) the actor engages with another person in, or causes another person to**  
23 **engage in, submit to, or perform, an act of sexual penetration or oral sex; and**

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

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

27 **(ii) the actor’s use of or threat to use physical force or restraint causes**  
28 **the other person to engage in, submit to, or perform the act of sexual**  
29 **penetration or oral sex; and**

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<sup>27</sup> In accord with this contextual approach, see, e.g., *M.C. v. Bulgaria*, [2003] ECHR 39272/98, ¶ 161 (noting that in many countries and in international criminal law “the prosecution of non-consensual sexual acts [even in the absence of force] is sought in practice... through a context-sensitive assessment of the evidence”).

Section 213.2. Sexual Assault by Physical Force or Restraint

1           (c) the actor is reckless with respect to the conduct, attendant circumstances,  
2           and results specified in paragraphs (a) and (b).

3           (2) *Grading*. Sexual Assault by Physical Force or Restraint is a felony of the third  
4           degree [10-year maximum] and a registrable offense.

5           **Comment:**

6           *Grading*. Section 213.2 covers reckless conduct of widely varying culpability, from the  
7           use of physical force or restraint that leaves no mark to slaps, punches, and kicks that result in cuts,  
8           bruises, and traumatizing fear. It can even extend to the use of aggravated physical force or restraint  
9           that causes serious bodily injury; that conduct is covered by Section 213.1 only when the actor  
10          *knows* that such force or restraint causes the other person to submit to or perform the sexual act. If  
11          the actor is only reckless in that regard, Section 213.1 is not available, and the lesser penalties of  
12          Section 213.2 apply, up to the maximum authorized for a felony of the third degree.<sup>28</sup> Within that  
13          authorized range, the sentence imposed, as with any criminal conviction, ought to reflect the  
14          relative severity of the offense in the context of all the circumstances, as discussed in the revised  
15          sentencing provisions of the Code.<sup>29</sup>

16          Sexual Assault by Physical Force or Restraint is graded as a third-degree felony, and it is  
17          a registrable offense.

**REPORTERS' NOTES**

18          *Grading*. This offense, Sexual Assault by Physical Force or Restraint, involves the use of  
19          physical force or restraint to cause the victim to engage in, submit to, or perform an act of sexual  
20          penetration or oral sex. Under current law, authorized sentences for state offenses comparable to  
21          Section 213.2 range from a high of life (Florida) or life without parole (Georgia) to maximums  
22          (absent recidivist enhancements) of eight years (California), 10 years (New Jersey), 12-15 years  
23          (North Carolina, Michigan), and 16.5 years (Ohio).<sup>30</sup>

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<sup>28</sup> The revised sentencing provisions of the Model Penal Code provide that this offense level is subject to “a term of incarceration ... [that] shall not exceed [10] years.” MODEL PENAL CODE: SENTENCING (AM L. INST., Official Statutory Text, May 24, 2017), Section 6.06(6)(b). The brackets indicate that the appropriate level of punishment is regarded as a “fundamental policy question[] that must be confronted by responsible officials within each state.” See Comment 2 to Section 213.1, at note 16, quoting *id.*, at Comment *k*, p. 157.

<sup>29</sup> MODEL PENAL CODE: SENTENCING, *supra* note 28.

<sup>30</sup> CAL. PENAL CODE § 264(a) (Deering 2020); FLA. STAT. §§ 794.011(5)(b), 775.084(4)(b)(1) (2019); GA. CODE ANN. § 16-6-1(b) (2019); N.J. STAT. ANN. §§ 2C:14-2(c), 2C:43-6(a)(2); MICH. COMP. LAWS § 750.520d(2) (2020); N.C. GEN. STAT. §§ 14-27.22(b), 15A-1340.17(c), (f) (2020); OHIO REV. CODE ANN. §§ 2907.02(b), 2929.14(a)(1)(a), 2929.144(b)(1) (LexisNexis 2019). In some states additional enhancements apply when the victim is a young child.

1           Given the classification of Sexual Assault by Aggravated Physical Force or Restraint as  
2 either a felony of the second degree or a felony of the third degree—enhanced by an authorized  
3 maximum sentence five years greater than that ordinarily applicable to a third-degree felony—the  
4 less serious offense of Sexual Assault by Physical Force or Restraint (involving either non-  
5 aggravated physical force or restraint, or aggravated physical force or restraint used with a reckless  
6 rather than a knowing mens rea) is properly placed at the next lowest grading level, that of a third-  
7 degree felony.<sup>31</sup> The next lower grade for this offense, the fourth-degree felony, would likely place  
8 the offense at a lower level than that found in any American jurisdiction.

9           With respect to registration and other collateral consequences applicable primarily to  
10 persons convicted of a sexual offense, the conduct sufficient for conviction under Section 213.2  
11 spans a wide range of threatening behavior. The covered threats include any threat of more than  
12 negligible force that causes the other person to submit to or perform a sexual act, and the offense  
13 reaches conduct that is reckless but not necessarily purposeful or knowing. Even at the lower levels  
14 of culpability, however, the offense involves an actor’s conscious awareness of using a threat of  
15 physical force or restraint to pursue a sexual objective not welcomed by the other person.  
16 Registration—but solely for the use of law enforcement—is therefore is appropriate.

17 **SECTION 213.3. SEXUAL ASSAULT OF AN INCAPACITATED, VULNERABLE, OR LEGALLY**  
18 **RESTRICTED PERSON**

19           ***(1) Sexual Assault of an Incapacitated Person. An actor is guilty of Sexual Assault of***  
20 **an Incapacitated Person when:**

21                   **(a) the actor engages with another person in, or causes another person to**  
22 **engage in, submit to, or perform, an act of sexual penetration or oral sex; and**

23                   **(b) the act is without effective consent because at the time of the act, the other**  
24 **person:**

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

27                           **(ii) lacks substantial capacity to appraise, control, or remember the**  
28 **person’s own sexual conduct or that of anyone else because of a substance**  
29 **administered to that person, without that person’s knowledge or consent; and**  
30 **the actor administered the incapacitating substance for the purpose of causing**

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<sup>31</sup> See Reporters’ Note to Section 213.1.

1           that incapacity or knows that it was surreptitiously administered by another  
2           for that purpose; and

3           (c) the actor is reckless with respect to the conduct, attendant circumstances,  
4           and results specified in paragraphs (a) and (b).

5           **Sexual Assault of an Incapacitated Person is a felony of the third degree [*10-year***  
6 ***maximum*]** and a registrable offense.

7           **(2) *Sexual Assault of a Vulnerable Person.* An actor is guilty of Sexual Assault of a**  
8 **Vulnerable Person when:**

9           (a) the actor engages with another person in, or causes another person to  
10           engage in, submit to, or perform, an act of sexual penetration or oral sex; and

11           (b) the act is without effective consent because at the time of the act, the other  
12           person:

13                   (i) has an intellectual, developmental, or mental disability, or a mental  
14                   illness, that makes the person substantially incapable of appraising the nature  
15                   of the sexual activity involved, or of understanding the right to give or  
16                   withhold consent in sexual encounters, and the actor has no similarly serious  
17                   disability; or

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

19                   (iii) lacks substantial capacity to communicate lack of consent; or

20                   (iv) is wholly or partly undressed, or in the process of undressing, for  
21                   the purpose of receiving nonsexual professional or commercial services from  
22                   the actor and has not given the actor explicit prior permission to engage in that  
23                   act; and

24           (c) the actor is reckless with respect to the conduct, attendant circumstances,  
25           and results specified in paragraphs (a) and (b).

26           **Sexual Assault of a Vulnerable Person is a felony of the fourth degree [*five-year***  
27 ***maximum*]** and a registrable offense.

28           **(3) *Sexual Assault of a Legally Restricted Person.* An actor is guilty of Sexual Assault**  
29 **of a Legally Restricted Person when:**

30           (a) the actor, who did not have a consensual sexually intimate relationship with  
31           the legally restricted person at the time when that state-imposed restriction on that

1           **person’s liberty began, engages with that person in, or causes that person to engage**  
2           **in, submit to, or perform, an act of sexual penetration or oral sex; and**

3                   **(b) the act is without effective consent because at the time of the act, the other**  
4           **person is:**

5                           **(i) in custody, incarcerated, on probation, on parole, under civil**  
6                           **commitment, in a pretrial release or pretrial diversion or treatment program,**  
7                           **or in any other status involving a state-imposed restriction on liberty; and**

8                           **(ii) the actor is in a position of actual or apparent authority or**  
9                           **supervision over the restriction on the other person’s liberty; and**

10                   **(c) the actor acts knowingly with respect to the conduct, attendant**  
11           **circumstances, and results specified in paragraphs (a) and (b).**

12           **Sexual Assault of a Legally Restricted Person is a felony of the fourth degree [five-**  
13           **year maximum].**

\*\*\*\*

#### REPORTERS’ NOTES

14           Sexual Assault of an Incapacitated Person (subsection (1)) is a felony of the third degree,  
15           with a benchmark maximum of 10 years, and Sexual Assault of a Vulnerable Person (subsection  
16           (2)) is a felony of the fourth degree, with a benchmark maximum of five years.<sup>32</sup> Under current  
17           law, authorized sentences for state offenses comparable to Sections 213.3(1) & (2) range from a  
18           high of life (Virginia, Missouri) or life without parole (Georgia, Washington) to maximums (absent  
19           recidivist enhancements) of 10 years (New Jersey), 14-15 years (North Carolina, Michigan), and  
20           20 years (Maryland, Pennsylvania, Tennessee).<sup>33</sup> Both offenses demonstrate a callous willingness  
21           to exploit the incapacity or vulnerability of another person, and therefore registration—but solely  
22           for the use of law enforcement—is appropriate for both offenses.

23           Sexual Assault of a Legally Restricted Person is a felony of the fourth degree, with a  
24           benchmark maximum of five years. Under current law, authorized sentences for state offenses  
25           comparable to Section 213.3(3) range from a high of life (Florida) to maximums (absent recidivist  
26           enhancements) of one year (California, Virginia), five years (Illinois, Ohio, Michigan), 20-25 years

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<sup>32</sup> Under MODEL PENAL CODE: SENTENCING (Proposed Final Draft, April 10, 2017) (hereafter MPCs), these benchmark points of reference for maximum sentences at each grade of an offense are stated in brackets. A Comment to Section 6.06(6)(c) explains: “The revised Code does not offer exact guidance on the maximum prison terms that should be attached to different grades of felony offenses. Instead, maximum authorized terms are stated in brackets in part because judgments about the sanctions appropriate to a felony of the second degree are fundamental policy questions that must be confronted by responsible officials within each state.” Id., Comment *k*, p. 157

<sup>33</sup> TBS on file. In some states additional enhancements apply when the victim is a young child.

Section 213.3 Sexual Assault of an Incapacitated, Vulnerable, or Legally Restricted Person

1 (Georgia, Pennsylvania), and 31 years (Wisconsin), with a median maximum sentence of  
2 approximately seven years.<sup>34</sup> Because conduct that falls within Section 213.3(3) supports  
3 conviction without proof of physical force, physical restraint, extortionate coercion, or the kind of  
4 incapacity/vulnerability required for conviction under Section 213.3(1) & (2), the offense therefore  
5 is not registrable.

\*\*\*\*

6 **SECTION 213.5. SEXUAL ASSAULT BY PROHIBITED DECEPTION**

7 **(1) An actor is guilty of Sexual Assault by Prohibited Deception when:**

8 **(a) the actor engages with another person in, or causes another person to**  
9 **engage in, submit to, or perform, an act of sexual penetration or oral sex; and**

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

11 **(i) the actor caused the other person to believe falsely that the act had**  
12 **diagnostic, curative, or preventive medical properties; or**

13 **(ii) the actor caused the other person to believe falsely that the actor**  
14 **was someone else who was personally known to that person; and**

15 **(iii) the actor's deception causes the other person to engage in, submit**  
16 **to, or perform the act of sexual penetration or oral sex; and**

17 **(c) the actor acts knowingly with respect to the conduct, attendant**  
18 **circumstances, and results specified in paragraphs (a) and (b).**

19 **(2) Grading. Sexual Assault by Prohibited Deception is a felony of the fifth degree**  
20 **[three-year maximum].**

\*\*\*\*

21 **Comment:**

22 **Mens rea.** Subsections (1)(b)(iii) and (1)(c) require that the actor know that the actor has  
23 induced the false belief, and that the actor know that this false belief has caused the other person  
24 to engage in an act of sexual penetration or oral sex.

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<sup>34</sup> TBS on file. In some states additional enhancements apply when the victim is a young child. In several states (e.g., Maryland, Massachusetts, North Carolina) conduct that falls within Section 213.3(3) is not a punishable offense.

## Section 213.5. Sexual Assault by Prohibited Deception

1           The 1962 Code punished acts of intercourse when an actor knowingly deceived a woman  
2 into believing the actor was her husband.<sup>35</sup> In applying a mens rea of knowledge, the Commentary  
3 explained that although “the statute in terms does not require that the woman’s mistaken belief  
4 must be induced by the actor, he must have knowledge that her submission to his advances is based  
5 on a mistaken supposition as to their marital status.”<sup>36</sup>

6           Consistent with Section 213.1(2)(c) of the 1962 Code, Section 213.5 imposes a mens rea  
7 of knowledge. However, several additional points of clarification are required. First, Section  
8 213.5—unlike the 1962 Code—applies not just to deceptions as to the identity of a personally  
9 known individual, but also to medical misrepresentations.

10           Second, Section 213.5—unlike the 1962 Code—requires not just that the actor know that  
11 the other person engaged in the act as a result of the false belief, but also that the actor knowingly  
12 induced the false belief. Thus, an actor who knowingly takes advantage of a false belief held by  
13 another person—but not caused by the actor—is not liable. Nor is an actor liable if the actor  
14 knowingly causes another person to believe in a falsehood, but does not know that this belief has  
15 caused the person to engage in the sexual act. Both culpable elements are required: the actor’s  
16 knowing induction of the false belief and the actor’s knowledge that this belief caused the act of  
17 sexual penetration or oral sex. Although it may be morally repugnant to exploit another person’s  
18 ignorance for sexual gratification, it tests the boundaries of the penal law to enforce such a blurry  
19 line between ill-advised sexual decisions and exploitative ones.

20           Third, unlike the 1962 Code, Section 213.5 does not require that the actor be the person  
21 with whom the act of penetration or oral sex occurs. For instance, Section 213.5 applies to an actor  
22 who knowingly causes another person to believe falsely that sex with a third party will cure the  
23 person’s cancer. The actus reus and mens rea of Section 213.5 require only that the actor know  
24 that the actor is inducing the false belief and know that this false belief causes the other person to  
25 engage in the act of penetration or oral sex; it does not require that the sexual act be with the actor.

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<sup>35</sup> 1962 Code Section 213.1(2)(c) (“Gross Sexual Imposition. A male who has sexual intercourse with a female not his wife commits a felony of the third degree if: ... c) he knows ... that she submits because she mistakenly supposes that he is her husband.”).

<sup>36</sup> 1962 Code Comment to Section 213.1(2)(c), at 333.

**REPORTERS' NOTES**

1           Although recklessness is the default mens rea for the Model Penal Code, that mens rea  
2 sweeps too broadly in the case of deception. When a knowing mens rea is required, an intentionally  
3 deceptive actor may escape liability if that person is able to convince a jury that the actor was  
4 aware only of a substantial risk, but not a practical certainty, that deception induced the other  
5 person's willingness to participate in the sexual act. But allowing a deception-based conviction  
6 upon a lesser showing risks injustice. For this reason, a mens rea of purpose is often required in  
7 other offenses involving fraud and deception, such as the Model Penal Code provisions addressed  
8 to fraud and deception in taking property.<sup>37</sup> For Section 213.5, *purpose* sets the bar too high,  
9 because an actor who knows with practical certainty that the actor is causing an erroneous belief,  
10 and knows that this belief has caused the sexual act, should be liable—even if the actor's conscious  
11 object was not to cause the sex act but rather something else (such as revenge). Thus requiring  
12 *knowledge* strikes the right balance between ensuring that actors who knowingly induce and  
13 capitalize on deception are punished and deterred, while avoiding liability for actors who engage  
14 in risky but not knowingly harmful behavior.

\*\*\*\*

15 **SECTION 213.7. AGGRAVATED OFFENSIVE SEXUAL CONTACT; OFFENSIVE SEXUAL CONTACT**

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

18                   **(a) the actor knowingly engages with another person in, or causes another**  
19 **person to engage in, submit to, or perform, an act of sexual contact; and**

20                   **(b) the act is without effective consent because the act, had it been one of sexual**  
21 **penetration or oral sex, would be an offense as defined by:**

22                           **(i) Section 213.1 or 213.2;**

23                           **(ii) Section 213.3(1) or (2); or**

24                           **(iii) Section 213.4.**

25           **Aggravated Offensive Sexual Contact is a felony of the fifth degree [*three-year***  
26 ***maximum*]. It is a registrable offense when it involves a violation of subsection (1)(b)(i) or (ii).**

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<sup>37</sup> See, e.g., 1962 Code Section 223.3 (“Theft by Deception. A person is guilty of theft if he *purposefully* obtains property of another by deception. A person deceives if he *purposefully*: creates or reinforces a false impression ....”) (emphasis added); id. Section 224.1 (“Forgery. (1) Definition. A person is guilty of forgery if, with *purpose* to defraud or injure anyone....”) (emphasis added); id. Section 224.3 (“Fraudulent Destruction, Removal or Concealment of Recordable Instruments. ... if with *purpose* to deceive or injure anyone, he destroys...”) (emphasis added).

## REPORTERS' NOTES

1           **Grading.** Absent aggravating circumstances, the base offense of Offensive Sexual Contact  
2 (Section 213.7(2)) is graded as a petty misdemeanor. The offense is more serious when the actor  
3 uses or threatens physical force, physical restraint, or an extortionate demand, or when the other  
4 person is incapacitated or vulnerable. In those circumstances, Section 213.7(1) raises the penalty  
5 to a fifth-degree felony for the offense of Aggravated Offensive Sexual Contact. A violation of  
6 Section 213.7(1) is especially serious, and therefore a registrable offense, when it involves the use  
7 of physical force, physical restraint, or a vulnerable or incapacitated victim. Registration is not  
8 warranted, however, when the offense has been committed through the use of nonviolent coercion.

9           Contemporary law reflects a broad range of maximum penalties for violations of sexual-  
10 contact statutes, as it does for sexual-penetration statutes.<sup>38</sup> However, there are several points of  
11 consensus. First, there is consensus that the baseline sexual-contact offense, which punishes  
12 contact with an adult that is offensive or without that person's consent, but without aggravating  
13 circumstances, is in almost all cases graded as a low-level misdemeanor.<sup>39</sup> Second, forcible-  
14 touching offenses, and contact with vulnerable persons (such as the mentally impaired), are  
15 typically graded as felonies,<sup>40</sup> at times carrying quite severe penalties.<sup>41</sup>

16           In keeping with existing law, Section 213.7 grades the basic sexual-contact offense as a  
17 petty misdemeanor. Notwithstanding the denotation "petty," the Model Penal Code Sentencing  
18 provisions suggest six months' incarceration as a rough point of reference for the maximum  
19 punishment in the case of a petty misdemeanor.<sup>42</sup>

20           Section 213.7 generally departs from existing law in two respects. Section 213.7(1) grades  
21 the aggravated contact offenses as a fifth-degree felony (suggesting a three-year maximum as a  
22 rough point of reference), as opposed to the prevalent state legislation applying more severe  
23 penalties.

24           Several factors support the Draft's decision to authorize a less severe penalty than found  
25 in existing state law, even in aggravated circumstances or for sexual contact in situations involving  
26 vulnerable or coerced victims. Sexual contact, even under aggravating circumstances, typically

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<sup>38</sup> See Reporters' Note to Section 213.6.

<sup>39</sup> See, e.g., Cal. Penal Code § 243.4 (e)(i) (sexual contact against the will, punishable by 6 months); Conn. Gen. Stat. Ann. § 53a-73a (sexual contact without consent, punishable by one year); West's Haw. Rev. Stat. Ann. § 707-733 (sexual contact by compulsion, defined as absence of consent, punishable as a misdemeanor). But see, e.g., ARIZ. REV. STAT. ANN. § 13-1404 (2015) (punishing sexual contact without consent as a Class 5 felony); supra note 28 (describing evolution of Arizona law on the definition of "consent"); UTAH CODE ANN. § 76-5-404 (defining a high-level felony for indecent touches); VT. STAT. ANN. tit. 13 § 2601 (permitting up to five years for lewd and lascivious conduct). Only six jurisdictions (D.C., Montana, North Dakota, Ohio, West Virginia, and the federal system) set the maximum penalty lower than 364 days or a year; in these jurisdictions the law prescribes 60- to 90-day maximum penalties for the applicable misdemeanors.

<sup>40</sup> See, e.g., R.I. GEN. LAWS § 11-37-4.

<sup>41</sup> See, e.g., UTAH CODE ANN. § 76-5-404 (allowing life for serious bodily injury, otherwise 15 years for forcible contact); WIS. STAT. ANN. § 940.22 (equating sexual contact and sexual intercourse, and allowing up to 40-year penalty); NEB. REV. STAT. § 28-320 (allowing 20 years for causing serious bodily injury); WYO. STAT. ANN. §§ 6-2-304, 6-2-306 (allowing 15-year penalty for a variety of circumstances excluding serious bodily injury, and 20 years for serious bodily injury)

<sup>42</sup> MPCs, supra note 32, Section 6.11(7)(b).

1 causes less severe harm than that caused by the more intrusive acts of sexual penetration and oral  
2 sex. Grading the basic contact offense with greater severity than the lowest-level penetration  
3 offense would seem illogical. In addition, many situations of Offensive Sexual Contact by Physical  
4 Force or Surreptitious Incapacitation are also likely to support additional nonsexual charges—such  
5 as counts for assault or weapon possession. These added offenses provide adequate flexibility in  
6 sentencing for situations that warrant punishment beyond the statutory maximum authorized for a  
7 felony of the fifth degree. And to the extent that the sexual contact occurred in a situation in which  
8 the defendant intended a more serious offense, the crime of attempt can permit a more fitting  
9 penalty.

10 Similarly, instances of unwanted sexual contact without those aggravating conditions,  
11 while worthy of punishment, should not be punished at the felony level. Again, the harm to the  
12 victim from, and the culpability of the actor for, offensive sexual contact without aggravating  
13 factors are generally less severe than the harm and culpability involved when the unwanted sexual  
14 acts are sexual penetration or oral sex. To elevate this contact to a felony, authorizing a term of  
15 incarceration akin to the term imposed on actors who penetrate others without consent, would  
16 collapse important differences in culpability and open the door to unnecessarily harsh, uneven, and  
17 potentially discriminatory exercises of charging and sentencing discretion.

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

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

20 **(a) the actor engages with another person in, or causes another person to**  
21 **engage in, submit to, or perform, an act of sexual penetration or oral sex; and**

22 **(b) the act is without effective consent because at the time of the act:**

23 **(i) the other person is younger than 16; and**

24 **(ii) the actor is more than five years older than the other person; and**

25 **(c) the actor is reckless with respect to the conduct, attendant circumstances,**  
26 **and results specified in paragraphs (a) and (b).**

27 **Sexual Assault of a Minor is a felony of the fifth degree [*three-year maximum*] except**  
28 **that it is a felony of the fourth degree [*five-year maximum*] when at the time of the act the**  
29 **actor is 21 or older; it is a felony of the fourth degree [*five-year maximum*] and a registrable**  
30 **offense when at the time of the act the actor is more than 10 years older than the other person;**  
31 **and it is a felony of the third degree [*10-year maximum*] and a registrable offense when at the**  
32 **time of the act the actor is 18 or older, the other person is younger than 12, and the actor is**  
33 **reckless with respect to whether the other person is younger than 12.**

\*\*\*\*

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

3                   **(a) the actor engages with another person in, or causes another person to**  
4 **engage in, submit to, or perform, an act of sexual penetration or oral sex; and**

5                   **(b) the act is without effective consent because at the time of the act:**

6                           **(i) the other person is younger than 18; and**

7                           **(ii) the actor is more than five years older than the other person; and**

8                           **(iii) the actor holds over the other person a formal position of authority,**  
9 **such as a teacher, employer, religious leader, treatment provider,**  
10 **administrator, or coach; and**

11                   **(c) the actor is reckless with respect to the conduct, attendant circumstances,**  
12 **and results specified in paragraphs (a) and (b).**

13           **Exploitative Sexual Assault of a Minor is a felony of the fifth degree [*three-year***  
14 ***maximum*] and a registrable offense. It is a defense to a prosecution under Section 213.8(3)**  
15 **for the actor to prove by a preponderance of the evidence that the actor's position of**  
16 **authority over the other person did not impair the other person's ability to form an**  
17 **independent judgment about whether to consent to the act of sexual penetration or oral sex.**

18           **(4) *Fondling a Minor.* An actor is guilty of Fondling a Minor when:**

19                   **(a) the actor knowingly fondles another person, or knowingly causes another**  
20 **person to submit to or perform an act of fondling; and**

21                   **(b) the act is without effective consent because at the time of the act:**

22                           **(i) the other person is younger than 12 and the actor is more than five**  
23 **years older than the other person; or**

24                           **(ii) the other person is younger than 16 and the actor is more than seven**  
25 **years older than the other person; and**

26                   **(c) the actor is reckless with respect to the attendant circumstances described**  
27 **in paragraph (b)(i) or (ii).**

28           **Fondling a Minor is a felony of the fifth degree [*three-year maximum*], except that it**  
29 **is a felony of the fourth degree [*five-year maximum*] when at the time of the act the actor is**

1 **21 or older; and it is a felony of the fourth degree [*five-year maximum*] and a registrable**  
2 **offense when at the time of the act:**

3 (a) **the actor is more than 10 years older than the other person and is reckless**  
4 **with respect to being more than 10 years older than the other person; or**

5 (b) **the actor is 18 or older, the other person is younger than 12, and the actor**  
6 **is reckless with respect to whether the other person is younger than 12.**

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

9 (a) **the actor knowingly engages with another person in, or causes another**  
10 **person to engage in, submit to, or perform, an act of sexual contact; and**

11 (b) **the act is without effective consent because at the time of the act:**

12 (i) **the other person is younger than 18; and**

13 (ii) **the actor is more than five years older than the other person; and**

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

17 (c) **the actor is reckless with respect to the attendant circumstances described**  
18 **in paragraph (b)(i) and (ii).**

19 **Aggravated Offensive Sexual Contact with a Minor is a felony of the fourth degree**  
20 **[*five-year maximum*] and a registrable offense.**

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

23 (a) **the actor knowingly engages with another person in, or causes another**  
24 **person to engage in, submit to, or perform:**

25 (i) **an act of sexual contact; or**

26 (ii) **an act involving the touching of the tongue of anyone to any body**  
27 **part or object, when that act is for the purpose of anyone's sexual arousal,**  
28 **sexual gratification, sexual humiliation, or sexual degradation; and**

29 (b) **the act is without effective consent because at the time of the act:**

30 (i) **the other person is younger than 12, and the actor is more than five**  
31 **years older than the other person; or**

1                   (ii) the other person is younger than 16, and the actor is more than  
2                   seven years older than the other person; and

3                   (c) the actor is reckless with respect to the attendant circumstances described  
4                   in paragraph (b)(i) or (ii).

5                   **Offensive Sexual Contact with a Minor is a misdemeanor [*one-year maximum*], except**  
6                   **that it is a felony of the fifth degree [*three-year maximum*] when at the time of the act the**  
7                   **actor is 18 or older, the other person is younger than 12, and the actor is reckless with respect**  
8                   **to whether the other person is younger than 12.**

### REPORTERS' NOTES

9                   **Grading.** The grading scheme of Section 213.8 proceeds from several basic premises,  
10                   which are supported by social scientific research, but not always embodied in existing law.

11                   Misdemeanor penalties for contact offenses with minors are found only in a minority of  
12                   jurisdictions and chiefly for contact with an adolescent complainant.<sup>43</sup> More commonly, states  
13                   punish sexual contact with adolescents as a low-level felony,<sup>44</sup> and there is also support for far  
14                   more extreme sanctions.<sup>45</sup> A precise sense of the actual degree of liability is at times difficult to

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<sup>43</sup> See, e.g., IOWA CODE ANN. § 709.12 (LexisNexis 2019) (defining sexual contact by actors 18 or older with a child as a misdemeanor offense, as well as providing juvenile courts jurisdiction for cases where the actor is 16 or 17 and the contact occurs with a child at least five years younger); MICH. COMP. LAWS SERV. §§ 750.520c(1)(a), (2)(a), .520e(1)(a), (2) (LexisNexis 2019) (defining sexual contact as a felony punishable by 15 years' imprisonment where the complainant is under 13, and as a misdemeanor where the complainant is 13 to 16 and the actor is five or more years older); N.H. REV. STAT. ANN. §§ 632-A:3(III)(a)(1), :4(I)(b) (LexisNexis 2019) (defining sexual contact as a class B felony where the complainant is under 13, and as a misdemeanor where the complainant is 13 to 16 and the actor is five or more years older); N.Y. PENAL LAW §§ 130.55-.65 (Consol. 2019) (defining contact with a person 14 to 17 where the actor is five years older and with a person younger than 14 years of age as misdemeanors, and defining contact with a complainant younger than 11 or younger than 13 when the actor is 21 or older as a seven-year felony); OHIO REV. CODE ANN. § 2907.06(A)(4), (C) (LexisNexis 2020) (defining sexual contact by an actor 18 or older with a complainant aged 13 to 16, where the actor is four or more years older, as a misdemeanor); S.D. CODIFIED LAWS §§ 22-22-7, -7.3 (2019) (defining the offense of sexual contact with a child under 16 as a Class 3 felony where the victim is under 16 and the actor 16 or older, but as a misdemeanor where the actor is under 16 or where the victim is at least 13 and the actor is less than five years older); UTAH CODE ANN. § 76-5-401.1 (LexisNexis 2019) (defining sexual abuse with a person aged 14 to 16 by actor four or more years older as a misdemeanor); VA. CODE ANN. § 18.2-67.4:2 (2019) (punishing sexual abuse by an adult with a child aged 13 to 15 as a misdemeanor).

<sup>44</sup> GA. CODE ANN. § 16-6-22.1(d) (2020) (punishing sexual battery of a minor younger than 16 as a five-year felony); HAW. REV. STAT. § 707-732(1)(b)-(c), (2) (2019) (defining the act of knowing sexual contact with a person younger than 14, or with a person 14 to 16 when the actor is five or more years older, as a class C felony); NEB. REV. STAT. ANN. § 28-320.01(3) (LexisNexis 2019) (defining sexual contact with a complainant 14 or younger by an actor 19 or older as a Class IIIA felony if the actor does not cause serious injury); N.C. GEN. STAT. § 14-202.1 (2019) (defining "taking indecent liberties" with a minor younger than 16, where the actor is at least 16 and five years older as a Class F felony); 18 PA. CONS. STAT. §§ 1104(1)-(2), 3126(a)(7)-(8), (b) (2019) (defining a five-year contact offense for actors with a complainant younger than 13, or a two-year offense for an actor four or more years older than a complainant aged 13 to 16).

<sup>45</sup> See, e.g., LA. STAT. ANN. § 14:81(A)(1), (H)(1)-(2) (2018) (punishing any lewd and lascivious act with a child under the age of 17, where the actor is more than two years older, with a seven-year maximum, unless the child is younger than 13 and the actor is 17 or older, in which case the maximum is 25 years); MD. CODE ANN., CRIM. LAW § 3-307(a)(3), (b) (LexisNexis 2019) (punishing sexual contact with a complainant under 14 where the actor is four years older with maximum imprisonment of 10 years); VA. CODE ANN. § 18.2-67.3(A)(1), (B) (2019) (punishing sexual abuse with a person younger than 13 with up to 20 years' imprisonment); WASH. REV. CODE ANN. §§ 9A.44.083, .086, .089 (LexisNexis 2020) (defining contact with a complainant under

## Section 213.8. Sexual Offenses Involving Minors

1 discern because some of those provisions cover acts of both penetration and contact.<sup>46</sup> Existing  
2 law exhibits both the practice of setting a single penalty applicable to several age-based  
3 thresholds<sup>47</sup> and the practice of providing for harsher penalties based on the age of the actor in  
4 relation to the age of the complainant.<sup>48</sup> Also, many jurisdictions have multiple options for  
5 different degrees of liability for essentially identical conduct,<sup>49</sup> which leads to uncertainty in how  
6 actual sentencing practices likely unfold.

7 The penalties applicable to the base offense of Offensive Sexual Contact with a Minor  
8 (Section 213.8(6)) reflect the judgment that sexual contact with minors of any age by actors  
9 significantly older merits serious punishment. However, Section 213.8(6) distinguishes between  
10 the degree of punishment appropriate as both a deterrent and a retributive matter in two  
11 circumstances: when the minor is older as opposed to a minor too young to comprehend or  
12 nominally consent to even the most superficial sexual acts, and when the actor is a sexually mature  
13 adult as opposed to an adolescent or young adult who is still in the throes of development. The  
14 punishment also reflects the structure of Section 213.8, which departs from the dominant approach  
15 in existing law by separating out the most intimate form of sexual contact, fondling of genitals, for  
16 enhanced punishment.

17 Accordingly, an actor who engages in sexual contact with a minor 12 through 15 years old,  
18 when the actor is more than seven years older, is punishable by up to one year's incarceration, as  
19 is the actor who engages in sexual contact with a minor younger than 12, when the actor is more  
20 than five years older. The grade of the offense is raised to that of a fifth-degree felony (with a

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12 where the actor is three or more years older as a class A felony, contact with a complainant aged 12 to 14 where the actor is three or more years older as a class B felony, and contact with a complainant aged 14 to 16 where the actor four or more years older as a class C felony).

<sup>46</sup> See, e.g., 720 ILL. COMP. STAT. ANN. 5/11-1.60(d) (LexisNexis 2019) (punishing sexual penetration and contact in a single scheme as applied to acts with a complainant 13 to 17 by an actor at least five years older); WIS. STAT. ANN. §§ 948.02(1)(e), (2), 948.093 (LexisNexis 2019) (defining “sexual contact or sexual intercourse” as a Class B felony when the complainant is younger than 13, and as a Class C felony when the complainant is younger than 16, unless the actor is not yet 19 and the complainant is 15 or older and the act is intercourse, or 15 when the act is contact, in which case the offense is a misdemeanor).

<sup>47</sup> See, e.g., 720 ILL. COMP. STAT. ANN. 5/11-1.60(c)-(e) (LexisNexis 2019) (punishing sexual conduct as a Class 2 felony in a single scheme in the following circumstances: contact with a complainant under 13 by an actor 17 or older; contact by an actor younger than 17 with a complainant younger than nine; contact or penetration with a complainant 13 to 17 by an actor more than five years older); 18 PA. CONS. STAT. § 3126 (2019) (defining indecent assault with complainant less than 13 as a misdemeanor or felony contact offense or as a misdemeanor of the second degree where the actor is four or more years older than a complainant aged 13 to 16).

<sup>48</sup> 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).

<sup>49</sup> 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.

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1 benchmark maximum of three years' incarceration) when at the time of the act the actor is 18 or  
2 older, the other person is younger than 12, and the actor is reckless with respect to whether the  
3 other person is younger than 12. Both punishments exceed the petty misdemeanor applicable to  
4 the offense of Offensive Sexual Contact (Section 213.7(2)), which applies in the case of sexual  
5 contact without the consent of an adult complainant.

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

17 Sections 213.1 through 213.7 apply equally to complainants under 16 as to older  
18 complainants, but experience teaches that an actor may not have to resort to force or coercion in  
19 order to cause a younger complainant to submit to unwanted sexual activity.<sup>50</sup> The younger the  
20 complainant, the greater the probability that even nominal consent fades. And eventually, the  
21 prospect of nominal consent altogether disappears; whereas a 15-year-old may believe himself or  
22 herself to be "consenting" to the advances of a flattering adult, a five-year-old lacks even the  
23 capacity for that nominal degree of autonomy. The same is true for instances of incest, where the  
24 familial bond makes any notion of meaningful consent or willingness moot. As a result, sexual  
25 encounters with young children are more properly punished at a level akin to offenses involving  
26 force or coercion, rather than just nonconsent.

27 Second, the grading scheme distinguishes between actors who, like the complainants, are  
28 themselves young minors; actors who are older minors and young adults engaging in inappropriate  
29 behavior with nominally consenting partners who are relatively close in age; and adult actors who  
30 exploit minors. These distinctions receive less support in existing law, although there are clear  
31 traces. More commonly, statutes either preclude liability for peer-range actors, either on their face  
32 or by providing for an affirmative defense, or dramatically reduce the punishment when the actor  
33 is also a minor. Relatively few statutes draw finer distinctions, such as by diminishing punishment  
34 for actors within a certain age range of the complainant.<sup>51</sup> Instead, schemes tend to either permit

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<sup>50</sup> That said, although the use of actual physical violence is uncommon as regards very young complainants, data suggests that actors more commonly use threats or other coercive measures that could satisfy the elements of other Sections of Article 213. Michele Elliott et al., *Child Sexual Abuse Prevention: What Offenders Tell Us*, 19 CHILD ABUSE & NEGLECT 579, 582 tbl.1 (1995) (reporting data from interviews with child sex offenders, 44 percent of whom use "coercion and persuasion," and 19 percent of whom used physical force).

<sup>51</sup> 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).

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1 or preclude liability, not base liability on the size of the age gap between the actor and the  
2 complainant.

3 Section 213.8 rejects this approach, choosing instead to calibrate punishment more finely  
4 according to the degree of wrongfulness suggested by the behavior. Although a 12-year-old minor  
5 who sexually abuses a six-year-old child, or a 16-year-old who abuses a 10-year-old, may be a  
6 worthy subject of state interest via the juvenile-justice system, the authorized punishment for those  
7 offenses should not treat the minor actor’s culpability as equivalent to that of an adult actor three  
8 times older. An adult who has reached full maturity is distinguishable from a preteen or teenager  
9 in cognitive, social, and especially sexual development. An adult is also likely less amenable to  
10 reintegrative rehabilitation. Lastly, a far greater degree of wrongfulness is suggested by an adult’s  
11 interest in, and willingness to impose upon, a minor with little to no sexual experience than by the  
12 same actions done by a minor close in age and with similar relative inexperience.

13 This distinction is supported by social science research into juvenile development, as well  
14 as by recent case law embracing that research. In a series of recent cases, the Supreme Court has  
15 recognized that the maximum sentences for juveniles who commit crimes—even older juveniles—  
16 should take into account the cognitive and emotional immaturity of the minds of juveniles as  
17 compared to adults who engage in the same antisocial behaviors.<sup>52</sup> A significant body of research  
18 shows that minors do not suddenly acquire adult cognitive capacities at the age of 18, but rather  
19 that an adolescent’s impulse control, decisionmaking ability, and reasoning are still in  
20 development until the early 20s, when clear physiological shifts occur.<sup>53</sup> In other words, “[t]here  
21 is now incontrovertible evidence that adolescence is a period of significant changes in brain  
22 structure and function.”<sup>54</sup> And in particular, changes during puberty and early adolescence involve  
23 “the density and distribution of dopamine receptors,” which in turn “plays a critical role in how  
24 humans experience pleasure” and “have important implications for sensation-seeking”—  
25 specifically including sexual pleasure.<sup>55</sup> In fact, a distinct body of research has explored the

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<sup>52</sup> 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).

<sup>53</sup> 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”).

<sup>54</sup> 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.”).

<sup>55</sup> Steinberg, *supra* note 54, 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).

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1 relationship between risky sexual behavior—such as unprotected sex—and adolescents’ neural  
2 and cognitive capacities.<sup>56</sup>

3 The grading structure of Section 213.8 takes both the legal and scientific developments in  
4 our understanding of juvenile misconduct into account in setting maximum punishments. For this  
5 reason, actors below the age of 18 are treated more leniently than are actors older than 18 who  
6 engage in identical behavior. Section 213.8 also treats young adults more leniently when the  
7 offense involves sexual behavior with a complainant 12 or older.

8 Lastly, in affixing penalties, even for the most egregious offenses defined by Section 213.8  
9 such as abuse of young children by adults and the abuse of minors by parental figures, the scheme  
10 embraces the principles and the overall grading objectives of Articles 6 and 7, the revised  
11 sentencing provisions of the Model Penal Code. In so doing, Section 213.8 does not intend to  
12 minimize or dismiss the serious harms caused by child sexual abuse. The provisions of Section  
13 213.8 governing adult sexual imposition on minors, especially those very young or in a child-  
14 caregiver relationship with the actor, authorize lengthy periods of incarceration. Therefore, the  
15 grading of offenses in Section 213.8 harmonizes with the penalties for offenses of analogous  
16 severity in other provisions of Article 213 and throughout the Code.

17 The resulting scheme therefore authorizes punishments (1) equivalent to Sexual Assault by  
18 Physical Force or Restraint for adult actors who engage in sex with minors under 12 or parental  
19 figures who abuse their children and wards, and (2) the next most serious level of punishment for  
20 adult actors who engage sexually with minors aged 12 to 15. The scheme penalizes, but at lower  
21 levels, young adults and minors who engage in sexual activity with inappropriately young  
22 partners—punishing teenagers who sexually abuse young children at the felony level, and  
23 punishing young adults who engage with teenagers under 16 as misdemeanants.

24 With regard to the specific sentences authorized for each grade of an Article 213 offense,  
25 the harsh penal approaches of recent decades have more recently given way to deeper  
26 understanding of the many costs imposed by imprisonment on the actor, the actor’s family and  
27 community, and all of society.<sup>57</sup> Such considerations must count heavily in all judgments assigning  
28 specific authorized sentence ranges to the relative grading categories specified for the offenses  
29 defined by Section 213.8.

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<sup>56</sup> 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”).

<sup>57</sup> 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, *THE GROWTH OF INCARCERATION IN THE UNITED STATES* 4-7 (Jeremy Travis, et al., eds., 2014) (detailing increasing harshness of penal sanctions and the costs to communities and society, specifically noting that the “incremental deterrent effect of increases in lengthy prison sentences is modest at best” and that “[i]ncarceration is strongly correlated with negative social and economic outcomes for former prisoners and their families”).

1 **SECTION 213.9. SEX TRAFFICKING AND RELATED OFFENSES**

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

3 (c) “Trafficking Victim” means a person who has been recruited, enticed,  
4 transported, transferred, harbored, provided, isolated, or maintained, as described  
5 in subsection (2)(a) and is or will be coerced, as described in subsection (2)(a)(i), or is  
6 underage, as described in subsection (2)(a)(ii).

7 **(2) Sex Trafficking.**

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

11 (i) coercion is being, or will be, used to cause the person to engage in,  
12 submit to, or perform a commercial sex act, which therefore will be without  
13 effective consent; and the actor knows that coercion is being or will be used to  
14 cause the person to submit to or perform that commercial sex act; or

15 (ii) the person is younger than 18 and is being, or will be, caused to  
16 submit to or perform a commercial sex act; and the actor is reckless with  
17 respect to whether the person is younger than 18 and is being, or will be,  
18 caused to submit to or perform the commercial sex act.

19 (b) Grading. Sex Trafficking is a felony of the third degree [*10-year maximum*]  
20 and a registrable offense.

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21 **(3) Promoting Sex with a Trafficking Victim.** An actor is guilty of Promoting Sex with  
22 a Trafficking Victim if the actor, by advertising or other means, knowingly encourages,  
23 induces, or otherwise solicits another person to engage in a commercial sex act with a  
24 trafficking victim. Promoting Sex with a Trafficking Victim is a felony of the third degree  
25 [*10-year maximum*].

26 **(4) Patronizing a Trafficking Victim.** An actor is guilty of Patronizing a Trafficking  
27 Victim if the actor knowingly engages in a commercial sex act with a trafficking victim.  
28 Patronizing a Trafficking Victim is a felony of the fourth degree [*five-year maximum*].

1           **(5) *Complicity in Sex Trafficking.* An actor is guilty of Complicity in Sex Trafficking**  
2 **if the actor knowingly provides resources, services, or other means that facilitate the**  
3 **commission of an offense defined by subsections (2), (3), or (4). Complicity in Sex Trafficking**  
4 **is a felony of the fourth degree [*five-year maximum*].**

#### REPORTERS' NOTES

##### 5           **1. *Sex Trafficking – Section 213.9(2).***

6           ***Grading.*** Sex Trafficking is a grave offense, involving the exploitation of particularly  
7 vulnerable individuals, often in connection with organized-crime networks that subject dozens of  
8 victims to numerous discrete acts of sexual abuse. Under current law, authorized maximum  
9 sentences for offenses comparable to Section 213.9(2) vary considerably.<sup>58</sup> The federal statute, the  
10 Trafficking Victims Protection Act (TVPA), is among the most severe, imposing a mandatory  
11 minimum of 15 years, with a maximum of life imprisonment, when trafficking involves either  
12 coercion or a minor under the age of 14. When coercion is absent and the victim is a minor between  
13 the ages of 14 and 18, the federal statute drops its mandatory minimum to 10 years, but the  
14 maximum remains at life imprisonment.<sup>59</sup>

15           Penalties available under state trafficking statutes typically are much less severe, with  
16 many maximum authorized sentences set between 10 and 20 years' imprisonment.<sup>60</sup>  
17 Representative statutory maximum sentences include 7-10 years in Maryland, North Carolina, and  
18 Virginia,<sup>61</sup> 12-16 years in Arizona, Indiana, Michigan, Ohio, and Tennessee,<sup>62</sup> 20 years in

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<sup>58</sup> For an overview, sentences range from a high of life for the federal offense, 30 years in Florida, and 20 years in Texas to maximums (absent recidivist enhancements) of 16.5 years in Ohio, 12 years in Indiana and Tennessee, and 10 years in Maryland and Virginia. In many states additional enhancements apply when the victim is a young child. Even with child-victim enhancements, many states set the maximum for a first offense at 20 years or less. At the opposite end of the spectrum, maximums in child-victim cases of life imprisonment or 99 years are authorized in California, Florida, Georgia, Massachusetts, Missouri, New Jersey, and Texas.

<sup>59</sup> 18 U.S.C. § 1591(b).

<sup>60</sup> See Polaris Project, 2013 Analysis of State Human Trafficking Laws (August 2013), <https://polarisproject.org/sites/default/files/2013-State-Ratings-Analysis.pdf>.

<sup>61</sup> MD. CODE § 11-303 (2019) (10-year maximum); N.C. GEN. STAT. § 14-43.11 (2019) (class C felony); *id.*, § 15A-1340.17 (for class C felony, maximum of 92 months (3.7-7.7 years)); VA. CODE ANN. § 18.2-357.1(B), (C) (2018) (2019) (class 4 felony); *id.*, § 18.2-10(d) (for class 4 felony, 10-year maximum).

<sup>62</sup> ARIZ. REV. STAT. § 13-1307(b) (LexisNexis 2020) (class 2 felony); *id.*, § 13-702(d) (for class 2 felony, 12.5-year maximum; 23 years if prior record enhancement applies); IND. STAT. ANN. § 35-42-3.5-1 (2019) (level 4 felony); *id.*, § 35-50-2-55 (for level 4 felony, 12-year maximum); MICH. COMP. LAWS SERV. § 750.462e, f (LexisNexis 2018) (15 years; 22.5 years if prior-record enhancement applies); OHIO STAT. ANN. § 2905.32 (2019) (first-degree felony); *id.*, § 2929.144 (for first-degree felony, 16.5 years [maximum term is highest minimum term plus 50%; *id.*, § 2929.14 (for first-degree felony, highest minimum term is 11 years)]; TENN. CODE ANN. § 39-13-309(c) (2019) (class B felony); *id.*, § 40-35-112(a)(2) (for class B felony, 12-year maximum; 20 years if prior record enhancement applies).

## Section 213.9. Sex Trafficking and Related Offenses

1 California, New Jersey, Pennsylvania and Texas,<sup>63</sup> 25 years in New York,<sup>64</sup> and 30 years in  
2 Florida<sup>65</sup>—all well below the federal maximum of life imprisonment. Under many state sentencing  
3 regimes, the authorized sentences depend on multiple factors. The New York statutes, for example,  
4 prescribe (i) 1-25 years for sex trafficking, “compelling prostitution” of a minor by force, fraud,  
5 or coercion, or “promoting prostitution” of a minor under 13; (ii) 1-15 years for “promoting  
6 prostitution” of a minor under 18 or “use of a child [under 17] to engage in a sexual performance”;  
7 and (iii) a maximum of seven years for “promoting prostitution of a minor” 18-19 years old or  
8 “promoting a sexual performance by a child” under 17.<sup>66</sup> In Texas, the penalty is (i) up to 20 years  
9 for “trafficking in persons” and “compelling prostitution” when the victim is an adult; (ii) up to  
10 life imprisonment for those offenses if the victim is a child under 14; and (iii) up to 20 years for  
11 employing a minor to work in sexually oriented commercial activity or in a sexual performance.<sup>67</sup>

12 The wide range of these authorized maximums in part reflects the fact that the offense is  
13 defined in extraordinarily broad terms; it can potentially extend from a single instance of  
14 transporting or providing support to a psychologically coerced adult or to a 17-year-old minor to  
15 running an organized network involving dozens of trafficked victims. This exploitative conduct  
16 deserves significant punishment across that spectrum, but in the less serious cases, judicial  
17 sentencing discretion may not consistently reach an appropriately measured sentence, especially  
18 when the authorized maximum is quite high. Accordingly, the grading of this unusually  
19 heterogeneous offense requires exceptional care.

20 One consideration in setting an appropriate maximum is the recognition that the most  
21 egregious instances of the offense, those that typically come to mind when picturing sex  
22 traffickers, involve multiple victims and multiple instances of trafficking activity. In such cases,  
23 consecutive sentences are an available and appropriate way to reflect the seriousness of conduct

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<sup>63</sup> CAL. PENAL CODE § 236.1(b) (2019) (presumptive sentences of 8, 14, or 20 years; 40 years if prior-record enhancement applies); N.J. STAT. ANN. § 2C:13-8 (2019) (first-degree crime); id., § 2C:43-6 (for first-degree crime, 20-year maximum); 18 PA. CONS. STAT. § 3012 (2018) (first-degree felony); id. § 1103(1) (for first-degree felony, 20-year maximum); TEX. PENAL CODE ANN. § 20A.02 (West 2017) (second-degree felony); id., § 12.33 (for second-degree felony, 20-year maximum; 99 years if prior-record enhancement applies).

<sup>64</sup> N.Y. PENAL LAW § 230.34 (LexisNexis 2018) (Class B felony; 25-year maximum); § 70.00 (prescribing maximum sentences for felonies).

<sup>65</sup> FLA. STAT. ANN. § 787.06 (LexisNexis 2018) (first-degree felony, 30-year maximum); id., § 775.082 (establishing maximum sentences for felonies; 99 years if prior-record enhancement applies).

<sup>66</sup> N.Y. PENAL LAW § 230.34 (sex trafficking, Class B felony with range of 1-25 years); id., § 230.33 (“compelling prostitution” of a minor by fraud, force, or coercion, also a Class B felony); id., § 230.32 (“promoting prostitution” of a minor under 13, Class B felony); id., § 230.30 (“promoting prostitution” of a minor under 18, Class C felony with a range of 1-15 years); id., § 263.05 (“use of a child [under 17] in a sexual performance,” Class C felony); id., § 230.25 (“promoting prostitution” of a minor under 19, Class D felony with a range of 1-7 years); id., § 263.15 (“promoting a sexual performance by a child” less than 17 years old, Class D felony); id., § 70.00 (establishing maximum sentences for felonies).

<sup>67</sup> TEX. PENAL CODE ANN. § 20A.02 (West 2019) (punishing “trafficking in persons” as second-degree felony, 20-year maximum; first-degree felony with maximum of life imprisonment when victim is a child); id., § 43.05 (punishing “compelling prostitution” with 20-year maximum and “compelling prostitution” of a child with maximum of life imprisonment); id., §§ 43.25, 43.251 (punishing employing a child to work in a sexually oriented commercial activity or sexual performance with 20-year maximum; punishment increased to maximum of life imprisonment if child is under 14); id., § 12.32 (establishing maximum sentence for first-degree felony); id., § 12.33 (establishing maximum sentence for second-degree felony).

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1 that spans many distinct episodes of abuse. The authorized maximum for conviction on a single  
2 count therefore need not be high enough to permit a sentence justified by the entire scope of the  
3 offender’s misconduct. Conversely, a somewhat lower cap on the authorized sentence may be an  
4 appropriate way to constrain judicial and prosecutorial sentencing discretion when a conviction  
5 rests on a single instance of harboring or transporting a trafficking victim.

6 Section 213.9(2) rejects the most severe of these approaches and disapproves mandatory  
7 minimums in particular. The revised sentencing provisions of the Model Penal Code, like their  
8 predecessors, categorically reject statute-mandated minimums, such as the 15-year minimum  
9 imposed under the TVPA.<sup>68</sup> The federal maximum term of life imprisonment also is unjustifiably  
10 severe. The great majority of state trafficking statutes prescribe substantially lower maximum  
11 sentences, particularly in the case of adult trafficking victims. Of the 20 largest states, almost half  
12 impose a cap lower than 20 years’ imprisonment in adult-victim cases.<sup>69</sup> A number of states  
13 authorize penalty enhancements when the trafficking victim is younger (under 15, for example);  
14 even in child-victim cases, however, many states set the maximum for a first offense at 20 years  
15 or less.<sup>70</sup>

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<sup>68</sup> See MPCs, *supra* note 32, Section 6.06, Comment *m*, p. 165 (“The revised Code continues the firm position of the Institute that legislatively mandated minimum sentences are unsound ...”) (internal quotation marks omitted).

<sup>69</sup> See generally Polaris Project, *supra* note 60. For representative statutes setting a statutory maximum lower than 20 years, see statutes of Arizona, Indiana, Michigan, Maryland, North Carolina, Ohio, Tennessee, and Virginia, cited at notes 105-07 *supra*. See also WASH. REV. CODE § 9.94A.515 (2019) (trafficking 1 is level XIV offense); *id.*, § 9.94A.510 (18.3-year maximum, 19.5 years if prior-record enhancement applies). At the other end of the spectrum, Missouri sets the statutory maximum at life imprisonment even in first-offender adult-victim cases. MO. REV. STAT. § 566.209(2) (2019). For offenders with a prior felony record, statutory maximums for trafficking an adult victim exceed 30 years, CA: CAL. PENAL CODE § 236.1(b) (Deering 2020) (20-year maximum for first-time offender); *id.*, § 667(e)(1) (for prior serious or violent felony offender, double term to 40 years); FLA. STAT. § 787.06(3) (2019) (first-degree felony); *id.*, § 775.084(4)(b)(1) (for repeat offender, first-degree felony max is life); MA: MASS. ANN. LAWS ch. 265, § 52(a) (LexisNexis 2020) (life max for defendant who commits sex-trafficking offense more than once); MO: MO. REV. STAT. § 566.209(2) (2019) (life maximum); TX: TEX. PENAL CODE ANN. § 20A.02(a)(3) (West 2019) (second-degree felony); *id.*, § 12.42(b) (second-degree felony enhanced to first degree if defendant has prior felony conviction); *id.*, § 12.32 (first-degree felony has max of 99 years); and WI: WIS. STAT. ANN. § 940.302(2)(a) (West 2020) (class D felony); *id.*, § 939.50(3)(d) (25-year max); *id.*, § 939.62(1)(c) (can add up to 6 years to statutory max if prior felony conviction within past 5 years).

<sup>70</sup> E.g., N.C. GEN. STAT. § 14-43.11(b) (2020) (B2 felony); *id.*, § 15A-1340.17 (16.3 year-maximum for B2 felony; 18.8 years for offender with prior felony record); MICH. COMP. LAWS § 750.462f(2) (2020) (20 years; 30 years for offender with prior felony record); 18 PA. CONS. STAT. § 3011(b) (2020) (first-degree felony); *id.*, § 1103(1) (20-year max for first-degree felony, max penalty increased to 40 years on April 6, 2020); OHIO REV. CODE ANN. § 2905.32 (LexisNexis 2019) (first-degree felony); *id.*, § 2929.14(a)(1)(a) (highest min for first-degree felony is 11 years); *id.*, § 2929.144(b)(1) (maximum is min plus 50% of min, which is 16.5 years); VA. CODE ANN. § 18.2-357.1(c) (2019) (class 3 felony); *id.*, § 18.2-10(c) (20-year max for class 3 felony).

Statutes where the maximum in child-victim cases is only slightly higher include ARIZ. REV. STAT. § 13-3212(e) (LexisNexis 2020) (class 2 felony); *id.*, § 13-705(c) (for class 2 felony, 27-year maximum; 37 years for offender with prior felony record); 720 ILL. COMP. STAT. ANN. 5/10-9(c) (LexisNexis 2019) (Class X felony for minor under 17); 730 ILL. COMP. STAT. ANN. 5/5-4.5-25(a) (LexisNexis 2019) (30-year max for class X felony); IND. CODE ANN. § 35-42-3.5-1.3 (LexisNexis 2020) (child sex trafficking level 2 felony); *id.*, § 35-50-2-4.5 (30-year max for Level 2 felony); MD. CODE ANN., CRIM. LAW § 3-1102(c)(2) (LexisNexis 2020) (25-year maximum); TENN. CODE ANN. § 39-13-309(c) (2019) (class A felony); *id.*, § 40-35-112(a)(1) (for class A felony, 25-year maximum, 40 years for offender with prior felony record).

Higher statutory maximums for child-victim trafficking are set in CAL. PENAL CODE § 236.1(c)(2) (Deering 2020) (life); FLA. STAT. § 787.06(3)(g) (2019) (life felony); *id.*, § 775.082(3)(a)(2) (max life for life felony); GA. CODE ANN. § 16-5-46(f)(2) (2019) (life maximum); MASS. ANN. LAWS ch. 265, § 50(b) (LexisNexis 2019) (life maximum); MO. REV. STAT. § 566.211(3) (2019) (life maximum); N.J. STAT. ANN. § 2C:13-8(d) (2019) (life maximum); TEX. PENAL CODE ANN. § 20A.02(a)(7) (West 2019) (first-degree

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1 Mindful of these considerations, Section 213.9(2)(b) classifies Sex Trafficking as a felony  
2 of the third degree.<sup>71</sup> The sentencing provisions of the revised Code regulate the degree of  
3 punishment through a comprehensive system that includes sentencing guidelines,<sup>72</sup> structured  
4 judicial sentencing discretion,<sup>73</sup> and appellate review,<sup>74</sup> so that the maximum applicable in an  
5 individual case is tied to the specific aggravating and mitigating factors in that case.<sup>75</sup>

6 Section 213.9(2)(b) grades the offense toward the low end of currently prevalent state  
7 sentencing provisions, classifying it as a felony of the third degree. Under the revised Model Penal  
8 Code sentencing provisions, this offense level is subject to “a term of incarceration ... [that] shall  
9 not exceed [10] years”; the maximum authorized term is stated in brackets in part because  
10 judgments about the sanctions appropriate to a felony of the second degree “are fundamental policy  
11 questions that must be confronted by responsible officials within each state.”<sup>76</sup>

12 Several distinct considerations shape the recommendation to classify the offense at the  
13 third-degree felony level. In its most serious forms, sex trafficking is an exceptionally grave  
14 offense. An offender, together with several associates, may exploit dozens of vulnerable victims,  
15 inflicting permanent physical and psychological scars while reaping millions of dollars in profit.  
16 Trafficking rings of this sort, and their devastating consequences, come to light all too often. The  
17 sentencing regime must permit emphatic condemnation and stern punishment commensurate with  
18 the seriousness of dangerous criminal enterprises like these.

19 At the same time, the sex-trafficking offense necessarily encompasses crimes of far more  
20 limited scope. Headline-grabbing criminal syndicates shape public perceptions of the offense, but  
21 violations often lack their scope and systematic character. The offender may have exploited a  
22 single victim on a single occasion; sex-trafficking prosecutions need not be—and are not—limited  
23 to the context of organized crime.<sup>77</sup> Judicial sentencing discretion can moderate the potential  
24 severity of statutory maximums, but discretion cannot ensure consistently proportionate

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felony); *id.*, § 12.32 (99-year maximum for first-degree felony); WASH. REV. CODE § 9.94A.535(3)(l) (2019) (trafficking of minor supports a sentence above the standard range with no stated maximum).

<sup>71</sup> Under the revised sentencing provisions of the Model Penal Code, a person convicted of a felony of the third degree “may be sentenced by the court, subject to the provisions of Articles 6B [relating to sentencing guidelines] and 7 [governing judicial sentencing authority], to a term of incarceration ... [that] shall not exceed [10] years.” MPCs, *supra* note 32, Section 6.06(6)(b). The Comment to this Section of the sentencing provisions explains that “maximum authorized terms are stated in brackets [in part because] recommendations concerning the severity of sanctions that ought to attend particular crimes ... are fundamental policy questions that must be confronted by responsible officials within each state. . . .” *Id.*, Section 6.06, Comment *k*, p. 157.

<sup>72</sup> *Id.*, Article 6B.

<sup>73</sup> *Id.*, Sections 7.01-7.08.

<sup>74</sup> *Id.*, Section 7.09.

<sup>75</sup> See *id.*, p. 158: “Under the revised Code’s sentencing system, severity is regulated primarily through sentencing guidelines, the court’s departure power under the guidelines, meaningful appellate sentence review, and invigorated statutory mechanisms ... for subconstitutional proportionality review of excessively harsh penalties.”

<sup>76</sup> MPCs, *supra* note 32, Section 6.06(6)(b), Comment *k*, p. 157.

<sup>77</sup> Cf. *United States v. Dann*, 652 F.3d 1160 (9th Cir. 2011) (defendant convicted under federal forced-labor statute, 18 U.S.C. § 1589(a), a provision analogous to federal TVPA (18 U.S.C. § 1591) for using false accusations of theft and threats to engineer household helper’s deportation in order to coerce her to continue performing nonsexual services as a nanny).

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1 punishment for more limited offenses of this sort. Unnecessarily long terms of incarceration are  
2 prevalent in American criminal law,<sup>78</sup> and sex offenses are especially likely to draw needlessly  
3 harsh punishment, both when legislatures set authorized terms and when judges impose sentences  
4 in individual cases.<sup>79</sup>

5 In this context, the average of current state practice has less than its usual relevance as a  
6 guide to sound policy; to the contrary, criminal-justice professionals largely agree with the approach  
7 that the Institute endorsed in revising the sentencing provisions of the Model Penal Code, namely  
8 that legislatively authorized sentences tend to be needlessly severe.<sup>80</sup> Statutory maximums toward  
9 the low end of current state legislation therefore can provide the most reliable guidance. A  
10 substantial number of states have set maximum sentences for sex trafficking at or near the 10-year  
11 level, with no indication that these sentencing caps have proved inadequate. That practical  
12 experience provides some assurance that similar caps should suffice for sex-trafficking enforcement  
13 elsewhere, absent distinctive concerns in a particular jurisdiction. And the flexibility built into the  
14 Code’s sentencing provisions<sup>81</sup> leaves room for legislatively authorized sentencing enhancements  
15 in cases involving child victims, habitual offenders, or other aggravating circumstances.

16 There remains a legitimate concern about whether a 10-year sentencing cap would unduly  
17 constrain punishment in the kind of case that most often comes to public attention, one that  
18 involves an extensive trafficking network, with multiple victims and recurring coerced or underage  
19 sexual encounters over an extended period. The sentencing range authorized by statute (unlike a  
20 guideline sentencing range) cannot be set at levels that suffice only for the typical or “heartland”  
21 case; instead, the *statutory maximum* must afford scope for suitable punishment in exceptionally  
22 serious instances of the prohibited conduct.

23 In the case of a criminal enterprise, however, a 10-year cap does not present this problem,  
24 because a separate offense of Sex Trafficking is committed every time an offender, with the  
25 required mens rea, trafficks a single minor or coerced adult who will submit to or perform a single  
26 commercial sex act. Thus, the offender who trafficks five victims will face five counts of Sex  
27 Trafficking, even if each victim submits to or performs only a single commercial sex act. If each  
28 of the five victims submits to or performs five commercial sex acts, the offender could face 25

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<sup>78</sup> See, e.g., MPCS, supra note 32; Peter Baker, *2016 Candidates Are United in Call to Alter Justice System*, N.Y. TIMES, April 27, 2015 (noting broad consensus among “Democrats and Republicans alike [on need] to reduce the prison population and rethink a system that has locked up a generation of young men, particularly African-Americans.”).

<sup>79</sup> See 1962 Code, Commentary at 286, 298: “There is a danger . . . that public apprehension will lead to an overreaction in legislative halls. It is, after all, both politically rewarding and relatively easy to take a public stand by passing a law against plainly offensive and unpopular conduct. Although the point is valid with respect to any crime, it deserves special emphasis here that definition of the crime of rape calls for a balanced judgment . . . The Michigan statute seems a good example of the operation of [these] pressures . . . [I]t seems plain that the Michigan statute is an overreaction that creates a whole new set of difficulties of its own.”

<sup>80</sup> See note 78, supra.

<sup>81</sup> See MPCS, supra note 32, Section 6.06(6)(b), Comment *k*, p. 157 (“The revised Code does not offer exact guidance on the maximum prison terms that should be attached to different grades of felony offenses. Instead, maximum authorized terms are stated in brackets. . . . [R]ecommendations concerning the severity of sanctions that ought to attend particular crimes. . . . are fundamental policy questions that must be confronted by responsible officials within each state. . . .”).

1 separate counts. Because consecutive sentences are appropriate when an offender victimizes  
2 multiple individuals or a single individual on multiple occasions,<sup>82</sup> a cap of 10 years (for example)  
3 on each count would not unduly constrain the punishment available in the case of a large-scale  
4 trafficker. The offender convicted of trafficking five victims, each of whom submitted to a single  
5 commercial sex act, would face five counts, with a maximum sentence of 50 years' imprisonment;  
6 the offender convicted of trafficking five victims, each of whom submitted to five commercial sex  
7 acts, would face 25 counts, with a maximum sentence of 250 years' imprisonment.<sup>83</sup> In these  
8 circumstances, a statutory maximum in the 10-year range for each individual count would not force  
9 undue leniency.

10 A distinct question is whether Sex Trafficking should be treated as a registrable offense.  
11 Registration is typically viewed as a measure to permit heightened surveillance of persons who  
12 have been convicted of offenses that are sexually motivated. Sex Trafficking differs in that its  
13 motivation is essentially financial. However, a common behavior pattern among persons convicted  
14 of this offense is the practice of trolling for potential victims at locations frequented by people who  
15 are underage or otherwise vulnerable to exploitation. There is therefore a legitimate justification  
16 for requiring registration—but solely for the use of law enforcement—to facilitate heightened law  
17 enforcement attention to persons who may return to this behavior when they reenter society after  
18 serving a sentence for this offense.

19 **2. Promoting Sex with a Trafficking Victim – Section 213.9(3).**

20 Section 213.9(3) defines an offense applicable to the actor who, by advertising or other  
21 means, knowingly encourages, induces, or otherwise solicits another person to engage in a  
22 commercial sex act with a trafficking victim. Within the Model Penal Code as a whole, the offense  
23 is in part redundant, because Section 251.2(2) defines the offense of Promoting Prostitution, which  
24 includes “soliciting a person to patronize a prostitute.”<sup>84</sup> But the 1962 Code grades this offense,  
25 when committed that way, as a misdemeanor, with no provision for raising the degree of the  
26 offense when the person patronized is a victim of trafficking.<sup>85</sup> Section 213.9(3), in accord with  
27 the comparable seriousness of other Article 213 offenses, grades the offense as a felony of the third  
28 degree when the actor knows that the commercial sex act will involve a trafficking victim. But  
29 when the actor’s involvement is limited to advertising or otherwise soliciting people to patronize  
30 the trafficking victim, the actor’s actions and motivations are not comparable to those of someone  
31 engaged in the primary offense of Sex Trafficking; accordingly, registration is not warranted.

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<sup>82</sup> See U.S. Sentencing Guidelines (Consecutive Sentences).

<sup>83</sup> It must not be overlooked that trafficking prosecutors often encounter exceptional difficulty convincing victims to testify. Thus, an offender who allegedly controlled an extensive trafficking network may ultimately face conviction only on a few counts, representing just a small slice of the offender’s suspected involvement. Nonetheless, our system is appropriately committed to the principle that permissible sentences must always be set, not on the basis of suspicion or probabilities, but solely as a function of misconduct proved beyond a reasonable doubt. See *Alleyne v. United States*, 570 U.S. 99 (2013); *Blakeley v. Washington*, 542 U.S. 296 (2004).

<sup>84</sup> MPC § 251.2(2)(d) (1962).

<sup>85</sup> MPC 251.2(3) (1962). Under this provision, however, the offense becomes a felony of the third degree if the actor “promotes prostitution of a child under 16.”

1           **3. Patronizing a Trafficking Victim – Section 213.9(4).**

2           An actor is guilty of Patronizing a Trafficking Victim if the actor engages in a commercial  
3 sex act knowing that the other person is a victim of trafficking. In federal law and in some states,  
4 that conduct suffices to convict the actor of the primary offense of Sex Trafficking. Section 213.9  
5 rejects that approach. Patronizing with full knowledge of the other person’s status as a trafficking  
6 victim is a very serious offense, and there is a strong interest in deterring that conduct because it  
7 is central to the motivation for trafficking. But patronizing is nonetheless less serious than the  
8 conduct of an actor who (for example) knowingly recruits, transports, or harbors a person who is  
9 underage or coerced. Appropriate labeling and proportionality in sentencing therefore require that  
10 the patronizing offense be graded a step lower than the primary offense of Sex Trafficking; it is  
11 graded as a felony of the fourth degree and is not a registrable offense.

12           The federal TVPA takes a different approach; it applies in equal terms to suppliers of sexual  
13 services and their customers—in other words, to the actor who engages in recruiting, transporting,  
14 or harboring a coerced or underage person, and to the individual who patronizes a coerced or  
15 underage person.<sup>86</sup> The TVPA subjects both the supplier and the customer to the same statutory  
16 penalty—a mandatory minimum term of 15 years, with a maximum of life imprisonment. In  
17 contrast, the Uniform Act on the prevention of human trafficking<sup>87</sup> addresses suppliers and  
18 customers in separate sections, with distinct penalty provisions. Under both the Uniform Act and  
19 the federal statute, however, patronizing in itself is sufficient predicate conduct, and the only  
20 additional element of the offense is the requisite awareness that a coerced or underage victim is  
21 involved. Because the considerations relevant to criminal punishment of the customer depend in  
22 part on whether the victim was coerced or underage, and whether or not the victim has been the  
23 target of conventional trafficking activity, these situations are discussed separately.

24           **a. Coerced victims not subjected to the forms of trafficking specified in Section**  
25 **213.9(2)(a).** In the case of coerced victims, the “patronizing” provisions of the TVPA and the  
26 Uniform Act extend the Sex Trafficking offense beyond the realm of the trafficking activity  
27 specified in Section 213.9(2)(a), because the crime can be committed even when neither the  
28 defendant nor anyone else recruited, transported, harbored, or isolated the victim. In addition to  
29 proof of patronizing, the federal Act, for example, requires only “reckless disregard of the fact”  
30 that an adult victim was subjected to force, fraud, or coercion; the Uniform Act requires knowledge  
31 that the adult victim was subjected to coercion or deception.

32           In many situations of this kind, criminal liability will not be objectionable in principle;  
33 Sections 213.2, 213.4, 213.5, and 213.7, for example, impose felony sanctions on an actor who  
34 knowingly or recklessly causes another party to submit to or perform a sexual act by using or  
35 threatening force or nonviolent harm, or by using certain forms of deception. A customer who aids  
36 in the commission of such an offense by purposely engaging in the requisite sexual act with

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<sup>86</sup> See *United States v. Jungers*, 702 F.3d 1066 (8<sup>th</sup> Cir. 2013).

<sup>87</sup> NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING (Feb. 25, 2014) (hereinafter cited as “UNIFORM ACT”).

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1 awareness of those circumstances will face accomplice liability for the violation of one of *those*  
2 *Sections*, by the operation of Section 2.06 of the Code.<sup>88</sup> But bringing the customer who acts with  
3 awareness of those circumstances within the scope of *a trafficking offense*, even though the  
4 specified forms of trafficking activity are absent, presents two problems. First, the highly  
5 stigmatizing label of “sex trafficking” is misapplied when conventional forms of trafficking are  
6 not involved and the gist of the offense is different—not ordinary trafficking but the use of force,  
7 nonviolent threats, or deception against the victim. Second, the kinds of coercion and deception  
8 sufficient to trigger liability for trafficking are much broader than the kinds of nonviolent threats  
9 and deception required for liability under provisions like Sections 213.4, 213.5, and 213.7 of  
10 Article 213. That additional reach makes sense in the context of conventional trafficking, but when  
11 the constraining effects of recruiting, transporting, harboring, or isolating an individual are absent,  
12 liability beyond the boundaries of Sections 213.4, 213.5, and 213.7 cannot be justified. Section  
13 213.9 therefore does not accept “patronizing” as an act sufficient *by itself* to fall within the scope  
14 of the Sex Trafficking offense.

15 *b. Underage victims not subjected to the forms of trafficking specified in Section*  
16 *213.9(2)(a)*. In the case of an underage victim, the “patronizing” provisions of the Uniform Act  
17 and the federal TVPA likewise extend the Sex Trafficking offense beyond the realm of trafficking  
18 activity as traditionally understood, because the crime can be committed even when neither the  
19 defendant nor anyone else recruited, transported, harbored, or isolated the victim. The only offense  
20 element, in addition to the act of patronizing, is the required mens rea (if any) with respect to the  
21 victim’s age. On the mens rea issue, the federal Act requires something less than recklessness,<sup>89</sup>  
22 and the Uniform Act makes the purchase of commercial sex with a minor a strict-liability offense.<sup>90</sup>  
23 The result under both statutes is to attach the stigma of “sex trafficking” to any purchaser of sexual  
24 services, and to substantially enhance the authorized punishment, whenever the other party is  
25 underage, regardless of whether other aggravating circumstances are present.

26 A stringent response to underage commercial sex is not controversial when the customer  
27 is guilty of statutory rape. But because both the TVPA and the Uniform Act define a “minor” as

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<sup>88</sup> The 1962 Code does not fully specify the mens rea of accomplice liability. The Commentary explains: “There is deliberate ambiguity as to whether the purpose requirement extends to circumstance elements of the contemplated offense or whether, as in the case of attempts, the policy of the substantive offense on this point should control. The ... [actor’s required] attitude towards the circumstances [is] left to the courts.” MODEL PENAL CODE AND COMMENTARIES, Comment to 2.06 at 311 n.37 (AM. L. INST. 1985). In *Rosemond v. United States*, 134 S. Ct. 1240 (2014), the Supreme Court held (without specifying whether the offense element in dispute was a conduct element or an attendant circumstance) that accomplice liability for a violation of 18 U.S. C. § 924(c) (use of a firearm “during and in relation to any crime of violence of drug trafficking crime”) requires a mens rea of knowledge, not purpose. (“What matters ... is that the defendant has chosen, with full knowledge, to participate in the illegal scheme—not that, if all had been left to him, he would have planned the identical crime.”). Compare *United States v. Gardner*, 488 F.3d 700, 714 (6th Cir. 2007), holding that for liability as an accomplice in providing a gun to a convicted felon, the prosecution need show only negligence with respect to the “convicted felon” element. Across a variety of other offenses, no clear pattern emerges; state courts and other federal courts have held that the attendant-circumstance mens rea required for accomplice liability can vary from knowledge to negligence to strict liability. See SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES 717-719 (10th ed. 2017).

<sup>89</sup> See Tent. Draft No. 5, *supra* note 156, Section 213.9, Comment 3.j. & note 97.

<sup>90</sup> UNIFORM ACT, *supra* note 87, § 7(a)(2) and Comment at 12 (“subsection (a)(2) ... is a strict liability offense”).

## Section 213.9. Sex Trafficking and Related Offenses

1 any person younger than 18, both statutes impose felony sanctions on acts that most jurisdictions  
2 do not consider illegal outside the commercial context.<sup>91</sup>

3 Whatever the appropriate policy with respect to criminalization of sex work generally,<sup>92</sup>  
4 there is ample justification for defining the purchase of sex from a 16- or 17-year-old as an offense  
5 that is more serious than adult prostitution,<sup>93</sup> Many states do just that, by classifying commercial  
6 sex with an adult as a misdemeanor—such as “patronizing a prostitute”—but grading the offense  
7 as a felony when it involves a person between 16 and 18.<sup>94</sup> This approach, however, does not  
8 codify the crime with the “trafficking” offenses, and states typically avoid that label. In 2017, for  
9 example, Connecticut repealed a statute that had treated commercial sex with minors as a form of  
10 sex trafficking, and replaced it with a stand-alone provision punishing “commercial sexual abuse  
11 of a minor.”<sup>95</sup> To be sure, patronizing often occurs in a trafficking context, but the “trafficking”  
12 label and its associated punishment are out of place when it does not—that is, when neither the  
13 defendant nor anyone else has used conventional means of trafficking as a way to involve the  
14 youthful victim.

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<sup>91</sup> See Tent. Draft No. 5, *supra* note 156, Reporters’ Notes to Section 213.8 (noting that outside the commercial context, only a minority of states set the age of consent higher than 16, and that even when one participant is under 16, many states do not criminalize noncommercial sex acts when the other person is close in age).

<sup>92</sup> That policy issue is intensely debated. For representative discussion for and against decriminalization, see JESSICA SPECTOR, ED., *PROSTITUTION AND PORNOGRAPHY: PHILOSOPHICAL DEBATE ABOUT THE SEX INDUSTRY* (2006). In current law, sex work is prohibited in all states except Nevada, where rural counties have the option to permit commercial sex in “a licensed house of prostitution.” NEV. REV. STAT. ANN. § 201.354(1) (2019) (providing that “[i]t is unlawful for any person to engage in prostitution or solicitation therefor, except in a licensed house of prostitution.”). Licenses are granted by county licensing boards, *id.*, § 244.34 (specifying standards and procedures for license approval), but counties with population more than 700,000 may not do so, *id.*, § 244.34(8) (providing that “[i]n a county whose population is 700,000 or more, the license board shall not grant any license ... for the purpose of operating a house of ... prostitution.”). On one recent count, 10 Nevada counties had issued licenses to operate a house of prostitution. See.

Concern persists that even where licensed and regulated, as in Nevada, brothels can become sites for coercive sex trafficking and other abuses. See, e.g., Brian Joseph, “Lawsuit seeks to close Nevada brothels,” *LAS VEGAS REVIEW-JOURNAL*, Feb. 25, 2019, <https://www.reviewjournal.com/local/local-nevada/lawsuit-seeks-to-close-nevada-brothels-1605343> (describing federal lawsuit alleging coercion of Nevada sex workers and claiming that the brothels illegally impact interstate and foreign commerce). Compare Ray Hagar, “Nevada brothel workers speak out against bill that would outlaw legal prostitution,” *RENO GAZETTE JOURNAL*, Mar. 13, 2019 (describing sex workers who deny exploitation and claim: “All of us who worked at the ranches are doing it by choice and it is what we want to do doing... We should be able to make that choice by ourselves.” <https://www.rgj.com/story/news/politics/2019/03/13/nevada-brothel-workers-slam-bill-outlaw-legal-prostitution/3140764002/>).

<sup>93</sup> Even in the Nevada counties that legalize sex work, participants must be adults; soliciting or providing a person under 18 for commercial sex is a criminal offense. NEV. REV. STAT. ANN. § 201.300(2)(a)(1) (prohibiting providing “child” for prostitution); *id.*, § 201.295 (defining “child” to mean person less than 18 years of age).

<sup>94</sup> E.g., WASH. REV. CODE § 9.68A.100(1) (2019).

<sup>95</sup> See H.B. 7309, 2017 Gen. Assemb., Jan. Sess. (Ct. 2017), repealing CONN. GEN. STAT. § 53a-83c. Section 83c had been enacted in 2013 as part of legislation aimed at combating human trafficking. See Connecticut State Library, Connecticut General Assembly - House Proceedings 2013, Vol. 56, Part 22, 007580 (2013), [http://ctstatelibrary.org/wp-content/lh-bills/2013\\_PA166\\_HB5666.pdf](http://ctstatelibrary.org/wp-content/lh-bills/2013_PA166_HB5666.pdf) (remarks of Rep. Fox, stating that bill targets “the dangers of human trafficking.”); *id.* at 007585 (remarks of Rep. Burger, stating that bill punishes “the Johns that patronize children that are the victims of human trafficking...”). The replacement provision enacted in 2017 separates this prohibition from the trafficking offenses; it makes the purchase of sexual services from a minor a class B felony when the minor is aged 15-18, and a class A felony when the minor is under the age of 15. CONN. GEN. STAT. § 53a-83b (2018).

1 **Illustration:**

2 14. In a public park, Complainant, a homeless 17-year-old runaway, approaches  
 3 Accused, who is 23, and offers to walk with Accused to a secluded spot where Complainant  
 4 will perform oral sex in exchange for \$50. Accused agrees. A policeman observes the act  
 5 and arrests both Accused and Complainant. Complainant has been living independently,  
 6 and there is no evidence that anyone recruited, transported, harbored, or isolated  
 7 Complainant. In most states and under the 1962 Code, Complainant could be convicted of  
 8 prostitution,<sup>96</sup> and Accused could be convicted of patronizing a prostitute.<sup>97</sup> But in  
 9 addition, under the federal Trafficking Victims Protection Act, Accused could be convicted  
 10 of Sex Trafficking if found to have the necessary awareness of Complainant’s age. In  
 11 contrast, Section 213.9 would not impose trafficking liability under these circumstances,  
 12 absent facts establishing that the Complainant had been subjected to the forms of  
 13 trafficking activity specified in Section 213.9(2)(a)—for example, recruiting, enticing,  
 14 transporting, or harboring Complainant.

15 Article 213, in accord with prevalent state approaches,<sup>98</sup> considers a sex-trafficking  
 16 conviction inappropriate in circumstances like those presented in Illustration 14. When an actor  
 17 purchases sexual services from a minor but does not know that anyone has engaged in conventional  
 18 trafficking activity involving that minor, neither Section 213.9(2) nor Section 213.9(4) applies to  
 19 the actor’s conduct; judgments about criminalization, grading, and labeling in that situation lie  
 20 outside the scope of the Sex Trafficking offense. The appropriate penal response to commercial  
 21 sex, in the absence of the narrower range of activity defined as trafficking in Section 213.9(2)(a),  
 22 is addressed in Section 251.2 of the 1962 Code (Prostitution and Related Offenses) or, in the case  
 23 of persons younger than 16, in Section 213.8 (Sexual Offenses Involving Minors).<sup>99</sup> Section 213.9  
 24 of the revised Code is limited to the problem of trafficking in its more widely understood forms—  
 25 recruiting, enticing, transporting, transferring, harboring, providing, isolating, or maintaining a  
 26 person who is coerced or underage.

27 When commercial sex involves a minor who *has* been trafficked in the conventional sense,  
 28 the subject matter falls within the scope of Section 213.9. Accordingly, an actor who purchases  
 29 sexual services with appropriate awareness of those circumstances is a plausible candidate for a  
 30 trafficking-related conviction. The next subparagraph of this Comment addresses that question,

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<sup>96</sup> See 1962 Code Section 251.2(1). Whether Article 251 of the 1962 Code correctly exposes a minor to conviction under these circumstances is of course debatable, but that issue is beyond the scope of Article 213.

<sup>97</sup> See 1962 Code Section 251.2(5).

<sup>98</sup> See Tent. Draft No. 5, *supra* note 156, text at notes 90-92.

<sup>99</sup> MPC Section 251.2(5) classifies the offense of “Patronizing Prostitutes” as a violation, and Section 1.04(5) provides that “[a] violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.” The revised sentencing provisions of the Code “do not speak to penalties for violations. The current revision project does not affect original § 1.04(5).” MPCS, *supra* note 32, Section 6.01, Comment *e*, at 37. Thus, Section 1.04(5) of the 1962 Code remains in effect. But because Section 213.9 addresses only the problem of trafficking, it neither faces nor resolves questions concerning the 1962 Code’s criminalization and grading for the conduct of the customer in a non-trafficking context.

## Section 213.9. Sex Trafficking and Related Offenses

1 together with the related question whether to punish the purchaser for the offense of Sex  
2 Trafficking when the trafficked person is not a minor but a coerced adult.

3 *c. Underage or coerced victims subjected to the forms of trafficking specified in Section*  
4 *213.9(2)(a).* When a person who purchases sexual services knows that the other party is a  
5 trafficking victim, conviction for a trafficking-related offense is not anomalous in principle.  
6 Nonetheless, state statutes and policy discussion reflect considerable disagreement about whether  
7 anti-trafficking statutes are wisely used against customers in these circumstances.

8 The argument in favor of criminalizing the act of a person who knowingly patronizes a  
9 trafficking victim is straightforward. Trafficking flourishes only in response to the demand for  
10 commercial sex, and sanctions targeting the customer can suppress a traffickers' incentives to  
11 supply victims of trafficking in order to meet this demand. Indeed, demand-side strategies focused  
12 on easy-to-deter customers can be more effective and efficient than supply-side efforts to punish  
13 hard-to-deter suppliers who reap millions of dollars in profit from their crimes.<sup>100</sup> Moreover,  
14 because existing penalties for "patronizing a prostitute" are low,<sup>101</sup> they fail to reflect the  
15 culpability of a customer who knowingly patronizes a trafficked victim.<sup>102</sup> Some also argue that  
16 misdemeanor penalties afford insufficient deterrence in light of the magnitude of the harm,<sup>103</sup>  
17 given that a substantial proportion of sex workers are trafficking victims and that customers  
18 typically know this.<sup>104</sup> Some studies suggest that customers, even when not specifically seeking a  
19 trafficking victim, may not care whether the other party to the sexual encounter has been trafficked  
20 and may not be deterred by misdemeanor sanctions.<sup>105</sup> In contrast, states that treat patronizing a

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<sup>100</sup> See Stephen J. Schulhofer, *Solving the Drug Enforcement Dilemma: Lessons from Economics*, 1994 U. CHI. LEGAL FORUM 207 (1994).

<sup>101</sup> Offenses like "Patronizing a Prostitute" are generally punished as a misdemeanor. See, e.g., N.Y. PENAL LAW § 230.04 (LexisNexis 2019) (class A misdemeanor); CAL. PENAL CODE § 647 (Deering 2019) (disorderly conduct, which includes patronizing a prostitute, is misdemeanor).

<sup>102</sup> See Heather C. Gregorio, Note, *More Than "Johns," Less Than Traffickers: In Search of Just and Proportional Sanctions for Buyers of Sex with Trafficking Victims*, 90 N.Y.U. L. REV. 626, 649 (2015).

<sup>103</sup> See Samantha Healy Vardaman & Christine Raino, *Prosecuting Demand as a Crime of Human Trafficking: The Eighth Circuit Decision in United States v. Jungers*, 43 U. MEM. L. REV. 917, 952-953 (suggesting that stiff sentences are needed for "maximum deterrence"). Moreover, educational and treatment programs for individuals arrested merely for soliciting illegal commercial sex ("john schools") are often used in lieu of criminal penalties, further weakening any potential deterrent effect. See Michael Shively, et al., A National Overview of Prostitution and Sex Trafficking Demand Reduction Efforts, National Criminal Justice Reference Service, 61-64 (Apr. 30, 2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/238796.pdf> (noting that about 58 U.S. cities and counties have john schools and about two-thirds of them are structured as diversion programs that dismiss charges upon successful completion).

<sup>104</sup> Rachel Durchslag & Samir Goswami, *Deconstructing the Demand for Prostitution: Preliminary Insights From Interviews With Chicago Men Who Purchase Sex*, Chicago Alliance Against Sexual Exploitation 20-22 (May 2008), <https://humantraffickinghotline.org/sites/default/files/Deconstructing-the-Demand-for-Prostitution%20-%20CAASE.pdf> (findings of Chicago survey reporting, albeit on basis of small, imperfect survey, that 20% of johns admitted having bought sex from women who were trafficked from other countries, and 32% believed that majority of women in sex work entered sex trade before age of 18); Gregorio, *supra* note 102, at 637 (citing study to effect that 28% of johns are not deterred from purchasing sex even when they learn that the person is likely under 18); Mary Graw Leary, *Dear John, You Are a Human Trafficker*, 68 S.C. L. REV. 415, 435 (2017) (42% of callers responding to false advertisement for prostitution were willing to proceed with transaction even after being warned that victim was a minor).

<sup>105</sup> See *id.*, at 435-436.

## Section 213.9. Sex Trafficking and Related Offenses

1 sex-trafficking victim as an offense distinct from “patronizing a prostitute” generally classify the  
2 offense as a felony carrying heavy sanctions.<sup>106</sup>

3 Nonetheless, several factors complicate the case for deploying trafficking sanctions against  
4 customers as such. Trafficking convictions are a blunt instrument. Those who engage in  
5 conventional trafficking activity typically spend considerable time with their victims, while the  
6 buyer’s encounter with a victim is usually brief.<sup>107</sup> Thus, the offense label of “Sex Trafficking”  
7 has highly misleading connotations when applied to the conduct of a one-time customer, whatever  
8 may be the customer’s awareness of circumstances in the background. Absent proof of the  
9 customer’s involvement in trafficking activity itself, the associated stigma and sanctions therefore  
10 can be greatly disproportionate to the customer’s fault.<sup>108</sup> The same “culpability gap” and harsh  
11 implications of a trafficking conviction also leave many prosecutors especially reluctant to charge  
12 that offense,<sup>109</sup> exacerbating the ever-present concern about haphazard, overly punitive, and  
13 racially discriminatory enforcement.

14 None of these complexities detracts from the significant culpability of the person who pays  
15 for sexual services while aware of trafficking circumstances. The policy question whether to  
16 convict that person of a trafficking-related offense is a close one. Significantly, only a minority of  
17 states currently treat patronizing as a sufficient basis for a Sex Trafficking conviction. A recent  
18 law-review survey identifies six states that impose trafficking-based sanctions in this situation<sup>110</sup>;  
19 10 additional states do so as well.<sup>111</sup> Roughly two-thirds of the states do not; even in the context  
20 of contemporary legislative attention to trafficking since 2003, a substantial majority of states treat  
21 their anti-prostitution statutes as sufficient to address the problem on the demand side.<sup>112</sup>

22 In light of these considerations, Section 213.9 does not place patronizing within the reach  
23 of the sex-trafficking offense, but defines the separate offense of Patronizing a Trafficking Victim,

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<sup>106</sup> E.g., 18 PA. CONS. STAT. § 3013 (2018) (second-degree felony); TEX. PENAL CODE ANN. § 20A.02 (West 2017) (second-degree felony).

<sup>107</sup> *Id.*, at 652.

<sup>108</sup> *Id.*, at 637, 653.

<sup>109</sup> See Leary, *supra* note 104, at 445

<sup>110</sup> Gregorio, *supra* note 102, at 645-646 & nn.93-95 (citing statutes of Arkansas, Louisiana, Oklahoma, Rhode Island, Tennessee, and Washington).

<sup>111</sup> See GA. CODE ANN. § 16-5-46 (2018); HAW. REV. STAT. § 712-1200 (2018); MISS. CODE ANN. § 97-3-54.1 (2018); MONT. CODE ANN. § 45-5-705 (2017); N.D. CENT. CODE § 12.1-41-05 (2017); 18 PA. CONS. STAT. § 3013 (2018); TEX. PENAL CODE ANN. § 20A.02 (WEST 2017); VT. STAT. ANN. tit.13, § 2655 (2018); W. VA. CODE § 61-14-6 (2018); WYO. STAT. ANN. § 6-2-707 (2018). Ohio does not impose trafficking liability on the patron when the victim is an adult, but does so when the trafficking victim is 16 or 17 years old and the accused is at least four years older. See OHIO REV. CODE ANN. § 2907.07(B)(2) (LexisNexis 2018). The offense is a fifth-degree felony punishable by imprisonment from six-12 months in the case of a first offense. See *id.*, § 2907.07(F)(3).

<sup>112</sup> E.g., MINN. STAT. ANN. § 609.322(1)-(1a) (West 2019) (exempting from criminal liability for sex trafficking an individual who acted “as a prostitute or patron”); OHIO REV. CODE ANN. § 2905.32(C) (West 2019) (“In a prosecution under [the trafficking statute], proof that the defendant engaged in sexual activity with any person, or solicited sexual activity with any person, whether or not for hire, without more, does not constitute a violation of this section.”). Ohio does, however, impose sex-trafficking penalties on the patron when a trafficking victim is 16 or 17 years old and the accused is at least four years older. See Tent. Draft No. 5, *supra* note 156, Section 213.9, at note 92.

## Section 213.9. Sex Trafficking and Related Offenses

1 applicable to the actor who knowingly patronizes a victim of sex trafficking. It reflects the  
2 judgment that the person who does so should not face the stigma and very severe sanctions attached  
3 to the offense of Sex Trafficking, but that the conduct is nonetheless much more serious than that  
4 of “patronizing a prostitute,” which is merely a “violation” under the 1962 Code and a  
5 misdemeanor under the law of most states. The patronizing offense under Section 213.9(4) is  
6 graded as a felony of the fourth degree but is not a registrable offense. Of course, an actor guilty  
7 of the patronizing offense under Section 213.9(4) is also subject to prosecution for other age-based  
8 and coercion-based offenses under Article 213 when the facts warrant. But Section 213.9 limits  
9 liability for Sex Trafficking to those who engage in trafficking activity in the typical ways, set out  
10 in Section 213.9(2)(a)—recruiting, enticing, transporting, transferring, harboring, providing,  
11 isolating, or maintaining a person who is coerced or underage.

12 **4. *Complicity in Sex Trafficking – Section 213.9(5)*.** The offense of Complicity in Sex  
13 Trafficking applies to the actor who knowingly provides resources, services, or other means that  
14 facilitate the commission of an offense defined by subsections (2), (3), or (4). Within the Model  
15 Penal Code as a whole, the offense is largely redundant, because Section 2.06 of the 1962 Code  
16 provides for accomplice liability in these circumstances.<sup>113</sup> The offense is nonetheless defined  
17 explicitly in Section 213.9, to insure appropriate coverage to the extent that a legislature may be  
18 considering revised Article 213 without having previously adopted the entire MPC.

19 Complicity under Section 213.9(5) is a felony of the fourth degree and not a registrable  
20 offense. In the 1962 Code, accomplice liability under Section 2.06 carries the same punishment as  
21 the underlying substantive offense. The grading judgment in Section 213.9(5) is identical to that  
22 under Section 2.06 when the Section 213.9 offense of Complicity is based on having facilitated  
23 Patronizing (Section 213.9(4))—the non-registrable fourth-degree felony classification under  
24 subsection (5) is the same as that of the underlying substantive offense. When Complicity under  
25 subsection (5) is based on having facilitated Sex Trafficking (subsection (2)) or Promoting  
26 (subsection (3)), the Complicity offense, a non-registrable fourth-degree felony, is one level lower  
27 than the substantive offenses under subsections (2) & (3), which are felonies of the third degree.  
28 The relatively severe third-degree felony sanctions for each count of those offenses are  
29 inappropriate when the acts of Complicity are one step removed from the conduct punished by the  
30 underlying substantive offenses. For the same reason, the registration requirement attached to  
31 conviction of Sex Trafficking under subsection (2) is inappropriate when the actor’s liability is  
32 based on Promoting, Patronizing, or Complicity rather than on direct participation in the trafficking  
33 activity.

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<sup>113</sup> Under prevailing accomplice liability law, knowledge is usually accepted as a sufficient mens rea in the case of serious felonies. *United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985). Section 2.06 requires the ostensibly stricter mens rea of purpose, but the difference between knowledge and purpose is slender or nonexistent in the case of serious crimes like sex trafficking.

1 **SECTION 213.11. SENTENCING AND COLLATERAL CONSEQUENCES OF CONVICTION**

**REPORTERS' NOTES**

**Executive Summary\***

2 Sentencing and the collateral consequences of conviction raise unusually complex issues;  
3 extensive black letter is required to treat them with precision. But black letter is not the ideal way  
4 to convey the provisions' overall aims and effects. This Executive Summary serves that purpose.  
5 It first explains why there is a need for Sections 213.11 to 213.11J in the scheme of Article 213. It  
6 then summarizes the most prominent features of current law on this subject and explains why it is  
7 important for Sections 213.11 to 213.11J to establish a different framework.

8 1. *Why is this subject addressed in Article 213?* Underlying this common question are  
9 concerns about preemption and the appropriate scope of the project. Sentencing is treated  
10 comprehensively in the Institute's recent revision of the sentencing provisions of the MPC. To  
11 reconsider that subject in Article 213 might seem unnecessary or inconsistent with prior judgments  
12 of the Institute. Moreover, *collateral* consequences are not intrinsically matters of criminal law  
13 and therefore might seem beyond the proper scope of a *penal* code.

14 These concerns are understandable but misplaced. With respect to "preemption,"  
15 *MPC:Sentencing* treats sentencing issues only in general terms applicable to any offense. The  
16 Comments to *MPC:Sentencing* state that it is not intended to preclude special rules tailored to the  
17 specifics of particular offenses.<sup>114</sup> In any event, Sections 213.11-213.11J are not inconsistent with  
18 *MPC:Sentencing*; they supplement its provisions without contradicting them.

19 The concern about relevance to criminal law is especially important. In determining  
20 whether to criminalize various forms of sexual misconduct, the Article 213 revision must consider  
21 all important consequences of doing so, regardless of whether they be labeled "penal" or  
22 "regulatory." When revising the sentencing provisions of the MPC, the Institute approved a  
23 lengthy Article on collateral consequences, defined as "disadvantages, however denominated, that  
24 are authorized or required by federal or state law as a direct result of an individual's conviction  
25 [that] are *not part of the sentence* ordered by the court ...."<sup>115</sup> In that Article, moreover,  
26 *MPC:Sentencing* addresses—and forbids—certain demonstrably noncriminal consequences of

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\* In this Executive Summary, cross-references to footnotes and accompanying text indicate footnotes and accompanying text for Sections 213.11-213.11J in MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES, Tent. Draft No. 5 (May 4, 2021).

<sup>114</sup> See MPCs, *supra* note 32, Section 7.06(4) (stating that "[a] certificate of restoration of rights removes all mandatory collateral consequences ..., except as provided by Article 213.) See also *id.*, Section 7.06 Comment *d* (stating that the Section 7.06 provisions concerning relief from collateral consequences are subject to an exception: "for individuals convicted of sexual offenses, the restrictions on relief set forth in Article 213 apply.")

<sup>115</sup> MODEL PENAL CODE: SENTENCING, Section 7.01 (Official Statutory Text), *supra* note 28 (emphasis added).

1 conviction—disenfranchisement and disqualification from jury service.<sup>116</sup> In short, the Institute  
2 has rejected the position that collateral consequences lie outside the domain of the MPC.

3 Collateral consequences are *especially* important for Article 213. Over the past half-  
4 century, the principle that frames the sexual offenses has shifted from force and coercion to the  
5 absence of consent.<sup>117</sup> Updating the MPC to reflect this shift was a primary motivation for the  
6 Institute’s decision to revise Article 213. And because it is now widely accepted that absence of  
7 consent can now support conviction, without proof of force, coercion, or incapacity, the reach of  
8 sexual-offense law has justifiably expanded in most American jurisdictions<sup>118</sup> and around the  
9 world.<sup>119</sup>

10 The crucial question is to determine *how far* this expansion should go. That judgment must  
11 be shaped by balancing the need for penal safeguards against the potentially disproportionate  
12 consequences of a criminal conviction. A decision to consider the first half of this equation in  
13 isolation, without attention to the second half, would be difficult to defend.<sup>120</sup>

14 This is not an abstract question. In prevalent state law, the consequences of a sexual-offense  
15 conviction often include highly restrictive “collateral” measures, such as onerous registration  
16 duties, limits on employment and residency, and expanded public awareness of a local resident’s  
17 record of convictions. Courts have held that sex-offense collateral-consequence regimes in Alaska,  
18 Kentucky, Michigan, Pennsylvania, and many other states constitute *criminal punishment* (either  
19 on their face, or as applied to individual defendants) and therefore are subject to all the strictures  
20 of the criminal law.<sup>121</sup> Statutory provisions like those are obviously appropriate for a penal code

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<sup>116</sup> *Id.*, Section 7.03.

<sup>117</sup> See, e.g., Stephen J. Schulhofer, *Consent: What It Means and Why It’s Time to Require It*, 47 U. PAC. L. REV. 665, 671-74 (2016) (describing a trend among jurisdictions away from requiring force and toward requiring consent); Matthew R. Lyon, *No Means No?: Withdrawal of Consent During Intercourse and the Continuing Evolution of the Definition of Rape*, 95 J. CRIM. L. & CRIMINOLOGY 277, 283-290 (2004) (tracing this history, from the common law crime of rape that included elements of both force and nonconsent, to an increasing focus on force alone following the publication of the original Model Penal Code, to a more recent move away from force and increasing emphasis on nonconsent).

<sup>118</sup> See “Current State of the Law -- Consent-Only Offenses” (Oct. 20, 2016).

<sup>119</sup> For example, the Istanbul Convention, adopted by the Council of Europe in 2011, requires member states to criminalize all “non-consensual acts of sexual nature.” See *Council of Europe Treaty Series - No. 210, Convention on Preventing and Combating Violence Against Women and Domestic Violence*, May 11, 2011. The Convention was signed by 45 of the Council’s 47 member nations; only Russia and Azerbaijan failed to sign.

<sup>120</sup> Referring to current Minnesota efforts to revise that state’s definitions of sexual assault, the mother of Jacob Wetterling (the victim of a nationally notorious sexual crime) recently wrote that “[a]ny statutory analysis of the criminal statutes is woefully incomplete without considering the effectiveness, cost, and collateral and material consequences the [sex-offense] Registry poses.” Patty Wetterling, Letter to Minnesota Senators and Representatives, Feb. 8, 2021.

<sup>121</sup> In *Smith v. Doe*, 538 U.S. 84, 92 (2003), the Supreme Court held that sex-offense registration regimes are not necessarily punitive and that Alaska SORA was not punitive as a matter of federal constitutional law. Compare *Doe v. State*, 189 P.3d 999 (Alaska 2008) (holding Alaska SORA to be punitive under state constitution); *Doe v. Snyder*, 834 F.3d 696, 705-706 (6th Cir. 2016) (holding that “*Smith* [should not] be understood as writing a blank check to states to do whatever they please in this arena.... Michigan’s SORA imposes punishment”). Accord, *State v. Myers*, 923 P.2d 1024 (Kan. 1996) (holding Kansas SORA to be punitive as applied); *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009) (holding residency restrictions of Kentucky SORNA to be punitive); *State v. Letalien*, 985 A.2d 4 (Me. 2009) (holding Maine SORNA to be punitive on its face); *Doe v. State*, 111 A.3d 1077, 1100 (N.H. 2015) (holding that “[a]s applied to petitioner, ... the punitive effect of [New Hampshire registry law] was enough to overcome any nonpunitive legislative intent”); *Riley v. N.J. State Parole Bd.*, 98 A.3d 544 (N.J. 2014) (holding New Jersey Sex Offender Monitoring Act to be punitive); *Starkey v. Oklahoma Dep’t of Corr.*, 305 P.3d 1004 (Okla. 2013) (holding Oklahoma’s registration statute to be punitive as applied); *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2018) (holding

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1 to address. But whether these consequences are penal or regulatory, they have powerful impacts  
2 on a convicted individual and therefore must be considered in any judgment about whether to  
3 criminalize an area of behavior.

4 An example makes this principle concrete. A decision to punish sexual penetration of an  
5 adult victim without consent, but in the absence of any force, incapacity, or coercion could be  
6 readily supported if the potential prison sentence is low and if the Code stipulates that conviction  
7 cannot lead to any “collateral” burdens. But that decision would be difficult to sustain if conviction  
8 could lead to life imprisonment even in the absence of aggravating circumstances. That decision  
9 likewise would be difficult to sustain if conviction could require lifetime registration with law  
10 enforcement and lifetime limits on employment and residency. Yet in many states, current law  
11 does exactly that; a penal code that expands the categories of conduct it criminalizes but does not  
12 address the collateral consequences of conviction would leave these preexisting burdens of  
13 conviction in effect, even if those burdens were originally limited to a narrower class of more  
14 severe offenses. A sound approach to the criminalization decision cannot avoid attention to these  
15 consequences.

16 2. *Current law.* All American jurisdictions currently require persons convicted of certain  
17 sexual offenses to register with local law-enforcement where they reside, work, or study, and to  
18 continually update the personal information provided. In most states the list of sexual offenses that  
19 trigger these obligations is extensive, the obligations are long-lasting, and the steps required to  
20 keep the information updated may be onerous. Many states or their municipalities also prohibit  
21 registrants from residing in certain areas; most prohibit registrants from working in certain  
22 sensitive occupations or locations.<sup>122</sup> And in nearly all states, much of the registry information is  
23 widely available. Although a few states keep that information confidential except with respect to  
24 registrants at high risk of reoffending,<sup>123</sup> most permit public access to information pertaining to  
25 every registered ex-offender.<sup>124</sup> Moreover, most states require law enforcement to proactively  
26 notify various non-law-enforcement individuals and groups as soon as a new registrant comes to  
27 the area. Although a few states notify only groups or individuals with a particular need to know,  
28 the great majority allow notification to be distributed widely, including to anyone who asks to be  
29 notified, regardless of need to know.<sup>125</sup>

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Pennsylvania’s registration statute to be punitive); In re C.P., 967 N.E.2d 729, 738 (Ohio 2012) (holding that Ohio’s registration statute imposes cruel and unusual punishment as applied to juveniles).

Cf. *State v. Bani*, 36 P.3d 1255, 1268 (Haw. 2001) (holding Hawaii SORNA to violate procedural due process in the absence of individualized risk assessment); *Doe v. Attorney General*, 686 N.E.2d 1007 (Mass. 1997) (Massachusetts, same); in re J.B., 107 A.3d 1 (Pa. 2014) (holding that Pennsylvania SORNA violates procedural due process as applied to juveniles); *Doe v. Wasden*, 9th Cir. Dec. 9, 2020 (holding that *Smith* does not foreclose plaintiffs’ claim that Idaho SORNA regime is punitive).

<sup>122</sup> See generally, text at notes 149, 296-301, 319-322.

<sup>123</sup> See text at notes 94-99, 276-278.

<sup>124</sup> See text at note 243.

<sup>125</sup> See text at notes 243, 274-278.

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1 Federal law complicates this picture. The Sex Offender Registration and Notification Act  
2 of 2006 (federal SORNA)<sup>126</sup> requires every state, as a condition of receiving certain federal funds,  
3 to maintain a registry of persons convicted of almost any offense that has “an element involving a  
4 sexual act or sexual contact with another.” Although federal SORNA does not require states to  
5 limit registrants’ employment or residency, its other requirements are more restrictive than many  
6 states’ preexisting laws. The offenses that must trigger a state duty to register include adjudications  
7 of delinquency involving use of force by juveniles aged 14 or older and adult convictions even for  
8 misdemeanor offenses that involve sexual contact with another<sup>127</sup>; registrants must appear in  
9 person, within three business days, to report any change in required registry information<sup>128</sup>; the  
10 duties to register and to update personal information normally continue for at least 15 years even  
11 for the lowest-level offenses; and those duties normally continue for life in the case of any  
12 penetration offense committed by force or threat.<sup>129</sup> Federal SORNA also requires each state to  
13 make available on the Internet most information about every registrant and to immediately notify  
14 large swathes of the local community, including “[a]ny organization, company, or individual who  
15 requests such notification pursuant to procedures established by the jurisdiction,” whenever an ex-  
16 offender updates registry information or newly registers in the area.<sup>130</sup>

17 Given the onerous requirements federal SORNA imposes on registrants and on state  
18 officials themselves, a large majority of the states have chosen not to comply with its entire  
19 mandate. As of November 2020, only 18 states were fully SORNA-compliant; the rest have opted  
20 to disregard one or more of its major provisions, even at the cost of losing millions of dollars in  
21 federal funding.<sup>131</sup> Even so, registration requirements, public access to registry information, and  
22 proactive community notification about registrants in the area are the norm throughout the United  
23 States. And in many jurisdictions the burdens imposed on persons convicted of a sexual offense  
24 are even more restrictive than federal SORNA requires. Most states require registrants to submit  
25 to GPS monitoring in various circumstances; many restrict Internet usage; and at least 27 states  
26 and many municipalities prohibit registrants from living near schools, parks, playgrounds, and  
27 day-care centers.<sup>132</sup>

28 3. *Assessment.* The aim of these laws is to ease public fear, reduce recidivism, and enable  
29 concerned citizens to take steps for self-protection. Yet extensive research demonstrates that these  
30 gains have not materialized. To the contrary, there is clear evidence, widely acknowledged by

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<sup>126</sup> 34 U.S.C. §§ 20901-20929 (2020).

<sup>127</sup> *Id.*, § 20911(5) & (8).

<sup>128</sup> *Id.*, § 20913(c).

<sup>129</sup> *Id.*, § 20915(a).

<sup>130</sup> *Id.*, §§ 20920(a); 20923(b).

<sup>131</sup> See text at note 167. The most frequent reasons for substantial noncompliance were narrower lists of triggering offenses and less frequent obligations to verify and update registry information. See Andrew J. Harris & Christopher Lobanov-Rostovsky, National Sex Offender Registration and Notification Act (SORNA) Implementation Inventory Preliminary Results (July 2016), pp. 4, 13-30 (detailing reasons for noncompliance as of March 2016.)

<sup>132</sup> See text at note 297.

1 professionals in the field, that these laws are seriously counterproductive.<sup>133</sup> They are expensive  
2 for local police to administer, unduly hinder the rehabilitation of ex-offenders, and ultimately  
3 defeat their own central purposes by *impeding* law enforcement and *increasing* the incidence of  
4 sexual offenses.<sup>134</sup>

5 a. *Recidivism*. Although a common view holds that that “[t]he risk of recidivism posed by  
6 sex offenders is ‘frightening and high,’”<sup>135</sup> the available empirical evidence lends little or no  
7 support to this claim.<sup>136</sup> Even taking into account that reporting rates for sexual offenses are  
8 exceptionally low, “[s]ex offenders have some of the lowest recidivism rates of any class of  
9 criminal.”<sup>137</sup> This is also true of sexual offenses against children. Again, low reporting rates for  
10 offenses against minors make research about recidivism in these cases only suggestive rather than  
11 definitive, but to the extent that reliable data are available, they indicate that recidivism rates for  
12 these offenses are as low as or lower than for other sexual crimes.<sup>138</sup>

13 Comparative recidivism rates, however, are largely beside the point. Sexual offenses are  
14 distinctively unsettling and injurious, even more so in the case of sexual offenses against children.  
15 Exceptional prevention efforts are unquestionably justified. The crucial point is simply that  
16 registration, public access, community notification, residency restrictions, and other special  
17 burdens do not have the anticipated preventive effect. Research on this point has been extensive,  
18 and its conclusions are clear: all the available evidence indicates that these special burdens *do not*  
19 reduce recidivism rates for these offenses.<sup>139</sup>

20 b. *Self-protection*. Citizen self-protection is a separate goal. Yet public access and  
21 community notification seldom prompt individuals to take effective precautions to safeguard  
22 themselves or their loved ones. And the very existence of these regimes diverts attention from  
23 much more significant sexual dangers, thus in effect fostering a false sense of security and  
24 increasing the dangers to children and others.<sup>140</sup>

25 Schools, day-care centers, and other organizations that serve vulnerable populations  
26 present a different issue. They must not employ staff or volunteers who put their clientele at risk  
27 of sexual abuse, and their due-diligence obligations in that regard are strong. But background-  
28 check mechanisms are available nationally and in all states to meet this need within well-regulated

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<sup>133</sup> See text at notes 150, 255-256, 316-327.

<sup>134</sup> See generally *id.*

<sup>135</sup> *Smith v. Doe*, 538 U.S. 84, 103 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)).

<sup>136</sup> See text at notes 111-128.

<sup>137</sup> Stuart A. Scheingold et al., *Sexual Violence, Victim Advocacy, and Republican Criminology: Washington State’s Community Protection Act*, 28 LAW & SOC’Y REV. 729, 743 (1994) (noting that “as few as 5.3% [of sex offenders] re-offend within three years, according to the Bureau of Justice Statistics, as opposed to rates in the 65 to 80% range for drug offenders and thieves.”)

<sup>138</sup> See text at notes 111-128.

<sup>139</sup> See text at notes 131-135. With respect to the recidivism impact of particular measures, “research provides little if any support for the effectiveness of residential restriction laws in deterring or preventing sexual offenses.” Tewksbury, *Residency Restrictions*, note 299, at 539. See also text at notes 319-323.

<sup>140</sup> See text at note 136 and Reporters’ Note to Section 213.11H.

1 privacy-protective frameworks. Where incomplete or too narrow in their coverage, these  
2 background-check mechanisms can be strengthened without resort to county- and municipal-level  
3 sex-offense registries, which in any event cannot meet the need—they are overbroad, poorly  
4 insulated from *unnecessary* public access, and dangerously *underinclusive* because they omit  
5 criminal history pertaining to relevant nonsexual offenses.<sup>141</sup>

6 c. *Costs*. Substantial costs must be weighed against these scant public-safety benefits.  
7 Registration laws are expensive to implement, especially when (as is typical) they target a large,  
8 heterogeneous group of ex-offenders. For local police departments, registry management, GPS  
9 monitoring, and related duties take personnel away from responding to emergencies, investigating  
10 crime, and providing other public services. Out-of-pocket expenses for website technology and for  
11 recording and updating registry information can run to several millions of dollars per year.<sup>142</sup> Many  
12 states find that more selective approaches can achieve nearly all the benefits at much lower cost.<sup>143</sup>

13 d. *Unintended Effects*. Even more concerning are the counterproductive side effects.  
14 Restricted residency pushes registrants into socially disorganized, economically stressed  
15 neighborhoods or into homelessness. Public access to registry information, community  
16 notification, overbroad limits on employment and residency, and indirect impacts on registrants'  
17 ability to find jobs and housing lead to a high incidence of registrant joblessness, social isolation,  
18 homelessness, suicide, and even physical violence at the hands of misguided members of the  
19 public.<sup>144</sup> These effects in turn mean negative impacts *for public safety* because successful  
20 reintegration into society requires stable living arrangements, supportive family, and steady  
21 employment, while poor social support and psychological stress are important risk factors for  
22 sexual recidivism. So the burdens typically imposed on registrants almost inevitably aggravate the  
23 very dangers they seek to allay; the adverse impacts on registrants impede their rehabilitation and  
24 aggravate their risks of reoffending.<sup>145</sup> Registration of juveniles has had distinctively harsh  
25 consequences, and assessments of its value have been especially negative.<sup>146</sup> Because these  
26 criminogenic effects can *increase* registrant recidivism, they tend to outweigh any public-safety  
27 benefits of self-protection and the enhanced possibilities for surveillance and deterrence of  
28 registrants. The result, convincingly documented, is that these laws actually undermine public  
29 safety, the exact opposite of what lawmakers and the public so confidently assume they  
30 accomplish.

31 4. *Recommendations*.

32 a. *Overall approach*. The strong case against these schemes prompts many experts to  
33 unconditionally oppose *any* regime for sex-offense registration or other collateral consequences.

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<sup>141</sup> See text at notes 258-271.

<sup>142</sup> See text at notes 145-146, 309-312.

<sup>143</sup> See note 167.

<sup>144</sup> See text at notes 149, 253-256, 319-322.

<sup>145</sup> See text at notes 150, 255-256, 316-327.

<sup>146</sup> See note 81 and text at notes 190-204.

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1 The Draft does not endorse that view. First, simply as a pragmatic matter, it is clear that an Institute  
2 recommendation to eliminate registries entirely will have no constructive law-reform impact,  
3 either now or in any foreseeable political future. Registries and their associated features currently  
4 command overwhelming public support, based on emotions and intuitions not easily dislodged.  
5 Those actively engaged in the reform effort on the ground are emphatic that there is no legislative  
6 audience for an approach that categorically opposes registries altogether.<sup>147</sup>

7 On the merits, moreover, unqualified opposition to registries in any form reaches farther  
8 than a discriminating analysis can justify. Sex-offense collateral consequences in the United States  
9 are certainly too harsh, a fact that no doubt contributes to the strongly negative reaction that the  
10 registry concept so often prompts. But the overly severe, counterproductive effects are not inherent  
11 in registries as such. Instead, they result from features common in the United States but readily  
12 severable and virtually unheard of elsewhere in the world.

13 Nearly every Western nation maintains registries of persons who have been convicted of a  
14 sexual offense. But unlike American registries, those of other countries are almost exclusively for  
15 law-enforcement use, with either very limited need-to-know access for others or (in the great  
16 majority of countries) no public access at all. Registry regimes outside the United States typically  
17 include none of the elements that make American sex-offense regimes so destructive—most  
18 obviously, the sweeping and illogical restrictions on residency, but also, for registries themselves,  
19 the overbroad list of offenses that require registration, burdensome and overly long-lasting update  
20 duties, unrestricted public access, and sweeping community notification disconnected from any  
21 plausible need to know.<sup>148</sup>

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<sup>147</sup> See, e.g., William Buhl, J.J. Prescott & Miriam Aukerman, *Michigan Poised to Double Down on Failed Sex Offender Registry*, DETROIT FREE PRESS, Dec. 10, 2020 (statement of “a judge whose hands were tied by SORA’s one-size-fits-all approach, a researcher who has documented the counterproductive impact of registries, and an attorney who has represented [registrants]” arguing that in Michigan “[l]egislators should bring together stakeholders and experts to draft an evidence-based statute, looking to examples like the draft model law written by the American Law Institute.”); Patty Wetterling, Letter to Minnesota Senators and Representatives, Feb. 8, 2021 (urging appointment of a Working Group to consider “many needed reforms” because Minnesota SORNA is “overbroad” and “must be scaled back.”); Eric Janus, Letter to Minnesota Senators and Representatives, Feb. 8, 2021 (same); Ira Ellman, email to Stephen Schulhofer, Nov. 10, 2020 (describing difficult, nearly unsuccessful California effort to enact modest SORNA amendments, merely to differentiate triggering offenses by tiers, and concluding “The idea of proposing [California] simply abolish its registry never occurred to anyone. [Even in] this heavily blue state in which Democrats enjoy legislative super majorities, that would have been a complete non-starter.”); Eric S. Janus, email to Stephen Schulhofer, Jan. 21, 2021 (“Although I doubt that there are good grounds for uniquely targeting sex crimes for even highly confined registration laws, I believe that the current ALI draft moves substantially in the right direction. I am aware of efforts in some states ... [to] rein in registration laws. A model law that focuses on the one arguably valid foundation for such laws—assisting law enforcement—would be of enormous benefit as a guide to state legislative efforts.”); Eric Tennen (Boston attorney who has represented several hundred registrants), Letter to Stephen Schulhofer, Feb. 16, 2021:

“I [do not] support registration. ... But as a practical matter, I recognize there is no real legal or political route to abolition.... I believe [the ALI’s] efforts can more realistically achieve reform than simply taking the position registration should not exist.... I do not believe that even our progressive [Massachusetts] Legislature would entertain calls to abolish our registry. However, I do believe our Legislature might be responsive to evidence-based arguments to scale back registration... Therefore, [I support] ALI’s efforts on this front. I believe Council Draft 11 is an extremely well argued, well researched proposal. It is both modest and groundbreaking. Modest because it recognizes the reality of registration; groundbreaking because it insists registration be objective and scientific.”

<sup>148</sup> See text at notes 30-80.

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1 In light of these concerns, the Draft does not condemn sex-offense collateral consequences  
2 wholesale. Instead, it recommends a selective approach. Because a sex-offense registry provides  
3 locally relevant information that police cannot obtain from ordinary criminal-history databases  
4 when they have not identified a particular suspect,<sup>149</sup> registries facilitate high-priority  
5 investigations of serious sexual offenses. That gives them the important practical advantages that  
6 prompt virtually all Western nations to maintain sex-offense registries for law-enforcement use.<sup>150</sup>  
7 As long as the confidentiality of these records is preserved, registration for law-enforcement  
8 purposes poses relatively few dangers to public safety and to the welfare of registrants themselves.

9 The Draft therefore accepts the value of registries available exclusively to law enforcement,  
10 but requires that they be structured to avoid undue burdens on registrants. At the same time, the  
11 Draft limits and carefully targets other special burdens, permitting them only on a substantially  
12 more restricted basis than that found in much of current American law, in order to make their  
13 imposition more coherent and less prone to abusive application.

14 b. *Principal details.* The Draft's core recommendation is to permit sex-offense registries  
15 for the exclusive use of law enforcement, while deploying a range of devices, some conspicuous  
16 and others more granular, to minimize or eliminate unnecessarily harsh and counterproductive  
17 features of currently prevalent law. Seven of these limiting devices are especially important:

18 1) *Triggering offenses.* Section 213.11A sharply restricts the class of individuals to whom  
19 the duty to register and other sex-offense collateral consequences apply. It precludes registration  
20 of nearly all juveniles, and for adults a duty to register is triggered by conviction of an Article 213  
21 offense only when the conviction is for one of the Article 213 offenses that most strongly arouse  
22 public concern, specifically:

23 (i) Sexual Assault by Aggravated Physical Force or Restraint, as defined by Section  
24 213.1.

25 (ii) Sexual Assault by Physical Force or Restraint, as defined by Section 213.2

26 (iii) Sexual Assault of an Incapacitated or Vulnerable Person, as defined by  
27 Sections 213.3(1) & (2).

28 (iv) Aggravated Offensive Sexual Contact, as defined by Section 213.7(1), when it  
29 involves the use of physical force, physical restraint, or an incapacitated or vulnerable  
30 victim, as defined in Sections 213.1, 213.2, 213.3(1) or 213.3(2).

31 (v) Sexual Assault of a Minor, as defined by Section 213.8(1), but only when the  
32 actor is more than 10 years older than the minor, or the actor is 18 or older and the minor  
33 is younger than 12.

34 (vi) Incestuous Sexual Assault of a Minor, as defined by Section 213.8(2), but only  
35 when the minor is younger than 16.

36 (vii) Exploitative Sexual Assault of a Minor, as defined by Section 213.8(3).

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<sup>149</sup> See text at notes 85.

<sup>150</sup> See text at notes 30-80.

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1 (viii) Fondling a Minor, as defined by Section 213.8(4), but only when the actor is  
2 more than 10 years older than the minor, or the actor is 18 or older and the minor is younger  
3 than 12.

4 (ix) Aggravated Offensive Sexual Contact with a Minor, as defined by Section  
5 213.8(5).

6 (x) Sex Trafficking, as defined by Section 213.9(2).

7 2) *Updating information.* Section 213.11E permits registrants to update required  
8 information by email or other readily accessible means of communication, without needing to  
9 make overly frequent personal appearances or navigate other burdensome bureaucratic obstacles.

10 3) *Duration of duties.* The registration framework shortens in three ways the duration of  
11 required registration. Section 213.11F(2) limits to 15 years the registrant's duty to keep registry  
12 information current. Section 213.11F(3) provides for automatic termination of that duty at an  
13 earlier date if the registrant meets specified rehabilitative goals during the initial registration  
14 period. Finally, Section 213.11J permits the registrant to apply for early removal from the registry  
15 upon an appropriate showing of rehabilitation.

16 4) *Public access to registry information.* Section 213.11H marks a major departure from  
17 the American practice of investing considerable resources in an effort to maximize public  
18 awareness of registry information. It restricts access to registry information almost exclusively to  
19 government law-enforcement agencies and personnel. Non-law-enforcement access is largely  
20 precluded, and Section 213.11H imposes on authorities who have access to registry information a  
21 strong obligation to preserve its confidentiality.

22 A legitimate need for non-law-enforcement access arises when an individual is being  
23 considered for a position of trust involving contact with a vulnerable population. But the FBI has  
24 authority to share criminal-history information with state agencies responsible for licensing and  
25 employment background checks in regulated areas, including for individuals who work with  
26 vulnerable populations.<sup>151</sup> Although some state regimes do not apply to all arguably relevant  
27 occupations and may have other gaps, the solution to that problem is simply to fill those gaps  
28 directly, after expressly confronting the conflicting public-safety benefits and privacy costs.  
29 Whether that step is taken or not, local sex-offense registries cannot fill such gaps because they  
30 omit criminal history information pertaining to large numbers of crucially relevant nonsexual  
31 offenses and therefore are vastly underinclusive.<sup>152</sup> To open local registries for these purposes  
32 would create unjustifiable and unnecessary risks, given the availability of pertinent records  
33 (including for relevant *nonsexual* offenses) from national and state databases subject to stronger  
34 oversight and controls. The legitimate need can be met more adequately in other ways. Section  
35 213.11H, together with the Annex to Sections 213.11–213.11J, provides two alternative templates  
36 for creating an effective regime that meets relevant background-check needs without the dangers  
37 to public safety and registrant welfare that accompany direct public access to registry information.

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<sup>151</sup> See text at note 262.

<sup>152</sup> See text at notes 262-271.

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1           5) *Community notification*. Because persons and organizations with a justifiable need to  
2 know have access to criminal-record information on a well-regulated basis through the criminal-  
3 history background-check systems just mentioned, Section 213.11I(3) bars proactive government  
4 measures broadly notifying community organizations and individuals that a registrant resides,  
5 works, or studies in the area.

6           6) *Other burdens*. Section 213.11I tightly constrains, and in most cases eliminates, other  
7 burdens and restrictions applicable specifically to persons convicted of a sexual offense. It creates  
8 a strong presumption against GPS monitoring, residency restrictions, limits on Internet access, and  
9 the like, permitting them only when an individual, case-by-case risk assessment strongly supports  
10 the need for such a measure, to an extent that outweighs its potential for costly, counterproductive,  
11 and criminogenic effects. The official making the determination must carefully consider the  
12 public-safety need for the particular measure; weigh that need against its impact on the registrant,  
13 the registrant’s family, and the registrant’s prospects for rehabilitation; and ensure that any  
14 measure approved is drawn as narrowly as possible to achieve its public-safety objectives.

15           7) *Relief from registration and other burdens*. Section 213.11J establishes standards and  
16 procedures by which registrants can petition for early relief from registration and other special  
17 burdens of a sex-offense conviction.

18 **SECTION 213.11. SENTENCING AND COLLATERAL CONSEQUENCES OF CONVICTION**

19           **(1) Definitions. For purposes of this Article:**

\*\*\*\*

20           **(c) a “sexual offense” is any offense defined by this Article or that otherwise**  
21 **has an element involving sexual penetration, oral sex, or sexual contact; any offense**  
22 **against a minor that involves kidnapping or false imprisonment (unless committed by**  
23 **a parent or guardian); any offense against a minor that involves sexual performance**  
24 **or solicitation to engage in prostitution; any offense that involves producing,**  
25 **distributing, or possessing child pornography; and any attempt, solicitation, or**  
26 **conspiracy to commit any of these offenses.**

27           **(2) General Rule. Sentencing procedure, the authorized disposition of a person**  
28 **convicted of an Article 213 offense, sentencing consequences, and collateral consequences are**  
29 **specified in Articles 6 and 7 of this Code\* and, when based on conviction for an Article 213**  
30 **offense, are subject to the additional requirements of this Section.**

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\* MODEL PENAL CODE: SENTENCING, *Official Statutory Text* (May 24, 2017).

1           **(3) *Additional Requirements for Sentencing Consequences.*** Notwithstanding any  
2 contrary provisions of law, the conditions of any suspended sentence under Section 6.02(2),  
3 any sentence to probation under Section 6.05, and any terms of parole or post-release  
4 supervision under Section 6.13, when based on conviction for an Article 213 offense, must be  
5 eligible for early relief under Section 213.11J and must not include:

6           **(a) a condition that:**

7                   **(i) imposes an obligation to register with law enforcement that carries**  
8 **requirements other than those authorized under Sections 213.11A-213.11G**  
9 **and Section 213.11J;**

10                   **(ii) permits access to the person’s registry information, except as**  
11 **authorized under Section 213.11H; or**

12                   **(iii) authorizes or permits any government official to notify a public or**  
13 **private entity or individual, other than a government law-enforcement agency**  
14 **or individual, that the person is registered with law enforcement or resides,**  
15 **works, or studies in the locality, except as authorized under Section 213.11H;**

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16           **(4) *Additional Requirements for Collateral Consequences Applicable Primarily to***  
17 ***Persons Convicted of a Sexual Offense.*** Notwithstanding any contrary provisions of law,  
18 collateral consequences that are based on conviction for an Article 213 offense and applicable  
19 primarily to persons convicted of a sexual offense are authorized and their scope and  
20 implementation are delineated as follows:

21           **(a) The person’s obligation to register for law-enforcement purposes is**  
22 **governed by Section 213.11A.**

23           **(b) Notification of the person’s obligation to register and associated duties is**  
24 **governed by Section 213.11B.**

25           **(c) The time of initial registration is governed by Section 213.11C.**

26           **(d) The information required upon registration is specified in Section 213.11D.**

27           **(e) The duty to keep registration current is specified in Section 213.11E.**

28           **(f) The duration of the registration requirements is specified in Section 213.11F.**

29           **(g) Penalties for failure to register are governed by Section 213.11G.**

30           **(h) Access to registry information is governed by Section 213.11H.**

1           **(i) Collateral consequences that are based on conviction for an Article 213**  
2 **offense and applicable primarily to persons convicted of a sexual offense, other than**  
3 **the obligation to register for law-enforcement purposes and restrictions on**  
4 **occupation and employment required by state law, are governed by Section 213.11I.**

5           **(j) Standards and procedures for relief from the obligation to register,**  
6 **associated duties, and other collateral consequences applicable primarily to persons**  
7 **convicted of a sexual offense are governed by Section 213.11J.**

8           **(5) *Retroactive Effect.* As of the effective date of this Article, all prior registration**  
9 **requirements and other collateral consequences, whether imposed by this or any other**  
10 **jurisdiction, are subject to the requirements and limits of this Section and Sections 213.11A-**  
11 **J if they are:**

12                   **(a) applicable primarily to persons convicted of a sexual offense, and**

13                   **(b) based on conduct that would violate this Article if committed in this state**  
14 **after the effective date of this Article, provided that none of the requirements and**  
15 **limits of this Section and Sections 213.11A-J will impose on a person, for conduct**  
16 **prior to the effective date of this Article, any duties, burdens, or restrictions more**  
17 **extensive than those that were applicable to that person at the time of that conduct.**

18 **Comment:**

19           ***1. Scope.***

20           In current American law, persons convicted of a sexual offense face a variety of legal  
21 burdens not typically imposed on persons convicted of other serious crimes—burdens such as  
22 obligations to register with local law enforcement, GPS monitoring of their location, and  
23 restrictions on permissible places of residence. No single body of law generates all these burdens  
24 or even any particular type of restriction. For instance, a residency restriction may be imposed by  
25 the sentencing court as condition of probation, imposed by a parole board as a condition of post-  
26 release supervision, mandated by state law, or even applicable in some municipalities of the state  
27 but not in others. Articles 6 and 7 of *Model Penal Code: Sentencing* apply to sentencing  
28 procedures, sentencing consequences, and collateral consequences for criminal offenses generally,  
29 including those defined in Article 213. Section 213.11 and Sections 213.11A-213.11J of Article  
30 213 supplement those provisions with additional requirements tailored to the particular

## Section 213.11. Sentencing and Collateral Consequences of Conviction

1 circumstances of the sexual offenses defined by Article 213. These additional requirements apply  
2 not only when the relevant consequences are imposed by the sentencing court or parole board  
3 (“sentencing consequences”), but also when they do not arise in the sentencing process but instead  
4 are ordered by other state agencies or mandated by other federal, state, or local laws (“collateral  
5 consequences”).<sup>153</sup>

6 For sentencing consequences, subsection (3) specifies the additional requirements that  
7 govern and supersede any contrary provisions of law, with respect to the conditions listed in  
8 subsection (3)(a), (b), and (c).

9 For collateral consequences, subsection (4) specifies that the additional requirements of  
10 Sections 213.11A-213.11J govern and supersede any contrary provisions of law, with respect to  
11 collateral consequences that are “applicable primarily to persons convicted of a sexual offense.”  
12 The additional requirements of Sections 213.11A-213.11J are not limited to consequences that  
13 apply *only* to persons convicted of a sexual offense. Some statutes provide for burdens that are  
14 applicable both to persons convicted of a sexual offense and to persons convicted of a small  
15 number of offenses that arouse similar concern, such as abduction of a child. When those burdens  
16 are triggered by conviction of an Article 213 offense, the provisions of Sections 213.11A-213.11J  
17 apply and supersede contrary provisions of the laws in question, because those laws apply only to  
18 persons convicted of sexual offenses and a small number of other serious crimes. But the additional  
19 requirements of Sections 213.11A-213.11J do not affect collateral consequences—such as limits  
20 on the right to serve on a jury, or receive public benefits<sup>154</sup>—that may result from conviction for  
21 any serious crime or for a wide range of diverse felonies.

22 Section 213.11 and Sections 213.11A-213.11J also do not apply in connection with  
23 convictions for offenses other than those defined by Article 213, such as stalking, or the

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<sup>153</sup> The Article 7 provisions applicable to collateral consequences reach “penalties, disabilities, or disadvantages . . . authorized or required by state or federal law [that] are not part of the sentence ordered by the court.” MODEL PENAL CODE: SENTENCING, Section 7.01 (AM. L. INST., Official Statutory Text, May 24, 2017) (hereafter *MPCS Statutory Text*). The Comment to this Section indicates that its requirements do not govern “locally imposed” consequences of conviction. MPCS, *supra* note 32, Section 6x.01, Comment *b*, p. 278 (stating that this Section “excludes from the definition of collateral consequences all informal, locally imposed, private, and extralegal consequences of conviction”). The Comment could be read as intended to exclude “locally imposed” consequences of conviction only when they are *informal* or *private*, or also when they are formally mandated by the laws of a city or county. Either way, for sexual offenses, the difference between state-level and local-level law is not relevant to the concerns that animate Article 213, and important burdens of conviction, such as residency restrictions, often are grounded in municipal ordinances rather than statewide legislation. See text at note 297, *infra*. The standards and procedures of Section 213.11 and Sections 213.11A-213.11J therefore apply to restrictions under local as well federal and state law.

<sup>154</sup> See, e.g., *MPCS Statutory Text*, *supra* note 153, Section 7.03.

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1 production, distribution, or possession of child pornography. Registration and other collateral  
2 consequences applicable to persons convicted of such offenses raise concerns about overbreadth  
3 and unintended effects that are similar to those that arise in connection with offenses defined by  
4 Article 213. But since this revision of Article 213 has not comprehensively addressed the  
5 appropriate scope and sanctioning of those non-Article 213 offenses, this revision does not express  
6 judgments with respect to sentencing procedure, sentencing consequences, and collateral  
7 consequences for offenses outside Article 213. Those matters are governed by Articles 6 and 7 of  
8 *Model Penal Code: Sentencing*.

### 9 **2. General Principles.**

10 All American jurisdictions require persons convicted of a sexual offense to register with  
11 local law-enforcement authorities where they reside, work, or are enrolled as a student,<sup>155</sup> and to  
12 continually update the personal information provided. Typically, these registries permit the general  
13 public to access more limited, but still extensive personal information about the registrant through  
14 a separate public website that does not post especially sensitive personal-identity information, such  
15 as the registrant's social security number.

16 Beyond these core features, there is considerable variation in the registry regimes and other  
17 restrictions applicable specifically to persons convicted of a sexual offense. The majority of  
18 jurisdictions require law-enforcement agencies to notify concerned community organizations or  
19 the public generally when a person who has been convicted of a sexual offense moves into the  
20 area, although jurisdictions vary in how they provide such notification (i.e., whether through email  
21 or some separate notification system, or through the generally available website nearly all  
22 jurisdictions maintain). In addition to registration requirements, most jurisdictions require these  
23 persons to submit to GPS monitoring of their location at all times. Additional restrictions targeting  
24 persons convicted of a sexual offense are also common, though by no means universal. For  
25 example, many states or their municipalities prohibit these persons from residing in certain areas  
26 or working in certain occupations.<sup>156</sup>

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<sup>155</sup> Federal SORNA (the Sex Offender Registration and Notification Act of 2006), for example, defines “student” as “an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education.” SORNA § 20911(11).

<sup>156</sup> See generally, MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES, Tent. Draft No. 5 (May 4, 2021) (hereafter Tent. Draft No. 5), text at notes 149, 296-301, 319-322.

## Section 213.11. Sentencing and Collateral Consequences of Conviction

1           The objective of these laws is to reduce recidivism and enable the public to take measures  
2 for self-protection, or at least ease public fear of crimes that are particularly unsettling and  
3 injurious. Yet despite the intuitive plausibility of these benefits, extensive research demonstrates  
4 convincingly that the expected gains have not materialized.<sup>157</sup> At the same time, the laws have a  
5 broad range of well-documented, undesirable consequences. Most obvious are the onerous burdens  
6 on registrants themselves,<sup>158</sup> but the less evident effects are important and too often overlooked.  
7 In part because the burdens imposed on registrants can be powerfully criminogenic, some research  
8 suggests that these laws may even result in more rather than less crime, including sexual crime,  
9 and ultimately impair rather than enhance public safety,<sup>159</sup> undermining the very purposes that  
10 lawmakers and the public pursue in supporting these policies.

11           Because the registries provide locally relevant information that police cannot obtain from  
12 ordinary criminal-history databases when they have not identified a particular suspect,<sup>160</sup> sex-  
13 offense registries facilitate high-priority investigations of serious sexual offenses. That gives them  
14 important practical advantages for the police,<sup>161</sup> and virtually all Western nations maintain sex-  
15 offense registries for law-enforcement use.<sup>162</sup> But unrestricted public access to the registries,  
16 community notification, limits on residency and employment, and similar burdens are a different  
17 matter. These wider measures, which with few exceptions are unique to the United States,<sup>163</sup> can  
18 be severely counterproductive.<sup>164</sup>

19           In light of these concerns, the Institute calls for a cautious, discriminating approach to  
20 measures that impose on persons convicted of a sexual offense special burdens not applicable to  
21 persons convicted of most other serious crimes. It recognizes that registries available *exclusively*  
22 to law enforcement serve valuable, cost-effective functions and, if reasonably implemented, need  
23 not be punitive or unduly burdensome for the registrant. A registry can fulfill its purposes while

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<sup>157</sup> See *id.*, text at notes 131-136.

<sup>158</sup> See, e.g., *id.*, text at notes 149, 253-256, 319-322.

<sup>159</sup> See generally *id.*, text at notes 150, 255-256, 316-327.

<sup>160</sup> See *id.*, text at notes 84-85.

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

<sup>162</sup> See *id.*, text at notes 30-80.

<sup>163</sup> *Id.*

<sup>164</sup> See *id.*, text at notes 150, 255-256, 316-327.

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1 insuring, for example, that the person concerned can satisfy the associated duties, such as the  
2 obligation to keep registry information current, without being obliged (as is often the case in  
3 current registry regimes) to navigate an obstacle course of daunting bureaucratic requirements.

4 At the same time, in the interests of both fairness and public safety, the Institute finds it  
5 important to limit and carefully target other special burdens potentially applicable to these persons.  
6 Subsections (3) and (4) therefore authorize other special burdens only on a substantially more  
7 restricted basis than that found in much of current American law, in order to make their imposition  
8 more consistent, coherent, and less prone to abuse or oppression in application or effect.

9 Specifically, under the grading provisions of Article 213, only the most serious sexual  
10 offenses trigger an obligation to register with law enforcement and other burdens applicable  
11 specifically to persons convicted of a sexual offense. And conviction of one of these especially  
12 serious offenses authorizes only a few, narrowly tailored burdens in the interests of public safety  
13 and public peace of mind. Moreover, the same limitations apply to all legal penalties, disabilities,  
14 or disadvantages that result from conviction of an Article 213 offense, regardless of whether those  
15 burdens are imposed in connection with sentencing or under other legal authority.

16 When the obligation to register applies, Sections 213.11A-213.11G and Section 213.11J  
17 define and constrain the requirements associated with registration, Section 213.11H permits only  
18 law-enforcement agencies and personnel to access registry information, and Section 213.11I  
19 permits specified additional burdens (GPS monitoring and restrictions on the person's occupation,  
20 employment, education, Internet access, or place of residence) only in compliance with detailed  
21 safeguards. Other burdens applicable specifically to persons convicted of a sexual offense (in  
22 particular, non-law-enforcement access to registry information and community notification) are  
23 not authorized within the safeguards of Section 213.11I and therefore are precluded entirely.

24 To make those limitations effective in connection with sentencing, subsection (3)(a)(i)  
25 provides that a suspended sentence, a sentence to probation, and any terms of parole or postrelease  
26 supervision must be eligible for early relief under Section 213.11J and must not impose an  
27 obligation to register with law enforcement except as authorized under Sections 213.11A-213.11G  
28 and Section 213.11J. Those limits on the obligation to register and their justification are discussed  
29 in the Comments and Reporters' Notes to those Sections.

30 Subsection (3)(a)(ii) provides that sentencing consequences must not permit access to  
31 registry information, except as authorized under Section 213.11H, which imposes on law

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1 enforcement a strong obligation to preserve the confidentiality of that information, with only  
2 narrow exceptions. That limitation and its basis are discussed in the Comments and Reporters'  
3 Notes to Section 213.11H.

4 Under subsection (3)(a)(iii), sentencing consequences must not authorize or permit  
5 notification to any public or private individual or agency, other than law enforcement, that the  
6 person concerned is registered with law enforcement or resides, works, or studies in the locality,  
7 except as authorized under Section 213.11H; that provision allows law enforcement to share  
8 certain limited information with certain victims, and with state agencies charged with checking the  
9 background of persons applying to work with minors or other vulnerable groups.

10 Under subsection (3)(b), sentencing consequences must not authorize or permit a condition  
11 that restricts the person's occupation or employment, except as required by state law or authorized  
12 under the procedural safeguards and substantive standards of paragraph (d) of subsection (3). Many  
13 state-law restrictions on occupation and employment apply to a broad range of felony offenses and  
14 therefore are not affected by the rules and limitations imposed by Sections 213.11-213.11J. But  
15 those Sections do apply to state laws that primarily target sexual offenses, and many state laws  
16 relating to occupation and employment do just that.<sup>165</sup> These laws raise issues that are in part distinct  
17 from those presented by other sex-offense collateral consequences. Often they are embedded in  
18 detailed occupational licensing schemes that Article 213 should not categorically override, and their  
19 justifications are stronger than those that can plausibly apply to registration, residency restrictions,  
20 GPS monitoring, and the like. Restrictions on employment in nursing homes and day-care centers,  
21 for example, can reasonably be based on a broader list of triggering sexual offenses than those  
22 which arguably warrant duties to register with law enforcement. Paragraph (b) therefore does not  
23 require case-by-case justification under paragraph (d) for restrictions on occupation and  
24 employment that are required by state law. But restrictions on occupation and employment not  
25 required by state law can be imposed only in compliance with paragraphs (d) and (e).

26 Under paragraph (c) of subsection (3), sentencing consequences also may extend to GPS  
27 monitoring or restrictions on the person's education, Internet access, or place of residence (as well  
28 as restrictions on the person's occupation and employment that are not required by state law), but  
29 again, only as authorized under paragraphs (d) and (e). Paragraph (d) imposes procedural

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<sup>165</sup> See, e.g., Miss. Code Ann. § 43-15-303 (prohibiting organizations involved in child care from employing sex offenders or permitting them to volunteer). See also Tent. Draft No. 5, *supra* note 156, text at note 102.

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1 safeguards and substantive standards that require a showing of specific need, assessed after due  
2 consideration of the potential negative impacts on the registrant, the registrant's family and the  
3 registrant's prospects for rehabilitation and reintegration into society. Under paragraph (e), any  
4 such restrictions must be drawn as narrowly as possible to achieve the goal of public safety and  
5 must not be imposed for longer than the period permitted under Section 213.11F for the duties to  
6 register and keep the registration current. The reasons for precluding community notification as a  
7 sentencing consequence and for allowing the other listed burdens only in compliance with specific  
8 procedural and substantive safeguards are explained in the Comments and Reporters' Notes to  
9 Section 213.11I.

10 To make the same limitations effective for collateral consequences, subsection (4) and  
11 Sections 213.11A-213.11J impose essentially identical procedures and standards in connection  
12 with penalties, disabilities, and disadvantages that result directly from conviction of an Article 213  
13 offense but are not part of the sentence or the terms of parole or postrelease supervision. The  
14 justification for those procedures and standards, explained in the Comments and Reporters' Notes  
15 to Sections 213.11A-213.11J, is the same for collateral consequences as it is for sentencing  
16 consequences.

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17 **SECTION 213.11A. REGISTRATION FOR LAW-ENFORCEMENT PURPOSES**

18 **(1) *Convictions in This State***

19 **(a) Except as provided in subsection (3), every person who resides in this state**  
20 **and is convicted of an offense that is designated a registrable offense in this Article**  
21 **must, in addition to any other sanction imposed upon conviction, appear personally**  
22 **and register, at the time specified in Section 213.11C, with the law-enforcement**  
23 **authority designated by law in the [county] where the person resides. If the person**  
24 **convicted of that offense does not reside in this state, but works in this state,**  
25 **registration must be accomplished in the [county] where the person works; if the**  
26 **person convicted of that offense does not reside or work in this state but is enrolled in**  
27 **a program of study in this state, registration must be accomplished in the [county]**  
28 **where the person is enrolled in a program of study.**

1           **(b) If, after initially registering in the [county] where the person resides, works,**  
2 **or is enrolled in a program of study, as provided in paragraph (a), the person no**  
3 **longer has that connection with the [county] where the person was initially required**  
4 **to register, the person must appear personally and register, within seven days of**  
5 **leaving that [county], with the law-enforcement agency designated by law in the**  
6 **[county] where the person now resides, works, or is enrolled in a program of study.**

7           **(c) Notwithstanding any other provision of law, no conviction for an offense**  
8 **under this Article will require the person convicted to register with law enforcement**  
9 **or other governmental agency in a registry regime applicable primarily to persons**  
10 **convicted of a sexual offense, unless this Article designates that offense as a registrable**  
11 **offense.**

12           **(d) The following are the only Article 213 offenses that trigger a duty to**  
13 **register under this Section:**

14                   **(i) Sexual Assault by Aggravated Physical Force or Restraint, as**  
15 **defined by Section 213.1.**

16                   **(ii) Sexual Assault by Physical Force or Restraint, as defined by Section**  
17 **213.2.**

18                   **(iii) Sexual Assault of an Incapacitated or Vulnerable Person, as**  
19 **defined by Section 213.3(1) and (2).**

20                   **(iv) Aggravated Offensive Sexual Contact, as defined by Section**  
21 **213.7(1), when it involves the use of physical force, physical restraint, or an**  
22 **incapacitated or vulnerable victim, as defined in Sections 213.1, 213.2, 213.3(1)**  
23 **or 213.3(2).**

24                   **(v) Sexual Assault of a Minor, as defined by Section 213.8(1), but only**  
25 **when the actor is more than 10 years older than the minor, or the actor is 18**  
26 **or older and the minor is younger than 12.**

27                   **(vi) Incestuous Sexual Assault of a Minor, as defined by Section**  
28 **213.8(2), but only when the minor is younger than 16.**

29                   **(vii) Exploitative Sexual Assault of a Minor, as defined by Section**  
30 **213.8(3).**

1                   (viii) **Fondling a Minor, as defined by Section 213.8(4), but only when**  
2                   **the actor is more than 10 years older than the other person, or the actor is 18**  
3                   **or older and the minor is younger than 12.**

4                   (ix) **Aggravated Offensive Sexual Contact with a Minor, as defined by**  
5                   **Section 213.8(5).**

6                   (x) **Sex Trafficking, as defined by Section 213.9(2).**

\*\*\*\*

7                   **(3) *Persons under the age of 18.* No person may be subject to the obligation to register**  
8                   **under subsection (1) of this Section, to other obligations or restrictions under this Section, or**  
9                   **to additional collateral consequences under Section 213.11I, on the basis of a criminal**  
10                   **conviction for an offense committed when the person was under the age of 18, or on the basis**  
11                   **of an adjudication of delinquency based on conduct when the person was under the age of**  
12                   **18; provided, however, that this subsection (3) does not apply to a person convicted of a**  
13                   **criminal offense of Sexual Assault by Aggravated Physical Force or Restraint if the person**  
14                   **was at least 16 years old at the time of that offense.**

15 **Comment:**

16                   ***1. Convictions in This State.*** Section 213.11A(1) applies to collateral consequences  
17 potentially applicable on the basis of a conviction in this state for an offense under Article 213.

18                   ***a. Subsection (1)(a).*** In order to serve law-enforcement purposes, subsection (1)(a) requires  
19 a person convicted of a sexual offense to register with a locally designated law enforcement agency  
20 and fulfill related duties when this Article designates it as a registrable offense.

21                   The offenses specified in subsection (1)(d) are the only offenses designated as registrable  
22 under this Article.

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23                   ***3. Persons under the Age of 18.*** Subsection (3) protects persons who were under 18 at the  
24 time of the offense from the obligation to register and from other collateral consequences  
25 applicable primarily to persons convicted of sexual offenses, regardless of whether the potential  
26 trigger for those consequences is an adjudication of delinquency or a criminal conviction under  
27 this Article, except that minors convicted of a criminal offense of Sexual Assault by Aggravated

1 Physical Force or Restraint remain subject to the requirements of Section 213.11A if they were at  
2 least 16 years old at the time of that offense.

### REPORTERS' NOTES

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

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

10 (ii) *Section 213.2. Sexual Assault by Physical Force.* This offense, though less serious than  
11 that defined by Section 213.1, nonetheless applies when an actor has the necessary culpable  
12 awareness of causing another person to engage in, submit to, or perform sexual penetration or oral  
13 sex by using or threatening physical force or restraint. So defined, the offense only includes within  
14 its reach misconduct that marks the actor as a violent predator. Section 213.2 therefore classifies  
15 the offense as registrable.

16 (iii) *Section 213.3(1) & (2). Sexual Assault of an Incapacitated or Vulnerable Person.* This  
17 offense covers very serious misconduct involving the sexual exploitation of individuals who are  
18 at heightened risk of abuse, and therefore is appropriately classified as a registrable offense.

19 (iv) *Section 213.7(1). Aggravated Offensive Sexual Contact,* but only when it involves  
20 physical force, physical restraint, or an incapacitated or vulnerable victim. This offense, unlike  
21 those under Sections 213.1, .2, & .3, is based on proof of sexual contact short of sexual penetration  
22 or oral sex. Although less serious to that extent, it nonetheless involves misconduct that marks the  
23 actor as violent or willing to exploit individuals who are at heightened risk of abuse. It therefore  
24 is appropriately classified as a registrable offense.

25 (v) *Section 213.8(1) & (4).* These two offenses against minors are registrable when they  
26 involve sexual penetration, oral sex, or fondling by an actor who is more than 10 years older than  
27 the minor, or where the actor is 18 or older and the minor is younger than 12. This is predatory  
28 sexual abuse of an exceptionally serious nature, justifying the special precautions that registration  
29 permits.

30 (vi) *Section 213.8(2) & (3).* These offenses are registrable when they involve (a) sexual  
31 penetration or oral sex with a minor under the age of 16 by a person who is a parent, guardian, or  
32 other adult in a similarly direct position of trust and responsibility; or (b) a minor younger than 18,  
33 where the actor is more than five years older, and the actor holds over the minor a formal position  
34 of authority. These are exceptionally serious forms of sexual misconduct, involving exploitation  
35 and abuse of trust that call for the special precautions that registration permits.

36 (vii) *Section 213.8(5). Aggravated Offensive Sexual Contact with a Minor.* This offense  
37 involves sexual contact short of sexual penetration or oral sex. Although less serious to that extent,  
38 it nonetheless involves misconduct that marks the actor as a violent or exploitative predator who

1 presents a heightened risk of abuse to minors. It therefore is appropriately classified as a registrable  
2 offense.

3 (viii) *Section 213.9(2). Sex Trafficking.* Like the other registrable offenses, Sex Trafficking  
4 is an especially serious felony involving predatory behavior and exploitation of vulnerable victims.  
5 As its motivation is primarily financial, however, it arguably calls for a different kind of law-  
6 enforcement attention. Of course, if its perpetrators are themselves guilty of other Article 213  
7 offenses, they may be eligible for registration on that basis alone. If not, their involvement in acts  
8 of sex trafficking may exhibit a different kind of motivation from that characteristic of other Article  
9 213 offenses. Nonetheless, persons guilty of Sex Trafficking are involved in exploiting minors or  
10 coercing minors and/or adults into submitting to sex acts for the trafficker's commercial gain.  
11 Moreover, sex traffickers often troll for victims in places frequented by minors or other vulnerable  
12 groups. Accordingly, these behaviors warrant the heightened law enforcement attention that  
13 registration permits.



15 The other Article 213 offenses all involve serious crimes, and their perpetrators  
16 undoubtedly may include a number of potential recidivists. But the empirical research and  
17 experience detailed above make clear that the currently prevalent approach, which seeks to cast  
18 the widest conceivably defensible net, is unjust, costly, and counterproductive. With respect to the  
19 Article 213 offenses not designated as registrable, the social harms of registration demonstrably  
20 outweigh its potential benefits. Making this judgment explicit, Section 213.11A(1)(b) stipulates  
21 that no conviction for any other criminal offense under Article 213 can be the basis for requiring  
22 registration with law enforcement or any other obligation applicable primarily to persons convicted  
23 of a sexual offense.

\*\*\*\*

24 **3. Section 213.11A(3): Persons under the Age of 18.**

25 Under current law, many states impose duties to register and other sex-offense collateral  
26 consequences for a long list of sexual offenses even when the perpetrator was younger than 18 at  
27 the time of the misconduct. Registration is widely required, often for life, not only when the youth  
28 is convicted of a criminal offense as an adult but also in many circumstances where the offense  
29 was the basis for an adjudication of delinquency.<sup>166</sup> Federal SORNA seeks to require states to  
30 extend registration to juveniles adjudicated delinquent if they were at least 14 years of age at the  
31 time of the offense and the offense was comparable to or more severe than the federal crime of  
32 aggravated sexual abuse (defined as including sexual penetration by use of force) or an attempt or  
33 conspiracy to commit that offense.<sup>167</sup>

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<sup>166</sup> See Elizabeth J. Letourneau, *Juvenile Registration and Notification are Failed Policies That Must End*, in WAYNE A. LOGAN & J. J. PRESCOTT, eds., *SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS* 164, 166-168 (2021).

<sup>167</sup> SORNA § 20911(8) (2019); 18 U.S.C. § 2241. Department of Justice guidance allows jurisdictions discretion whether to publicly disclose the same information about juvenile offenders that they are required to disclose regarding adult offenders. See Supplemental Guidelines for Juvenile Registration Under the Sex Offender Registration and Notification Act, 81 Fed. Reg. 50552,

## Section 213.11A. Registration for Law-Enforcement Purposes

1           The research is replete with heartbreaking stories of the unnecessarily cruel, life-destroying  
2 impact of placing individuals on a sex-offender registry for offenses committed as minors.<sup>168</sup> The  
3 impact has been not only harsh but exceptionally counterproductive. Patricia Wetterling is  
4 especially outspoken in condemning juvenile registration. “I don’t see any, not one redeeming  
5 quality in doing that. . . . Registering juveniles is ludicrous and wrong always.” Noting that she  
6 objected to the language covering juveniles when the Jacob Wetterling bill was being drafted, she  
7 recalls that she “kept raising questions about treating juveniles the same way we treat adults. It  
8 makes no sense at all . . . . I was told not to worry about the juvenile provisions because that would  
9 get thrown out. I was told there was no way that it would pass . . . and yet [it did].”<sup>169</sup>

10           In at least one study, victim advocates reported that “juvenile offender registration [has]  
11 inadvertently created a disincentive for victims to disclose [their victimization].”<sup>170</sup> They say their  
12 clients “fear that there are no intermediate interventions available,” and that when abused at the  
13 hands of a juvenile, “they fear that the youth will be required to register as a sex offender and will,  
14 therefore, be ‘branded’ for life despite being potentially amenable to treatment.”<sup>171</sup>

15           Apart from the vivid anecdotal evidence, systematic research consistently tells a similarly  
16 negative story. Findings suggest that registration of juveniles has no preventive effect<sup>172</sup> and  
17 substantial criminogenic consequences,<sup>173</sup> with overall effects that are unambiguously counter-  
18 productive for the individual concerned and for society as a whole.<sup>174</sup> One quantitative study  
19 estimates that juvenile registration alone saddles the public with social costs, net of benefits,

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50555 (Aug. 1, 2016) (“[R]egistration jurisdictions need not publicly disclose information about sex offenders required to register on the basis of juvenile delinquency adjudications” in order to be considered in substantial compliance with SORNA). Nonetheless, the underlying SORNA mandate subjecting these juveniles to registration remains applicable.

<sup>168</sup> HUMAN RIGHTS WATCH, RAISED ON THE REGISTRY (2013).

<sup>169</sup> Patricia Wetterling & Richard G. Wright, *The Politics of Sex Offender Policies: An Interview with Patricia Wetterling*, in RICHARD G. WRIGHT, ed., *SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS* 50, 99, 101 (2d ed. 2015).

<sup>170</sup> Rachel Kate Bandy, *The Impact of Sex Offender Policies on Victims*, in WRIGHT, *supra* note 169, at 471, 488.

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

<sup>172</sup> See Letourneau, *Failed Policies*, *supra* note 166, at 170 (reporting that “studies examining the policies of several states and the federal government have all concluded that subjecting children to SORN has no impact on sexual recidivism”); Elizabeth J. Letourneau et al., *Juvenile Registration and Notification Policy Effects: A Multistate Evaluation Project*, National Criminal Justice Reference Service, <http://www.ncjrs.gov/App/publications/abstract.aspx?ID=273674> (January 2018); Cynthia J. Najdowski et al., *Adolescent Sex Offender Registration Policy: Perspectives on General Deterrence Potential from Criminology and Developmental Psychology*, 22 *PSYCHOL., PUB. POL’Y, & L.* 114 (2016).

<sup>173</sup> Catherine L. Carpenter, *Throwaway Children: The Tragic Consequences of a False Narrative*, 45 *SW. L. REV.* 461 (2016).

<sup>174</sup> For a review of methodological issues in some of the reports referenced here and a call for more systematic research, see U.S. Library of Congress, Federal Research Division, *Sex Offender Registration and Notification Policies: Summary and Assessment of Research on Claimed Impacts on Registered Offenders 4-5* (June 2020). The Library of Congress assessment notes that many studies of the effects of registration and other collateral consequences on offenders and their families lack control groups, substantial sample sizes, or verification of registrant self-reports. *Id.* at iii-iv. While these points suggest reasons for caution in interpreting these results, they in no way imply that these studies or any others lend support for *contrary* conclusions. Moreover, methodological problems of this sort are endemic to research in this area. For example, scientifically rigorous control groups are virtually never available, given that random assignment of convicted persons to treatment and control groups is unacceptable, and quasi-experimental comparisons are almost equally out of reach, given the near ubiquity of registration regimes in the United States. Whatever the empirical uncertainties, proponents of juvenile registration and other sex-offense collateral consequences do not offer methodologically superior studies that present affirmative evidence of the *benefits* of these regimes.

## Section 213.11A. Registration for Law-Enforcement Purposes

1 amounting to at least \$40 million per year, and that community notification pertaining to offenders  
2 placed on a registry as minors generates net social costs of at least \$10 billion per year.<sup>175</sup> Of  
3 course, the assumptions underlying such estimates of this kind are always debatable; nonetheless,  
4 there can be little doubt that by any measure, the costs of juvenile registration are substantial.

5 Studies from other methodological perspectives regularly reach qualitatively similar  
6 results.<sup>176</sup> In 2016, the Federal Advisory Committee on Juvenile Justice, in recommendations to  
7 the Justice Department’s Office of Juvenile Justice and Delinquency Prevention, reported that  
8 juvenile sex-offender registration laws “are inconsistent with research and evidence-based practice  
9 and undermine positive outcomes.” The Committee urged rejection of the registration approach  
10 for juveniles in preference to using “evidence-based, community based and family-focused  
11 responses,” and formally recommended that SORNA be amended “to exempt juveniles from sex  
12 offender registration, community notification, and residency restriction laws.”<sup>177</sup> A Justice  
13 Department research initiative likewise concluded that “[j]uvenile cases have been pled to non-  
14 registration offenses at the expense of the juvenile not being eligible for treatment,” even though  
15 “[c]ost-benefit analysis demonstrates that sex-offender treatment programs for youth can provide  
16 a positive return on taxpayer investment.” The Department “recommended against any further  
17 expansion of registration and notification with juveniles in the absence of more extensive empirical  
18 evidence supporting the utility of this strategy”<sup>178</sup>

19 Responding in part to these assessments, several state courts have held that mandatory  
20 registration of juveniles convicted of a sexual offense is unconstitutional because it lacks an  
21 individualized assessment of risk.<sup>179</sup> At a minimum, the research suggests, juvenile registration  
22 must be reserved for “situations where either unique risk or needs are clearly associated with the

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<sup>175</sup> See Richard B. Belzer, *The Costs and Benefits of Subjecting Juveniles to Sex-Offender Registration and Notification*, 41 R STREET POL’Y STUDY (2015), <https://www.rstreet.org/wp-content/uploads/2015/09/RSTREET41.pdf>. See also Jill S. Levenson et al., *Grand Challenges: Social Justice and the Need for Evidence-based Sex Offender Registry Reform*, 43 J. SOC. & SOC. WELFARE 3, 15 (explaining that “[t]he expenditures of registry programs include local police surveillance and compliance verification of RSOs [registered sex offenders], costs associated with non-compliance, such as courts and incarceration, and expenses for continuous technological improvements to build and maintain online registries and to seamlessly update and connect registry systems with other databases ... When quantifiable costs are summed, they are estimated to range from \$10 billion to \$40 billion nationally per year.”).

<sup>176</sup> See, e.g., J.C. Sandler, et al., *Juvenile Sexual Crime Reporting Rapes Are Not Influenced by Juvenile Sex Offender Registration Policies*, PSYCH., PUB. POL’Y & L. (forthcoming 2020); E.J. Letourneau, et al., *Juvenile Registration and Notification Policies Fail to Prevent First-Time Sexual Offenses: A Replication Study* (manuscript under review, 2019); A.J. Harris, et al., *Collateral Consequences of Juvenile Sex Offender Registration and Notification: Results from a Survey of Treatment Providers*, 28 SEXUAL ABUSE: A J. OF RES. AND TREATMENT 770 ((2016); Najdowski et. al., supra note 172.

<sup>177</sup> GEORGE W. TIMBERLAKE & AMY M. DAVENPORT, FED. ADVISORY COMM. ON JUVENILE JUSTICE, RECOMMENDATIONS OF THE FEDERAL ADVISORY COMMITTEE ON JUVENILE JUSTICE 4 (2016), [https://facjj.ojp.gov/ojpasset/Documents/FACJJ\\_Recommendation\\_OJJDP\\_November\\_2016.pdf](https://facjj.ojp.gov/ojpasset/Documents/FACJJ_Recommendation_OJJDP_November_2016.pdf).

<sup>178</sup> U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, SEX OFFENDER MANAGEMENT ASSESSMENT AND PLANNING INITIATIVE (2016).

<sup>179</sup> In re C.P., 967 N.E.2d 729 (Ohio 2012) (finding automatic, lifelong registration of juvenile to violate constitutional prohibition against cruel and unusual punishment); In re J.B., 107 A.3d 1 (Pa. 2014) (finding automatic, lifelong registration of juvenile to violate procedural due process). See also Marsha Levick & Riya Saha Shah, *The Momentum Builds: Challenging Lifetime Registration of Juveniles Convicted of Sexual Offenses in the Post-Roper Era*, 40 N.Y.U. REV. L. & SOC. CHANGE HARBINGER 115 (2016).

Section 213.11A. Registration for Law-Enforcement Purposes

1 commission of a crime”<sup>180</sup> and individuals convicted (or adjudicated delinquent) for conduct as  
2 minors must have viable opportunities to terminate their registration duties at an early date. But  
3 even a limited period on a sex-offense registry leaves a youthful offender’s sex-offense record  
4 widely available through public and private databases, in effect creating long-term punishment and  
5 leading many to argue that minors should be exempt from registration and notification  
6 requirements entirely.<sup>181</sup> Eleven states specifically exclude minors from their state sex-offender  
7 registries, despite SORNA’s contrary requirements.<sup>182</sup>

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

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13 **SECTION 213.11D. INFORMATION REQUIRED IN REGISTRATION**

14 **(1) A person subject to registration under Section 213.11A must provide the following**  
15 **information to the appropriate official for inclusion in the law-enforcement registry:**

16 **(a) the name and date of birth of the person (including any alias used by the**  
17 **person);**

18 **(b) the Social Security number, if any, of the person;**

19 **(c) the address of each place where the person resides or expects to reside;**

20 **(d) the name and address of any place where the person works or expects to**  
21 **work;**

22 **(e) the name and address of any place where the person is a student or expects**  
23 **to be a student;**

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<sup>180</sup> Amanda M. Fanniff et al., *Juveniles Adjudicated for Sexual Offenses: Fallacies, Facts, and Faulty Policy*, 88 TEMP. L. REV. 789, 799 (2016). The authors argue that a “reasonable strategy would be to target the highest risk [juvenile sex offenders] for the ... most invasive social control policies,” but note the difficulty of developing the accurate risk assessment tools on which such a strategy depends. As a result other prevention strategies “may prove more fruitful than registration and notification policies, ... without [their] potential harmful effects.” *Id.*, at 800-801.

See also Lydia D. Johnson, *Juvenile Sex Offenders: Should They Go to a School with Your Children or Should We Create a Pedophile Academy*, 50 U. TOL. L. REV. 39, 54-56 (2018) (arguing that registry obligations for juveniles should be limited to those who commit crimes such as forcible rape or sexual assault of minor children younger than 14, and those juvenile offenders who fail to complete an assigned rehabilitation treatment program).

<sup>181</sup> Ashley R. Brost & Annick-Marie S. Jordan, *Punishment That Does Not Fit the Crime: The Unconstitutional Practice of Placing Youth on Sex Offender Registries*, 62 S.D. L. REV. 806, 817, 829 (2017).

<sup>182</sup> Lisa Ann Minutola & Riya Saha Shah, *A Lifetime Label: Juvenile Sex Offender Registration*, 33 DEL. LAW. 8 (2015).

1           **(f) the license-plate number and a description of any vehicle owned or**  
2           **regularly operated by the person;**

3           **(g) all telephone numbers and email addresses used by the person, and all**  
4           **designations that the person uses for self-identification in internet and telephonic**  
5           **communications and postings;**

6           **(h) the document number of each passport held by the person and, if the**  
7           **person is not a United States citizen, the document type and document number for**  
8           **each document that establishes the person’s current immigration status in the United**  
9           **States.**

\*\*\*\*

10 **Comment:**

11           Subsection (1) specifies the information that the registrant and the registering authority  
12           itself must provide. They require the disclosure of considerable detail, as do all existing registration  
13           regimes, consistent with their perceived public-safety objectives.

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**REPORTERS’ NOTES**

14           **1. Subsection (1): The Required Information.** Federal SORNA directs states to obtain  
15           from each person required to register a long list of personal information, including the registrant’s  
16           name, address, date of birth, and Social Security number; the location of the registrant’s current  
17           employment or school; the license-plate number and description of any vehicle owned or operated  
18           by the registrant; telephone numbers, email addresses, and passport numbers used by the registrant,  
19           and similar identifying information. In addition, states must themselves provide to the directory  
20           the registrant’s criminal history, physical description and a current photo, fingerprints, palm prints,  
21           a DNA sample, and a photocopy of the registrant’s driver’s license or identification card.<sup>183</sup> States  
22           vary considerably in the information that registrants must provide.<sup>184</sup>

23           Subsection (1) largely follows the requirements for information to be reported as specified  
24           in federal SORNA and its implementing regulations, as promulgated by the Attorney General.<sup>185</sup>  
25           There are legitimate law enforcement uses for this information, and the risks to the registrant’s

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<sup>183</sup> SORNA § 20914.

<sup>184</sup> See Catherine Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Law*, 63 HASTINGS L.J. 1071, 1078 (2012) (describing sex-offense registry laws enacted in the wake of SORNA).

<sup>185</sup> SORNA § 20914(a) & (b); 28 C.F.R. § 72.6.

1 privacy are cabined by the confidentiality provisions of Section 213.11H. Section 213.11D largely  
2 tracks the federal approach with regard to information to be reported, in order to avoid unnecessary  
3 conflicts with federal SORNA. However, Section 213.11D does not endorse federal SORNA’s  
4 requirement that each registrant report extensive particulars concerning any intended international  
5 travel.<sup>186</sup> Given that the provisions of International Megan’s Law relevant to tracking of  
6 international travel focus on registrants who have been convicted of a sex offense against a  
7 minor,<sup>187</sup> requiring all registrants to report international travel plans in great detail is unjustifiably  
8 burdensome and vastly overbroad.

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9 **SECTION 213.11H. ACCESS TO REGISTRY INFORMATION**

10 **(1) Confidentiality**

11 **(a) Each law-enforcement agency that receives information from a registrant**  
12 **pursuant to Section 213.11D(5) must exercise due diligence to ensure that this**  
13 **registrant-supplied information remains confidential, except that relevant**  
14 **information about a specific registrant, including but not limited to registrant-**  
15 **supplied information, must be disclosed:**

16 **(i) to any government law-enforcement agency that requests**  
17 **information to aid in the investigation of a specific criminal offense;**

18 **(ii) to any adult who was the victim of an Article 213 offense committed**  
19 **by the registrant and to the parent or guardian of any minor who was the**  
20 **victim of an Article 213 offense committed by the registrant, if either the victim**  
21 **or that parent or guardian resides, works, or is enrolled in a program of study**  
22 **in the [county] where the registrant resides, works, or is enrolled in a program**  
23 **of study; provided that such disclosure must be limited to the fact that the**  
24 **registrant resides, works, or is enrolled in a program of study in that [county];**

25 **(iii) to the United States Marshal’s Service as required by International**  
26 **Megan’s Law, Pub. L. No. 114-119, 130 Stat. 15 (2016), when that information**

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<sup>186</sup> SORNA §20914(a)(7) requires each registrant to report “any anticipated dates and places of departure, arrival, or return, carrier and flight numbers for air travel, destination country and address or other contact information therein, means and purpose of travel, and any other itinerary or other travel-related information required by the Attorney General.”

<sup>187</sup> Pub. L. No. 114-119, 130 Stat. 15, 16, §3(3) (2016).

1 involves the international travel plans of a registrant who has been convicted  
2 of a sexual offense involving a minor; and

3 (iv) to the [*Department of Public Safety*] as appropriate to enable the  
4 Department to provide the criminal history background check authorized by  
5 [*Section xx/yy*] of the [*Code of Criminal Procedure*] to any public or private  
6 agency, organization, or individual qualified to receive such a background  
7 check on the basis of serving, having access to, or screening others to serve or  
8 have access to minors, the elderly, or persons who are disabled or otherwise  
9 vulnerable; provided that any disclosure to the Department under this  
10 subparagraph must comply with the terms of [*Section xx/yy*] of the [*Code of*  
11 *Criminal Procedure*]. See Annex, pp. [82-90], *infra*.

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12 **Comment:**

13 Section 213.11H seeks to reserve registry information exclusively for law-enforcement  
14 use. Subsection (1) therefore requires that registry information be disseminated no more widely  
15 than necessary to serve direct law-enforcement objectives. Information concerning a specific  
16 registrant must be provided to a government law-enforcement agency that request's assistance in  
17 connection with the investigation of a specific criminal offense. Private police and private security  
18 guards do not have comparable responsibilities for investigating and prosecuting criminal offenses  
19 and therefore are not eligible to gain access to registry information under this provision.

**REPORTERS' NOTES**

20 **1. Confidentiality and Public Access Generally.**

21 Federal SORNA and most state registration regimes contemplate largely unrestricted  
22 public access to registry information. The federal statute requires states to post on the Internet and  
23 make available to the general public, in conveniently searchable form, all information included in  
24 the registry, subject to specified exceptions.<sup>188</sup> States are required to withhold from the public the  
25 registrant's Social Security number, the names of victims, and all information about arrests that  
26 did not result in conviction. In addition, states are permitted to withhold information concerning  
27 registrants convicted of certain low-level offenses involving an adult victim. For the more serious

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<sup>188</sup> SORNA § 20920.

## Section 213.11H. Access to Registry Information

1 offenses, and for all covered offenses involving a victim who is a minor, states are permitted to  
2 withhold (in addition to Social Security number and records of arrests not resulting in conviction)  
3 only the name and location of a registrant’s employer or (for a student) place of study. In other  
4 words, for registrants convicted of more serious offenses, and for *any* registrant convicted of a  
5 covered offense involving a victim who is a minor, states *must* make available to any member of  
6 the public the registrant’s current address, physical description, current photo, and identifying  
7 information for any vehicle the registrant uses. In addition, the state information must be submitted  
8 to the Attorney General, who maintains a national registry of the same information,<sup>189</sup> and a public  
9 website (the Dru Sjodin National Sex Offender Public Website) with most of the same information  
10 accessible in searchable form on the Internet, subject to the same restrictions.<sup>190</sup> Though many  
11 foreign countries maintain sex-offense registries of some sort, this practice of largely unrestricted  
12 public access to registry information is virtually unheard of outside the United States.<sup>191</sup>

13 A large majority of the states comply with federal SORNA’s public-access requirement by  
14 maintaining registries readily accessible to any member of the general public.<sup>192</sup> But a few states,  
15 resisting federal SORNA’s requirements, permit public access to their registries only with respect  
16 to registrants determined to present a particularly high risk of reoffending.<sup>193</sup> In Massachusetts, a  
17 sex-offense registry board classifies registrants by assessing the risk of reoffending in accordance  
18 with criteria outlined by statute.<sup>194</sup> Prior to 2013, only registrants placed at the highest level (Level  
19 3) were listed on the Massachusetts registry’s public website; a 2013 enactment extended public  
20 access to registrants classified at Level 2 after that date.<sup>195</sup> In Minnesota, a committee assesses  
21 recidivism risk on a case-by-case basis,<sup>196</sup> and the state’s website lists only registrants placed at  
22 the highest level.<sup>197</sup> New Jersey posts information on high-risk and some moderate-risk  
23 registrants.<sup>198</sup> In New York a board of examiners classifies registrants based on risk of

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<sup>189</sup> SORNA § 20921.

<sup>190</sup> SORNA § 20922.

<sup>191</sup> See JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD*, 159-160 (2015) (referring to this practice as “American criminal record exceptionalism”); WAYNE A. LOGAN, MARGARET COLGATE LOVE & JENNY ROBERTS, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY AND PRACTICE* (2018) § 5.3 (2018)(noting that “[o]utside of the United States, unrestricted access to criminal record information is generally only possible for law enforcement agencies, prosecutors, courts, prison administration authorities, and listed public agencies dealing with particularly important and delicate matters.”). See also Tent. Draft No. 5, *supra* note 156, text accompanying notes 30-80.

<sup>192</sup>See “Collateral Consequences,” ABA CRIMINAL JUSTICE SECTION, <http://www.abacollateralconsequences.org/search/?jurisdiction=37>.

<sup>193</sup> 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).

<sup>194</sup> MASS. GEN. LAWS ANN. ch. 6, § 178K.

<sup>195</sup> 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).

<sup>196</sup> MINN. STAT. ANN. § 244.052 subd. 3.

<sup>197</sup> *Id.* subd. 4b.

<sup>198</sup> N.J. STAT. ANN. § 2C:7-13.

## Section 213.11H. Access to Registry Information

1 reoffending,<sup>199</sup> and only those placed at the two highest levels are listed on the state’s public  
2 website.<sup>200</sup>

3 Public access, however, is only one element of a broader system for raising community  
4 awareness and sensitivity with regard to the persons in the area who have been previously convicted  
5 of a sexual offense. Federal SORNA requires each local jurisdiction to employ active measures to  
6 alert interested individuals and public and private agencies when such a person registers in the area.  
7 Most states take similar steps with regard to public access and community notification.

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

14 Open records and government transparency are bedrock, if oversimplified, values in  
15 American political culture.<sup>201</sup> In addition, both public access and community notification can  
16 enable citizens to feel a sense of empowerment with regard to crimes that many consider especially  
17 sinister, unpredictable, and frightening. Payoffs of this kind are arguably important even if such  
18 laws have no effect on actual recidivism rates.

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

24 Studies in Ohio and Minnesota found no statistically significant relationship between being  
25 notified about a high-risk registrant in the neighborhood and taking steps to protect *oneself* (such  
26 as installing better locks or lighting).<sup>202</sup> Among residents who were parents, those receiving  
27 notification in both states were more likely to take steps to protect their children, such as warning  
28 them not to talk to strangers and not to let unknown persons into the home.<sup>203</sup>

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

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<sup>199</sup> N.Y. CORRECT. LAW § 168-l.

<sup>200</sup> N.Y. CORRECT. LAW § 168-q.

<sup>201</sup> See generally JACOBS, *supra* note 191.

<sup>202</sup> Rachel Bandy, *Measuring the Impact of Sex Offender Notification on Community Adoption of Protective Behaviors*, 10 CRIMINOLOGY & PUBLIC POLICY 237 (2011) (Minneapolis); Victoria S. Beck, James Clingermayer, Robert J. Ramsey & Lawrence F. Travis, *Community Response to Sex Offenders*, 32 J. PSYCHIATRY & L. 141 (2004) (Hamilton County, Ohio).

<sup>203</sup> Bandy, *supra* note 202, at 249, 255; Beck, et al., *supra* note 202, at 163. See also Levenson, *supra* note 175, at 6-7 (noting that “[f]ew people seem to utilize registries with any regularity or take preventive measures after searching a registry”).

1 *not* living in their own neighborhoods). It would be similarly worrisome if parents who receive  
2 notification tend to emphasize the dangers of stranger abuse at the expense of warnings and  
3 protective measures appropriate with respect to the even-higher risk of abuse at the hands of  
4 relatives, teachers, and other acquaintances. In any case, without minimizing the importance of  
5 such warnings, it is safe to say that state and local law enforcement could easily use other public-  
6 education measures, where necessary, to encourage wise child-protection behavior on the part of  
7 parents and teachers, without incurring the direct costs (and indirect consequences for registrants)  
8 entailed in public registries and community-notification laws that spotlight the small part of the  
9 overall risk that stems from particular individuals.

10 Negative impacts on registrants are convincingly documented in an extensive literature.  
11 They include a high incidence of joblessness, social isolation, homelessness, suicide, and on  
12 occasion even physically violent victimization at the hands of self-appointed vigilantes or  
13 psychologically unstable citizens who object to having a “sex offender” nearby.<sup>204</sup> Because these  
14 powerfully criminogenic effects hinder the registrant’s rehabilitation and can make recidivism  
15 more likely, at least for some offenders, they offset to some extent and probably outweigh the  
16 potential public-safety benefits of self-protection and the enhanced possibilities for surveillance  
17 and deterrence of registrants.<sup>205</sup>

18 In light of these considerations, Section 213.11H marks a major departure from the  
19 prevalent American practice of investing considerable resources in an effort to maximize public  
20 awareness of registry information. Both to promote just treatment of persons convicted of sexual  
21 offenses and, importantly, to further public-safety goals rather than impeding them, Section  
22 213.11H prohibits unrestricted public access. In order to ensure maximum feasible confidentiality  
23 for registry information, it provides that registry information must be kept confidential, subject to  
24 four narrow exceptions:

25 **Subparagraph (1)(a)(i) – investigation of specific offenses.** Subparagraph (1)(a)(i),  
26 provides that registry information can be disclosed to government law-enforcement agencies and  
27 officials but only for the narrowly defined law-enforcement purpose of aiding in the investigation  
28 of a specific criminal offense.

29 **Subparagraph (1)(a)(ii) – disclosure to victims.** Subparagraph (1)(a)(ii) recognizes the  
30 legitimate interest that the victim of a sexual offense has in learning whether the perpetrator of that  
31 offense is present in the area. That information would not necessarily be afforded from other  
32 sources, if (for example) a perpetrator released from prison initially settles far away from the scene  
33 of the offense, but subsequently moves there to live, work, or study. Subparagraph (1)(a)(ii)  
34 therefore requires disclosure to that victim (and to the parent or guardian of any minor who was  
35 the victim of the offense) of the fact that a registrant who perpetrated that offense now resides,

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<sup>204</sup> See, e.g., *E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir. 1997) (noting that “[r]etribution has been visited by private, unlawful violence and threats . . .”).

<sup>205</sup> J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J. L. & ECON. 161, 181 (2011). For discussion of methodological problems in rigorously measuring such impacts and the need for caution in interpreting some of these research findings, see note 174, *supra*.

1 works, or is enrolled in a program of study in the same local jurisdiction where the victim (or the  
2 parent or guardian of a victim who is a minor) resides, works, or is enrolled in a program of study.  
3 Crucially, such disclosure must be limited simply to the fact that the registrant is present in that  
4 local area; it must not include information about *where* the registrant resides, works, or studies,  
5 nor may it include other details about the registrant. This limited disclosure meets a legitimate  
6 concern without significantly compromising the goal of maintaining maximum feasible  
7 confidentiality for registry information.

8 **Subparagraph (1)(a)(iii) – international travel.** Subparagraph (1)(a)(iii) permits sharing  
9 with the United States Marshall’s Service the international travel plans of any registrant convicted  
10 of a sexual offense involving a minor, in order to facilitate the Service’s responsibilities under  
11 International Megan’s Law. Even though the Marshall’s Service is a law enforcement agency, such  
12 disclosure would fall outside the scope of the limited law-enforcement disclosures permitted by  
13 subparagraph (1)(a)(i), which permits disclosure only “to aid in the investigation of a specific  
14 criminal offense.” Subparagraph (1)(a)(iii), is nonetheless consistent with the balance struck by  
15 Section 213.11H; it makes possible this law-enforcement-related function, to which the U.S.  
16 government and many other nations are committed, without creating the unduly wide disclosure  
17 loophole that would arise if Section 213.11H’s confidentiality principle were made inapplicable to  
18 sharing of registry information with law enforcement agencies generally for any purpose.

19 **Subparagraph (1)(a)(iv) – background checks.** A legitimate need for private-sector  
20 access to criminal history information arises when a school, day-care center, or other organization  
21 needs to perform a background check on an individual being considered for a position of trust  
22 involving contact with a vulnerable population.<sup>206</sup> Private individuals may have a similar need  
23 when considering applicants for positions involving full-time, long-term care or even just  
24 occasional baby-sitting. These needs are among the reasons most frequently cited to justify open  
25 public access to registry information. There is little public appreciation of the fact that sex-offense  
26 registries are very poorly suited to meeting these needs, and that other mechanisms are already in  
27 place to do the job.

28 Commercial services cull criminal-history information from courthouse docket sheets and  
29 other open records, but the information available from these sources is frequently incomplete or  
30 inaccurate,<sup>207</sup> leaving a justifiable desire for access to more reliable, official sources.<sup>208</sup> Although  
31 most private-sector employers cannot directly access the FBI’s national databases for criminal-  
32 history information,<sup>209</sup> a cluster of discrete statutory authorities permits the FBI to share criminal-

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<sup>206</sup> See LOGAN, ET AL., supra note 191, at § 5.34 (noting that “[c]riminal history background screening is a legitimate step that employers and volunteer organizations take to protect their customers, their employees, their assets, and the public.”).

<sup>207</sup> Id., at §§ 5.6, 5.10. Commercial services of this kind are regulated under the Fair Credit Reporting Act (FCRA). 15 U.S.C.A. §§1681 et seq., but the quality of their reports is very uneven. Id.

<sup>208</sup> Employers and others with needs of this sort can turn to NSOPW, the national clearing house specifically maintained as a resource for locating information on persons convicted of a sexual offense. See text at note 15 & note 84, supra. But NSOPW merely directs such inquiries to state-run public websites; the information sought cannot be obtained in this way if access to the relevant state’s registry is restricted exclusively to law enforcement agencies, as Section 213.11H generally requires.

<sup>209</sup> LOGAN, ET AL., supra note 191, at § 5.37.

## Section 213.11H. Access to Registry Information

1 history information with state and local government agencies responsible for licensing and other  
2 background checks in regulated areas, including, for example, day-care and nursing-home workers  
3 and others who work with vulnerable populations, such as persons who are disabled.<sup>210</sup>

4 To be sure, these systems sometimes have limitations, at least in a few jurisdictions. Some  
5 states do not have in place the kind of regulatory regime needed to give them access to FBI  
6 databases; their regimes may not apply to all arguably relevant occupations; and volunteer  
7 positions may not be covered at all. Responding to concerns like these from organizations that  
8 employ staff in a wide range of positions of trust (not only those involving potential sexual abuse),  
9 the Attorney General in 2006 proposed widening the options for private-sector direct access to FBI  
10 databases, subject to certain privacy safeguards.<sup>211</sup> Congress initially did not accept those  
11 recommendations, in part because of the risks to privacy when criminal-history information is  
12 more widely disseminated.<sup>212</sup> States have made some progress in establishing agencies capable of  
13 conducting FBI background checks, but the steps taken have been far from comprehensive.  
14 Instead, they focused selectively on screening for individuals working or volunteering in certain  
15 particularly sensitive professions.<sup>213</sup> More recently, the Child Protection Improvements Act (2018)  
16 requires the Attorney General to establish a program that would allow organizations working with  
17 children to access the results of FBI background checks, even if the state in which they are located  
18 does not have a state agency set up to conduct those checks.<sup>214</sup> But this step only draws attention  
19 to yet another gap in background-check capabilities: to date the Attorney General has failed to take  
20 the necessary steps to implement this authority.<sup>215</sup>

21 Supporters of public access to sex-offense registries often claim that these registries can  
22 fill these persistent gaps and meet the resulting need in states where existing background-check  
23 mechanisms do not afford comprehensive coverage. But this is a serious misconception. Unless a

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<sup>210</sup> Id., at § 5.45. See also National Child Protection Act of 1993, Pub. L. No. 103-209, 107 Stat. 2490 (1993) (allowing businesses or organizations working with children to ask a state agency to check FBI records on employees and volunteers).

<sup>211</sup> See U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 7 (2006), available at [https://www.bjs.gov/content/pub/pdf/ag\\_bgchecks\\_report.pdf](https://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf).

<sup>212</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-162, CRIMINAL HISTORY RECORDS: ADDITIONAL ACTIONS COULD ENHANCE THE COMPLETENESS OF RECORDS USED FOR EMPLOYMENT-RELATED BACKGROUND CHECKS 17 (2015), available at <https://www.gao.gov/assets/670/668505.pdf> (noting among other concerns, that FBI officials worried that criminal history information made available to the private sector could not be securely protected, with a resulting threat to privacy rights).

<sup>213</sup> GENERAL ACCOUNTABILITY OFFICE, CRIMINAL HISTORY RECORDS 11 (2015), <https://www.gao.gov/assets/gao-15-162.pdf>. The GAO survey of officials in 47 states and the District of Columbia reported that 45 of the 48 respondents had processes in place for conducting FBI background checks for individuals seeking a job or license as a *teacher* or *day-care worker*, 42 reported conducting FBI background checks for individuals working in *certain healthcare positions*, and 38 reported conducting checks for "youth development positions" such as Boys or Girls clubs.

<sup>214</sup> Publ. L. No. 115-141 (2018), 132 Stat. 348 (codified at 34 U.S.C. § 40102); see 34 U.S.C. § 40102(a)(3)(A). See also AMERICAN CAMP. ASSOC., CHILD PROTECTION IMPROVEMENTS ACT BECOMES LAW (Mar. 26, 2018), <https://www.acacamps.org/news-publications/hot-topic/child-protection-improvements-act-becomes-law> ("The new law enables organizations serving vulnerable populations, such as children, the elderly, and individuals with disabilities to conduct fast, accurate, and affordable FBI background checks on prospective volunteers and employees.").

<sup>215</sup> A 2018 notice in the Federal Register announced that the FBI was drafting implementing regulations, but there has been no further publication since that time. Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions—Fall 2018, 83 Fed. Reg. 57804, 57903 (Nov. 16, 2018).

## Section 213.11H. Access to Registry Information

1 potential employer, a host for volunteers, or a parent seeking to hire a babysitter collects an  
2 applicant's DNA or fingerprints, a local registry is readily subject to false negatives, due to  
3 variation in the spelling of names or an applicant's wilful misrepresentation. Equally important,  
4 sex-offense registries fall far short of reaching all relevant offenses of concern, most of which do  
5 not include a sexual element. For example, federal regulations prohibit the employment in a  
6 nursing home of anyone convicted of crimes involving misappropriation of property, or abuse,  
7 neglect, exploitation, or mistreatment of the elderly<sup>216</sup>; these offenses do not have a sexual element  
8 and typically do not fall within the domain of sex-offense registries. Similarly, states typically bar  
9 nursing-home employment of individuals previously convicted not only of sexual offenses, but  
10 also of homicide, robbery, burglary, abuse of children or the elderly, nonsexual assault, drug  
11 offenses, theft, forgery, financial crimes, and fraud<sup>217</sup> -- again, offenses that do not have a sexual  
12 element and typically do not fall within the domain of sex-offense registries. In Pennsylvania,  
13 child-safety advocates expressed alarm that the state's sex-offense registries omitted child-abuse  
14 allegations known to children's protective services that were determined to be well founded but  
15 did not result in criminal prosecution.<sup>218</sup> Because sex-offense registries are prone to false negatives  
16 and are vastly under-inclusive, they cannot possibly serve the legitimate need for a reliable source  
17 of needed background-check information. Similar problems exist for the Department of Justice's  
18 National Sex Offender Public Website (NSOPW), which allows searches across local law-  
19 enforcement registries, but does not solve the problems of false negatives and under-inclusiveness.

20 In sum, effective, reasonably comprehensive background-check mechanisms are already  
21 in place in most states. Where these mechanisms fall short, that problem can and should be  
22 addressed directly, for example by expanding the list of occupations for which the state facilitates  
23 FBI or other background checks, after expressly confronting the conflicting public-safety benefits  
24 and privacy costs. Pennsylvania recently enacted an all-inclusive system that requires every person  
25 seeking access to a position involving contact with children to obtain a background clearance from  
26 a state agency and submit it to the employer or organization concerned.<sup>219</sup> Pennsylvania lawmakers

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<sup>216</sup> 42 C.F.R. § 483.12(a)(3).

<sup>217</sup> E.g., CAL. HEALTH & SAFETY CODE § 1569.17 (disqualifying offenses include robbery, sexual battery, child abuse, elder or dependent-adult abuse, arson, and kidnapping); FLA. STAT. ANN. §§ 430.0402, 435.04 (disqualifying offenses include murder, burglary, sexual battery, kidnapping, sexual and nonsexual abuse of minors and other vulnerable populations, forgery, fraud, and identity theft); ILL. ADMIN. CODE tit. 77, § 955.160 & App. C & § 955.275 & App. B (disqualifying offenses, with option to apply for waiver, include assault, burglary, arson, hijacking, cruelty to children, theft, and credit-card fraud); id., § 955.160 & App. A. (disqualifying offenses, with only narrow possibility for waiver, include murder, armed robbery, sexual crimes, and financial exploitation of the elderly); N.Y. EXEC. LAW § 845-b(5) (disqualifying offenses, subject to a narrow exception, include all Class A felonies and any felony involving assault, a sexual offense, larceny, prescription-medication theft, drug offenses, or endangering the welfare of the elderly); 35 PA. STAT. ANN. § 10225.502-503 (disqualifying offenses include controlled-substance offenses, violent crimes, sex offenses, offenses endangering children, theft, and forgery); TEX. HEALTH & SAFETY CODE ANN. § 250.006 (disqualifying offenses include homicide; kidnapping; arson; robbery; sex offenses; injury to a child, elder, or disabled person; money laundering; health-care fraud; burglary; assault; theft; disorderly conduct; and misapplication of fiduciary property).

<sup>218</sup> See JOINT STATE GOVERNMENT COMMISSION, CHILD PROTECTION IN PENNSYLVANIA: PROPOSED RECOMMENDATIONS, REPORT OF THE TASK FORCE ON CHILD PROTECTION (November 2012), available at <http://www.childprotection.state.pa.us/Resources/press/2012-1127%20Child%20Protection%20Report%20FINAL.pdf>; Center for Children's Justice, Children's Justice & Advocacy Report: Act 153 of 2014 (Nov. 3, 2014), <http://www.c4cj.org/files/cjar1132104backgroundchecks.pdf>.

<sup>219</sup> 23 PA. CONS. STAT. ANN. § 6344 *et seq.* These clearances consist of (1) a criminal history report from the Pennsylvania State Police; (2) a child-abuse history certification from the Department of Human Services; and (3) a federal criminal history

1 designed the system to ensure that background checks do not miss relevant information that might  
2 not appear in a sex-offense registry.<sup>220</sup> At the same time the system minimizes the threat to the ex-  
3 offender’s privacy because the applicant for the position initiates the clearance process and either  
4 obtains the necessary certification or simply declines to pursue the job application. Britain’s  
5 Disclosure and Barring Agency serves a similar purpose and operates in a similar way.<sup>221</sup>

6 In contrast, opening local registries to private-sector inquiries, even if only on a need-to-  
7 know basis, endangers the successful reintegration and rehabilitation of ex-offenders, because  
8 judgments about disclosure are highly decentralized—initially left to the discretion of county and  
9 municipal-level law enforcement, with subsequent protection of confidentiality entrusted to  
10 countless private employers and their human-resources personnel. These privacy concerns have  
11 made the FBI and Congress reluctant to permit unrestricted private-sector access to the FBI’s  
12 criminal history database,<sup>222</sup> and have made the issues fraught, and have complicated efforts to fill  
13 the gaps; the Child Protections Improvement Act of 2018 should have expanded access, but for  
14 the moment, its promise remains no more than that. The point is not to belittle efforts to solve this  
15 problem as it applies to the FBI data base; rather it is to underscore that the genuine difficulties  
16 that attend public access to information under centralized FBI oversight multiply many times over  
17 in the case of private-sector access to registries under decentralized local control.

18 In short, the background-check concern can be met much more effectively, and with far  
19 fewer privacy costs, without making public access to sex-offense registries and websites part of  
20 that process.

21 This conclusion might suggest that Section 213.11H need not address the background-  
22 check issue at all. But public concern about this perceived need is strong, and silence on the subject  
23 could leave an impression of major weaknesses in Article 213’s strictly confidential registry  
24 system. Moreover, the Institute seeks to offer a Model Code that is ready for adoption, and in a  
25 state where existing background-check procedures have significant gaps, Article 213 would be  
26 incomplete if it simply tells such a state to fill those gaps without showing specifically how this  
27 should be done.

28 For that reason, and in order to ensure that Article 213 offers a package of statutory  
29 provisions that is fully responsive to relevant concerns, subparagraph (1)(a)(iv) establishes a  
30 concrete mechanism for sharing registry information for background-check purposes. That  
31 information is *not* shared directly with the general public or even with private sector employers  
32 that have a genuine need to know. Instead, subparagraph (1)(a)(iv) provides that registry  
33 information can be conveyed to an appropriate state agency. That agency in turn will perform the

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obtained after submitting fingerprints through the Pennsylvania State Police to the FBI. Id. §§ 6344(b), 6344.2(b). An employer or organization must obtain this documentation from applicants prior to their employment or volunteering and must maintain it on file. Id. § 6344(b.1) & (b.2). The certifications remain valid for five years, after which the employee or volunteer must obtain new clearances. Id. § 6344.4.

<sup>220</sup> See PA. HOUSE J., 2014 Reg. Sess., No. 64 (Oct. 14, 2014), at 1568-1569.

<sup>221</sup> See Tent. Draft No. 5, *supra* note 156, text at note 55.

<sup>222</sup> See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 213.

1 necessary background-check investigation in accordance with specific protocols for which  
2 subparagraph (1)(a)(iv), together with its Annex, offers a comprehensive template. The state  
3 agency is then charged with passing on the background-check results to prospective employers  
4 and/or those who apply for relevant positions as employees or volunteers. The Annex shows, and  
5 the accompanying Reporters' Notes explain, how this system works to provide thorough and  
6 complete background check information, extending to all offenses of potential concern, while  
7 preserving the maximum feasible degree of privacy for affected registrants.

8 **SECTION 213.11I. ADDITIONAL COLLATERAL CONSEQUENCES OF CONVICTION**

9 **(1) Definitions. For purposes of this Section:**

10 **(a) the term “Article 213 offense” includes an offense under the law of another**  
11 **jurisdiction that is comparable to an Article 213 offense under Section 213.11A(2)(c);**

12 **(b) the term “additional collateral consequence” means any collateral**  
13 **consequence, as defined in Section 213.11(1)(b), that is:**

14 **(i) authorized or required as a direct result of a person’s conviction for**  
15 **an Article 213 offense, and**

16 **(ii) applicable primarily to persons convicted of a sexual offense, other**  
17 **than the obligation to register with law enforcement specified in Section**  
18 **213.11A, the associated duties and restrictions specified in Sections 213.11C-**  
19 **213.11G, and any restriction on occupation or employment required by state**  
20 **law.**

21 **(c) An additional collateral consequence under this Section includes any**  
22 **collateral consequence that restricts the convicted person’s occupation or**  
23 **employment except as required by state law; limits the convicted person’s education,**  
24 **Internet access, or place of residence; uses methods such as GPS monitoring to track**  
25 **the person’s movements; notifies a community organization or entity or a private**  
26 **party that the person resides, works, or is enrolled in a program of study in the**  
27 **locality; or permits a public or private agency, organization, or person to access**  
28 **registry information, except as authorized by Section 213.11H; but only if this**  
29 **collateral consequence results from a conviction for an Article 213 offense and is not**  
30 **a sentencing consequence as defined in Section 213.11(1)(a).**

1           **(d) An additional collateral consequence under this Section does not include a**  
2 **sentencing consequence, as defined in Section 213.11(1)(a), and does not include a**  
3 **collateral consequence that is:**

4                   **(i) authorized or required as a direct result of an individual’s conviction**  
5 **of an offense other than an Article 213 offense, or**

6                   **(ii) applicable to persons convicted of many different offenses, such as**  
7 **any government-imposed limits on jury service, access to public benefits, and**  
8 **other government-imposed penalties, disabilities, and disadvantages that**  
9 **result from conviction of a wide variety of offenses, including but not limited**  
10 **to sexual offenses.**

11           ***(2) Additional collateral consequences precluded for persons not required to register.***

12 **Notwithstanding any other provision of law, no person shall be subject to an additional**  
13 **collateral consequence, as defined in this Section, unless:**

14                   **(a) that additional collateral consequence is based on a conviction for a**  
15 **registrable Article 213 offense, and**

16                   **(b) that person is currently required to register with law enforcement under**  
17 **Section 213.11A.**

18           ***(3) Additional collateral consequences for persons required to register. Notwithstanding***  
19 **any other provision of law:**

20                   **(a) a person currently required to register with law enforcement under Section**  
21 **213.11A must not be subject to any government action notifying a community**  
22 **organization or entity or a private party that the person resides, works, or is enrolled**  
23 **in a program of study in the locality, except as authorized by Section 213.11H, and**  
24 **must not be subject to any government action permitting a public or private agency,**  
25 **organization, or person to access registry information, except as authorized by**  
26 **Section 213.11H; and**

27                   **(b) a person required to register with law enforcement under Section 213.11A**  
28 **may be subject to an additional collateral consequence not specified in subsection**  
29 **(3)(a), but only if an official designated by law, after affording the person notice and**  
30 **an opportunity to respond concerning the proposed additional collateral**

1 **consequence, determines that the additional collateral consequence is manifestly**  
2 **required in the interest of public safety, after due consideration of:**

3 **(i) the nature of the offense;**

4 **(ii) all other circumstances of the case;**

5 **(iii) the person’s prior record; and**

6 **(iv) the potential negative impacts of the burden, restriction,**  
7 **requirement, or government action on the person, on the person’s family, and**  
8 **on the person’s prospects for rehabilitation and reintegration into society.**

\*\*\*\*

9 **Comment:**

10 Section 213.11I determines when conviction for a sexual offense can trigger collateral  
11 consequences beyond the basic duties to register with law enforcement and to keep the registry  
12 information up to date.

13 Subsection (1), together with Section 213.11(1)(b), defines the operative term “additional  
14 collateral consequence” and makes clear that it includes any government action or government-  
15 imposed burden or limitation that is (a) authorized or required as a direct result of a person’s  
16 conviction for an Article 213 offense (or an offense under the law of another jurisdiction that is  
17 comparable to an Article 213 offense), and (b) applicable primarily to persons convicted of a  
18 sexual offense, other than the basic duties associated with registration itself and any restriction on  
19 occupation or employment required by state law. The additional collateral consequences  
20 referenced include such common restrictions as limits on a registrant’s employment that are not  
21 required by state law, and limits on a registrant’s education, Internet access, and residency. Also  
22 included are the widespread practices of GPS monitoring, notifying community organizations and  
23 private citizens that a person previously convicted of a sexual offense is present in the area; and  
24 allowing non-law-enforcement agencies and officials to access registry information. These  
25 measures are permitted only when authorized under the conditions specified in subsections (2),  
26 (3), and (4).

27 Because the “additional collateral consequences” governed by Section 213.11I include  
28 only burdens applicable primarily to sex offenses as such, Section 213.11I does not affect collateral  
29 consequences triggered by wider categories of offenses, such as the restrictions that many

## Section 213.11I. Additional Collateral Consequences of Conviction

1 jurisdictions impose on ex-offenders’ rights to serve on juries or receive public benefits.  
2 Subsection (1)(d)(i) also makes clear that Section 213.11I imposes no limits on collateral  
3 consequences that are authorized or required as a direct result of an individual’s conviction of an  
4 offense other than an Article 213 offense.

5 Subsection (2) provides that “additional collateral consequences,” as defined, are  
6 categorically precluded in the case of persons not subject to registration under Section 213.11A.

7 Subsection (3)(a) identifies two groups of “additional collateral consequences” that are  
8 categorically precluded even for persons who *are* subject to registration—namely, any government  
9 action notifying a community organization or entity or a private party that the person resides,  
10 works, or studies in the area, except as authorized by Section 213.11H; and any other government  
11 action providing or permitting access to registry information by any entity or individual other than  
12 a law-enforcement agency or official, except as authorized by Section 213.11H.

13 Under subsection (3)(b), “additional collateral consequences” not identified in subsection  
14 (3) are not categorically prohibited, but they may be imposed only in compliance with the  
15 procedures and standards specified in subsection (3)(b) and subsection (4)....

\*\*\*\*

### REPORTERS’ NOTES

16 Section 213.11I establishes procedures and standards for imposing collateral consequences  
17 other than those delineated in Sections 213.11A-213.11H. It precludes imposition of any additional  
18 collateral consequence on the basis of a conviction for an Article 213 offense that is not a  
19 designated under Article 213 as a registrable offense. It also precludes two groups of consequences  
20 even when the triggering Article 213 offense *is* registrable: community notification and non-law-  
21 enforcement access to registry information. But it authorizes a variety of additional collateral  
22 consequences, including restrictions on employment, residency, and Internet access, GPS  
23 monitoring, and a number of other restrictions and disabilities, provided that the decision to impose  
24 one of these permissible consequences must be made in compliance with the requirements of  
25 subsection (3)(b) and subsection (4).

26 As explained in Comment 1 to Section 213.11, that Sections 213.11-213.11J, and thus the  
27 limitations of Section 213.11I, do not apply in connection with convictions for offenses other than  
28 those defined by Article 213. Collateral consequences applicable to persons convicted of such  
29 offenses raise concerns about overbreadth and unintended effects that are similar to those that arise  
30 in connection with offenses defined by Article 213. But since this revision of Article 213 has not  
31 comprehensively addressed the appropriate scope and sanctioning of non-Article 213 offenses, this

Section 213.11I. Additional Collateral Consequences of Conviction

- 1 revision does not express judgments with respect to collateral consequences for offenses outside
- 2 Article 213. Those matters are governed by Articles 6 and 7 of *Model Penal Code: Sentencing*.

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ANNEX

MODEL PROCEDURES FOR  
CRIMINAL HISTORY BACKGROUND CHECKS  
[ALTERNATIVE A]

1 SECTION [XX]. BACKGROUND CHECKS

2           **(1) *Criminal History Certificate for prospective employees and volunteers.*** Subject to all  
3 applicable provisions of federal employment and non-discrimination law, including Title VII  
4 of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e, et seq., and all applicable  
5 provisions of the employment and non-discrimination laws of this state, any public or private  
6 organization or entity and any individual that hires or screens employees or volunteers for a  
7 position involving contact with or access to minors, the elderly, or persons who are disabled  
8 or otherwise vulnerable, is authorized to require the applicant for such a position to submit  
9 a Criminal History Certificate issued by the [*Department of Public Safety*] under the  
10 procedures prescribed by this Section.

11           **(2) *Application for a Criminal History Certificate.*** Any person who seeks a position  
12 involving contact with or access to minors, the elderly, or persons who are disabled or  
13 otherwise vulnerable is authorized to apply to the [*Department of Public Safety*] for a  
14 Criminal History Certificate. The application must be submitted on a form approved by the  
15 Department, and must be accompanied by a full set of fingerprints, a signed waiver from the  
16 applicant allowing the release to the applicant of the information specified in subsection (3),  
17 and payment of an appropriate fee, as set by regulations issued by the Department.

18           **(3) *Procedure for issuing a Criminal History Certificate.*** After verifying the applicant's  
19 identity, the Department shall consult the records of the [*Department of Public Safety*] and  
20 the [*Department of Children and Family Services*], and compile the information identified in  
21 paragraphs (a) and (b). The Department or its authorized agent shall submit the applicant's  
22 fingerprints to the Federal Bureau of Investigation and obtain a record of the information  
23 identified in paragraph (c). The Department shall then issue to the applicant a Criminal  
24 History Certificate that contains the following information:

25                   **(a)** a report from the [*Department of Public Safety*] of criminal-history record  
26 information pertaining to the applicant that includes any criminal convictions of the  
27 applicant for an offense or offenses specified in subsection (4), or a statement from

1 the Department that its records contain no such information pertaining to the  
2 applicant.

3 (b) A report from the [*Department of Children and Family Services*] as to  
4 whether the applicant is named in its records as the alleged perpetrator in a pending  
5 child-abuse investigation or as the perpetrator of a founded report of child abuse  
6 within the five-year period immediately preceding verification pursuant to this  
7 section.

8 (c) A report of federal criminal-history record information that identifies any  
9 criminal convictions of the applicant for an offense or offenses specified in subsection  
10 (4), or a statement that federal criminal-history records contain no such information  
11 pertaining to the applicant.

12 (4) *Offenses to be reported.* The reports of criminal-history record information to be  
13 issued pursuant to subsections (3)(a) and (3)(c) shall indicate only whether the applicant has  
14 been convicted of criminal conduct constituting one or more of the following offenses or  
15 equivalent offenses under federal law or the law of this or any other state:

16 (a) criminal homicide;

17 (b) aggravated assault;

18 (c) stalking;

19 (d) kidnapping;

20 (e) unlawful restraint;

21 (f) rape or sexual assault;

22 (g) abuse, neglect, or exploitation of an elderly or disabled person;

23 (h) domestic violence;

24 (i) violation of an order of protection;

25 (j) endangering the welfare of a child;

26 (k) child abuse;

27 (l) corruption of minors;

28 (m) manufacture, distribution, or possession of child pornography;

29 (n) a felony offense involving the manufacture, distribution, use, or possession  
30 of a controlled substance committed within the five-year period immediately

1 preceding the applicant's request for a Certificate of Criminal History under this  
2 Section; or

3 (o) attempt, solicitation, or conspiracy to commit any of the offenses set forth  
4 in this subsection.

5 (5) *Updates.* If an individual who has obtained a Certificate of Criminal History from  
6 the Department is subsequently convicted of an offense listed in subsection (4) or is named  
7 as a perpetrator in a founded report of child abuse with the [*Department of Children and*  
8 *Family Services*], the individual shall provide the Department with written notice to that  
9 effect not later than 72 hours after the conviction or notification that the individual was  
10 named as a perpetrator in a founded report of child abuse.

11 (6) *Time limit for certification.* The Department shall comply with certification  
12 requests no later than [14] days from the receipt of the request.

13 (7) *Accuracy.* The Department must in writing notify persons who apply for a  
14 Criminal History Certificate of their right to challenge the accuracy and completeness of any  
15 information to be included in the Certificate, to obtain a determination as to the validity of  
16 such challenge, and to obtain a corrected Certificate to the extent that any such challenge is  
17 determined to have merit. That notice must also explain the procedures provided for doing  
18 so.

19 (8) *Confidentiality.* The information provided and compiled under this Section,  
20 including, but not limited to, the names, addresses and telephone numbers of applicants,  
21 shall not be subject to disclosure under the [*Freedom of Information Act*] [*Right-to-Know*  
22 *Law*]. This information shall not be released to any person other than the applicant, except  
23 as authorized by the Department pursuant to its regulations.

24 (9) *Regulations.* The Department shall promulgate the regulations necessary to  
25 implement this Section.

**MODEL PROCEDURES FOR**  
**CRIMINAL HISTORY BACKGROUND CHECKS**  
*[ALTERNATIVE B]*

1 **SECTION [YY]. BACKGROUND CHECKS.**

2 **(1) *Definitions.* As used in this Section, the term:**

3 **(a) “Care” means the provision of care, treatment, education, training,**  
4 **instruction, supervision, or recreation to minors, the elderly, or persons who are**  
5 **disabled or otherwise vulnerable.**

6 **(b) “Care entity” means any public or private organization or agency that**  
7 **provides care or care-placement services, including an organization or entity that**  
8 **licenses or certifies others to provide care or care-placement services.**

9 **(c) “Qualified care entity” means a care entity that has applied to the**  
10 **[*Department of Public Safety*] for certification as a qualified care entity and has been**  
11 **certified as such by the Department. As a part of the application for certification, the**  
12 **applicant care entity must submit a signed agreement, on a form approved by the**  
13 **Department, agreeing to comply with all applicable provisions of state and federal**  
14 **law. The Department may periodically audit qualified care entities to ensure**  
15 **compliance with state and federal law and this Section. The Department must by**  
16 **regulation promulgate standards and procedures for making such determinations,**  
17 **including standards and procedures for applicants to challenge adverse**  
18 **determinations.**

19 **(2) *Requests for screening.***

20 **(a) A qualified care entity may submit to the Department a request for**  
21 **screening of a current or prospective employee or volunteer for a position involving**  
22 **contact with or access to minors, the elderly, or persons who are disabled or otherwise**  
23 **vulnerable.**

24 **(b) Each such request must be accompanied by a full set of fingerprints of the**  
25 **person to be screened, a signed waiver from the person to be screened allowing the**  
26 **release to the applicant of the information specified in subsection (4), and payment of**  
27 **an appropriate fee, as set by regulations issued by the Department.**

1           (c) Any current or prospective employee or volunteer who is subject to a  
2 request for screening must indicate to the qualified care entity submitting the request  
3 the name and address of each qualified care entity that has submitted a previous  
4 request for screening regarding that current or prospective employee or volunteer.

5           (3) *Screening procedure.* After verifying the identity of the person to be screened, the  
6 Department shall consult its records and those of the [*Department of Children and Family*  
7 *Services*] and compile the information identified in subsection (4)(a) and (b). The Department  
8 or its authorized agent shall submit the fingerprints of the person to be screened to the  
9 Federal Bureau of Investigation and obtain a record of the information identified in  
10 subsection (4)(c).

11           (4) After obtaining the information specified in subsection (3), the Department shall  
12 then issue to the qualified care entity a Screening Report that contains the following  
13 information:

14           (a) The state criminal-history records pertaining to the person to be screened  
15 that identify any criminal convictions of the person to be screened for an offense or  
16 offenses specified in subsection (5), or a statement that its records contain no such  
17 information pertaining to the person to be screened.

18           (b) A report from the [*Department of Children and Family Services*] as to  
19 whether the person to be screened is named in its records as the alleged perpetrator  
20 in a pending child-abuse investigation or as the perpetrator of a founded report of  
21 child abuse within the five-year period immediately preceding verification pursuant  
22 to this section.

23           (c) Federal criminal-history record information pertaining to the person to be  
24 screened that identifies any criminal convictions of the applicant for an offense or  
25 offenses specified in subsection (5), or a statement that federal criminal-history  
26 records contain no such information pertaining to the applicant.

27           (5) *Offenses to be reported.* The reports of criminal-history record information to be  
28 issued pursuant to subsections (4)(a) and (4)(b) shall indicate only whether the applicant has  
29 been convicted of criminal conduct constituting one or more of the following offenses or  
30 equivalent offenses under federal law or the law of this or any other state:

31           (a) criminal homicide;

- 1           **(b) aggravated assault;**
- 2           **(c) stalking;**
- 3           **(d) kidnapping;**
- 4           **(e) unlawful restraint;**
- 5           **(f) rape or sexual assault;**
- 6           **(g) abuse, neglect, or exploitation of an elderly or disabled person;**
- 7           **(h) domestic violence;**
- 8           **(i) violation of an order of protection;**
- 9           **(j) endangering the welfare of a child;**
- 10          **(k) child abuse;**
- 11          **(l) corruption of minors;**
- 12          **(m) manufacture, distribution, or possession of child pornography;**
- 13          **(n) a felony offense involving the manufacture, distribution, use, or possession**  
14          **of a controlled substance committed within the five-year period immediately**  
15          **preceding the applicant’s request for a Certificate of Criminal History under this**  
16          **Section; or**
- 17          **(o) attempt, solicitation, or conspiracy to commit any of the offenses set forth**  
18          **in this subsection.**

19          **(6) *Time limit for issuing a Screening Report.*** The Department shall comply with  
20          requests for a Screening Report no later than [14] days from the receipt of the request.

21          **(7) *Confidentiality.*** The criminal history information provided in the screening report  
22          is available to qualified care entities to use only for the purpose of screening current or  
23          prospective employees and volunteers for a position with or certification from a qualified  
24          care entity. It must not be revealed to any person or entity other than a person or entity with  
25          responsibility for screening the current or prospective employee or volunteer in question,  
26          and it must not be used for any other purpose.

27          **(8) *Determination of fitness.*** The determination whether the criminal history record  
28          of the person screened bears upon the fitness of that person to serve in a position involving  
29          contact with or access to minors, the elderly, or persons who are disabled or otherwise  
30          vulnerable shall be made solely by the qualified care entity. The Department is neither  
31          required nor authorized to make such a determination on behalf of any qualified care entity.

1           **(9) Accuracy.** The qualified care entity must in writing notify persons screened of their  
2 right to obtain a copy of any background screening report, to challenge the accuracy and  
3 completeness of any information contained in any such report, and to obtain a determination  
4 as to the validity of such challenge before a final determination regarding the person is made  
5 by the qualified care entity reviewing the criminal history information. That notice must also  
6 explain the procedures provided for doing so.

7           **(10) Regulations.** The Department shall promulgate the regulations necessary to  
8 implement this Section.

9

## REPORTERS' NOTES

1           The Annex provides two alternative statutory frameworks for establishing a background-  
2 check regime that does not afford public access to sex-offense registries but nonetheless meets the  
3 need for vetting prospective employees and volunteers who will serve in positions affording access  
4 to children, the elderly, or other vulnerable individuals. Alternative A is modeled on the regime  
5 that has operated successfully for many years in Pennsylvania.<sup>223</sup> It requires any organization  
6 offering a position that involves contact with minors, the elderly, or other vulnerable groups to  
7 request a criminal history screen from any applicant. The applicant must then request the state's  
8 [*Department of Public Safety*] to conduct a background check that includes state and federal  
9 criminal history, as well as child abuse reports or investigations. If the applicant does not have a  
10 relevant conviction or child abuse record, the applicant obtains a certification that can then be  
11 provided to the prospective employer or organization.

12           In terms of both public safety and applicant privacy, Alternative A offers decisive  
13 advantages in comparison to criminal-history background-check systems that rely on sex-offense  
14 registries and even in comparison to the broader background-check systems prevalent in many  
15 states. First, in terms of public safety, it pays attention to a far wider range of potentially concerning  
16 behavior than just the sexual offenses covered in sex-offense registry systems, it reaches serious  
17 and relevant non-sexual offenses not covered in some state background-check systems, and it even  
18 extends to child-abuse allegations that are pending or determined to be well-founded even when  
19 (as is commonly the case) they do not result in a criminal conviction.<sup>224</sup> At the same time,  
20 Alternative A affords maximum protection to applicant privacy because the results of the  
21 background investigation remain entirely within the control of the applicants,<sup>225</sup> who can choose  
22 whether to pursue their application in spite of a problematic background report or simply withdraw  
23 their application if they are unable to obtain a satisfactory certification. Alternative A also provides  
24 a procedure for the applicant to challenge the accuracy of any information to be included in the  
25 Certificate and obtain a corrected Certificate when any such challenge has merit.<sup>226</sup>

26           Alternative B is modeled on the regime that has operated successfully for many years in  
27 Florida.<sup>227</sup> Like Alternative A, it pays attention to a far wider range of potentially concerning  
28 behavior than is addressed by sex-offense registries and by some state background-check systems.  
29 Like Alternative A, it extends to child-abuse allegations that are pending or determined to be well-

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<sup>223</sup> See 23 PA. CONS. STAT. ANN. §§ 6344 et seq.

<sup>224</sup> See Alternative A, *supra*, §§ [xx](3)(b) & (4).

<sup>225</sup> *Id.*, § [xx](8) (information compiled in connection with the background check “shall not be released to any person other than the applicant, except as authorized by the Department pursuant to its regulations”).

<sup>226</sup> *Id.*, § [xx](7).

<sup>227</sup> See FLA. STAT. § 943.0542.

## Model Procedures for Criminal History Background Checks [Alternative B]

1 founded.<sup>228</sup> And it provides a procedure for the applicant to challenge the accuracy of the  
2 information included in the screening report.<sup>229</sup>

3 Unlike Alternative A, however, Alternative B is considerably less protective of applicant  
4 privacy. The background-check process is initiated by the organization that considers the  
5 applicant's application for employment (or for a volunteer position), and the results of the  
6 investigation are released directly to that organization, not to the applicant. The procedure under  
7 Alternative B for challenging the accuracy of the screening report can be initiated only after that  
8 organization receives the report, when the damage to the applicant's privacy may already have  
9 been done. And with regard to confidentiality, Alternative B, following the Florida model,  
10 stipulates that information compiled in connection with the background check, when released to  
11 the entity that requested the background check, "must not be revealed to any person or entity other  
12 than a person or entity with responsibility for screening the current or prospective employee or  
13 volunteer in question, and it must not be used for any other purpose."<sup>230</sup> A proviso of that sort is  
14 inevitably somewhat porous. There can be no guarantee that it will be uniformly respected in  
15 practice, and accordingly its effectiveness in protecting applicant privacy is orders of magnitude  
16 weaker than that of Alternative A.

17 Alternatives A and B both offer a much more comprehensive and reliable screening process  
18 than any sex-offender registry can. And they do so without nearly the risk to registrant privacy  
19 (with its collateral impact on both registrant welfare and public safety) that is posed by public  
20 access to registry information. As between the two alternatives, Alternative A is demonstrably  
21 preferable in every respect. Alternative B is nonetheless presented as an option because its  
22 structure is closer to the screening procedures that are familiar in most states. These typically rely  
23 on employer organizations to initiate background screening, and the resulting information is  
24 conveyed directly to those organizations. That approach, though it puts applicant privacy at  
25 unnecessary risk, may represent a less significant departure from customary procedures than the  
26 superior but more innovative Pennsylvania system.

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<sup>228</sup> See Alternative B, *supra*, §§ [yy](4)(b) & (5).

<sup>229</sup> *Id.*, § [yy] (9).

<sup>230</sup> *Id.*, § [yy](7).

## APPENDIX A

### 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.

\*\*\*

## **2.02 *General Requirements of Culpability***

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

### **(2) *Kinds of Culpability Defined.***

#### **(a) Purposely.**

A person acts purposely with respect to a material element of an offense when:

- (i) if the element involves the nature of the person’s conduct or a result thereof, it is the person’s conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, the person is aware of the existence of such circumstances or the person believes or hopes that they exist.

**(b) Knowingly.**

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of the person's conduct or the attendant circumstances, the person is aware that the person's conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of the person's conduct, the person is aware that it is practically certain that the person's conduct will cause such a result.

**(c) Recklessly.**

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

**(d) Negligently.**

A person acts negligently with respect to a material element of an offense when the person should be aware of a substantial and unjustifiable risk that the material element exists or will result from the person's conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of the actor's conduct and the circumstances known to the actor, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

**(3) *Culpability Required Unless Otherwise Provided.*** When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.

**(4) *Prescribed Culpability Requirement Applies to All Material Elements.*** When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

**(5) *Substitutes for Negligence, Recklessness and Knowledge.*** When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

\*\*\*

**2.03 *Causal Relationship Between Conduct and Result; Divergence Between Result Designed or Contemplated and Actual Result or Between Probable and Actual Result***

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

- (a) it is an antecedent but for which the result in question would not have occurred;**
- and**
- (b) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.**

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

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

(b) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just]<sup>1</sup> bearing on the actor's liability or on the gravity of the actor's offense.

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

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

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

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

### *2.12 De Minimis Infractions*

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

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

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

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

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<sup>1</sup> The commentary at p. 261 n.16 explains: "The word 'just' is in brackets because of disagreement within the Institute over whether it is wise to put undefined questions of justice to the jury...."

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

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**4.10. *Immaturity Excluding Criminal Conviction; Transfer of Proceedings to Juvenile Court*<sup>2</sup>**

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

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

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

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

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

**(2) No court shall have jurisdiction to try or convict a person of an offense if criminal proceedings against the person are barred by Subsection (1) of this Section. When it appears that a person charged with the commission of an offense may be of such an age that criminal proceedings may be barred under Subsection (1) of this Section, the Court shall hold a hearing thereon, and the burden shall be on the prosecution to establish to the satisfaction of the Court that the criminal proceeding is not barred upon such grounds. If the Court determines that the proceeding is barred, custody of the person charged shall be surrendered to the Juvenile Court, and the case, including all papers and processes relating thereto, shall be transferred.**

**210.0 Definitions**

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**(2) “bodily injury” means physical pain, illness or any impairment of physical condition;**

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<sup>2</sup> This Section of the 1962 Code was not included in prior Drafts for this project, but it is pertinent now because of a Section 213.8 amendment that passed in June.

Appendix A

**(3) “serious bodily injury” means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ;**

**(4) “deadly weapon” means any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.**

## APPENDIX B

### COMPLETE BLACK LETTER OF ARTICLE 213

#### SECTION 213.0. GENERAL PRINCIPLES OF LIABILITY; DEFINITIONS

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

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

(b) Subsection (2) of Section 2.08 (Intoxication) does not apply to this article.

Instead, the general provisions of the criminal law and rules of evidence of the jurisdiction govern the materiality of the actor’s intoxication in determining the actor’s culpability for an offense.

#### *(2) Definitions*

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

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

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

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

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

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

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

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

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

**(e) “Consent”**

**(i) “Consent” for purposes of Article 213 means a person’s willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact.**

**(ii) Neither verbal nor physical resistance is required to establish that consent is lacking. Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.**

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

**(iv) 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.**

**(f) Force.**

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

**(ii) “Aggravated physical force or restraint” means a physical act or physical restraint that inflicts or is capable of inflicting death, serious bodily**

**injury, or extreme physical pain, or that confines another for a substantial period in a place of isolation other than under color of law.**

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

**(h) “Registrable offense”**

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

**(ii) No offense is a registrable offense under this Article 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 under this Article in this jurisdiction if it had been committed in this jurisdiction.**

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

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

**(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and**

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

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

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

**(c) the actor acts knowingly with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).**

**(2) *Grading.* Sexual Assault by Aggravated Physical Force or Restraint is a registrable offense. It is a felony of the third degree [*10-year maximum*], except that (1) the**

maximum term of imprisonment is five years greater than that otherwise applicable to a felony of the third degree; and (2) it is a felony of the second degree [20-year maximum] if the actor violates subsection (1) of this Section and in so doing:

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

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

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

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

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

(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the other person engaged in, submitted to, or performed the act of sexual penetration or oral sex under the circumstances described in subsection(1)(b). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a circumstance described in that subsection. If applicable, the actor may raise an affirmative defense of Explicit Prior Permission according to the terms of Section 213.10.

#### SECTION 213.2. SEXUAL ASSAULT BY PHYSICAL FORCE OR RESTRAINT

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

(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because:

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

(ii) the actor's use of or threat to use physical force or restraint causes the other person to engage in, submit to, or perform the act of sexual penetration or oral sex; and

(c) the actor is reckless with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).

(2) *Grading.* Sexual Assault by Physical Force or Restraint is a felony of the third degree [*10-year maximum*] and a registrable offense.

(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the other person engaged in, submitted to, or performed the act of sexual penetration or oral sex under the circumstances described in subsection (1)(b). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a circumstance described in that subsection. If applicable, the actor may raise an affirmative defense of Explicit Prior Permission according to the terms of Section 213.10.

### SECTION 213.3. SEXUAL ASSAULT OF AN INCAPACITATED, VULNERABLE, OR LEGALLY RESTRICTED PERSON

(1) *Sexual Assault of an Incapacitated Person.* An actor is guilty of Sexual Assault of an Incapacitated Person when:

(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act, the other person:

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

(ii) lacks substantial capacity to appraise, control, or remember the person's own sexual conduct or that of anyone else because of a substance administered to that person, without that person's knowledge or consent; and the actor administered the incapacitating substance for the purpose of causing that incapacity or knows that it was surreptitiously administered by another for that purpose; and

(c) the actor is reckless with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).

Sexual Assault of an Incapacitated Person is a felony of the third degree [*10-year maximum*] and a registrable offense.

**(2) *Sexual Assault of a Vulnerable Person.* An actor is guilty of Sexual Assault of a Vulnerable Person when:**

**(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and**

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

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

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

**(iii) lacks substantial capacity to communicate lack of consent; or**

**(iv) is wholly or partly undressed, or in the process of undressing, for the purpose of receiving nonsexual professional or commercial services from the actor and has not given the actor explicit prior permission to engage in that act; and**

**(c) the actor is reckless with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).**

**Sexual Assault of a Vulnerable Person is a felony of the fourth degree [*five-year maximum*] and a registrable offense.**

**(3) *Sexual Assault of a Legally Restricted Person.* An actor is guilty of Sexual Assault of a Legally Restricted Person when:**

**(a) the actor, who did not have a consensual sexually intimate relationship with the legally restricted person at the time when that state-imposed restriction on that person's liberty began, engages with that person in, or causes that person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and**

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

(i) in custody, incarcerated, on probation, on parole, under civil commitment, in a pretrial release or pretrial diversion or treatment program, or in any other status involving a state-imposed restriction on liberty; and

(ii) the actor is in a position of actual or apparent authority or supervision over the restriction on the other person's liberty; and

(c) the actor acts knowingly with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).

Sexual Assault of a Legally Restricted Person is a felony of the fourth degree [*five-year maximum*].

(4) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when a condition or circumstance described in subsections (1)(b), (2)(b), or (3)(b) existed at the time the other person engaged in, submitted to, or performed the act of sexual penetration or oral sex. Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a condition or circumstance described in these subsections.

#### SECTION 213.4. SEXUAL ASSAULT BY EXTORTION

(1) *Sexual Assault by Extortion.* An actor is guilty of Sexual Assault by Extortion when:

(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because the actor explicitly or implicitly threatened:

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

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

(iii) to take any action or cause any consequence that would cause someone of ordinary resolution in that person's situation under all the

circumstances to engage in, submit to, or perform the act of sexual penetration or oral sex; and

(iv) the actor's threat causes the other person to engage in, submit to, or perform the act of sexual penetration or oral sex; and

(c) the actor is reckless with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).

(2) *Grading.* Sexual Assault by Extortion is a felony of the fourth degree [*five-year maximum*].

(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the other person engaged in, submitted to, or performed the act of sexual penetration or oral sex because of a threat described in subsection (1)(b). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a circumstance described in that paragraph. If applicable, the actor may raise an affirmative defense of Explicit Prior Permission under Section 213.10.

#### SECTION 213.5. SEXUAL ASSAULT BY PROHIBITED DECEPTION

(1) An actor is guilty of Sexual Assault by Prohibited Deception when:

(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because:

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

(ii) the actor caused the other person to believe falsely that the actor was someone else who was personally known to that person; and

(iii) the actor's deception causes the other person to engage in, submit to, or perform the act of sexual penetration or oral sex; and

(c) the actor acts knowingly with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).

(2) *Grading.* Sexual Assault by Prohibited Deception is a felony of the fifth degree [*three-year maximum*].

**(3) *Effective consent.*** Consent is ineffective under Section 213.0(2)(e)(iv) when the other person engaged in, submitted to, or performed the act of sexual penetration or oral sex because of a circumstance described in subsection (1)(b). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a circumstance described in that paragraph.

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

**(1) An actor is guilty of Sexual Assault in the Absence of Consent when:**

**(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and**

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

**(c) the actor is reckless with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).**

**(2) *Grading.*** Sexual Assault in the Absence of Consent is a felony of the fifth degree [*three-year maximum*], except that it is a felony of the fourth degree [*five-year maximum*] when:

**(a) the other person has, by words or actions, expressly communicated unwillingness to submit to or perform the act, or the act is so sudden or unexpected that the other person has no adequate opportunity to express unwillingness before the act occurs; and**

**(b) the actor is reckless with respect to the attendant circumstance specified in paragraph (a).**

**(3) If applicable, the actor may raise an affirmative defense of Explicit Prior Permission under Section 213.10.**

**SECTION 213.7. AGGRAVATED OFFENSIVE SEXUAL CONTACT; OFFENSIVE SEXUAL CONTACT**

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

**(a) the actor knowingly engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual contact; and**

**(b) the act is without effective consent because the act, had it been one of sexual penetration or oral sex, would be an offense as defined by:**

- (i) Section 213.1 or 213.2;
- (ii) Section 213.3(1) or (2); or
- (iii) Section 213.4.

**Aggravated Offensive Sexual Contact is a felony of the fifth degree [*three-year maximum*]. It is a registrable offense when it involves a violation of subsection (1)(b)(i) or (ii).**

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

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

**(b) the other person did not consent to that act, and the actor is reckless with respect to the lack of consent; or**

**(c) the act is without effective consent because the act, had it been one of sexual penetration or oral sex, would be an offense as defined by Section 213.3 (3) or 213.5.**

**Offensive Sexual Contact is a petty misdemeanor [*six-month maximum*].**

**(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the other person engaged in, submitted to, or performed the act of sexual contact in a circumstance described in subsections (1)(b) or (2)(c). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a circumstance described in those subsections. If applicable, an actor charged with a violation of subsections (1)(b)(i), (1)(b)(iii), or (2)(b) may raise an affirmative defense of Explicit Prior Permission under Section 213.10.**

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

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

**(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and**

**(b) the act is without effective consent because at the time of the act:**

**(i) the other person is younger than 16; and**

**(ii) the actor is more than five years older than the other person; and**

**(c) the actor is reckless with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).**

Sexual Assault of a Minor is a felony of the fifth degree [*three-year maximum*] except that it is a felony of the fourth degree [*five-year maximum*] when at the time of the act the actor is 21 or older; it is a felony of the fourth degree [*five-year maximum*] and a registrable offense when at the time of the act the actor is more than 10 years older than the other person; and it is a felony of the third degree [*10-year maximum*] and a registrable offense when at the time of the act the actor is 18 or older, the other person is younger than 12, and the actor is reckless with respect to whether the other person is younger than 12.

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

(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) at the time of the act, the actor is 18 or older and the other person is younger than 18; and

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

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

(ii) the legal spouse, domestic partner, or sexual partner of a person described by subparagraph (i); or

(iii) a legal guardian or de facto parent of the other person, who resides intermittently or permanently in the same dwelling as the other person; and

(d) the actor is reckless with respect to the conduct, attendant circumstances, and results specified in paragraphs (a), (b), and (c).

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

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

(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act:

- (i) the other person is younger than 18; and
  - (ii) the actor is more than five years older than the other person; and
  - (iii) the actor holds over the other person a formal position of authority, such as a teacher, employer, religious leader, treatment provider, administrator, or coach; and
- (c) the actor is reckless with respect to the conduct, attendant circumstances, and results specified in paragraphs (a) and (b).

Exploitative Sexual Assault of a Minor is a felony of the fifth degree [*three-year maximum*] and a registrable offense. It is a defense to a prosecution under Section 213.8(3) for the actor to prove by a preponderance of the evidence that the actor's position of authority over the other person did not impair the other person's ability to form an independent judgment about whether to consent to the act of sexual penetration or oral sex.

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

- (a) the actor knowingly fondles another person, or knowingly causes another person to submit to or perform an act of fondling; and
- (b) the act is without effective consent because at the time of the act:
  - (i) the other person is younger than 12 and the actor is more than five years older than the other person; or
  - (ii) the other person is younger than 16 and the actor is more than seven years older than the other person; and
- (c) the actor is reckless with respect to the attendant circumstances described in paragraph (b)(i) or (ii).

Fondling a Minor is a felony of the fifth degree [*three-year maximum*], except that it is a felony of the fourth degree [*five-year maximum*] when at the time of the act the actor is 21 or older; and it is a felony of the fourth degree [*five-year maximum*] and a registrable offense when at the time of the act:

- (a) the actor is more than 10 years older than the other person and is reckless with respect to being more than 10 years older than the other person; or
- (b) the actor is 18 or older, the other person is younger than 12, and the actor is reckless with respect to whether the other person is younger than 12.

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

- (a) the actor knowingly engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual contact; and**
- (b) the act is without effective consent because at the time of the act:**
  - (i) the other person is younger than 18; and**
  - (ii) the actor is more than five years older than the other person; and**
  - (iii) the act, had it been an act of sexual penetration or oral sex, would be an offense as defined by Section 213.1, 213.2, 213.3, 213.4, 213.5, or 213.8(2) or (3); and**
- (c) the actor is reckless with respect to the attendant circumstances described in paragraph (b)(i) and (ii).**

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

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

- (a) the actor knowingly engages with another person in, or causes another person to engage in, submit to, or perform:**
  - (i) an act of sexual contact; or**
  - (ii) an act involving the touching of the tongue of anyone to any body part or object, when that act is for the purpose of anyone's sexual arousal, sexual gratification, sexual humiliation, or sexual degradation; and**
- (b) the act is without effective consent because at the time of the act:**
  - (i) the other person is younger than 12, and the actor is more than five years older than the other person; or**
  - (ii) the other person is younger than 16, and the actor is more than seven years older than the other person; and**
- (c) the actor is reckless with respect to the attendant circumstances described in paragraph (b)(i) or (ii).**

**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 18 or older, the other person is younger than 12, and the actor is reckless with respect to whether the other person is younger than 12.

(7) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the circumstances described in any of the subsections (1) through (6) exist at the time of the act. Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in the circumstances described in any of those subsections.

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

[(9) *Affirmative defense of marriage.* It is an affirmative defense to a charge under subsections (1), (3), (4), and (6) of this Section, and to a charge under subsection (5)(b) based on an act that would be a violation of subsection (3) had it been an act of sexual penetration or oral sex, that the actor was the legal spouse of the other person at the time of the act of sexual penetration, oral sex, fondling, or sexual contact.]

(10) In a Juvenile Court proceeding to adjudicate delinquency on the basis of conduct that would constitute an offense under this Section, an actor younger than 14 may be adjudicated delinquent only as a misdemeanor, regardless of the penalty authorized for that conduct when it constitutes an offense under this Section.

#### SECTION 213.9. SEX TRAFFICKING AND RELATED OFFENSES

(1) *Definitions.* For purposes of this Section:

(a) “Coercion” means:

(i) using or threatening to use physical force or restraint against anyone;

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

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

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

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

(vi) any combination of these circumstances.

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

(c) "Trafficking Victim" means a person who has been recruited, enticed, transported, transferred, harbored, provided, isolated, or maintained, as described in subsection (2)(a), and is or will be coerced, as described in subsection (2)(a)(i), or is underage, as described in subsection (2)(a)(ii).

### *(2) Sex Trafficking.*

(a) 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:

(i) 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

(ii) the person is younger than 18 and is being, or will be, caused to submit to or perform a commercial sex act; and the actor is reckless with respect to whether the person is younger than 18 and is being, or will be, caused to submit to or perform the commercial sex act.

(b) **Grading. Sex Trafficking is a felony of the third degree [10-year maximum] and a registrable offense.**

(c) **Effective consent. Consent is ineffective under Section 213.0(2)(e)(iv) when a circumstance described in subsection (1)(a) is present. Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring under a circumstance described in that subsection. If applicable, the actor may raise an affirmative defense of Explicit Prior Permission under Section 213.10 when:**

(i) a charge of Sex Trafficking is based on coercion under subsection (2)(a)(i); and

(ii) the person giving such permission does so before that person has been subjected to trafficking under subsection (2)(a) and before that person has been subjected to coercion under subsection (2)(a)(i).

(3) ***Promoting Sex with a Trafficking Victim.* An actor is guilty of Promoting Sex with a Trafficking Victim if the actor, by advertising or other means, knowingly encourages, induces, or otherwise solicits another person to engage in a commercial sex act with a trafficking victim. Promoting Sex with a Trafficking Victim is a felony of the third degree [10-year maximum].**

(4) ***Patronizing a Trafficking Victim.* An actor is guilty of Patronizing a Trafficking Victim if the actor knowingly engages in a commercial sex act with a trafficking victim. Patronizing a Trafficking Victim is a felony of the fourth degree [five-year maximum].**

(5) ***Complicity in Sex Trafficking.* An actor is guilty of Complicity in Sex Trafficking if the actor knowingly provides resources, services, or other means that facilitate the commission of an offense defined by subsections (2), (3), or (4). Complicity in Sex Trafficking is a felony of the fourth degree [five-year maximum].**

**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) only 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 reckless with respect to whether the permission was withdrawn;**

**(b) the actor relies on permission to use force or restraint or ignore the absence of consent at a time when the other party will be unconscious, asleep, or otherwise unable to withdraw that permission;**

**(c) the actor recklessly engages in conduct that causes or risks serious bodily injury; or**

**(d) at the time explicit permission is given, the other party is, and the actor is reckless with respect to whether the other party is:**

**(i) younger than 18;**

**(ii) giving that permission while subjected to physical force or restraint;**

(iii) giving that permission because of the use of or threat to use physical force or restraint, or extortion as defined by Section 213.4, if that party does not give the permission;

(iv) lacking substantial capacity to appraise or control that party's conduct as a result of intoxication, whether voluntary or involuntary, and regardless of the identity of the person who administered the intoxicants;

(v) incapacitated, vulnerable, or legally restricted, as defined by Section 213.3;

(vi) subject to prohibited deception, as defined by Section 213.5; or

(vii) subject to trafficking, as defined by Section 213.9(1).

#### **SECTION 213.11. SENTENCING AND COLLATERAL CONSEQUENCES OF CONVICTION**

(1) *Definitions.* For purposes of this Article:

(a) “sentencing consequences” are penalties, disabilities, or disadvantages that are part of the sentence imposed by the court or by an agency authorized to set the terms of parole or post-release supervision in connection with a conviction for an Article 213 offense; and

(b) “collateral consequences” are penalties, disabilities, or disadvantages, however denominated, that are authorized or required by federal, state, or local law as a direct result of an individual's conviction of an Article 213 offense but are not part of the sentence imposed by the court or by an agency authorized to set the terms of parole or post-release supervision in connection with that conviction.

(c) a “sexual offense” is any offense defined by this Article or that otherwise has an element involving sexual penetration, oral sex, or sexual contact; any offense against a minor that involves kidnapping or false imprisonment (unless committed by a parent or guardian), sexual performance, or solicitation to engage in prostitution; any offense that involves possessing, producing, or distributing child pornography; and any attempt, solicitation, or conspiracy to commit any of these offenses.

(2) *General Rule.* Sentencing procedure, the authorized disposition of a person convicted of an Article 213 offense, sentencing consequences, and collateral consequences are

specified in Articles 6 and 7 of this Code\* and, when based on conviction for an Article 213 offense, are subject to the additional requirements of this Section.

**(3) *Additional Requirements for Sentencing Consequences.*** Notwithstanding any contrary provisions of law, the conditions of any suspended sentence under Section 6.02(2), any sentence to probation under Section 6.05, and any terms of parole or post-release supervision under Section 6.13, when based on conviction for an Article 213 offense, must be eligible for early relief under Section 213.11J and must not include:

**(a) a condition that:**

**(i) imposes an obligation to register with law enforcement that carries requirements other than those authorized under Sections 213.11A-213.11G and Section 213.11J;**

**(ii) permits access to the person's registry information, except as authorized under Section 213.11H; or**

**(iii) authorizes or permits any government official to notify a public or private entity or individual, other than a government law-enforcement agency or individual, that the person is registered with law enforcement or resides, works, or studies in the locality, except as authorized under Section 213.11H.**

**(b) a condition that restricts the person's occupation or employment, except as required by state law or authorized under paragraph (d) of this subsection; or**

**(c) except as authorized under paragraph (d) of this subsection, a condition that:**

**(i) requires the person to submit to GPS monitoring; or**

**(ii) restricts the person's education, Internet access, or place of residence.**

**(d) The court, and any agency authorized to set the terms of parole or post-release supervision, may impose a condition, not required by state law, that restricts the person's occupation or employment, or a condition specified in paragraph (c) of this subsection, only if the court or agency determines that the condition is manifestly required in the interest of public safety. That determination must be:**

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\* **MODEL PENAL CODE: SENTENCING**, *Official Statutory Text* (May 24, 2017).

(i) made after due consideration of the nature of the offense; all other circumstances of the case; the person's prior record; and the potential negative impacts of the burden, restriction, requirement, or government action on the person, on the person's family, and on the person's prospects for rehabilitation and reintegration into society; and

(ii) accompanied by a written statement of the official setting the condition, explaining the need for it, the evidentiary basis for the finding of need, and the reasons why a more narrowly drawn condition would not adequately meet that need.

(e) Any condition imposed under paragraph (d) must be:

(i) drawn as narrowly as possible to achieve the goal of public safety; and

(ii) imposed only for a period not to exceed that permitted under Section 213.11F for the duties to register and keep the registration current.

***(4) Additional Requirements for Collateral Consequences Applicable Primarily to Persons Convicted of a Sexual Offense.*** Notwithstanding any contrary provisions of law, collateral consequences that are based on conviction for an Article 213 offense and applicable primarily to persons convicted of a sexual offense are authorized and their scope and implementation are delineated as follows:

(a) The person's obligation to register for law-enforcement purposes is governed by Section 213.11A.

(b) Notification of the person's obligation to register and associated duties is governed by Section 213.11B.

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

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

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

(f) The duration of the registration requirements is specified in Section 213.11F.

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

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

(i) Collateral consequences that are based on conviction for an Article 213 offense and applicable primarily to persons convicted of a sexual offense, other than the obligation to register for law-enforcement purposes and restrictions on occupation and employment required by state law, are governed by Section 213.11I.

(j) Standards and procedures for relief from the obligation to register, associated duties, and other collateral consequences applicable primarily to persons convicted of a sexual offense are governed by Section 213.11J.

(5) *Retroactive Effect.* As of the effective date of this Article, all prior registration requirements and other collateral consequences, whether imposed by this or any other jurisdiction, are subject to the requirements and limits of this Section and Sections 213.11A-J if they are:

(a) applicable primarily to persons convicted of a sexual offense,

(b) based on conduct that would violate this Article if committed in this state after the effective date of this Article; provided that none of the requirements and limits of this Section and Sections 213.11A-J will impose on a person convicted prior to the effective date of this Article any duties, burdens, or restrictions more extensive than those that were applicable to that person at the time of that conviction.

#### SECTION 213.11A. REGISTRATION FOR LAW-ENFORCEMENT PURPOSES

##### (1) *Convictions in This State*

(a) Except as provided in subsection (3), every person who resides in this state and is convicted of an offense that is designated a registrable offense in this Article must, in addition to any other sanction imposed upon conviction, appear personally and register, at the time specified in Section 213.11C, with the law-enforcement authority designated by law in the [county] where the person resides. If the person convicted of that offense does not reside in this state, but works in this state, registration must be accomplished in the [county] where the person works; if the person convicted of that offense does not reside or work in this state but is enrolled in a program of study in this state, registration must be accomplished in the [county] where the person is enrolled in a program of study.

**(b) If, after initially registering in the [county] where the person resides, works, or is enrolled in a program of study, as provided in paragraph (a), the person no longer has that connection with the [county] where the person was initially required to register, the person must appear personally and register, within seven days of leaving that [county], with the law-enforcement agency designated by law in the [county] where the person now resides, works, or is enrolled in a program of study.**

**(c) Notwithstanding any other provision of law, no conviction for an offense under this Article will require the person convicted to register with law enforcement or other governmental agency in a registry regime applicable primarily to persons convicted of a sexual offense, unless this Article designates that offense as a registrable offense.**

**(d) The following are the only Article 213 offenses that trigger a duty to register under this Section:**

**(i) Sexual Assault by Aggravated Physical Force or Restraint, as defined by Section 213.1.**

**(ii) Sexual Assault by Physical Force or Restraint, as defined by Section 213.2.**

**(iii) Sexual Assault of an Incapacitated or Vulnerable Person, as defined by Section 213.3(1) and (2).**

**(iv) Aggravated Offensive Sexual Contact, as defined by Section 213.7(1), when it involves the use of physical force, physical restraint, or an incapacitated or vulnerable victim, as defined in Sections 213.1, 213.2, 213.3(1) or 213.3(2).**

**(v) Sexual Assault of a Minor, as defined by Section 213.8(1), but only when the actor is more than 10 years older than the minor, or the actor is 18 or older and the minor is younger than 12.**

**(vi) Incestuous Sexual Assault of a Minor, as defined by Section 213.8(2), but only when the minor is younger than 16.**

**(vii) Exploitative Sexual Assault of a Minor, as defined by Section 213.8(3).**

(viii) Fondling a Minor, as defined by Section 213.8(4), but only when the actor is more than 10 years older than the other person, or the actor is 18 or older and the minor is younger than 12.

(ix) Aggravated Offensive Sexual Contact with a Minor, as defined by Section 213.8(5).

(x) Sex Trafficking, as defined by Section 213.9(2).

**(2) *Convictions in Other Jurisdictions***

(a) *Duty to register and related duties.* Every person currently obliged to register with law enforcement or other public authority in another jurisdiction, because of a conviction in that jurisdiction, who subsequently resides, works, or enrolls in a program of study in this state, must register with the law-enforcement agency designated by law in the [county] of this state where the person resides, works, or is enrolled in a program of study and comply with the requirements of Sections 213.11A-213.11G, provided that the offense of conviction in the other jurisdiction is comparable to an offense that would be registrable under this Article if committed in this state.

(b) *Place of registration.* If the person who is obliged to register under paragraph (a) resides in this state, registration must be accomplished in the [county] where the person resides. If the person who is obliged to register under paragraph (a) does not reside in this state, but works in this state, registration must be accomplished in the [county] where the person works; if the person does not reside or work in this state but is enrolled in a program of study in this state, registration must be accomplished in the [county] where the person is enrolled in a program of study.

(c) *Determining the comparability of conviction offenses in other jurisdictions.*

(i) *Standard.* A conviction offense in another jurisdiction is comparable to a registrable offense under this Article if and only if the elements of the other jurisdiction's offense are no broader than the elements of that registrable offense. When, regardless of the conduct underlying the other jurisdiction's conviction, the other jurisdiction's 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 a conviction offense 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 in another jurisdiction will require the offender to register with law enforcement under this Section, unless that conviction:

(i) currently requires the offender to register with law enforcement or other governmental authority in that jurisdiction, or would currently require the offender to register in that jurisdiction if the offender resided, worked, or studied in that jurisdiction; and

(ii) is for an offense comparable to an offense that would be registrable under this Section if committed in this state.

(3) *Persons under the age of 18.* No person may be subject to the obligation to register under subsection (1) of this Section, to other obligations or restrictions under this Section, or to additional collateral consequences under Section 213.11I, on the basis of a criminal conviction for an offense committed when the person was under the age of 18, or on the basis of an adjudication of delinquency based on conduct when the person was under the age of 18; provided, however, that this subsection (3) does not apply to a person convicted of a criminal offense of Sexual Assault by Aggravated Physical Force or Restraint if the person was at least 16 years old at the time of that offense.

#### **SECTION 213.11B. NOTIFICATION OF THE OBLIGATION TO REGISTER AND ASSOCIATED DUTIES**

(1) Before accepting a guilty plea, and at the time of sentencing after conviction on a guilty plea or at trial, the sentencing judge must:

(a) inform the person who is subject to registration of the registration requirement;

(b) explain the associated duties, including:

Appendix B

(i) the identity and location, or procedure for determining the identity and location, of the law-enforcement agency where the person must appear to register as required by Section 213.11A;

(ii) the duty to register with a law-enforcement agency in any [county] where the person subsequently resides, including the possible duty to register with a law-enforcement agency or other government authority in another state to which the person subsequently moves;

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

(iv) the duty to promptly notify the relevant authority in the [county] where the person is required to register of any change in the registry information pertaining to that person, as required by Section 213.11E(2);

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

(d) confirm that defense counsel has explained to that person those duties and the right to petition for relief from those duties;

(e) confirm that the person understands those duties and that right;

(f) require the person to read and sign a form stating that defense counsel and the sentencing judge have explained the applicable duties and the right to petition for relief from those duties, and that the person understands those duties and that right;

(g) ensure that if the person convicted of a sexual offense cannot read or understand the language in which the form is written, the person will be informed of the pertinent information by other suitable means that the jurisdiction uses to communicate with such persons; and

(h) satisfy all other notification requirements applicable under Model Penal Code: Sentencing, Section 7.04(1).

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

(3) If the convicted person is sentenced to a custodial sanction, an appropriate official must, shortly before the person's release from custody, again inform the person of the registration requirement, explain the associated rights and duties, including the right to

petition for relief from those duties, and require the person to read and sign a form stating that those rights and duties have been explained and that the person understands those rights and duties. At the time of release from custody, the person concerned shall receive a copy of that form.

**SECTION 213.11C. TIME OF INITIAL REGISTRATION**

**A person subject to registration must initially register:**

- (a) if incarcerated after sentence is imposed, then within three business days after release; or**
- (b) if not incarcerated after sentence is imposed, then not later than five business days after being sentenced for the offense giving rise to the duty of registration.**

**SECTION 213.11D. INFORMATION REQUIRED IN REGISTRATION**

**(1) A person subject to registration under Section 213.11A must provide the following information to the appropriate official for inclusion in the law-enforcement registry:**

- (a) the name and date of birth 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;**
- (g) all telephone numbers and email addresses used by the person, and all designations that the person uses for self-identification in internet and telephonic communications and postings;**
- (h) the document number of each passport held by the person and, if the person is not a United States citizen, the document type and document number for**

each document that establishes the person's current immigration status in the United States.

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

(a) the text of the provision of law defining the sexual offense for which the person is registered;

(b) the person's criminal history, including the date and offense designation of all convictions; and the person's parole, probation, or supervised-release status;

(c) any other information required by law.

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

**(4) *Registrants Who Lack a Fixed Place of Employment.*** If a person required to register is or will be employed but lacks a fixed place of employment, the person must, at the time of registration, report with as much specificity as possible the location or locations where the person works or will work, instead of the information required under subsection (1)(d).

**(5)** The [county] where a person registers must promptly provide the information specified in subsections (1) - (4) of this Section to the appropriate law enforcement agency in every other [county] of this state where the registrant works or expects to work or is enrolled or expects to enroll in a program of study. If the person is also registered in another jurisdiction, the [county] of this state where the person registers must promptly provide the information specified in subsections (1) - (4) of this Section to each law enforcement agency with which the person is registered in the other jurisdiction.

**(6) *Correction of Errors.*** Each [county] where a person registers and each [county] that receives information about a registrant pursuant to subsection (5) of this Section must provide efficacious, reasonably accessible procedures for correcting erroneous registry information. The [county] where a person registers must, at the time of registration, provide the registrant instructions on how to use those procedures to seek correction of registry information that the registrant believes to be erroneous.

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

**(1) *Annual Updates.***

(a) A person who is required to register under Section 213.11A must, not less frequently than once every year, appear in person in the [county] where the person currently resides, verify the current accuracy of the information that the registrant 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 or in which the person resides, works, or is enrolled in a program of study. If the person who is required to register does not reside in this state, but works in this state, the annual update specified in this paragraph must be accomplished in the [county] where the person works; if the person does not reside or work in this state but is enrolled in a program of study in this state, the annual update specified in this paragraph must be accomplished in the [county] where the person is enrolled in a program of study.

(b) Not less than 30 nor more than 45 days before the person's annual registration date, the authority where the person is registered under Section 213.11A must send written notice to the person's residential address, alerting the registrant to the requirements of this Section.

(c) In the case of 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), the authority where the person is registered under Section 213.11A must make a good-faith effort to provide this written notice to the person at the location the person has reported as the principal place where the person sleeps.

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

(a) Except as provided in paragraph (b) of this subsection, a person subject to registration under Section 213.11A must, not later than five business days after each change of name and each change in the information that the person is required to provide under Section 213.11D, notify the [county] specified in Section 213.11A of:

(i) all changes in the information that the person is required to provide under Section 213.11D, and

(ii) the identity of all other jurisdictions in which the person resides, works, or is enrolled in a program of study.

(b) Registrants who lack a stable residential address or place of employment, and therefore report instead the principal place or places where they sleep or work, as provided in Section 213.11D(3) and (4), must confirm or update those locations once every 90 days but need not do so more often.

(c) Each [county] that maintains a registry of persons who are required to register under Section 213.11A must permit registrants to notify the law enforcement agency with which the person is registered, by one or more reliable, readily accessible methods of communication of the jurisdiction's choosing, such as U.S. mail, submission of an appropriate form online, or otherwise, of any change in the information the person is required to provide under Section 213.11D, and any change in the identity of *all other jurisdictions in which the person* resides, works, or is enrolled in a program of study.

(d) Each [county] where a person registers pursuant to Section 213.11A must advise the registrant, at the time of registration, of the registrant's option to use one of the means of communication established under subsection (2)(c), rather than appearing personally for that purpose, if the registrant so chooses, other than for the annual in-person meeting requirement of subsection (1).

(3) The [county] notified of any changes pursuant to subsections (1) and (2) must promptly provide the registrant a written receipt confirming that the updated information has been provided, and must provide that information to the appropriate authority in all other [counties] where the person resides, works, or is enrolled in a program of study.

#### SECTION 213.11F. DURATION OF REGISTRATION REQUIREMENT

##### (1) *Ordinary Termination.*

(a) Subject to the provisions of subsection (2) of this Section and Section 213.11J, a person required to register under Section 213.11A 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.

(b) At the expiration of that 15-year period, the duty to keep that registration current will terminate, and the person who had been registered will not be subject to any further duties under this Article on the basis of that registration requirement. The person will remain subject to any registration requirement under this Article that arises from conviction of any other Article 213 offense.

(c) In determining whether the 15-year period has been completed, that period shall include any time in which the person was registered in this state or any other jurisdiction, prior to the effective date of Sections 213.11 and 213.11A-J, for the offense giving rise to that registration requirement.

(2) *Early Termination.* If, during the first 10 years of the period during which a person is required to keep registration information current under Section 213.11E, the person:

(a) successfully completes any period of supervised release, probation, or parole, and satisfies any financial obligation that arises from the conviction for the registrable offense, 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 sexual-offense treatment program; and

(c) is not convicted of, or facing pending charges for, any subsequent offense under this Article, or any subsequent sexual offense in this state or any other 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 (3).

(3) *Access to Registry Information After Termination.* When the person's obligation to register and to keep registry information current terminates under subsection (1) or (2), subsequent access to registry information is limited as follows:

(a) Registry information recorded as of the date when termination takes effect must remain available to any government law-enforcement agency seeking disclosure of that information in compliance with Section 213.11H(1)(a).

(b) Except as provided in paragraph (a), no public or private agency may thereafter be permitted access to registry information associated with a registration requirement that has terminated.

(4) *Notice of Termination.* When a person's duty to register terminates under subsection (1) or (2), the law enforcement agency in the [county] where the person's duty to register arises on the basis of residence, work, or study must:

(a) include in its registry a notice that the person's duty to register and all duties associated with that registration requirement have terminated; and

(b) upon the person's request, notify each law enforcement agency and other authority that has received information about the registrant pursuant to Section 213.11D(5) that the person's duty to register and all duties associated with that registration requirement have terminated and that no public or private agency other than a government law enforcement agency shall thereafter be permitted to have access to that registry information.

(c) upon the person's request, provide the person a certificate attesting that the person's duty to register and all duties associated with that registration requirement have terminated.

#### SECTION 213.11G. FAILURE TO REGISTER

(1) *Offense of Failure to Register.* A person required to register under Section 213.11A is guilty of Failure to Register, a misdemeanor, if that person knowingly fails to register as required by Sections 213.11A, 213.11C, and 213.11D, or knowingly fails to update a registration as required by Section 213.11E.

(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 contribute to the creation of those circumstances in reckless disregard of the impact of those circumstances on the ability to meet registration requirements; and

(c) after those circumstances ceased to exist, the accused complied as soon as reasonably feasible.

**(3) *Other Consequences of Not Meeting Registration Requirements.*** Failing to register or to meet other registration requirements may not be a basis for revoking bail, probation, parole, or other conditions of release from custody, unless the person who failed to do so has been convicted under this Section of the offense of Failure to Register.

#### **SECTION 213.11H. ACCESS TO REGISTRY INFORMATION**

##### **(1) *Confidentiality***

(a) Each law-enforcement agency that receives information from a registrant pursuant to Section 213.11D(5) must exercise due diligence to ensure that this registrant-supplied information remains confidential, except that relevant information about a specific registrant, including but not limited to registrant-supplied information, must be disclosed:

(i) to any government law enforcement agency that requests information to aid in the investigation of a specific criminal offense;

(ii) to any adult victim of an Article 213 offense committed by the registrant and to any parent or guardian of a minor victim of an Article 213 offense committed by the registrant, if the either the victim or that parent or guardian resides, works, or is enrolled in a program of study in the [county] where the registrant resides, works, or studies; provided that such disclosure must be limited to the fact that the registrant resides, works, or is enrolled in a program of study in that [county];

(iii) to the United States Marshal's Service as required by International Megan's Law, Pub. L. No. 114-119, 130 Stat. 15 (2016), when that information involves the international travel plans of a registrant who has been convicted of a sexual offense involving a minor; and

(iv) to the [*Department of Public Safety*] as appropriate to enable the Department to provide the criminal history background check authorized by [*Section xx/yy*] of the [*Code of Criminal Procedure*] to any public or private agency, organization, or individual qualified to receive such a background check on the basis of serving, having access to, or screening others to serve or have access to minors, the elderly, or persons who are disabled or otherwise vulnerable; provided that any disclosure to the Department under this subparagraph must comply with the terms of [*Section xx/yy*] of the [*Code of Criminal Procedure*]. See Annex, pp. 82-90, *infra*.

(b) Any disclosure pursuant to paragraph (a) must include a warning that:

(i) the agency, organization, or individual receiving the information must exercise due diligence to ensure that the information remains confidential, except as provided in paragraph (a);

(ii) such information may be disclosed and used for the purposes specified in subparagraphs (a)(i)-(iv), but otherwise must not be disclosed to any person or public or private agency;

(iii) such information may not be used to injure, harass, or commit a crime against the registrant or anyone else; and

(iv) any failure to comply with the confidentiality and use-limitation requirements of this Section could result in civil or criminal penalties.

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

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

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

Unauthorized Disclosure of Registry Information is a felony of the fourth degree [*five-year maximum*].

**SECTION 213.11I. ADDITIONAL COLLATERAL CONSEQUENCES OF CONVICTION**

**(1) Definitions.** For purposes of this Section,

**(a)** the term “Article 213 offense” includes an offense under the law of another jurisdiction that is comparable to an Article 213 offense under Section 213.11A(2)(c);

**(b)** the term “additional collateral consequence” means any collateral consequence, as defined in Section 213.11(1)(b), that is:

**(i)** authorized or required as a direct result of a person’s conviction for an Article 213 offense, and

**(ii)** applicable primarily to persons convicted of a sexual offense, other than the obligation to register with law enforcement specified in Section 213.11A, the associated duties and restrictions specified in Sections 213.11C-213.11G, and any restriction on occupation or employment required by state law.

**(c)** An additional collateral consequence under this Section includes any collateral consequence that restricts the convicted person’s occupation or employment except as required by state law; limits the convicted person’s education, Internet access, or place of residence; uses methods such as GPS monitoring to track the person’s movements; notifies a community organization or entity or a private party that the person resides, works, or is enrolled in a program of study in the locality; or permits a public or private agency, organization, or person to access registry information, except as authorized by Section 213.11H; but only if this collateral consequence results from a conviction for an Article 213 offense and is not a sentencing consequence as defined in Section 213.11(1)(a).

**(d)** An additional collateral consequence under this Section does not include a sentencing consequence, as defined in Section 213.11(1)(a), and does not include a collateral consequence that is:

**(i)** authorized or required as a direct result of an individual’s conviction of an offense other than an Article 213 offense, or

**(ii)** applicable to persons convicted of many different offenses, such as any government-imposed limits on jury service, access to public benefits, and other government-imposed penalties, disabilities, and disadvantages that

result from conviction of a wide variety of offenses, including but not limited to sexual offenses.

**(2) *Additional collateral consequences precluded for persons not required to register.***

**Notwithstanding any other provision of law, no person shall be subject to an additional collateral consequence, as defined in this Section, unless:**

**(a) that additional collateral consequence is based on a conviction for a registrable Article 213 offense, and**

**(b) that person is currently required to register with law enforcement under Section 213.11A.**

**(3) *Additional collateral consequences for persons required to register.* Notwithstanding any other provision of law:**

**(a) a person currently required to register with law enforcement under Section 213.11A must not be subject to any government action notifying a community organization or entity or a private party that the person resides, works, or is enrolled in a program of study in the locality, except as authorized by Section 213.11H, and must not be subject to any government action permitting a public or private agency, organization, or person to access registry information, except as authorized by Section 213.11H; and**

**(b) a person required to register with law enforcement under Section 213.11A may be subject to an additional collateral consequence not specified in subsection (3)(a), but only if an official designated by law, after affording the person notice and an opportunity to respond concerning the proposed additional collateral consequence, determines that the additional collateral consequence is manifestly required in the interest of public safety, after due consideration of:**

**(i) the nature of the offense;**

**(ii) all other circumstances of the case;**

**(iii) the person's prior record; and**

**(iv) 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)(b) of this Section must determine that the additional collateral consequence:

**(a)** satisfies all applicable notification requirements set forth in Section 213.11B;

**(b)** is authorized by law;

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

**(d)** is accompanied by a written statement of the official approving the additional collateral consequence, explaining the need for it, the evidentiary basis for the finding of need, and the reasons why a more narrowly drawn restriction, disability, or government action would not adequately meet that need; and

**(e)** is imposed only for a period not to exceed that permitted under Section 213.11F for the duties to register and keep the registration current.

**(5) *Confidentiality.*** In any proceeding under subsection (3)(b) to consider whether to impose an additional collateral consequence, the official responsible for making the determination must insure that the identity of the registrant concerned remains confidential.

**(6) *Judicial Review.*** A person on whom an additional collateral consequence has been imposed under subsection (3)(b) is entitled to judicial review in an appropriate court, within the time and in accordance with the procedures provided by law for review of decisions of administrative agencies in this jurisdiction.

#### **SECTION 213.11J. DISCRETIONARY RELIEF FROM REGISTRATION AND FROM OTHER SENTENCING CONSEQUENCES AND COLLATERAL CONSEQUENCES**

**(1) *Petition for Discretionary Relief.*** At any time prior to the expiration of any sentencing consequence imposed under Section 213.11(3) or any collateral consequence imposed under Section 213.11(4), including any additional collateral consequence imposed under Section 213.11(4)(i) and Section 213.11I(3), the registrant may petition the sentencing court, or other authority authorized by law, to order relief from all or part of those consequences. If the obligation to register or other consequences arose from an out-of-state conviction, the petition may be addressed to a court of general jurisdiction or other authority of this state in the place where the person concerned is registered.

**(2) *Proceedings on Petition for Discretionary Relief.*** The authority to which the petition is addressed may either dismiss the petition summarily, in whole or in part, or institute proceedings to rule on the merits of the petition. If that authority chooses to entertain submissions, hear argument, or take evidence prior to ruling on the merits of the petition, it must give notice of the proceeding and an opportunity to participate in it to the prosecuting attorney for the offense out of which the obligation to register or other consequence arose. If the obligation to register or other consequence arose from an out-of-state conviction, notice of the proceeding and an opportunity to participate in it must be addressed to the principal prosecuting attorney in the jurisdiction of this state where the authority to which the petition is addressed is located.

**(3) *Judgment on Proceedings for Discretionary Relief.*** Following proceedings for discretionary relief under subsection (2), the authority to which the petition is addressed may grant or deny relief, in whole or in part, from the obligation to register, any associated duties, and any of the sentencing consequences or collateral consequences in question. When that order terminates the registrant's obligation to register and to keep registry information current, subsequent disclosure of registry information is governed by subsection (5) of this Section. An order granting or denying relief following those proceedings must explain in writing the reasons for granting or denying relief.

**(4) *Standard for Discretionary Relief.*** The authority to which the petition is addressed must grant relief if it finds, after proceedings to rule on the merits pursuant to subsection (2), that the sentencing consequence or collateral consequence in question is likely to impose a substantial burden on the registrant's ability to reintegrate into law-abiding society, and that public-safety considerations do not require continued imposition of the obligation, duty, or consequence after due consideration of:

- (a) the nature of the offense;
- (b) all other circumstances of the case;
- (c) the registrant's prior and subsequent record of criminal convictions, if any;

and

(d) the potential negative impacts of the burden, restriction, or government action on the registrant, on the registrant's family, and on the registrant's prospects for rehabilitation and reintegration into society.

**Relief must not be denied arbitrarily or for any punitive purpose.**

**(5) *Access to registry information after discretionary relief.*** When an order of discretionary relief terminates the person's obligation to register and to keep registry information current, all limits on access to registry information under Section 213.11H shall remain in effect. Registry information recorded as of the date when discretionary relief takes effect must remain available to any government law-enforcement agency seeking disclosure of that information in compliance with Section 213.11H(1)(a) but must not otherwise be disclosed.

**(6) *Notice to other jurisdictions concerning discretionary relief.***

**(a)** When discretionary relief is granted to a person under this Section, the authority granting the order of relief must, upon the person's request, give notice of that order to any other jurisdiction where the person concerned is registered or where information about the person has been provided pursuant to Section 213.11D(5).

**(b)** When the other jurisdiction notified is a jurisdiction of this state, the notice must specify that the other jurisdiction must extend the same relief from registration-related duties and any other sentencing consequences or collateral consequences. When that order terminates the registrant's obligation to register and to keep registry information current, that notice must also specify the limits on subsequent disclosure of registry information applicable under subsection (5).

**(7) *Proceedings subsequent to discretionary relief.*** An order of discretionary relief granted under this Section does not preclude the authority to which the petition was addressed from later revoking that order if, on the basis of the registrant's subsequent conduct or any other substantial change in circumstances, the authority finds by a preponderance of the evidence that public-safety considerations, weighed against the burden on the registrant's ability to reintegrate into law-abiding society, no longer justify the order of relief.

**(8) *Confidentiality.*** In any proceedings under this Section to consider whether to grant or deny discretionary relief, the official responsible for making the determination must insure that the identity of the registrant concerned remains confidential.

ANNEX

MODEL PROCEDURES FOR  
CRIMINAL HISTORY BACKGROUND CHECKS  
[ALTERNATIVE A]

**SECTION [XX]. BACKGROUND CHECKS**

(1) *Criminal History Certificate for prospective employees and volunteers.* Subject to all applicable provisions of federal employment and non-discrimination law, including Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e, et seq., and all applicable provisions of the employment and non-discrimination laws of this state, any public or private organization or entity and any individual that hires or screens employees or volunteers for a position involving contact with or access to minors, the elderly, or persons who are disabled or otherwise vulnerable, is authorized to require the applicant for such a position to submit a Criminal History Certificate issued by the [Department of Public Safety] under the procedures prescribed by this Section.

(2) *Application for a Criminal History Certificate.* Any person who seeks a position involving contact with or access to minors, the elderly, or persons who are disabled or otherwise vulnerable is authorized to apply to the [Department of Public Safety] for a Criminal History Certificate. The application must be submitted on a form approved by the Department, and must be accompanied by a full set of fingerprints, a signed waiver from the applicant allowing the release to the applicant of the information specified in subsection (3), and payment of an appropriate fee, as set by regulations issued by the Department.

(3) *Procedure for issuing a Criminal History Certificate.* After verifying the applicant's identity, the Department shall consult the records of the [Department of Public Safety] and the [Department of Children and Family Services], and compile the information identified in paragraphs (a) and (b). The Department or its authorized agent shall submit the applicant's fingerprints to the Federal Bureau of Investigation and obtain a record of the information identified in paragraph (c). The Department shall then issue to the applicant a Criminal History Certificate that contains the following information:

(a) a report from the [Department of Public Safety] of criminal-history record information pertaining to the applicant that includes any criminal convictions of the applicant for an offense or offenses specified in subsection (4), or a statement from

the Department that its records contain no such information pertaining to the applicant.

(b) A report from the [*Department of Children and Family Services*] as to whether the applicant is named in its records as the alleged perpetrator in a pending child-abuse investigation or as the perpetrator of a founded report of child abuse within the five-year period immediately preceding verification pursuant to this section.

(c) A report of federal criminal-history record information that identifies any criminal convictions of the applicant for an offense or offenses specified in subsection (4), or a statement that federal criminal-history records contain no such information pertaining to the applicant.

(4) *Offenses to be reported.* The reports of criminal-history record information to be issued pursuant to subsections (3)(a) and (3)(c) shall indicate only whether the applicant has been convicted of criminal conduct constituting one or more of the following offenses or equivalent offenses under federal law or the law of this or any other state:

- (a) criminal homicide;
- (b) aggravated assault;
- (c) stalking;
- (d) kidnapping;
- (e) unlawful restraint;
- (f) rape or sexual assault;
- (g) abuse, neglect, or exploitation of an elderly or disabled person;
- (h) domestic violence;
- (i) violation of an order of protection;
- (j) endangering the welfare of a child;
- (k) child abuse;
- (l) corruption of minors;
- (m) manufacture, distribution, or possession of child pornography;
- (n) a felony offense involving the manufacture, distribution, use, or possession of a controlled substance committed within the five-year period immediately

preceding the applicant's request for a Certificate of Criminal History under this Section; or

(o) attempt, solicitation, or conspiracy to commit any of the offenses set forth in this subsection.

(5) *Updates.* If an individual who has obtained a Certificate of Criminal History from the Department is subsequently convicted of an offense listed in subsection (4) or is named as a perpetrator in a founded report of child abuse with the [*Department of Children and Family Services*], the individual shall provide the Department with written notice to that effect not later than 72 hours after the conviction or notification that the individual was named as a perpetrator in a founded report of child abuse.

(6) *Time limit for certification.* The Department shall comply with certification requests no later than [14] days from the receipt of the request.

(7) *Accuracy.* The Department must in writing notify persons who apply for a Criminal History Certificate of their right to challenge the accuracy and completeness of any information to be included in the Certificate, to obtain a determination as to the validity of such challenge, and to obtain a corrected Certificate to the extent that any such challenge is determined to have merit. That notice must also explain the procedures provided for doing so.

(8) *Confidentiality.* The information provided and compiled under this Section, including, but not limited to, the names, addresses and telephone numbers of applicants, shall not be subject to disclosure under the [*Freedom of Information Act*] [*Right-to-Know Law*]. This information shall not be released to any person other than the applicant, except as authorized by the Department pursuant to its regulations.

(9) *Regulations.* The Department shall promulgate the regulations necessary to implement this Section.

**MODEL PROCEDURES FOR**  
**CRIMINAL HISTORY BACKGROUND CHECKS**  
*[ALTERNATIVE B]*

**SECTION [YY]. BACKGROUND CHECKS.**

**(1) *Definitions.*** As used in this Section, the term:

(a) “Care” means the provision of care, treatment, education, training, instruction, supervision, or recreation to minors, the elderly, or persons who are disabled or otherwise vulnerable.

(b) “Care entity” means any public or private organization or agency that provides care or care-placement services, including an organization or entity that licenses or certifies others to provide care or care-placement services.

(c) “Qualified care entity” means a care entity that has applied to the *[Department of Public Safety]* for certification as a qualified care entity and has been certified as such by the Department. As a part of the application for certification, the applicant care entity must submit a signed agreement, on a form approved by the Department, agreeing to comply with all applicable provisions of state and federal law. The Department may periodically audit qualified care entities to ensure compliance with state and federal law and this Section. The Department must by regulation promulgate standards and procedures for making such determinations, including standards and procedures for applicants to challenge adverse determinations.

**(2) *Requests for screening.***

(a) A qualified care entity may submit to the Department a request for screening of a current or prospective employee or volunteer for a position involving contact with or access to minors, the elderly, or persons who are disabled or otherwise vulnerable.

(b) Each such request must be accompanied by a full set of fingerprints of the person to be screened, a signed waiver from the person to be screened allowing the release to the applicant of the information specified in subsection (4), and payment of an appropriate fee, as set by regulations issued by the Department.

(c) Any current or prospective employee or volunteer who is subject to a request for screening must indicate to the qualified care entity submitting the request the name and address of each qualified care entity that has submitted a previous request for screening regarding that current or prospective employee or volunteer.

(3) *Screening procedure.* After verifying the identity of the person to be screened, the Department shall consult its records and those of the [*Department of Children and Family Services*] and compile the information identified in subsections (4)(a) and (b). The Department or its authorized agent shall submit the fingerprints of the person to be screened to the Federal Bureau of Investigation and obtain a record of the information identified in subsection (4)(c).

(4) After obtaining the information specified in subsection (3), the Department shall then issue to the qualified care entity a Screening Report that contains the following information:

(a) The state criminal-history records pertaining to the person to be screened that identify any criminal convictions of the person to be screened for an offense or offenses specified in subsection (5), or a statement that its records contain no such information pertaining to the person to be screened.

(b) A report from the [*Department of Children and Family Services*] as to whether the person to be screened is named in its records as the alleged perpetrator in a pending child-abuse investigation or as the perpetrator of a founded report of child abuse within the five-year period immediately preceding verification pursuant to this section.

(c) Federal criminal-history record information pertaining to the person to be screened that identifies any criminal convictions of the applicant for an offense or offenses specified in subsection (5), or a statement that federal criminal-history records contain no such information pertaining to the applicant.

(5) *Offenses to be reported.* The reports of criminal-history record information to be issued pursuant to subsections (4)(a) and (4)(b) shall indicate only whether the applicant has been convicted of criminal conduct constituting one or more of the following offenses or equivalent offenses under federal law or the law of this or any other state:

(a) criminal homicide;

- (b) aggravated assault;**
- (c) stalking;**
- (d) kidnapping;**
- (e) unlawful restraint;**
- (f) rape or sexual assault;**
- (g) abuse, neglect, or exploitation of an elderly or disabled person;**
- (h) domestic violence;**
- (i) violation of an order of protection;**
- (j) endangering the welfare of a child;**
- (k) child abuse;**
- (l) corruption of minors;**
- (m) manufacture, distribution, or possession of child pornography;**
- (n) a felony offense involving the manufacture, distribution, use, or possession of a controlled substance committed within the five-year period immediately preceding the applicant's request for a Certificate of Criminal History under this Section; or**
- (o) attempt, solicitation, or conspiracy to commit any of the offenses set forth in this subsection.**

**(6) *Time limit for issuing a Screening Report.*** The Department shall comply with requests for a Screening Report no later than [14] days from the receipt of the request.

**(7) *Confidentiality.*** The criminal history information provided in the screening report is available to qualified care entities to use only for the purpose of screening current or prospective employees and volunteers for a position with or certification from a qualified care entity. It must not be revealed to any person or entity other than a person or entity with responsibility for screening the current or prospective employee or volunteer in question, and it must not be used for any other purpose.

**(8) *Determination of fitness.*** The determination whether the criminal history record of the person screened bears upon the fitness of that person to serve in a position involving contact with or access to minors, the elderly, or persons who are disabled or otherwise vulnerable shall be made solely by the qualified care entity. The Department is neither required nor authorized to make such a determination on behalf of any qualified care entity.

**(9) *Accuracy.*** The qualified care entity must in writing notify persons screened of their right to obtain a copy of any background screening report, to challenge the accuracy and completeness of any information contained in any such report, and to obtain a determination as to the validity of such challenge before a final determination regarding the person is made by the qualified care entity reviewing the criminal history information. That notice must also explain the procedures provided for doing so.

**(10) *Regulations.*** The Department shall promulgate the regulations necessary to implement this Section.

APPENDIX C  
COMPARISON OF COMPLETE BLACK LETTER – TENTATIVE DRAFT NO. 5  
TO TENTATIVE DRAFT NO. 6

ARTICLE 213  
BLACK LETTER

**SECTION 213.0. GENERAL PRINCIPLES OF LIABILITY; DEFINITIONS**

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

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

(b) Subsection (2) of Section 2.08 (Intoxication) does not apply to this article.

Instead, the general provisions of the criminal law and rules of evidence of the jurisdiction govern the materiality of the actor’s intoxication in determining the actor’s culpability for an offense.

*(2) Definitions*

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

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

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

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

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

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

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

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

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

(e) "Consent":

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

(ii) Neither verbal nor physical resistance is required to establish that consent is lacking. Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.

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

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

~~(v)~~ Consent may be revoked or withdrawn any time before or during the act of sexual penetration, oral sex, or sexual contact. A clear verbal refusal—such as "No," "Stop," or "Don't"—establishes the lack of consent or the revocation or withdrawal of previous consent. Lack of consent or revocation or withdrawal of consent may be overridden by subsequent consent given prior to the act of sexual penetration, oral sex, or sexual contact.

(f) Force.

(i) "Physical force or restraint" means a physical act or physical restraint that inflicts more than negligible physical harm, pain, or discomfort or that significantly restricts a person's ability to move freely. More than

negligible physical harm includes but is not limited to a burn, black eye, or bloody nose, and more than negligible pain or discomfort includes but is not limited to the pain or discomfort resulting from a kick, punch, or slap on the face.

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

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

(h) “Registrable offense”

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

(ii) No offense is a registrable offense under ~~any provision of law~~ this Article 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 under this Article in this jurisdiction if it had been committed in this jurisdiction.

#### SECTION 213.1. SEXUAL ASSAULT BY AGGRAVATED PHYSICAL FORCE OR RESTRAINT

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

(a) the actor engages with ~~causes~~ another person in, or causes another person to engage in, ~~to~~ submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because:

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

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

(c) the actor acts knowingly with respect to the conduct, attendant ~~knows that the~~ circumstances, and results specified ~~described~~ in paragraphs (a) and (b) ~~are present~~.

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

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

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

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

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

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

(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the other person engaged in, submitted to, or performed the act of sexual penetration or oral sex under the circumstances described in subsection(1)(b). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a circumstance described in that subsection. If applicable, the actor may raise an affirmative defense of Explicit Prior Permission according to the terms of Section 213.10.

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

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

(a) the actor engages with ~~causes~~ another person in, or causes another person to engage in, ~~to~~ submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because:

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

(ii) the actor's use of or threat to use physical force or restraint causes the other person to engage in, submit to, or perform the act of sexual penetration or oral sex; and

(c) the actor is reckless with respect to the conduct, attendant ~~aware of, yet recklessly disregards, the risk that the~~ circumstances, and results specified ~~described~~ in paragraphs (a) and (b) ~~are present~~.

(2) *Grading.* Sexual Assault by Physical Force or Restraint is a felony of the third degree [10-year maximum] and ~~It is~~ a registrable ~~when the actor has previously been convicted of a felony sex~~ offense.

(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the other person engaged in, submitted to, or performed the act of sexual penetration or oral sex under the circumstances described in subsection (1)(b). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a circumstance described in that subsection. If applicable, the actor may raise an affirmative defense of Explicit Prior Permission according to the terms of Section 213.10.

**SECTION 213.3. SEXUAL ASSAULT OF AN INCAPACITATED, VULNERABLE, OR LEGALLY RESTRICTED PERSON**

(1) *Sexual Assault of an Incapacitated Person.* An actor is guilty of Sexual Assault of an Incapacitated Person when:

(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act, the other person:

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

(ii) lacks substantial capacity to appraise, control, or remember the person's own sexual conduct or that of anyone else because of a substance administered to that person, without that person's knowledge or consent; and the actor administered the incapacitating substance for the purpose of causing that incapacity or knows that it was surreptitiously administered by another for that purpose; and

(c) the actor is reckless with respect to the conduct, attendant ~~aware of, yet recklessly disregards, the risk that the~~ circumstances, and results specified ~~described~~ in paragraphs (a) and (b) ~~are present~~.

Sexual Assault of an Incapacitated Person is a felony of the third degree [*10-year maximum*] and ~~It is a~~ registrable ~~offense when the actor has previously been convicted of a felony sex~~ offense.

(2) *Sexual Assault of a Vulnerable Person*. An actor is guilty of Sexual Assault of a Vulnerable Person when:

(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act, the other person:

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

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

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

(iv) is wholly or partly undressed, or in the process of undressing, for the purpose of receiving nonsexual professional or commercial services from

the actor and has not given the actor explicit prior permission to engage in that act; and

(c) the actor is reckless with respect to the conduct, attendant ~~aware of, yet recklessly disregards, the risk that the~~ circumstances, and results specified ~~described~~ in paragraphs (a) and (b) ~~are present~~.

Sexual Assault of a Vulnerable Person is a felony of the fourth degree [*five-year maximum*] and a registrable offense.

(3) *Sexual Assault of a Legally Restricted Person*. An actor is guilty of Sexual Assault of a Legally Restricted Person when:

(a) the actor, who did not have a consensual sexually intimate relationship with the legally restricted ~~other~~ person at the time when that ~~a~~ state-imposed restriction on that person's liberty began, engages with that ~~causes the other~~ person in, or causes that person to engage in, ~~to~~ submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act, the other person is:

(i) in custody, incarcerated, on probation, on parole, under civil commitment, in a pretrial release or pretrial diversion or treatment program, or in any other status involving a state-imposed restriction on liberty; and

(ii) the actor is in a position of actual or apparent authority or supervision over the restriction on the other person's liberty; and

(c) the actor acts knowingly with respect to the conduct, attendant ~~knows that the~~ circumstances, and results specified ~~described~~ in paragraphs (a) and (b) ~~are present~~.

Sexual Assault of a Legally Restricted Person is a felony of the fourth ~~fifth~~ degree [*five*~~three~~-year maximum].

(4) *Effective consent*. Consent is ineffective under Section 213.0(2)(e)(iv) when a condition or circumstance described in subsections (1)(b), (2)(b), or (3)(b) existed at the time the other person engaged in, submitted to, or performed the act of sexual penetration or oral sex. Submission, acquiescence, or words or conduct that would otherwise indicate consent

do not constitute effective consent when occurring in a condition or circumstance described in these subsections.

SECTION 213.4. SEXUAL ASSAULT BY EXTORTION

(1) *Sexual Assault by Extortion.* An actor is guilty of Sexual Assault by Extortion when:

(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because the actor explicitly or implicitly threatened:

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

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

(iii) to take any action or cause any consequence that would cause ~~submission to or performance of the act of sexual penetration or oral sex by~~ someone of ordinary resolution in that person's situation under all the circumstances to engage in, submit to, or perform the act of sexual penetration or oral sex; and

(iv) the actor's threat causes the other person to engage in, submit to, or perform the act of sexual penetration or oral sex; and

(c) the actor is reckless with respect to the conduct, attendant ~~aware of, yet recklessly disregards, the risk that the~~ circumstances, and results specified ~~described~~ in paragraphs (a) and (b) ~~are present~~.

(2) *Grading.* Sexual Assault by Extortion is a felony of the fourth degree [*five-year maximum*].

(3) *Effective consent.*— Consent is ineffective under Section 213.0(2)(e)(iv) when the other person engaged in, submitted to, or performed the act of sexual penetration or oral sex because of a threat described in subsection (1)(b). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when

occurring in a circumstance described in that paragraph. If applicable, the actor may raise an affirmative defense of Explicit Prior Permission under Section 213.10.

**SECTION 213.5. SEXUAL ASSAULT BY PROHIBITED DECEPTION**

**(1) An actor is guilty of Sexual Assault by Prohibited Deception when:**

(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because:

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

(ii) the actor caused the other person to believe falsely that the actor was someone else who was personally known to that person; and

(iii) the actor's deception causes the other person to engage in, submit to, or perform the act of sexual penetration or oral sex; and

(c) the actor acts knowingly with respect to the conduct, attendant ~~knows that the circumstances, and results specified described~~ in paragraphs (a) and (b) ~~are present~~.

(2) *Grading.* Sexual Assault by Prohibited Deception is a felony of the fifth degree [*three-year maximum*].

(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the other person engaged in, submitted to, or performed the act of sexual penetration or oral sex because of a circumstance described in subsection (1)(b). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring under a circumstance described in that paragraph.

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

**(1) An actor is guilty of Sexual Assault in the Absence of Consent when:**

(a) the actor engages with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) the other person does not consent to that act; and

(c) the actor is reckless with respect to the conduct, attendant ~~aware of, yet recklessly disregards, the risk that the~~ circumstances, and results specified ~~described~~ in paragraphs (a) and (b) ~~are present~~.

(2) *Grading.*- Sexual Assault in the Absence of Consent is a felony of the fifth degree [*three-year maximum*], except that it is a felony of the fourth degree [*five-year maximum*] when:

(a) the other person has, by words or actions, expressly communicated unwillingness to submit to or perform the act, or the act is so sudden or unexpected that the other person has no adequate opportunity to express unwillingness before the act occurs; and

(b) the actor is reckless with respect to the attendant ~~aware of, yet recklessly disregards, the risk that a~~ circumstance specified ~~described~~ in paragraph (a) ~~existed at the time of the act of sexual penetration or oral sex~~.

(3) If applicable, the actor may raise an affirmative defense of Explicit Prior Permission under Section 213.10.

SECTION 213.7. AGGRAVATED OFFENSIVE SEXUAL CONTACT; BY PHYSICAL FORCE OR RESTRAINT OR SURREPTITIOUS INCAPACITATION; OFFENSIVE SEXUAL CONTACT

(1) ~~*Aggravated Offensive Sexual Contact by Physical Force or Restraint or by Surreptitious Incapacitation.*~~ An actor is guilty of Aggravated ~~Offensive Sexual Contact by Physical Force or Restraint or by Surreptitious Incapacitation~~ when:

(a) the actor knowingly engages with ~~causes~~ another person in, or causes another person to engage in, submit to, or perform, an act of sexual contact; ~~with any person~~ and

(b) the act is without effective consent because the act, had it been one of sexual penetration or oral sex, would be an offense as defined by:

- (i) Section 213.1 or 213.2; ~~the actor uses or explicitly or implicitly threatens to use physical force or restraint against anyone, and that conduct causes the other person to submit to or perform the act of sexual contact; or~~
- (ii) Section 213.3(1) or (2); ~~or at the time of the act of sexual contact the other person lacks substantial capacity to appraise, control, or remember the~~

~~person's own sexual conduct or that of anyone else because of a substance administered to that person, without that person's knowledge or consent; and the actor administered the incapacitating substance for the purpose of causing that incapacity or knows that it was surreptitiously administered by another for that purpose; and~~

(iii) Section 213.4.

~~(c) the actor is aware of, yet recklessly disregards, the risk that a circumstance described in paragraph (b) is present, and that the other person submitted to or performed the act of sexual contact because of a circumstance described in paragraph (b).~~

Aggravated ~~Offensive Sexual Contact by Physical Force or Restraint or by Surreptitious Incapacitation~~ is a felony of the fifth degree [*three-year maximum*]. It is a registrable offense when it involves a violation of subsection (1)(b)(i) or (ii).

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

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

(b) the other person did not consent to that act, and the actor is reckless with respect to the lack of ~~aware of, yet recklessly disregards, the risk that the other person did not consent to that act~~; or

(c) ~~the that~~ act is without effective consent because the act, had it been one of sexual penetration or oral sex, would be an offense as defined by Section 213.3 (3) or 213.5.;

~~(i) the other person is unaware that such act is occurring, or is physically unable to communicate lack of consent at the time of the act; and the actor is aware of, yet recklessly disregards, the risk that the other person is in that condition at the time of the act; or~~

~~(ii) the act would be an offense as defined by Section 213.3(2) or (3), involving vulnerable or legally restricted persons, had the act been one of sexual penetration or oral sex; or~~

~~(iii) the act would be an offense as defined by Section 213.4, involving extortion, had the act been one of sexual penetration or oral sex; or~~

~~(iv) the act would be an offense as defined by Section 213.5, involving prohibited deception, had the act been one of sexual penetration or oral sex.~~

Offensive Sexual Contact is a petty misdemeanor [*six-month maximum*].

(3) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the other person engaged in, submitted to, or performed the act of sexual contact in under a circumstance described in subsections (1)(b) or (2)(c). Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in under a circumstance described in those subsections. If applicable, an actor charged with a violation of subsections (1)(b)(i), (1)(b)(iii), or (2)(b), ~~or (2)(e)(iii)~~ may raise an affirmative defense of Explicit Prior Permission under Section 213.10.

#### SECTION 213.8. SEXUAL OFFENSES INVOLVING MINORS

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

(a) the actor engages with another person in, ~~an act of sexual penetration or oral sex with another person~~ or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act:

(i) the other person is younger than 16; and

(ii) the actor is more than five years older than the other person; and

(c) the actor is reckless with respect to the conduct, attendant aware of, yet recklessly disregards, the risk that the circumstances, and results specified described in paragraphs (a) and (b) ~~exist~~.

Sexual Assault of a Minor is a felony of the fifth degree [*three-year maximum*] except that it is a felony of the fourth degree [*five-year maximum*] when at the time of the act the actor is 21 or older; it is a felony of the fourth degree [*five-year maximum*] and a registrable offense when at the time of the act the actor is more than 10 years older than the other person; and it is a felony of the third degree [*10-year maximum*] and a registrable offense when at the time of the act the actor is 18 ~~21~~ or older, the other person is younger than 12, and the actor

is reckless with respect to whether ~~aware of, yet recklessly disregards, the risk that~~ the other person is younger than 12.

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

(a) the actor engages ~~in an act of sexual penetration or oral sex~~ with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) at the time of the act, the actor is 18 or older and the other person is younger than 18; and

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

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

(ii) the legal spouse, domestic partner, or sexual partner of a person described by subparagraph (i); or

(iii) a legal guardian or de facto parent of the other person, who resides intermittently or permanently in the same dwelling as the other person; and

(d) the actor is reckless with respect to the conduct, attendant ~~aware of, yet recklessly disregards, the risk that the~~ circumstances, and results specified ~~described~~ in paragraphs (a), (b), and (c) ~~(a) through (c) exist~~.

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

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

(a) the actor engages ~~in an act of sexual penetration or oral sex~~ with another person in, or causes another person to engage in, submit to, or perform, an act of sexual penetration or oral sex; and

(b) the act is without effective consent because at the time of the act:

(i) the other person is younger than 18; and

(ii) the actor is more than five years older than the other person; and

(iii) the actor holds over the other person a formal position of authority ~~over the other person~~, such as a teacher, employer, religious leader, treatment provider, administrator, or coach; and

(c) the actor is reckless with respect to the conduct, attendant ~~aware of, yet recklessly disregards, the risk that the~~ circumstances, and results specified ~~described~~ in paragraphs (a) and (b) ~~exist~~.

Exploitative Sexual Assault of a Minor is a felony of the fifth degree [*three-year maximum*] and a registrable offense. It is a defense to a prosecution under Section 213.8(3) for the actor to prove by a preponderance of the evidence that the actor's position of authority over the other person did not impair the other person's ability to form an independent judgment about whether to consent to the act of sexual penetration or oral sex.

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

(a) the actor knowingly fondles another person, or knowingly causes another person to submit to or perform an act of fondling ~~with anyone~~; and

(b) the act is without effective consent because at the time of the act:

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

(ii) the other person is younger than 16 and the actor is more than seven years older than the other person; and

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

*Grading*. Fondling a Minor is a felony of the fifth degree [*three-year maximum*], except that it is a felony of the fourth degree [*five-year maximum*] when at the time of the act the actor is 21 or older; and it is a felony of the fourth degree [*five-year maximum*] and a registrable offense when at the time of the act: ~~the other person is younger than 12, and the actor is aware of, yet recklessly disregards, the risk that the other person is younger than 12.~~

(a) the actor is more than 10 years older than the other person and is reckless with respect to being more than 10 years older than the other person; or

(b) the actor is 18 or older, the other person is younger than 12, and the actor is reckless with respect to whether the other person is younger than 12.

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

(a) the actor knowingly engages ~~in an act of sexual contact~~ with another person in, or causes another person to engage in, submit to, or perform, an act of sexual contact; and

(b) the act is without effective consent because at the time of the act:

(i) the other person is younger than 18; and

(ii) the actor is more than five years older than the other person; and

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

(c) the actor is reckless with respect to the attendant ~~aware of, yet recklessly disregards, the risk that the~~ circumstances described in paragraph (b)(i) and (ii) ~~exist~~.

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

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

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

(i) an act of sexual contact; or

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

(b) the act is without effective consent because at the time of the act:

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

(ii) the other person is younger than 16, and the actor is more than seven years older than the other person; and

(c) the actor is reckless with respect to the attendant ~~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 18-21 or older, the other person is younger than 12, and the actor is reckless with respect to whether ~~aware of, yet recklessly disregards, the risk that~~ the other person is younger than 12.

(7) *Effective consent.* Consent is ineffective under Section 213.0(2)(e)(iv) when the circumstances described in any of the subsections (1) through (6) exist at the time of the act. Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in ~~under~~ the circumstances described in any of those subsections.

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

[(9) *Affirmative defense of marriage.* It is an affirmative defense to a charge under subsections (1), (3), (4), and (6) of this Section, and to a charge under subsection (5) ~~(b)~~ ~~(d)~~ based on an act that would be a violation of subsection ~~(3)~~ ~~(8)~~ had it been an act of sexual penetration or oral sex, that the actor was the legal spouse of the other person at the time of the act of sexual penetration, oral sex, fondling, or sexual contact.]

(10) In a Juvenile Court proceeding to adjudicate delinquency on the basis of conduct that would constitute an offense under this Section, an actor younger than 14 may be adjudicated delinquent only as a misdemeanant, regardless of the penalty authorized for that conduct when it constitutes an offense under this Section.

#### SECTION 213.9. SEX TRAFFICKING AND RELATED OFFENSES

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

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

~~(b) the person is younger than 18 and is being, or will be, caused to submit to or perform a commercial sex act; and the actor is aware of, yet recklessly disregards, the risk that the person is younger than 18 and is being, or will be, caused to submit to or perform the commercial sex act.~~

~~(2) Definitions. For purposes of Section 213.9(1)~~

(1) Definitions. For purposes of this Section:

(a) “Coercion” means:

(i) using or threatening to use physical force or restraint against anyone;

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

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

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

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

(vi) any combination of these circumstances.

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

~~(3) Grading. Sex Trafficking is a felony of the third degree [10-year maximum].~~

~~(4) Effective consent. Consent is ineffective under Section 213.0(2)(e)(iv) when the circumstances described in subsection (1) are present. Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring under a circumstance described in that subsection. If applicable, the actor may raise an affirmative defense of Explicit Prior Permission under Section 213.10 when:~~

~~(a) a charge of Sex Trafficking is based on coercion under subsection (1)(a); and~~

~~(b) the person giving such permission does so before that person has been subjected to trafficking under subsection (1) and before that person has been subjected to coercion under subsection (1)(a).~~

(c) “Trafficking Victim” means a person who has been recruited, enticed, transported, transferred, harbored, provided, isolated, or maintained, as described in subsection (2)(a), and is or will be coerced, as described in subsection (2)(a)(i), or is underage, as described in subsection (2)(a)(ii).

(2) Sex Trafficking.

(a) 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:

(i) 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

(ii) the person is younger than 18 and is being, or will be, caused to submit to or perform a commercial sex act; and the actor is aware of, yet recklessly disregards, the risk that reckless with respect to whether the person is younger than 18 and is being, or will be, caused to submit to or perform the commercial sex act.

(b) Grading. Sex Trafficking is a felony of the third degree [10-year maximum] and a registrable offense.¶

(c) Effective consent. Consent is ineffective under Section 213.0(2)(e)(iv) when a circumstance described in subsection (1)(a) is present. Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring under a circumstance described in that subsection. If applicable, the actor may raise an affirmative defense of Explicit Prior Permission under Section 213.10 when:

(i) a charge of Sex Trafficking is based on coercion under subsection (2)(a)(i); and

(ii) the person giving such permission does so before that person has been subjected to trafficking under subsection (2)(a) and before that person has been subjected to coercion under subsection (2)(a)(i).

(3) Promoting Sex with a Trafficking Victim. An actor is guilty of Promoting Sex with a Trafficking Victim if the actor, by advertising or other means, knowingly encourages, induces, or otherwise solicits another person to engage in a commercial sex act with a trafficking victim. Promoting Sex with a Trafficking Victim is a felony of the third degree [10-year maximum].

(4) Patronizing a Trafficking Victim. An actor is guilty of Patronizing a Trafficking Victim if the actor knowingly engages in a commercial sex act with a trafficking victim. Patronizing a Trafficking Victim is a felony of the fourth degree [five-year maximum].

(5) Complicity in Sex Trafficking. An actor is guilty of Complicity in Sex Trafficking if the actor knowingly provides resources, services, or other means that facilitate the commission of an offense defined by subsections (2), (3), or (4). Complicity in Sex Trafficking is a felony of the fourth degree [five-year maximum].

#### **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) only 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 reckless with respect to whether aware of, yet recklessly disregards, the risk that the permission was withdrawn;

(b) the actor relies on permission to use force or restraint or ignore the absence of consent at a time when the other party will be unconscious, asleep, or otherwise unable to withdraw that permission;

(c) the actor recklessly 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 reckless with respect to whether ~~aware of, yet recklessly disregards, the risk that~~ the other party is:

(i) ~~younger than 18;~~

(ii) giving that permission while subjected to physical force or restraint;

(iii) giving that permission because of the use of or threat to use physical force or restraint, or extortion as defined by Section 213.4, if that party does not give the permission;

- (iv) lacking substantial capacity to appraise or control ~~that party's his or her~~ conduct as a result of intoxication, whether voluntary or involuntary, and regardless of the identity of the person who administered the intoxicants;
- (v) incapacitated, vulnerable, or legally restricted, as defined by Section 213.3;
- (vi) subject to prohibited deception, as defined by Section 213.5; or
- (vii) subject to trafficking, as defined by Section 213.9(1).

**SECTION 213.11. SENTENCING AND COLLATERAL CONSEQUENCES OF CONVICTION**

(1) *Definitions.* For purposes of this Article:

(a) “sentencing consequences” are penalties, disabilities, or disadvantages that are part of the sentence imposed by the court or by an agency authorized to set the terms of parole or post-release supervision in connection with a conviction ~~for~~ of an Article 213 offense; and

(b) “collateral consequences” are penalties, disabilities, or disadvantages, however denominated, that are authorized or required by federal, state, or local law as a direct result of an individual’s conviction of an Article 213 offense but are not part of the sentence imposed by the court or by an agency authorized to set the terms of parole or post-release supervision in connection with that conviction.

(c) a “sexual offense” is any offense defined by this Article or that otherwise has an element involving sexual penetration, oral sex, or sexual contact; any offense against a minor that involves kidnapping or false imprisonment (unless committed by a parent or guardian), sexual performance, or solicitation to engage in prostitution; any offense that involves possessing, producing, or distributing child pornography; and any attempt, solicitation, or conspiracy to commit any of these offenses.

(2) *General Rule.* Sentencing procedure, the authorized disposition of a person convicted of an Article 213 offense, sentencing consequences, and collateral consequences are specified in Articles 6 and 7 of this Code,\* and when based on conviction for an Article 213 offense, are subject to the additional requirements of this Section.

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\* MODEL PENAL CODE: SENTENCING, *Official Statutory Text* (May 24, 2017).

**(3) *Additional Requirements for Sentencing Consequences.*** Notwithstanding any contrary provisions of law, the conditions of any suspended sentence under Section 6.02(2), any sentence to probation under Section 6.05, and any terms of parole or post-release supervision under Section 6.13, when based on conviction for an Article 213 offense, must be eligible for early relief under Section 213.11J and must not include:

**(a) a condition that:**

**(i) imposes an obligation to register with law enforcement that carries requirements other than those authorized under Sections 213.11A-213.11G and Section 213.11J;**

**(ii) permits access to the person's registry information, except as authorized under Section 213.11H; or**

**(iii) authorizes or permits any government official to notify a public or private entity or individual, other than a government law-enforcement agency or individual, that the person is registered with law enforcement or resides, works, or studies in the locality; except as authorized under Section 213.11H.**

**(b) a condition that restricts the person's occupation or employment, except as required by state law or authorized under paragraph (d) of this subsection; or**

**(c) except as authorized under paragraph (d) of this subsection, a condition that:**

**(i) requires the person to submit to GPS monitoring; or**

**(ii) restricts the person's education, Internet access, or place of residence.**

**(d) The court, and any agency authorized to set the terms of parole or post-release supervision, may impose a condition, not required by state law, that restricts the person's occupation or employment, or a condition specified in paragraph (c) of this subsection, only if the court or agency determines that the condition is manifestly required in the interest of public safety. That determination must be:**

**(i) made after due consideration of the nature of the offense; all other circumstances of the case; the person's prior record; and the potential negative impacts of the burden, restriction, requirement, or government**

action on the person, on the person's family, and on the person's prospects for rehabilitation and reintegration into society; and

(ii) accompanied by a written statement of the official setting the condition, explaining the need for it, the evidentiary basis for the finding of need, and the reasons why a more narrowly drawn condition would not adequately meet that need.

(e) Any condition imposed under paragraph (d) must be:

(i) drawn as narrowly as possible to achieve the goal of public safety; and

(ii) imposed only for a period not to exceed that permitted under Section 213.11F for the duties to register and keep the registration current.

(4) *Additional Requirements for Collateral Consequences ~~that are~~ Applicable Primarily to Persons Convicted of a Sexual Offense.* Notwithstanding any contrary provisions of law, collateral consequences that are based on conviction for an Article 213 offense and applicable primarily to persons convicted of a sexual offense ~~applicable primarily to persons convicted of a sexual offense, including the obligation to register with law enforcement; associated duties; restrictions on occupation and employment, education, and place of residence applicable primarily to persons convicted of a sexual offense; and other collateral consequences applicable primarily to persons convicted of a sexual offense,~~ are authorized and their scope and implementation are delineated as follows:

(a) The person's obligation to register for law-enforcement purposes is governed by Section 213.11A.

(b) Notification of the person's obligation to register and associated duties is governed by Section 213.11B.

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

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

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

(f) The duration of the registration requirements is specified in Section 213.11F.

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

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

(i) Collateral consequences that are based on conviction for an Article 213 offense and applicable primarily to persons convicted of a sexual offense, other than the obligation to register for law-enforcement purposes and restrictions on occupation and employment required by state law, are governed by Section 213.11I.

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

(5) Retroactive Effect. As of the effective date of this Article, all prior registration requirements and other collateral consequences, whether imposed by this or any other jurisdiction, are subject to the requirements and limits of this Section and Sections 213.11A-J if they are:

(a) applicable primarily to persons convicted of a sexual offense,

(b) based on conduct that would violate this Article if committed in this state after the effective date of this Article; provided that none of the requirements and limits of this Section and Sections 213.11A-J will impose on a person convicted prior to the effective date of this Article any duties, burdens, or restrictions more extensive than those that were applicable to that person at the time of that conviction.

#### SECTION 213.11A. REGISTRATION FOR LAW-ENFORCEMENT PURPOSES

(1) Convictions in This State ~~Offenses Committed in This Jurisdiction~~

(a) Except as provided in subsection (3), every person who resides in this state and is convicted of an offense that is designated a registrable offense in this Article must, in addition to any other sanction imposed upon conviction, appear personally and register, at the time specified in Section 213.11C, with the law-enforcement authority designated by law in the [county] where the person resides. If the person convicted of that offense ~~who is required to register under this subsection~~ does not reside in this state jurisdiction, but works in this ~~state jurisdiction~~, registration must be accomplished in the [county] where the person works; if the person convicted of that offense does not reside or work in this state jurisdiction but is enrolled in a program of study in this state jurisdiction, registration must be accomplished in the [county] where the person is enrolled in a program of study ~~studies~~.

(b) If, after initially registering in the [county] where the person resides, works, or is enrolled in a program of study, notify at least one local jurisdiction as provided in paragraph (a), the person no longer has that connection with the [county] where the person was initially required to register, the person must appear personally and register, within seven days of leaving that [county], with the law-enforcement agency designated by law in the [county] where the person now resides, works, or is enrolled in a program of study.

~~(b)~~ Notwithstanding any other provision of law, no conviction for an offense under this Article, ~~or for any other criminal offense in this jurisdiction,~~ will require the person convicted to register with law enforcement or other governmental agency authority in a registry regime applicable primarily to persons convicted of a sexual offense, unless this Article designates that offense as a registrable offense.

(d) The following are the only Article 213 offenses that trigger a duty to register under this Section:

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

(ii) Sexual Assault by Physical Force or Restraint, as defined by Section 213.2.

(iii) Sexual Assault of an Incapacitated or Vulnerable Person, as defined by Section 213.3(1) and (2).

(iv) Aggravated Offensive Sexual Contact, as defined by Section 213.7(1), when it involves the use of physical force, physical restraint, or an incapacitated or vulnerable victim, as defined in Sections 213.1, 213.2, 213.3(1) or 213.3(2).

(v) Sexual Assault of a Minor, as defined by Section 213.8(1), but only when the actor is more than 10 years older than the minor, or the actor is 18 or older and the minor is younger than 12.

(vi) Incestuous Sexual Assault of a Minor, as defined by Section 213.8(2), but only when the minor is younger than 16.

(vii) Exploitative Sexual Assault of a Minor, as defined by Section 213.8(3).

(viii) Fondling a Minor, as defined by Section 213.8(4), but only when the actor is more than 10 years older than the other person, or the actor is 18 or older and the minor is younger than 12.

(ix) Aggravated Offensive Sexual Contact with a Minor, as defined by Section 213.8(5).

(x) Sex Trafficking, as defined by Section 213.9(2).

(2) Convictions ~~Offenses Committed~~ in Other Jurisdictions

(a) *Duty to register and related duties.* Every person currently obliged to register with law enforcement or other public ~~publie~~ authority in another jurisdiction, because of a conviction ~~sexual offense committed~~ in that jurisdiction, who subsequently resides, works, or enrolls in a program of study in this state ~~jurisdiction~~, must register with the law-enforcement agency ~~authority~~ designated by law in the [county] of this state where the person resides, works, or is enrolled in a program of study and comply with the requirements of Sections 213.11A-213.11G, provided that the offense of conviction ~~committed~~ in the other jurisdiction is comparable to an offense that would be registrable under this Article if committed in this state ~~jurisdiction~~.

(b) *Place of registration.* If the person who is obliged to register under paragraph (a) resides in this state ~~jurisdiction~~, registration must be accomplished in the [county] where the person resides. If the person who is obliged to register under paragraph (a) does not reside in this state ~~jurisdiction~~, but works in this state ~~jurisdiction~~, registration must be accomplished in the [county] where the person works; if the person does not reside or work in this state ~~jurisdiction~~ but is enrolled in a program of study in this state ~~jurisdiction~~, registration must be accomplished in the [county] where the person is enrolled in a program of study ~~studies~~.

(c) *Determining the comparability of* conviction ~~in-state and out-of-state offenses in other jurisdictions~~.

(i) *Standard.* A conviction ~~An offense committed~~ in another jurisdiction is comparable to a registrable offense under this Article if and only if the elements of the other jurisdiction's ~~out-of-state~~ offense are no broader than the elements of that registrable offense. When, regardless of the conduct

underlying the other jurisdiction's ~~out-of-state~~ conviction, the other jurisdiction's ~~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 a conviction ~~an~~ offense ~~committed~~ in another jurisdiction is comparable to a registrable offense under this Article, the authority designated to make that determination must give the person concerned notice and an opportunity to be heard on that question, either orally or in writing.

(d) Notwithstanding any other provision of law, no conviction ~~for a sexual offense~~ in another jurisdiction will require the offender to register with law enforcement under this Section, or other governmental authority in this jurisdiction, unless that conviction ~~currently requires the offender to register with law enforcement or other governmental authority in the jurisdiction where the offense was committed and the conviction is for an offense comparable to an offense that would be registrable under this Article if committed in this jurisdiction;~~

(i) currently requires the offender to register with law enforcement or other governmental authority in that jurisdiction, or would currently require the offender to register in that jurisdiction if the offender resided, worked, or studied in that jurisdiction; and

(ii) is for an offense comparable to an offense that would be registrable under this Section if committed in this state.

(3) *Persons under the age of 18.* No person may be subject to the obligation to register under subsection (1) of this Section, to other obligations or restrictions under this Section, or to additional collateral consequences under Section 213.11I, on the basis of a criminal conviction for an offense committed when the person was under the age of 18, or on the basis of an adjudication of delinquency based on conduct when the person was under the age of 18; provided, however, that this subsection (3) does not apply to a person convicted of a criminal offense of Sexual Assault by Aggravated Physical Force or Restraint if the person was at least 16 years old at the time of that offense.

**SECTION 213.11B. NOTIFICATION OF THE OBLIGATION TO REGISTER AND ASSOCIATED DUTIES**

**(1) Before accepting a guilty plea, and at the time of sentencing after conviction on a guilty plea or at trial, the sentencing judge must:**

**(a) inform the person who is subject to registration of the registration requirement;**

**(b) explain the associated duties, including:**

**(i) the identity and location, or procedure for determining the identity and location, of the law-enforcement agency where the person must appear to register as required by Section 213.11A;**

**(ii) the duty to register with a law-enforcement agency in any [county] ~~locality~~ where the person subsequently resides, including the possible duty to register with a law-enforcement agency or other government authority in another state jurisdiction to which the person subsequently moves;**

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

**(iv) the duty to promptly notify the relevant authority in the [county] ~~at least one of the local jurisdictions~~ where the person is required to register ~~registered~~ of any change in the registry information pertaining to that person, as required by Section 213.11E(2);**

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

**(d) confirm that defense counsel has explained to that person those duties and the right to petition for relief from those duties;**

**(e) confirm that the person understands those duties and that right;**

**(f) require the person to read and sign a form stating that defense counsel and the sentencing judge have explained the applicable duties and the right to petition for relief from those duties, and that the person understands those duties and that right;**

**(g) ensure that if the person convicted of a sexual offense cannot read or understand the language in which the form is written, the person will be informed of the pertinent information by other suitable means that the jurisdiction uses to communicate with such persons ~~individuals~~; and**

(h) satisfy all other notification requirements applicable under Model Penal Code: Sentencing, Section 7.04(1).

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

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

#### SECTION 213.11C. TIME OF INITIAL REGISTRATION

A person subject to registration must initially register:

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

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

#### SECTION 213.11D. INFORMATION REQUIRED IN REGISTRATION

(1) A person subject to registration under Section 213.11A must provide the following information to the appropriate official for inclusion in the law-enforcement registry:

(a) the name and date of birth 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;

(g) all telephone numbers and email addresses used by the person, and all designations that the person uses for self-identification in internet and telephonic communications and postings;

(h) the document number of each passport held by the person and, if the person is not a United States citizen, the document type and document number for each document that establishes the person's current immigration status in the United States.

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

(a) the text of the provision of law defining the sexual offense for which the person is registered;

(b) the person's criminal history, including the date and offense designation of all convictions; and the person's parole, probation, or supervised-release status;

(c) any other information required by law.

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

(4) Registrants Who Lack a Fixed Place of Employment. If a person required to register is or will be employed but lacks a fixed place of employment, the person must, at the time of registration, report with as much specificity as possible the location or locations where the person works or will work, instead of the information required under subsection (1)(d).

~~(4) The local jurisdiction in which a person registers must promptly provide the information specified in subsections (1), (2), and (3) of this Section to an appropriate law-enforcement authority in every other jurisdiction in which the registrant works or expects to work and is enrolled or expects to enroll in a program of study.~~

(45) The [county] ~~local jurisdiction in which~~ where a person registers must promptly provide the information specified in subsections (1) - (4) ~~(1), (2), and (3)~~ of this Section to the

~~an~~ appropriate law enforcement ~~agency authority~~ in every other [county] of this state jurisdiction where in which the registrant works or expects to work ~~or and~~ is enrolled or expects to enroll in a program of study. If the person is also registered in another jurisdiction, the [county] of this state where the person registers must promptly provide the information specified in subsections (1) - (4) of this Section to each law enforcement agency with which the person is registered in the other jurisdiction.

~~(56)~~ *Correction of Errors.* Each [county] locality where a person registers and each [county] locality that receives information about a registrant pursuant to subsection (45) of this Section must provide efficacious, reasonably accessible procedures for correcting erroneous registry information. The [county] Each locality where a person registers must, at the time of registration, provide the registrant instructions on how to use those procedures to seek correction of registry information that the registrant believes to be erroneous.

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

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

(1) *Annual Updates.*

(a) A person who is required to register under Section 213.11A must, not less frequently than once every year, appear in person in the [county] where the person currently resides, verify the current accuracy of the information that the registrant 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 or in which the person resides, works, or is enrolled in a program of study. If the person who is required to register does not reside in this state, but works in this state, the annual update specified in this paragraph must be accomplished in the [county] where the person works; if the person does not reside or work in this state but is enrolled in a program of study in this state, the annual update

specified in this paragraph must be accomplished in the [county] where the person is enrolled in a program of study.

(b) Not less than 30 nor more than 45 days before the person's annual registration date, the authority where the person is registered under Section 213.11A must send written notice to the person's residential address, alerting the registrant to the requirements of this Section.

(c) In the case of 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), the authority where the person is registered under Section 213.11A must make a good-faith effort to provide this written notice to the person at the location the person has reported as the principal place where the person sleeps.

*(2) Change of Circumstances*

(a) Except as provided in paragraph (b) of this subsection, a person subject to registration under Section 213.11A must, not later than five business days after each change of name and each change in the information that ~~location where~~ the person is required to provide under Section 213.11D, ~~resides, works, or is enrolled in a program of study,~~ notify the [county] ~~at least one local jurisdiction~~ specified in Section 213.11A of:

(i) all changes in the information that the person is required to provide under Section 213.11D, and

(ii) the identity of all other jurisdictions in which the person resides, works, or is enrolled in a program of study.

(b) Registrants who lack a stable residential address or place of employment, and therefore report instead the principal place or places where they sleep or work, as provided in Section 213.11D(3) and (4), must confirm or update those locations once every 90 days but need not do so more often.

(c) Each [county] jurisdiction ~~that maintains a registry of persons who are required to register under Section 213.11A~~ ~~have been convicted of a sexual offense~~ must permit registrants to notify the law enforcement agency with which the person is registered, ~~jurisdiction,~~ by one or more reliable, readily accessible methods of communication of the jurisdiction's choosing, such as U.S. mail, submission of an

appropriate form online, or otherwise, of any change in the information the person is required to provide under Section 213.11D, of name, residence, employment, student status, or vehicle regularly used, and any change in the identity of all other jurisdictions in which the person resides, works, or is enrolled in a program of study.

(d) Each [county] jurisdiction where a person registers pursuant to Section 213.11A must advise the registrant, at the time of registration, of the registrant's option to use one of the means of communication established under subsection (2)(c), rather than appearing personally for that purpose, if the registrant so chooses, other than for the annual in-person meeting requirement of subsection (1).

(3) The [county] local jurisdiction notified of any changes pursuant to subsections (1) and (2) must promptly provide the registrant a written receipt confirming that the updated information has been provided, and must provide that information to the appropriate authority in all other [counties] jurisdictions where in which the person resides, works, or is enrolled in a program of study.

#### SECTION 213.11F. DURATION OF REGISTRATION REQUIREMENT

~~(1) Subject to the provisions of subsection (3) of this Section and Section 213.11J, a person required to register must keep the registration current for a period of 15 years, beginning on the date when the registrant is released from custody after conviction for the offense giving rise to the registration requirement; or if the registrant is not sentenced to a term of incarceration, beginning on the date when the registrant was sentenced for that offense.~~

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

##### (1) Ordinary Termination.

(a) Subject to the provisions of subsection (2) of this Section and Section 213.11J, a person required to register under Section 213.11A 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.

(b) At the expiration of that 15-year period, the duty to keep that registration current will terminate, and the person who had been registered will not be subject to any further duties under this Article on the basis of that registration requirement. The person will remain subject to any registration requirement under this Article that arises from conviction of any other Article 213 offense.

(c) In determining whether the 15-year period has been completed, that period shall include any time in which the person was registered in this state or any other jurisdiction, prior to the effective date of Sections 213.11 and 213.11A-J, for the offense giving rise to that registration requirement.

~~(3) *Early termination.* If, during the first 10 years of the period during which a person is required to keep registration information current, the person:~~

~~(3<sup>2</sup>) *Early Termination.* If, during the first 10 years of the period during which a person is required to keep registration information current under Section 213.11E, the person:~~

~~(a) successfully completes any period of supervised release, probation, or parole, and satisfies any financial obligation that arises from the conviction for the registrable offense, 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 sexual ual-offense treatment program; and~~

~~(c) is not convicted of, or facing pending charges for, any subsequent offense under this Article, or any subsequent sexual offense in this state or any other ~~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 (43).

(43) *Access to Registry Information After Termination.* When the person's obligation to register and to keep registry information current terminates under subsection ~~(1) (2)~~ or ~~(2) (3)~~, subsequent access to registry information is limited as follows:

(a) Registry information recorded as of the date when termination takes effect ~~must~~ remain available to any government law-enforcement agency seeking disclosure of that information in compliance with Section 213.11H(1)(a).

(b) Except as provided in paragraph (a), no public or private agency may thereafter be permitted access to registry information associated with a registration requirement that ~~concerning the person whose obligation to register and keep registry information public~~ has terminated.

(54) *Notice of Termination.* When a person's duty to register terminates under subsection ~~(1) (2)~~ or ~~(2) (3)~~, the law enforcement agency in the [county] ~~local jurisdiction~~ where the person's duty to register arises on the basis of residence, work, or study ~~person resides~~ must:

(a) include in its registry a notice that the person's duty to register and all duties associated with that registration requirement have terminated; and

(b) upon the person's request, notify each law enforcement agency and other authority that has received information about the registrant ~~all other jurisdictions where the person is registered and where information about the registrant has been provided~~ pursuant to Section 213.11D(5) ~~213.11D(4)~~ that the person's duty to register and all duties associated with that registration requirement have terminated and that no public or private agency other than a government law enforcement agency shall thereafter be permitted to have access to that registry information.

~~(6) Certification. When a person's duty to register terminates under subsection (2) or (3), the law enforcement agency in the local jurisdiction where the person resides must, upon request, provide that person a certificate attesting that~~

(c) upon the person's request, provide the person a certificate attesting that the person's duty to register and all duties associated with that registration requirement have terminated.

**SECTION 213.11G. FAILURE TO REGISTER**

(1) *Offense of Failure to Register.* A person required to register under Section 213.11A is guilty of Failure to Register, a misdemeanor, if that person knowingly fails to register as required by Sections 213.11A, 213.11C, and 213.11D, ~~and 213.11E(1)~~, or knowingly fails to update a registration as required by Section 213.11E.

(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 impact of those circumstances on the ability to meet registration requirements; ~~requirement to comply~~ and

(c) after those circumstances ceased to exist, the accused complied as soon as reasonably feasible.

(3) Other Consequences of Not Meeting Registration Requirements. Failing to register or to meet other registration requirements may not be a basis for revoking bail, probation, parole, or other conditions of release from custody, unless the person who failed to do so has been convicted under this Section of the offense of Failure to Register.

**SECTION 213.11H. ACCESS TO REGISTRY INFORMATION**

(1) *Confidentiality*

(a) Each law-enforcement agency ~~with which a person is registered and each law-enforcement agency~~ that receives information from ~~about~~ a registrant pursuant to Section 213.11D(5) ~~213.11D(4)~~ must exercise due diligence to ensure that this registrant-supplied ~~all~~ information ~~about the registrant~~ remains confidential, except that relevant information about a specific registrant, including but not limited to registrant-supplied information, must be disclosed; ~~must be made available to any government law-enforcement agency that requests information to aid in the investigation of a specific criminal offense~~

(i) to any government law enforcement agency that requests information to aid in the investigation of a specific criminal offense;

(ii) to any adult victim of an Article 213 offense committed by the registrant and to any parent or guardian of a minor victim of an Article 213 offense committed by the registrant, if the either the victim or that parent or guardian resides, works, or is enrolled in a program of study in the [county] where the registrant resides, works, or studies; provided that such disclosure must be limited to the fact that the registrant resides, works, or is enrolled in a program of study in that [county];

(iii) to the United States Marshal's Service as required by International Megan's Law, Pub. L. No. 114-119, 130 Stat. 15 (2016), when that information involves the international travel plans of a registrant who has been convicted of a sexual offense involving a minor; and

(iv) to the [Department of Public Safety] as appropriate to enable the Department to provide the criminal history background check authorized by [Section xx/yy] of the [Code of Criminal Procedure] to any public or private agency, organization, or individual qualified to receive such a background check on the basis of serving, having access to, or screening others to serve or have access to minors, the elderly, or persons who are disabled or otherwise vulnerable; provided that any disclosure to the Department under this subparagraph must comply with the terms of [Section xx/yy] of the [Code of Criminal Procedure]. See Annex, pp. 82-90, infra.

(b) Any disclosure pursuant to paragraph (a) must include a warning that:

(i) the ~~law-enforcement~~ agency, organization, or individual receiving the information must exercise due diligence to ensure that the information remains confidential, except as provided in paragraph (a);

(ii) such information may be disclosed and used ~~as provided in paragraph (a)~~ for the purposes specified in subparagraphs (a)(i)-(iv), 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)~~ (iii) such information may not be used to injure, harass, or commit a crime against the registrant or anyone else; and

(~~iv~~) any failure to comply with the confidentiality and use-limitation requirements of ~~paragraph (b)~~ this Section could result in civil or criminal penalties.

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

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

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

Unauthorized Disclosure of Registry Information is a felony of the fourth degree [*five-year maximum*].

#### SECTION 213.11I. ADDITIONAL COLLATERAL CONSEQUENCES OF CONVICTION

(1) *Definition.* For purposes of this Section, ~~the term “additional collateral consequence” means any collateral consequence, as defined in Section 213.11(1)(b), that is applicable primarily to persons convicted of a sexual offense, other than the obligation to register with law enforcement specified in Section 213.11A, the associated duties and restrictions specified in Sections 213.11C-213.11G, and any restriction on occupation or employment required by state law. These additional collateral consequences include any government-imposed program or restriction applicable primarily to persons convicted of a sexual offense that restricts the convicted person’s occupation or employment except as required by state law; limits the convicted person’s education, Internet access, or place of residence; uses methods such as GPS monitoring to track the person’s movements; notifies a community organization or entity or a private party that the person resides, works, or studies in the locality; or permits a public or private agency, organization, or person to access registry information, except as authorized by Section 213.11H. An “additional collateral consequence” under this Section does not include a collateral consequence that applies to persons convicted of many different offenses, such as government-imposed limits on voting, jury service, access to public benefits, and other government-imposed penalties, disabilities,~~

~~and disadvantages that result from conviction of a wide variety of offenses, including but not limited to sexual offenses.~~

(a) the term “Article 213 offense” includes an offense under the law of another jurisdiction that is comparable to an Article 213 offense under Section 213.11A(2)(c);

(b) the term “additional collateral consequence” means any collateral consequence, as defined in Section 213.11(1)(b), that is:

(i) authorized or required as a direct result of a person’s conviction for an Article 213 offense, and

(ii) applicable primarily to persons convicted of a sexual offense, other than the obligation to register with law enforcement specified in Section 213.11A, the associated duties and restrictions specified in Sections 213.11C-213.11G, and any restriction on occupation or employment required by state law.

(c) An additional collateral consequence under this Section includes any collateral consequence that restricts the convicted person’s occupation or employment except as required by state law; limits the convicted person’s education, Internet access, or place of residence; uses methods such as GPS monitoring to track the person’s movements; notifies a community organization or entity or a private party that the person resides, works, or is enrolled in a program of study in the locality; or permits a public or private agency, organization, or person to access registry information, except as authorized by Section 213.11H; but only if this collateral consequence results from a conviction for an Article 213 offense and is not a sentencing consequence as defined in Section 213.11(1)(a).

(d) An additional collateral consequence under this Section does not include a sentencing consequence, as defined in Section 213.11(1)(a), and does not include a collateral consequence that is:

(i) authorized or required as a direct result of an individual’s conviction of an offense other than an Article 213 offense, or

(ii) applicable to persons convicted of many different offenses, such as any government-imposed limits on jury service, access to public benefits, and other government-imposed penalties, disabilities, and disadvantages that

result from conviction of a wide variety of offenses, including but not limited to sexual offenses.

(2) *Additional cCollateral cConsequences pPrecluded for pPersons nNot rRequired to rRegister.* Notwithstanding any other provision of law, no person shall be subject to an additional collateral consequence, as defined in this Section, unless: subsection (1), unless that person has been convicted of a registrable offense and is required to register with law enforcement under Section 213.11A.

(a) that additional collateral consequence is based on a conviction for a registrable Article 213 offense, and

(b) that person is currently required to register with law enforcement under Section 213.11A.

(3) *Additional cCollateral cConsequences pPrecluded for pPersons rRequired to rRegister.* Notwithstanding any other provision of law, ~~a person required to register with law enforcement under Section 213.11A must not be subject to any government action notifying a community organization or entity or a private party that the person resides, works, or studies in the locality; and must not be subject to any government action permitting a public or private agency, organization, or person to access registry information, except as authorized by Section 213.11H.~~

(a) a person currently required to register with law enforcement under Section 213.11A must not be subject to any government action notifying a community organization or entity or a private party that the person resides, works, or is enrolled in a program of study in the locality, except as authorized by Section 213.11H, and must not be subject to any government action permitting a public or private agency, organization, or person to access registry information, except as authorized by Section 213.11H; and

(b) a person required to register with law enforcement under Section 213.11A may be subject to an additional collateral consequence not specified in subsection (3)(a), but only if an official designated by law, after affording the person notice and an opportunity to respond concerning the proposed additional collateral consequence, determines that the additional collateral consequence is manifestly required in the interest of public safety, after due consideration of:

- (a) the nature of the offense;
- (b) all other circumstances of the case;
- (c) the person's prior record; and
- (d) the potential negative impacts of the burden, restriction, requirement, or government action on the person, on the person's family, and on the person's prospects for rehabilitation and reintegration into society.

~~(4) *Additional Collateral Consequences Available for Persons Required to Register.* Notwithstanding any other provision of law, a person required to register with law enforcement under Section 213.11A may be subject to an additional collateral consequence not specified in subsection (3), but only if an official designated by law, after affording the person notice and an opportunity to respond concerning the proposed additional collateral consequence, determines that the additional collateral consequence is manifestly required in the interest of public safety, after due consideration of:~~

~~(5) *Limitations.* The designated official who approves any additional collateral consequence pursuant to subsection (3)(b) (4) of this Section must determine that the additional collateral consequence:~~

- ~~(a) satisfies all applicable notification requirements set forth in Section 213.11B;~~
- ~~(b) is authorized by law;~~
- ~~(c) is drawn as narrowly as possible to achieve the goal of public safety;~~
- ~~(d) is accompanied by a written statement of the official approving the additional collateral consequence, explaining the need for it, the evidentiary basis for the finding of need, and the reasons why a more narrowly drawn restriction, disability, or government action would not adequately meet that need; and~~
- ~~(e) is imposed only for a period not to exceed that permitted under Section 213.11F for the duties to register and keep the registration current.~~

~~(6) *Confidentiality.* In any proceeding under subsection (3)(b) (4) to consider whether to impose an additional collateral consequence, the official responsible for making the determination must insure that the identity of the registrant concerned remains confidential.~~

~~(6) *Judicial Review.* A person on whom an additional collateral consequence has been imposed under subsection (3)(b) is entitled to judicial review in an appropriate court, within~~

the time and in accordance with the procedures provided by law for review of decisions of administrative agencies in this jurisdiction.

SECTION 213.11J. DISCRETIONARY RELIEF FROM REGISTRATION AND FROM OTHER SENTENCING CONSEQUENCES AND COLLATERAL CONSEQUENCES

(1) *Petition for Discretionary Relief.* At any time prior to the expiration of any sentencing consequence ~~consequences~~ imposed under Section 213.11(3) or any collateral consequence ~~consequences applicable primarily to persons convicted of a sexual offense, including the obligation to register, the obligation to comply with associated duties, restrictions on occupation or employment required by state law, collateral consequences~~ imposed under Section 213.11(4), ~~and additional collateral consequences imposed under Section 213.11(4) including any additional collateral consequence imposed under Section 213.11(4)(i) and Section 213.11(3)~~, the registrant may petition the sentencing court, or other authority authorized by law, to order relief from all or part of those consequences. If the obligation to register or other consequences arose from an out-of-state conviction, the petition may be addressed to a court of general jurisdiction or other authority of this state in the place where the person concerned is registered.

(2) *Proceedings on Petition for Discretionary Relief.* The authority to which the petition is addressed may either dismiss the petition summarily, in whole or in part, or institute proceedings to rule on the merits of the petition. If that authority chooses to entertain submissions, hear argument, or take evidence prior to ruling on the merits of the petition, it must give notice of the proceeding and an opportunity to participate in it to the prosecuting attorney for the offense out of which the obligation to register or other consequence arose. If the obligation to register or other consequence arose from an out-of-state conviction, notice of the proceeding and an opportunity to participate in it must be addressed to the principal prosecuting attorney in the jurisdiction of this state where the authority to which the petition is addressed is located.

(3) *Judgment on Proceedings for Discretionary Relief.* Following proceedings for discretionary relief under subsection (2), the authority to which the petition is addressed may grant or deny relief, in whole or in part, from the obligation to register, any associated duties, and any of the sentencing consequences or collateral consequences in question. When that

order terminates the registrant's obligation to register and to keep registry information current, subsequent disclosure of registry information is governed by subsection (5) of this Section. An order granting or denying relief following those proceedings must explain in writing the reasons for granting or denying relief.

(4) *Standard for Discretionary Relief.* The authority to which the petition is addressed must grant relief if it finds, after proceedings to rule on the merits pursuant to subsection (2), that the sentencing consequence or collateral consequence in question is likely to impose a substantial burden on the registrant's ability to reintegrate into law-abiding society, and that public-safety considerations do not require continued imposition of the obligation, duty, or consequence after due consideration of:

- (a) the nature of the offense;
- (b) all other circumstances of the case;
- (c) the registrant's prior and subsequent record of criminal convictions, if any;

and

(d) the potential negative impacts of the burden, restriction, or government action on the registrant, on the registrant's family, and on the registrant's prospects for rehabilitation and reintegration into society.

Relief must not be denied arbitrarily or for any punitive purpose.

(5) *Access to ~~R~~egistry ~~I~~nformation ~~a~~fter ~~D~~iscretionary ~~R~~elief.* When an order of discretionary relief terminates the person's obligation to register and to keep registry information current, all limits on access to registry information under Section 213.11H shall remain in effect. Registry information recorded as of the date when discretionary relief takes effect must remain available to any government law-enforcement agency seeking disclosure of that information in compliance with Section 213.11H(1)(a) but must not otherwise be disclosed.

(6) *Notice to ~~O~~ther ~~J~~urisdictions ~~C~~oncerning ~~D~~iscretionary ~~R~~elief.*

(a) When discretionary relief is granted to a person under this Section, the authority granting the order of relief must, upon the person's request, give notice of that order to any other jurisdiction where the person concerned is registered or where information about the person has been provided pursuant to Section ~~213.11D(4)~~ 213.11D(5).

(b) When the other jurisdiction notified is a jurisdiction of this state, the notice must specify that the other jurisdiction must extend the same relief from registration-related duties and any other sentencing consequences or collateral consequences. When that order terminates the registrant's obligation to register and to keep registry information current, that notice must also specify the limits on subsequent disclosure of registry information applicable under subsection (5).

(7) *Proceedings sSubsequent to dDiscretionary rRelief.* An order of discretionary relief granted under this Section does not preclude the authority to which the petition was addressed from later revoking that order if, on the basis of the registrant's subsequent conduct or any other substantial change in circumstances, the authority finds by a preponderance of the evidence that public-safety considerations, weighed against the burden on the registrant's ability to reintegrate into law-abiding society, no longer justify the order of relief.

(8) *Confidentiality.* In any proceedings under this Section to consider whether to grant or deny discretionary relief, the official responsible for making the determination must insure that the identity of the registrant concerned remains confidential.

ANNEX  
MODEL PROCEDURES FOR  
CRIMINAL HISTORY BACKGROUND CHECKS  
[ALTERNATIVE A]

SECTION [XX]. BACKGROUND CHECKS

(1) *Criminal History Certificate for prospective employees and volunteers.* Subject to all applicable provisions of federal employment and non-discrimination law, including Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e, et seq., and all applicable provisions of the employment and non-discrimination laws of this state, any public or private organization or entity and any individual that hires or screens employees or volunteers for a position involving contact with or access to minors, the elderly, or persons who are disabled or otherwise vulnerable, is authorized to require the applicant for such a position to submit a Criminal History Certificate issued by the [Department of Public Safety] under the procedures prescribed by this Section.

(2) *Application for a Criminal History Certificate.* Any person who seeks a position involving contact with or access to minors, the elderly, or persons who are disabled or otherwise vulnerable is authorized to apply to the [Department of Public Safety] for a Criminal History Certificate. The application must be submitted on a form approved by the Department, and must be accompanied by a full set of fingerprints, a signed waiver from the applicant allowing the release to the applicant of the information specified in subsection (3), and payment of an appropriate fee, as set by regulations issued by the Department.

(3) *Procedure for issuing a Criminal History Certificate.* After verifying the applicant's identity, the Department shall consult the records of the [Department of Public Safety] and the [Department of Children and Family Services], and compile the information identified in paragraphs (a) and (b). The Department or its authorized agent shall submit the applicant's fingerprints to the Federal Bureau of Investigation and obtain a record of the information identified in paragraph (c). The Department shall then issue to the applicant a Criminal History Certificate that contains the following information:

(a) a report from the [Department of Public Safety] of criminal-history record information pertaining to the applicant that includes any criminal convictions of the applicant for an offense or offenses specified in subsection (4), or a statement from

the Department that its records contain no such information pertaining to the applicant.

(b) A report from the [Department of Children and Family Services] as to whether the applicant is named in its records as the alleged perpetrator in a pending child-abuse investigation or as the perpetrator of a founded report of child abuse within the five-year period immediately preceding verification pursuant to this section.

(c) A report of federal criminal-history record information that identifies any criminal convictions of the applicant for an offense or offenses specified in subsection (4), or a statement that federal criminal-history records contain no such information pertaining to the applicant.

(4) Offenses to be reported. The reports of criminal-history record information to be issued pursuant to subsections (3)(a) and (3)(c) shall indicate only whether the applicant has been convicted of criminal conduct constituting one or more of the following offenses or equivalent offenses under federal law or the law of this or any other state:

(a) criminal homicide;

(b) aggravated assault;

(c) stalking;

(d) kidnapping;

(e) unlawful restraint;

(f) rape or sexual assault;

(g) abuse, neglect, or exploitation of an elderly or disabled person;

(h) domestic violence;

(i) violation of an order of protection;

(j) endangering the welfare of a child;

(k) child abuse;

(l) corruption of minors;

(m) manufacture, distribution, or possession of child pornography;

(n) a felony offense involving the manufacture, distribution, use, or possession of a controlled substance committed within the five-year period immediately

preceding the applicant's request for a Certificate of Criminal History under this Section; or

(o) attempt, solicitation, or conspiracy to commit any of the offenses set forth in this subsection.

(5) Updates. If an individual who has obtained a Certificate of Criminal History from the Department is subsequently convicted of an offense listed in subsection (4) or is named as a perpetrator in a founded report of child abuse with the [Department of Children and Family Services], the individual shall provide the Department with written notice to that effect not later than 72 hours after the conviction or notification that the individual was named as a perpetrator in a founded report of child abuse.

(6) Time limit for certification. The Department shall comply with certification requests no later than [14] days from the receipt of the request.

(7) Accuracy. The Department must in writing notify persons who apply for a Criminal History Certificate of their right to challenge the accuracy and completeness of any information to be included in the Certificate, to obtain a determination as to the validity of such challenge, and to obtain a corrected Certificate to the extent that any such challenge is determined to have merit. That notice must also explain the procedures provided for doing so.

(8) Confidentiality. The information provided and compiled under this Section, including, but not limited to, the names, addresses and telephone numbers of applicants, shall not be subject to disclosure under the [Freedom of Information Act] [Right-to-Know Law]. This information shall not be released to any person other than the applicant, except as authorized by the Department pursuant to its regulations.

(9) Regulations. The Department shall promulgate the regulations necessary to implement this Section.

MODEL PROCEDURES FOR  
CRIMINAL HISTORY BACKGROUND CHECKS  
[ALTERNATIVE B]

SECTION [YY]. BACKGROUND CHECKS.

(1) Definitions. As used in this Section, the term:

(a) “Care” means the provision of care, treatment, education, training, instruction, supervision, or recreation to minors, the elderly, or persons who are disabled or otherwise vulnerable.

(b) “Care entity” means any public or private organization or agency that provides care or care-placement services, including an organization or entity that licenses or certifies others to provide care or care-placement services.

(c) “Qualified care entity” means a care entity that has applied to the [Department of Public Safety] for certification as a qualified care entity and has been certified as such by the Department. As a part of the application for certification, the applicant care entity must submit a signed agreement, on a form approved by the Department, agreeing to comply with all applicable provisions of state and federal law. The Department may periodically audit qualified care entities to ensure compliance with state and federal law and this Section. The Department must by regulation promulgate standards and procedures for making such determinations, including standards and procedures for applicants to challenge adverse determinations.

(2) Requests for screening.

(a) A qualified care entity may submit to the Department a request for screening of a current or prospective employee or volunteer for a position involving contact with or access to minors, the elderly, or persons who are disabled or otherwise vulnerable.

(b) Each such request must be accompanied by a full set of fingerprints of the person to be screened, a signed waiver from the person to be screened allowing the release to the applicant of the information specified in subsection (4), and payment of an appropriate fee, as set by regulations issued by the Department.

(c) Any current or prospective employee or volunteer who is subject to a request for screening must indicate to the qualified care entity submitting the request the name and address of each qualified care entity that has submitted a previous request for screening regarding that current or prospective employee or volunteer.

(3) Screening procedure. After verifying the identity of the person to be screened, the Department shall consult its records and those of the [Department of Children and Family Services] and compile the information identified in subsections (4)(a) and (b). The Department or its authorized agent shall submit the fingerprints of the person to be screened to the Federal Bureau of Investigation and obtain a record of the information identified in subsection (4)(c).

(4) After obtaining the information specified in subsection (3), the Department shall then issue to the qualified care entity a Screening Report that contains the following information:

(a) The state criminal-history records pertaining to the person to be screened that identify any criminal convictions of the person to be screened for an offense or offenses specified in subsection (5), or a statement that its records contain no such information pertaining to the person to be screened.

(b) A report from the [Department of Children and Family Services] as to whether the person to be screened is named in its records as the alleged perpetrator in a pending child-abuse investigation or as the perpetrator of a founded report of child abuse within the five-year period immediately preceding verification pursuant to this section.

(c) Federal criminal-history record information pertaining to the person to be screened that identifies any criminal convictions of the applicant for an offense or offenses specified in subsection (5), or a statement that Federal criminal-history records contain no such information pertaining to the applicant.

(5) Offenses to be reported. The reports of criminal-history record information to be issued pursuant to subsections (4)(a) and (4)(b) shall indicate only whether the applicant has been convicted of criminal conduct constituting one or more of the following offenses or equivalent offenses under federal law or the law of this or any other state:

(a) criminal homicide;

(b) aggravated assault;

(c) stalking;

(d) kidnapping;

(e) unlawful restraint;

(f) rape or sexual assault;

(g) abuse, neglect, or exploitation of an elderly or disabled person;

(h) domestic violence;

(i) violation of an order of protection;

(j) endangering the welfare of a child;

(k) child abuse;

(l) corruption of minors;

(m) manufacture, distribution, or possession of child pornography;

(n) a felony offense involving the manufacture, distribution, use, or possession of a controlled substance committed within the five-year period immediately preceding the applicant's request for a Certificate of Criminal History under this Section; or

(o) attempt, solicitation, or conspiracy to commit any of the offenses set forth in this subsection.

(6) *Time limit for issuing a Screening Report.* The Department shall comply with requests for a Screening Report no later than [14] days from the receipt of the request.

(7) *Confidentiality.* The criminal history information provided in the screening report is available to qualified care entities to use only for the purpose of screening current or prospective employees and volunteers for a position with or certification from a qualified care entity. It must not be revealed to any person or entity other than a person or entity with responsibility for screening the current or prospective employee or volunteer in question, and it must not be used for any other purpose.

(8) *Determination of fitness.* The determination whether the criminal history record of the person screened bears upon the fitness of that person to serve in a position involving contact with or access to minors, the elderly, or persons who are disabled or otherwise vulnerable shall be made solely by the qualified care entity. The Department is neither required nor authorized to make such a determination on behalf of any qualified care entity.

## Appendix C

(9) Accuracy. The qualified care entity must in writing notify persons screened of their right to obtain a copy of any background screening report, to challenge the accuracy and completeness of any information contained in any such report, and to obtain a determination as to the validity of such challenge before a final determination regarding the person is made by the qualified care entity reviewing the criminal history information. That notice must also explain the procedures provided for doing so.

(10) Regulations. The Department shall promulgate the regulations necessary to implement this Section.

Appendix C

<b>Legend:</b>	
<u>Insertion</u>	
<del>Deletion</del>	
<del>Moved from</del>	
<u>Moved to</u>	
Style change	
Format change	
<del>Moved deletion</del>	
Paragraph Alignment Changed	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	