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The American Law Institute
for Consideration at the Ninety-First Annual Meeting on May 19, 20, and 21, 2014



THE AMERICAN LAW INSTITUTE

MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES

Tentative Draft No. 1

(April 30, 2014)

SUBJECTS COVERED

Substantive Material (for discussion only)

- I. Proposed Sections 213.0, 213.1, 213.2, 213.3, 213.4, 213.5 (Reserved), 213.6 (Reserved), and 213.7
- II. General Commentary
- III. Statutory Commentary (Sections 213.0-213.6)

Evidentiary Material (for approval)

- I. Proposed Section 213.7
- II. Commentary

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**Model Penal Code:
Sexual Assault and Related Offenses
Tentative Draft No. 1**

Comments and Suggestions Invited

We welcome written comments on this draft and ask that they be addressed to the Director and the Reporters; their contact information appears below. Unless expressed otherwise in the submission, by submitting written comments the author authorizes The American Law Institute to retain the submitted material in its files and archives, and to copy, distribute, publish, and otherwise make it available to others, with appropriate credit to the author.

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

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The Council approved the start of this project in 2012. A draft on procedural and evidentiary principles applicable to Article 213 and on collateral consequences of conviction was discussed at the 2013 ALI Annual Meeting, but as planned no votes were taken.

Earlier drafts of some of the substantive material contained in this draft (§§ 213.0-213.6) are contained in Council Draft No. 1 (2013) and Preliminary Draft No. 3 (2013). Earlier versions of some of the evidentiary material contained in this draft (§ 213.7, formerly § 213.6) are contained in Council Draft No. 1 (2013), Preliminary Draft No. 3 (2013), the Discussion Draft (2013), Preliminary Draft No. 2 (2013), and Preliminary Draft No. 1 (2012).

Foreword

Half a century after the Model Penal Code was approved by the ALI membership, it is agreed that certain portions of this great work must be reconsidered in light of experience and changed values. We worked hard on our death penalty provisions. We are close to completion of the major work on sentencing. At the 2013 Annual Meeting we presented a Discussion Draft of Sections of Article 213 of the MPC on the subject of sexual assault. This year we present for discussion further revisions of the Sections defining the substantive offenses. We present for approval the Sections on procedure and evidence.

This project is led by Professors Stephen Schulhofer and Erin Murphy of NYU. Each understands the deep and challenging choices that legislators face in attempting to define the appropriate use of the criminal process to differentiate among and assign an appropriate punishment level to a wide range of behaviors of different levels of seriousness. Equally difficult is to adapt criminal processes and rules of evidence to the determination of facts so often in dispute and so often perceived differently by victims and defendants.

Steve and Erin are assisted by extremely strong and knowledgeable Advisers and Members Consultative Group participants who see these issues from different perspectives but are willing to discuss, recommend, and sometimes disagree in the civilized ALI manner. For many, including me, who are not experts, both the drafts and the meeting discussions have been educational at a high level. There remain extremely difficult choices about policy and statutory language that this year's Meeting and future meetings will take up.

Our gratitude to the Reporters and to all those committed to this work is immense. On this important subject, the ALI with its historic process has the potential to make major contributions to law reform.

LANCE LIEBMAN
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The American Law Institute

April 23, 2014

**MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES
TENTATIVE DRAFT NO. 1**

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MODEL PENAL CODE – ARTICLE 213

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Model Penal Code: Sexual Assault and Related Offenses

Tentative Draft No. 1

Stephen J. Schulhofer, *Reporter*

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May 19, 2014

REPORTERS' MEMORANDUM

This Tentative Draft reflects the current status of work on revision of *MPC Article 213: Sexual Offenses*. The present Memorandum summarizes the chronology and work plan of the revision project, gives a brief overview of the subject matter covered in this draft, and identifies the most important questions of policy presented by the draft. These questions are suggested as topics for discussion at the Annual Meeting on May 19, 2014.

Chronology and Work Plan

In 2012, the Council approved a project to revise Article 213 of the Model Penal Code. The Reporters began by focusing on two subject-matter areas—issues of procedure and evidence; and the collateral consequences of conviction. These matters were covered in a Preliminary Draft No. 1 (December 20, 2012), discussed with the project's Advisory Committee at a meeting in January 2013 and in a revision (Preliminary Draft No. 2 (March 8, 2013)) presented two months later for discussion with the Members Consultative Group. This latter draft was the basis for the Discussion Draft, presented to the membership for consideration at the 2013 Annual Meeting. That Discussion Draft presented proposed text and commentary for two Sections of Article 213; as currently numbered, they were Section 213.7, dealing with matters of procedure and evidence and Section 213.8, addressing the collateral consequences of conviction.

The next iteration of the project, Preliminary Draft No. 3 (October 30, 2013), covered two subject-matter areas—the definitions of the substantive offenses (Sections 213.1 through 213.3) and issues concerning procedure and evidence (Section 213.7). That Draft did not include the provisions addressed to the collateral consequences of conviction (current Section 213.8); that subject remains under consideration, but a revised text and commentary addressed to it were not yet ripe for further deliberation. Preliminary Draft No. 3 was presented to a joint meeting of the Advisory Committee and the Members Consultative Group on November 15, 2013, and was the subject of a detailed, day-long discussion.

Council Draft No. 1 (December 30, 2013), covering roughly the same terrain as the draft discussed with the Advisory Committee and the Members Consultative Group in November 2013, was presented to the Council for discussion on January 17, 2014. Of the two large subject areas included in that draft, the second—addressed to procedure and evidence—was a detailed revision of text and commentary reviewed on several previous occasions; it reflected the results of earlier discussions, comments submitted to the Reporters, and further research. The Reporters presented these provisions (Section 213.7) to the Council for approval; the Council in turn gave its approval to Section 213.7 and voted to forward that Section to the membership for discussion and vote at the Annual Meeting.

The first subject—the definitions of the substantive offenses—was presented to the Advisers for the first time in November 2013. Although the Reporters have incorporated much of the feedback from that session and from subsequent discussion with the Council at its meeting in January, they expect that these provisions will continue to benefit from detailed discussion and input from the Advisory Committee, the Members Consultative Group, the Council, and the ALI membership at its 2014 Annual Meeting. Therefore, the substantive Sections are not yet ready for a formal vote of approval; instead they will be subject to further review and revision before being submitted to the Council and the membership again at a later date.

Overview of the Draft

The draft's principal subject areas include:

A. With respect to the substantive offenses:

1. Definitions of the terms used to specify the elements of the Article 213 offenses (Section 213.0).
2. Designation of the elements and grading of the two most serious sexual offenses—Rape (Section 213.1(1)) and Aggravated Rape (Section 213.1(2)).
3. Designation of the elements and grading of three lesser offenses—Sexual Intercourse by Coercion or Imposition (Section 213.2), Sexual Intercourse by Exploitation (Section 213.3), and Sexual Intercourse Without Consent (Section 213.4).

B. With respect to procedure and evidence:

1. The admissibility of prior sexual behavior of the complainant (the domain of so-called “rape shield” laws) (Section 213.7(1)).
2. The admissibility of prior sexual misconduct of the defendant (the domain of Rule 413 of the Federal Rules of Evidence) (Section 213.7(2)).

3. Rules to govern the testimony of very young victims and witnesses (Section 213.7(3)).

4. Rules governing the admissibility of evidence concerning the timeliness and circumstances of the complainant's complaint (Section 213.7(4)).

The Reporters draw attention to two sets of issues, one procedural and one evidentiary, that are not covered because they were judged inappropriate for treatment in the Model Code:

- *Pre-trial procedures* for resolving issues of evidentiary admissibility were considered too deeply embedded in local practice to be a fruitful subject for treatment in the Model Code.
- *The reliability of eyewitness identification testimony*—including questions of admissibility, as affected by police practices and suggestive circumstances, as well as appropriate cautionary instructions—is perhaps the most important of the evidentiary issues *not* covered in Tentative Draft No. 1. Mistaken identifications are by no means confined to rape trials, but the misidentification problem is especially prominent in this context. Moreover, unlike the mid-20th-century concern about false claims of nonconsent, the problem of mistaken identification is established by irrefutable evidence. Moreover, the evidence demonstrates an especially disturbing impact of this problem on African American defendants. For these reasons, the Reporters considered it prudent to develop recommendations addressed to these difficulties and presented them, along with detailed commentary, for discussion at the first Advisory Committee meeting in January 2013. However, the Advisory Committee was largely unanimous in the view that Article 213 should not attempt to address evidentiary issues not unique to sexual-assault cases, and that the misidentification problem, though extremely serious, should be dealt with in other ways, possibly including a separate ALI project focused exclusively on this concern.

Suggested Questions for Discussion

The draft presents and tentatively resolves a large number of difficult and potentially controversial issues. Because of the nature and history of this subject matter, moreover, issues worthy of careful attention may, perhaps to a greater degree than usual, extend beyond the proposed text to encompass important questions about exposition and emphasis in the supporting commentary. The suggested questions identified below are by

no means intended to exhaust the areas warranting discussion, and are not necessarily more important than others not enumerated here; the members will no doubt have diverse views about the relative priority and difficulty of various concerns. That said, the following are among the issues that the Reporters consider particularly significant:

A. The Substantive Offenses

1. *Grading.* The draft defines a number of distinct sexual offenses, graded as felonies of the first through fourth degrees and in one instance as a misdemeanor. For reference, the maximum levels of imprisonment authorized at the various offense levels, as provided in the sentencing provisions proposed for the revised Model Code, are as follows:

- First-degree felony: life
- Second-degree felony: 20 years
- Third-degree felony: 10 years
- Fourth-degree felony: five years
- Fifth-degree felony: three years
- Misdemeanor: one year

A major question for consideration is whether the draft's offense categories differentiate in appropriate ways between more serious and less serious offenses, and whether the punishment levels authorized in each case are appropriate.

2. *The treatment of force.* With a few largely traditional exceptions, the draft requires physical force or its equivalent as a prerequisite to a conviction of Aggravated Rape and Rape, but it defines the required force in flexible terms. Both of these judgments warrant discussion: should physical force or its equivalent generally be a prerequisite to conviction for the most serious offenses, and should that prerequisite be defined in flexible rather than traditional (narrow) terms.

3. *Criminal liability in the absence of force.* Section 213.2(1)(a) of the draft, unlike the 1962 Code, defines a lesser felony (Sexual Intercourse by Coercion) that an actor can commit without any use of force or threat, whether violent or nonviolent, simply by proceeding in the face of a verbal expression of nonconsent. Is this an appropriate foundation for criminal liability?

4. *Criminal liability in the absence of affirmative consent.* Section 213.4 addresses the much-debated situation involving neither express protests nor affirmative permission—a situation, for example, in which one party proceeds to commit an act of sexual penetration while the other party remains silent and passive. Section 213.4 endorses the position that an affirmative expression of consent, either by words or conduct, is always an appropriate prerequisite to sexual intercourse, and that the failure to obtain such consent should be punishable under Article 213. As originally presented to the Advisers, to the Members Consultative Group, and to the Council, the draft treated that offense as a

felony of the fourth degree. Subsequent reflection, in light of the numerous comments received on this issue, has led to modification of that judgment. The current draft maintains the view that such misconduct should be considered a serious offense, but in light of the existing ambiguity of social norms in this regard and the extremely serious consequences invariably associated with any conviction for a felony sexual offense, the current draft takes the position that the offense is appropriately graded as a misdemeanor.

Is the absence of affirmative consent an appropriate foundation for criminal liability, and if so, should such an offense be graded as a misdemeanor?

5. *The conception of nonconsent.* Section 213.0(4) provides that a verbal “no,” in the absence of subsequent indicia of positive agreement, always suffices to establish nonconsent for purposes of liability under Section 213.2(1)(a). Is this an appropriate standard for determining nonconsent?

6. *The treatment of threats and resistance.* Section 213.2(1)(b) prohibits (as the offense of Sexual Intercourse by Coercion) the act of obtaining consent to sexual intercourse by making threats that would (in the case of a property transfer) qualify as extortion. Unlike the 1962 Code, it does not limit liability to cases in which the threat would prevent resistance by a reasonable person or “a [person] of ordinary resolution.” Is it appropriate to eliminate all obligations of resistance in situations that involve one of the enumerated threats?

7. *Liability based on negligence.* Sections 213.1 through 213.4 require a mens rea of knowledge or recklessness with respect to all the material elements of the sexual offenses. Like the general position of the 1962 Code with respect to non-homicidal crimes, the draft does not allow for criminal punishment when a person’s conduct is merely negligent. Unlike the 1962 Code, however, the draft endorses the view that this principle retains its force and should be fully respected even with respect to mistakes about age in the age-based sexual offenses. Particularly in light of the exceptionally serious character of a sexual-offense conviction and the substantially increased punishments and collateral consequences that, since 1962, American jurisdictions have so commonly imposed in such cases, conviction on the basis of a negligent mistake seems in stark contradiction to the normal requirement of subjective culpability that animates the Model Penal Code. Nonetheless, the Council may wish to discuss whether the revised Article 213 should allow for criminal punishment in certain situations involving negligent mistakes.

B. Procedure and Evidence

The evidentiary portion of the draft contains the most recent revision of the document reviewed by the full membership at the 2013 Annual Meeting and approved by the Council at its meeting in January 2014. This draft is now presented for endorsement at the Annual Meeting.

The latest version reflects several technical changes that occasion no need for substantive discussion. One of these technical changes deserves attention, however, simply to clarify a potential source of confusion. The draft restructures the opening clauses of the rape shield rule so that the general ban on evidence of sexual history appears before the definition of “sexual activity.” It is hoped that the reordering will alleviate the possibility that a casual reader might confuse the breadth of that definition with an intention to broadly *admit* prior sexual history. The new structure underscores the crucial point that the rape shield rule provides no independent basis for *admission* of evidence. It speaks only to *exclusion* of evidence that might otherwise be deemed admissible under the jurisdiction’s ordinary rules of evidence. Accordingly, the broader the definition of “sexual activity,” the more likely it is that otherwise admissible evidence will be excluded pursuant to this provision.

One slightly more substantive change modifies the provisions for out-of-court testimony by lowering the age at which a witness is eligible for this exceptional procedure from 13 to 12. This change responds primarily to the data on sexual maturity investigated in connection with setting the age of consent in connection with the definition of statutory rape. Although sexual immaturity for that purpose cannot necessarily be equated with the emotional vulnerability needed to support a departure from the ordinary requirement of in-court confrontation, it serves to identify a helpful threshold at which an inquiry into the latter issue can become appropriate.

In addition, the draft reflects three more significant substantive revisions:

1. *The rewriting of the “precocious sexual knowledge” provision.*

The current provision for precocious sexual knowledge, 213.7(1)(b)(v), is restructured to indicate that this provision *does not bar admission* of a juvenile witness’s prior sexual history when offered for certain limited purposes. The rephrasing underscores that such evidence is *affirmatively admissible* only when it satisfies the jurisdiction’s general rules of relevance, probative/prejudicial balancing, and the like.

In addition, the provision has been rephrased to clarify that the witness should be chronologically or developmentally of tender years. This language responds to the concern that the previous draft, by referring to a “juvenile witness,” failed sufficiently to emphasize that an exception from the general ban is justified only in the case of the youngest juveniles.

2. *The clarification of the sub-constitutional exception.*

The Reporters and the Council determined to maintain in Section 213.7(1)(b)(vi) a narrow exception to the rule of rape-shield inadmissibility when circumstances not specifically foreseen make particular sexual-activity evidence exceptionally important for a fair trial, even though the exclusion of such evidence arguably might not rise to the

level of a Constitutional violation. The prerequisites for invoking this “safety-valve” exception have been tightened and its rationale has been amplified in light of concerns expressed by various commentators.

3. *The redrafting of the official-complaint rule.*

The rule governing the admissibility of evidence relating to the timing and substance of a complainant’s prior reports relating to the incident in question has been significantly reworded. First, in response to concerns that the phrasing of the earlier draft unduly emphasized the possibility that a witness might be unbelievable, the rule’s suggested jury instruction has been eliminated, and the commentary’s suggested instruction has been significantly pared down. Second, the rewritten rule and attendant commentary makes more explicit that the provision is not meant to effectuate a substantive change in the operation of other general principles of evidence. That is, rules of evidence (such as prior consistent statements, excited utterance, *res gestae*, etc.) that would permit the admissibility of prior reports by the complainant are unaffected by Section 213.7(4). This Section simply clarifies that there is no tailored admissibility doctrine for all fresh or first complaints.

Finally, in response to concerns that the provision, as initially drafted, might be construed to block prosecution evidence necessary to defeat defense claims about the “normal” behavior of a genuine victim, Section 213.7(4) now makes more explicit that evidence of *lack of report* is excluded on the same terms as evidence of the existence of a prior report. In the event that ordinary rules of evidence admit evidence concerning the lack of a report, or that the defense makes an express or implied argument about the lack of a report, Section 213.7(4)(b) specifies that prior reports would then become admissible.

MODEL PENAL CODE

ARTICLE 213

I. PROPOSED SECTIONS 213.0 TO 213.7

1 SECTION 213.0. DEFINITIONS

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

3 (1) The definitions given in Section 210.0 apply;

4 (2) "Commercial sex act" means any act of sexual intercourse or sexual contact in
5 exchange for which any money, property, or services are given to or received by any
6 person.

7 (3) "Consent" means a person's positive agreement, communicated by either words
8 or actions, to engage in sexual intercourse or sexual contact.

9 (4) "Nonconsent" means a person's refusal to consent to sexual intercourse or sexual
10 contact, communicated by either words or actions; a verbally expressed refusal establishes
11 nonconsent in the absence of subsequent words or actions indicating positive agreement.

12 (5) "Recklessly" shall carry only the meaning designated in Model Penal Code
13 § 2.02(2)(c); the provisions of Model Penal Code § 2.08(2) shall not apply to this Article.

14 (6) "Sexual contact" means [*reserved*].

15 (7) "Sexual intercourse" means:

16 (a) any act involving penetration, however slight, of the anus or vagina by
17 any object or body part, unless done for bona fide medical, hygienic, or law-
18 enforcement purposes; or

19 (b) direct contact between the mouth or tongue of one person and the anus,
20 penis, or vagina of another person.

21

22 SECTION 213.1. RAPE AND RELATED OFFENSES

23 (1) An actor is guilty of rape, a felony of the second degree, if he or she knowingly or
24 recklessly:

25 (a) uses physical force, physical restraint, or an implied or express threat of
26 physical force, bodily injury, or physical restraint to cause another person to engage
27 in an act of sexual intercourse with anyone; or

28 (b) causes another person to engage in an act of sexual intercourse by
29 threatening to inflict bodily injury on someone other than such person or by
30 threatening to commit any other crime of violence; or

31 (c) has, or enables another person to have, sexual intercourse with a person
32 who, at the time of such act of sexual intercourse:

1 (i) is less than 12 years old; or

2 (ii) is sleeping, unconscious, or physically unable to express
3 nonconsent to engage in such act of sexual intercourse; or

4 (iii) lacks the capacity to express nonconsent to engage in such act of
5 sexual intercourse, because of mental disorder or disability, whether
6 temporary or permanent; or

7 (iv) lacks substantial capacity to appraise or control his or her
8 conduct because of drugs, alcohol, or other intoxicating or consciousness-
9 altering substances that the actor administered or caused to be administered,
10 without the knowledge of such other person, for the purpose of impairing
11 such other person's capacity to express nonconsent to such act of sexual
12 intercourse.

13 (2) An actor is guilty of aggravated rape, a felony of the first degree, if he or she
14 violates subsection (1) of this Section and:

15 (a) uses a deadly weapon to cause the other person to engage in such act of
16 sexual intercourse; or

17 (b) acts with the active participation or assistance of one or more other
18 persons who are present at the time of the act of sexual intercourse; or

19 (c) knowingly or recklessly causes serious bodily injury to the other person or
20 to anyone else for the purpose of causing such other person to engage in the act of
21 sexual intercourse; or

22 (d) the act of sexual intercourse in violation of subsection (2) of this Section is
23 a commercial sex act.

24
25 **SECTION 213.2. SEXUAL INTERCOURSE BY COERCION OR IMPOSITION.**

26 (1) An actor is guilty of sexual intercourse by coercion, a felony of the third degree,
27 if he or she:

28 (a) knowingly or recklessly has, or enables another person to have, sexual
29 intercourse with a person who at the time of the act of sexual intercourse:

30 (i) has by words or conduct expressly indicated nonconsent to such act
31 of sexual intercourse; or

32 (ii) is undressed or is in the process of undressing for the purpose of
33 receiving nonsexual professional services from the actor, and has not given
34 consent to sexual activity; or

35 (b) obtains the other person's consent by threatening to:

36 (i) accuse anyone of a criminal offense or of a failure to comply with
37 immigration regulations; or

38 (ii) expose any information tending to impair the credit or business
39 repute of any person; or

(iii) take or withhold action in an official capacity, whether public or private, or cause another person to take or withhold action in an official capacity, whether public or private; or

(iv) inflict any substantial economic or financial harm that would not benefit the actor; or

(c) knows or recklessly disregards the risk that the other person:

(i) is less than 18 years old and the actor is a parent, foster parent, guardian, teacher, educational or religious counselor, school administrator, extracurricular instructor, or coach of such person; or

(ii) is on probation or parole and that the actor holds any position of authority or supervision with respect to such person's probation or parole; or

(iii) is detained in a hospital, prison, or other custodial institution, and that the actor holds any position of authority at such facility.

(2) An actor is guilty of aggravated sexual intercourse by coercion, a felony of the second degree, if he or she violates subsection (1)(b) or (1)(c) of this Section and in doing so causes a person to engage in a commercial sex act involving sexual intercourse.

(3) An actor is guilty of sexual intercourse by imposition, a felony of the third degree, if he or she knowingly or recklessly has, or enables another person to have, sexual intercourse with a person who, at the time of the act of sexual intercourse:

(a) lacks the capacity to express nonconsent to such act of sexual intercourse, because of intoxication, whether voluntary or involuntary, and regardless of the identity of the person who administered such intoxicants; or

(b) is less than 16 years old and the actor is more than four years older than such person; or

(c) is mentally disabled, developmentally disabled, or mentally incapacitated, whether temporarily or permanently, to the extent that such person is incapable of understanding the physiological nature of sexual intercourse, its potential for causing pregnancy, or its potential for transmitting disease; or

(d) is mentally or developmentally disabled to the extent that such person's social or intellectual capacities are no greater than that of a person who is less than 12 years old.

(4) An actor is guilty of aggravated sexual intercourse by imposition, a felony of the second degree, if he or she violates subsection (3) of this Section and in doing so causes a person to engage in a commercial sex act involving sexual intercourse.

SECTION 213.3. SEXUAL INTERCOURSE BY EXPLOITATION

An actor is guilty of sexual intercourse by exploitation, a felony of the fourth degree, if he or she has sexual intercourse with another person and:

(1) is engaged in providing professional treatment, assessment, or counseling for a mental or emotional illness, symptom, or condition of such person over a period concurrent with or substantially contemporaneous with the time when the act of sexual intercourse occurs, regardless of the location where such act of sexual intercourse occurs and regardless of whether the actor is formally licensed to provide such treatment; or

(2) represents that the act of sexual intercourse is for purposes of medical treatment or that such person is in danger of physical injury or illness which the act of sexual intercourse may serve to mitigate or prevent; or

(3) knowingly leads such person to believe falsely that he or she is someone with whom such person has been sexually intimate.

SECTION 213.4. SEXUAL INTERCOURSE WITHOUT CONSENT.

An actor is guilty of sexual intercourse without consent, a misdemeanor, if the actor knowingly or recklessly has, or enables another person to have, sexual intercourse with a person who at the time of the act of sexual intercourse has not given consent to that act.

SECTION 213.5. CRIMINAL SEXUAL CONTACT

[Reserved]

SECTION 213.6. SEXUAL OFFENSES INVOLVING SPOUSES AND OTHER INTIMATE PARTNERS

[Reserved]

SECTION 213.7. PROCEDURAL AND EVIDENTIARY PRINCIPLES APPLICABLE TO ARTICLE 213

(1) *Sexual Activity of the Complainant.*

(a) *General Rule*

(i) In a prosecution under this Article, notwithstanding any other provision of law, reputation or opinion evidence about the sexual activity of the complainant is not admissible, unless constitutionally required.

(ii) Evidence of specific instances of sexual activity of the complainant, other than sexual activity with the accused, shall be inadmissible, except as provided in subsection (b), or when its admissibility is constitutionally required. If the proffered sexual activity alleges a prior instance of false accusation of a sexual offense, such evidence is further inadmissible unless the falsehood of the prior accusation is established by a preponderance of evidence, with proof beyond mere evidence that the complaint was judged unfounded or was otherwise not pursued.

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(iii) Specialized rules under state or local law shall establish procedures for determining, prior to trial whenever possible, the admissibility of evidence covered by this Section.

(iv) For purposes of this Section, "sexual activity" shall mean any behavior, condition, or expression related to human sexuality, or allegations thereof, whether voluntary or involuntary, including but not limited to evidence and allegations relating to sexual intimacy, contact, and orientation; use of pornography; sexual fantasies and dreams; use of contraceptives; habits of dress; and marital and partnership history or status.

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(b) *Exceptions.* Evidence of specific instances of sexual activity, if otherwise admissible according to generally applicable rules of evidence, shall not be inadmissible under subsection (a):

(i) when offered to prove that the defendant was not the source of physical evidence, pregnancy, infection, or injury in the present case;

(ii) when offered to impeach admitted evidence by specific contradiction or prior inconsistency;

(iii) when offered to prove the complainant's bias or motive to fabricate a material fact;

DELETED ? (iv) when such evidence is a prior false accusation established in accordance with subsection (1)(a)(ii), and is offered to prove the complainant's character for untruthfulness;

(v) when other evidence or circumstances at a trial involving an alleged victim of tender years suggest that the accusation is more likely to be true because the alleged victim has a specific kind of precocious sexual knowledge pertinent to the accusation, or when the prosecutor makes such a suggestion or argument, regardless of the alleged victim's age; or

(vi) when such evidence has an especially strong tendency to prove a material claim, and exclusion of such evidence would substantially impede a party's ability to support that claim.

(2) *Prior Sexual Conduct of the Defendant.*

Evidence of other sexual conduct by the defendant is not admissible to prove the character of the defendant in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as for impeachment, bias, or as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(3) *Testimony Outside of the Courtroom.*

(a) Testimony of an alleged victim of the defendant may be taken outside the courtroom in accordance with the procedures specified in subsection (b) if, at the request of any party, the court finds on the record, after a hearing based on evidence that includes the testimony of a medical or psychological expert who has examined the alleged victim, that

- (i) The alleged victim is less than 12 years of age at the time of trial, or has a documented developmental delay to the extent that his or her emotional or cognitive capacity is no greater than that of a child aged 12;
- (ii) The alleged victim will suffer serious emotional distress if required to testify in the presence of the defendant;
- (iii) Such distress will impair the alleged victim's ability to communicate, or will render the victim incapable of testifying; and
- (iv) The procedure is necessary to, and will significantly, mitigate that distress.

(b) After making the findings required by subsection (a), the court may order that the testimony of an alleged victim be taken outside the courtroom and outside the physical presence of the judge, the defendant, and the jury, provided that all of the following conditions are met:

- (i) The testimony is taken during the proceeding;
- (ii) The testimony is taken via a method of communication that allows the defendant, judge, and jury to hear and see clearly the witness and counsel for prosecution and defense;
- (iii) Counsel for the defense is present in the room in which the alleged victim testifies and has the opportunity to cross-examine the alleged victim in the usual way; or, in the event that the defendant elects to proceed *pro se*, then the court has appointed standby counsel prior to the commencement of trial, who shall be present;
- (iv) The room in which the alleged victim testifies contains no person other than the witness, counsel for the government, counsel or standby counsel for the defense, the operators of the technical equipment, any essential court personnel, and no more than one person who the court finds contributes to the well-being of the alleged victim;
- (v) During the testimony, the defendant, judge, and jury shall remain in the courtroom;
- (vi) The defendant shall be provided with a confidential and nondisruptive means of instantaneous communication with defense counsel.

(4) Official Complaint.

(a) In a prosecution under this Article, and to the extent consistent with the constitutional right of confrontation, the government may introduce in its case-in-chief evidence that shows the time and place where the complaint was made to a person in authority, along with evidence tending to establish the reasons for any delay, provided that such evidence is not substantially more prejudicial than probative. The court shall take care to circumscribe the admissible testimony to avoid reference to the details alleged in the complaint, including by limiting the testimony of a witness and by limiting the number of witnesses produced.

(b) Evidence of reports, or lack of reports, to persons other than those in authority are inadmissible, unless deemed admissible by generally applicable rules of evidence, or

1 unless offered to rebut an express or implied argument concerning the failure of the
2 complainant to make a report.

3

4 SECTION 213.8. COLLATERAL CONSEQUENCES OF CONVICTION

5 *[Reserved]*

II. GENERAL COMMENTARY

A. INTRODUCTORY NOTE

Article 213 contains the provisions of the Model Code on the controversial subject of the sexual offenses. In identifying the sexual behavior that ought to be proscribed by criminal sanctions, the legislator faces an acute dilemma. On the one hand, it is customary—at least for serious felonies—to reserve the social opprobrium and strong penalties of the criminal law for conduct that is universally condemned as intolerable. By this measure it would be acceptable, perhaps even obligatory, to define the sexual offenses quite narrowly, restricting them to clearly aberrational behavior and declining to attach penal sanctions to conduct that significant segments of our society regard as predictable, harmless, or even valuable in some circumstances. On the other hand, a vitally important function of the criminal law is to identify and seek to deter behaviors that pose unjustifiable risks, even when those risks are not yet universally understood.

Because criminal law is the site of the most afflictive sanctions that public authority can bring to bear on individuals, it necessarily must and will reflect prevailing social norms. But for the same reason, it must often be called upon to help shape those norms by communicating effectively the conditions under which commonplace or seemingly innocuous behavior can be unacceptably abusive or dangerous.

Nearly all law-reform efforts addressed to the sexual offenses are met at some point by the objection that they go beyond social standards currently accepted by a good many law-abiding citizens. That protest was heard in response to the Institute's 1962 Model Code, and it has been raised on the occasion of most, perhaps all, subsequent state efforts to revise the law of rape.

No doubt the same concern will be interposed in response to every other revision effort of this sort. And the concern is not always misplaced. But it must be treated as a matter of degree. Where deeply felt injuries are unappreciated or not uniformly appreciated by the general public, the criminal law may at times properly carry the burden of insuring that appropriate norms of interpersonal behavior are more widely understood and respected. Due weight must be given to the breadth and depth of existing social expectations, but also to the gravity of the harms to which individuals are exposed and, as always, the difficult art of the possible. The present revision seeks to strike that complex but unavoidable balance.

B. BACKGROUND AND ACCOMPLISHMENTS OF THE 1962 CODE

The classic definition of rape, in Blackstone's formulation, is still reflected in the law of many American jurisdictions: "Carnal knowledge of a woman forcibly and against her will."¹ From the earliest period, case law and social expectations embellished these elements. The traditional understanding, embedded in Anglo-American common law and practice, thought of

¹ WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND *210 (1765) (University of Chicago Press ed., 1979).

1 rape as an attack upon a chaste woman by a knife-wielding stranger or by some other violent
2 assailant who subdued her over her determined resistance. In an 1880 case, the Wisconsin
3 Supreme Court reversed a rape conviction despite the complainant's testimony that "He had my
4 hands tight, and my feet tight and I couldn't move . . . I got so tired out. I tried to save me as
5 much as I could, but . . . he held me, and . . . I worked so much as I could, and I gave up." The
6 court reversed the conviction, holding that "she ought to have continued [resisting] to the last.
7 . . . [T]he testimony does not show that the threat of personal violence overpowered her will."² In
8 a similar 1906 case, typical for the period, the court reversed a rape conviction because the
9 victim had failed to make "the most vehement exercise of every physical means or faculty within
10 the woman's power."³

11 Several key features of the offense stood out in this picture. First, the crime was seen as
12 one of *extreme brutality*; short of murder it was the gravest offense a person could commit
13 against the social order. Moreover, since the victim was expected to resist to the utmost, rape
14 could not occur unless the perpetrator deployed extraordinary force and violence, sufficiently
15 powerful to overcome that resistance.

16 The second point, a consequence of the first, was that rape was subject to *extremely*
17 *severe sanctions*. Even after capital punishment fell into disuse for felonies generally, it
18 remained an authorized—and widely inflicted—sanction for rape. Indeed, the death penalty for
19 rape of an adult woman was ruled unconstitutional only in 1977⁴ and capital punishment for rape
20 of a child remained constitutionally permissible until as recently as 2008.⁵ When capital
21 punishment was not imposed, rape was typically punished by very long prison terms or by
22 incarceration for life.

23 Third, the requirement of physical brutality was not just a grading concern; it marked the
24 line between lawful and prohibited behavior. Thus, coercive, aggressive, overbearing, and even
25 frightening actions, if not physically brutal, were *legally permissible*.

26 Fourth, the offense was seen—widely, if not universally—as *an injury to the husband or*
27 *father* of the raped woman. Enforcement patterns often seemed to take more seriously the
28 supposed harm to the husband or father's rights than the direct physical injury to the woman
29 herself. And the substantive law itself enshrined the same assumptions. Most strikingly, the
30 offense of rape could not be committed against a man; all victims of rape were, by definition,
31 female. In addition, the offense of rape could not be committed against a female victim by her
32 husband or (widely if not universally) against a female victim of previously unchaste character.
33 Even when this last restriction became obsolete in the substantive law, it remained relevant in
34 practice, because defendants typically were able to introduce evidence of the victim's prior
35 sexual history and use it to discredit her testimony.

² Whittaker v. State, 50 Wis. 519, 520, 522 (1880).

³ Brown v. State, 127 Wis. 193 (1906). The court added, by way of explanation, that "[a] woman is equipped to interpose most effective obstacles by means of hands and feet and pelvic muscles. Indeed, medical writers insist that these obstacles are practically insuperable in the absence of more than the usual relative disproportion of age and strength between man and woman." Id. at 199-200.

⁴ Coker v. Georgia, 433 U.S. 584 (1977).

⁵ Kennedy v. Louisiana, 554 U.S. 407 (2008).

1 Fifth, criminal-justice officials—police, prosecutors, judges, and jurors—widely assumed
2 that rape complainants (even previously chaste complainants) often made *false accusations*. It
3 was thought that a woman might readily cry rape to explain away an unwanted pregnancy, to
4 coerce a reluctant suitor, or for other reasons unrelated to the truth of the charge. Reflecting those
5 assumptions, rape victims were treated with extreme skepticism at all stages of the legal process,
6 and the formal rules of evidence imposed special barriers—for example, requirements of prompt
7 complaint, corroboration, and instructions warning the jury to treat the complainant’s testimony
8 with exceptional care.

9 The sixth point was that *rape convictions were exceptionally difficult to obtain*. The high
10 levels of force and resistance required, the severity of the applicable sanction, and doubts about
11 the veracity of complainants made prosecutors reluctant to charge rape and made jurors reluctant
12 to convict, absent special circumstances. Thus, from a victim’s point of view, society’s
13 unforgiving attitude toward rape and the harsh sanctions attached to it became a two-edged
14 sword. The high value placed on deterring and incapacitating the rapist helped protect potential
15 victims, but the severity of punishment drastically undermined the probability of conviction,
16 leaving potential victims more vulnerable, absent special circumstances.

17 Finally, among the special circumstances that could make conviction less difficult, *race*
18 was especially salient. Prosecutors typically did charge rape and jurors did convict more readily
19 when a white woman accused a black man. And because sanctions were draconian, a black man
20 convicted of rape typically faced life imprisonment or even the death penalty, a sanction rarely
21 imposed on white men convicted of the same offense.

22 Article 213 of the original Model Penal Code (proposed Official Draft, 1962) accepted
23 many of these traditional features of the law, often without any apparent reservations. But the
24 1962 Code was nonetheless a forward-looking document, rejecting some of the traditional
25 assumptions outright and cabining the reach of others.

26 The 1962 Code endorsed traditional procedural requirements reflecting the law’s anxiety
27 about false accusations, and it preserved the notion that “rape” should be seen a crime of extreme
28 violence perpetrated by a man against a woman. The 1962 Code even limited the classic form of
29 forcible rape to situations in which the defendant had compelled the victim to submit “by force
30 or by threat of *imminent* death, serious bodily injury, *extreme* pain or kidnapping.” But the 1962
31 Code also introduced protection against less extreme forms of abuse by creating a new offense
32 (called “gross sexual imposition”) for situations involving “any threat that would prevent
33 resistance by a woman of ordinary resolution.” The Code thus implicitly retained the need for
34 resistance, even for this lesser offense, but it nonetheless relaxed that requirement from utmost to
35 something like “reasonable” resistance, and it extended the criminal prohibition to include *less*
36 *brutal forms of violence* as well as some *nonphysical threats*.

37 As to the second feature, the 1962 Code recognized that the interest of victims was
38 ultimately disserved by the draconian sanctions then attached to rape, and therefore *substantially*
39 *reduced the penalties*. Capital punishment was excluded, and first-degree felony sanctions were
40 reserved for situations involving not only brutal violence (threats of imminent death, extreme
41 pain) but also a victim who had not voluntarily accepted the assailant’s social company. Thus,
42 even in situations involving the most extreme threats, rape was downgraded to a second-degree
43 felony if the defendant and victim were voluntary social companions, and sexual submission

1 obtained by less extreme physical threats was not considered “rape” at all but was treated as a
2 lesser, third-degree felony offense.

3 The goal of these penalty changes was not to encourage potential rapists or to endanger
4 women attacked while on a date but to address the sixth and seventh problems—the difficulty of
5 conviction and the draconian sanctions imposed on black defendants convicted of the offense.
6 Date rape still fell within the statutory terms, but only at the (still severe) level of a second-
7 degree felony. The 1962 Code’s penalty structure served to *ease the path to conviction* by
8 reducing the extreme severity of rape’s authorized sanctions, and it served to *mitigate racially*
9 *discriminatory effects* by precluding the death penalty and narrowly restricting the reach of the
10 first-degree offense.

11 On the fourth point, the Code retained and expressly defended the marital exemption
12 (both for rape and gross sexual imposition). But it *weakened the gender specificity* of traditional
13 law by creating offenses parallel to rape and gross sexual imposition for situations in which male
14 and female victims (other than a spouse) are forced to submit to non-vaginal forms of sexual
15 penetration.⁶ The offenses protecting against these forms of nonconsensual intercourse were
16 treated as distinct from rape and were unhappily labeled “deviate,” but they nonetheless carried
17 nearly identical elements and penalties. The 1962 Code also sought to extend protection to
18 women in their own right (except vis-à-vis their husbands), by limiting the defense of “sexually
19 promiscuous complainant” to certain forms of nominally consensual intercourse (“statutory”
20 rape); *formal defenses for “lack of chastity” and “promiscuity” were precluded* for all sexual
21 offenses involving force or unacceptable threats.

22 Finally, and well ahead of its time, the 1962 Code eliminated the crimes of adultery and
23 fornication, and took an unequivocal stance in favor of decriminalizing all fully consensual
24 sexual conduct between adults, expressly including same-sex sexual behavior between
25 consenting adults.

28 C. SOCIAL AND LEGAL DEVELOPMENTS SINCE 1962

29
30 Despite the promising and comparatively progressive orientation of the 1962 Code,
31 dramatic social and cultural change quickly overtook its formulations, rendering them outmoded
32 and in some instances even offensive to new sensibilities.

33 Most obviously, much of society no longer conceived of rape strictly in terms of vaginal
34 intercourse or the abuse of women. Ordinary speech contained countless references to rape of
35 inmates in men’s prisons,⁷ a legal impossibility under the Code and then-prevalent state statutes.

⁶ In an apparent drafting oversight, the 1962 Code did not prohibit forcible vaginal penetration of a woman by another woman. Section 213.1 prohibited *any* coercive sexual penetration of a woman when perpetrated *by a man*, and section 213.2 prohibited coercive sexual penetration of any person by any other person, but only in the case of penetration “per os or per anum.”

⁷ See, e.g., *United States v. Bailey*, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting) (“A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail. Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim.”).

1 In a more subtle but possibly more profound shift, rape evolved from a crime concerned
2 with brutal violence to one implicated by a much broader range of aggressive behaviors. As
3 deeper understanding emerged with regard to the physical, psychological, and emotional effects
4 of sexual abuse, the sorts of duress considered sufficient widened from aberrational violence to
5 other kinds of force, intimidation, and coercion. This natural evolution, a gradual expansion of
6 the idea of “force,” soon precipitated a tectonic shift in the basic conception of what rape is: from
7 an offense concerned with the infliction of physical harm to one penalizing the interference with
8 sexual autonomy—the right of every person to choose freely whether and when to be sexually
9 intimate with another person.⁸ In recognition of this development, the FBI recently eliminated all
10 reference to force in the criteria it uses to define rape for statistical purposes, changing the
11 definition from “vaginal penetration by physical force” to “[t]he penetration, no matter how
12 slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of
13 another person, without the consent of the victim.”⁹

14 To be sure, this conceptual shift has not yet taken root everywhere. Many courts and
15 countless citizens still carry the old force-based picture of what “rape” really means. Moreover,
16 one alternative paradigm for reform has placed its focus not on consent but instead on force.¹⁰
17 The idea underlying this approach is that questions of consent unduly shift attention to the
18 complainant, and his or her response to an attack, when in fact the critical question should be the
19 conduct of the defendant. This perspective is represented by states such as New Mexico, which
20 eliminated any showing of nonconsent, but retained a force requirement for liability.¹¹

21 Both perspectives have merit. On the one hand, rigid definitions of force, particularly
22 those focused primarily on exercises of physical force, threaten to exclude from criminal liability
23 a broad swath of sexual attacks that may involve more subtle degrees of threat or coercion. On
24 the other hand, placing the emphasis of the crime on nonconsent can turn the spotlight onto the
25 actions of the complainant. That emphasis also risks reintroducing the problematic traditional
26 approach to questions of force and resistance, because most jurisdictions’ (and lay persons’)
27 definition of consent requires reference to those concepts, and it is only natural to consider the

⁸ For an early articulation of this perspective, see, e.g., Comment, Towards a Consent Standard in the Law of Rape, 43 U. CHI. L. REV. 613, 644-645 (1976) (“Although the force element has traditionally furthered the policy of physical protection, as well as serving an evidentiary function, . . . freedom of sexual choice rather than physical protection is the primary value served by criminalization of rape.”) See also SUSAN ESTRICH, REAL RAPE 102 (1987); Stephen J. Schulhofer, Taking Sexual Autonomy Seriously: Rape Law and Beyond, 11 L. & Philos. 35 (1992).

⁹ U.S. Dep’t of Justice, Office of Public Affairs, Attorney General Eric Holder Announces Revisions to Uniform Crime Report’s Definition of Rape (Jan. 6, 2012), at <http://www.fbi.gov/news/pressrel/press-releases/attorney-general-eric-holder-announces-revisions-to-the-uniform-crime-reports-definition-of-rape>.

¹⁰ See, e.g., Michelle J. Anderson, Reviving Resistance in Rape Law, 1998 U. ILL. L. REV. 953, 1003 (“In contrast to the model of rape reform that focuses on nonconsent, some argue that the most important aspect of a woman’s experience of rape is force. Legal scholars advocating this model reject the notion that consent is the central aspect of a sexual interchange on which the law should focus.”).

¹¹ See, e.g., State v. Jimenez, 556 P.2d 60, 63-64 (N.M. 1976) (noting repeal of earlier statute that had element of nonconsent and its replacement with force-only statute).

1 presence of some conception (however broad) of force when contemplating the existence of
2 valid consent.¹²

3 Overall, the evolution of reform toward a more consent-based conception of the offense
4 has been unmistakable, not only in the United States but throughout the world. Two decades ago,
5 in an early exemplar of the trend, the New Jersey Supreme Court interpreted its statute
6 prohibiting sexual assault (the New Jersey equivalent of rape) to cover “any act of sexual
7 penetration engaged in by the defendant without the affirmative and freely given permission of
8 the victim.”¹³ The court explained that requiring proof of any additional force or resistance
9 “would be inconsistent with modern principles of personal autonomy.”¹⁴ Less than 10 years
10 later, in a decision interpreting the right to respect for private life in the European Convention on
11 Human Rights, the European Court of Human Rights acknowledged the references to threats of
12 violence in most European countries’ definitions of rape, but noted that case law and practice had
13 evolved to permit “prosecution of non-consensual sexual acts [even in the absence of force].”¹⁵
14 The court found that in the continental and common-law nations of Europe, as well as in the
15 United States, Canada, Australia, and South Africa, “[there is] a universal trend towards
16 regarding lack of consent as the essential element of rape and sexual abuse” and recognized “the
17 evolution of societies towards . . . respect for each individual’s sexual autonomy.”¹⁶ In the
18 European court’s view, protection of each person’s sexual autonomy through *criminal law*
19 *enforcement* is a fundamental human right.¹⁷

20 The challenge in drafting a Model Code is to determine whether this emerging paradigm
21 warrants legislative endorsement and, if so, to translate it into statutory language that is workable
22 and clear.

23 24 **D. VICTIMIZATION AND CRIMINAL-JUSTICE RESPONSES TODAY** 25

26 An overview of the contemporary social and institutional landscape relating to sexual
27 misconduct forms an essential predicate for the provisions of Article 213. The available data,
28 however, must be approached with exceptional caution. The circumstances that make social and

¹² Accord Anderson, *supra* note 10, at 1005 (“If, on the one hand, force was irrelevant in a rape prosecution and courts focused on nonconsent, courts might still measure a woman’s actual resistance against some notion of what the woman ideally should have done to express her lack of consent. . . . If, on the other hand, nonconsent were abolished and courts focused on force, courts might still measure a woman’s resistance against an ideal standard of what the woman should have done to prove that her attacker used force.”).

¹³ *State in the Interest of M.T.S.*, 129 N.J. 422, 609 A.2d 1266, 1277 (1992).

¹⁴ *Id.*; see also *State v. Meyers*, 799 N.W.2d 132, 142 (Iowa 2011) (“The overall purpose of Iowa’s sexual abuse statute is to protect the freedom of choice to engage in sex acts. The sex abuse statute exists to protect a person’s freedom of choice and to punish ‘unwanted and coerced intimacy.’”).

¹⁵ *M.C. v. Bulgaria*, [2003] ECHR 39272/98, ¶ 161.

¹⁶ *Id.* ¶¶ 163, 165.

¹⁷ *Id.* at ¶ 166 (rejecting government’s argument that sufficient protection can be afforded by the possibility of civil actions for damages against rape perpetrators and stating that “effective protection against rape and sexual abuse requires measures of a criminal-law nature.”).

1 institutional context uniquely important in this area of the penal law also make a reliable picture
2 of that context uniquely difficult to draw.

3 The Uniform Crime Reports, our most comprehensive source of crime statistics, suffer
4 distinctive weaknesses in regard to sexual assault, principally because of inconsistent, highly
5 subjective recording practices in police departments (including “unfounding” of complaints
6 filed) and because rape is notoriously underreported by its victims. National victimization
7 surveys partially correct for these flaws, but they pose methodological problems of their own;
8 more targeted surveys, among college students and military personnel for example, often point to
9 dramatically higher rates of victimization.¹⁸ The available data, though imperfect, nonetheless
10 permit some broadly useful benchmarks and perspectives.¹⁹

11 First, the underreporting phenomenon provides a telling window into some of the
12 underlying social and institutional problems. Studies consistently show that only a minority of
13 sexual assaults (from a low of 16 percent in some studies to no more than 42 percent in others)
14 are ever reported to the police, the lowest reporting rate among all the serious crimes.²⁰ When
15 questioned, victims most commonly explain that they did not report either because they viewed
16 the incident as a personal matter or because they feared reprisal.²¹ Hesitation to report was
17 especially common in the case of rapes by an acquaintance or intimate partner. In one study, 46
18 percent of stranger rapes were reported to police, but the reporting rate dropped to 39 percent for
19 acquaintance rapes and to 23 percent for rapes by a current or former husband or boyfriend.²²

20 Reporting rates have risen since the 1970s, a sign of some success in making criminal-
21 justice institutions more receptive to victims, and the increase in reporting rates has been

¹⁸ See *infra* notes 28-32 and accompanying text.

¹⁹ This Commentary relies primarily on two comprehensive studies: one by the Centers for Disease Control, and another by the Bureau of Justice Statistics. See Michele C. Black et al., *The National Intimate Partner and Sexual Violence Study*, Center for Disease Control and Prevention (2010) [hereinafter CDC study]; Jennifer L. Truman & Michael R. Rand, *Crime Victimization, 2009*, Bureau of Justice Statistics (Oct. 2010) [hereinafter 2009 BJS study]. For a review of the shortcomings of current study methodologies, see Kimberly Lonsway & Joanne Archambault, *The Justice Gap for Sexual Assault Cases: Future Directions for Research and Reform*, 18(2) *VIOLENCE AGAINST WOMEN* 145, 146-148 (2012).

²⁰ Callie Marie Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*, Bureau of Justice Statistics, at 1 (Aug. 2002); see also Lonsway & Archambault, *supra* note 19, at 146-147; Lynn Langton et al., *Victimizations Not Reported to the Police, 2006-2010*, Bureau of Justice Statistics (Aug. 2012) (finding that from 2006 to 2010, only 35 percent of rapes were reported to police). In contrast, according to this study, the reporting rate was an estimated 48 percent for all violent victimizations, and among the crimes in this category not reported to the police, 34 percent were reported to another official (like a guard, manager, or school official). Only household theft (33 percent) had a lower reporting rate. The highest reporting rate was for motor-vehicle thefts (83 percent). *Id.*

²¹ Rennison, *supra* note 20, at 3; see also Langton, *supra* note 20, at 4 Tbl.1. Other explanations include a fear of police bias, a desire to protect the offender, or a report to officials other than police. Rennison, *supra* note 20, at 3. (“The closer the relationship between the female victim and the offender, the greater the likelihood that the police would not be told about the rape or sexual assault.”). Three-quarters of offenses by current or former husbands or boyfriends were not reported.

²² Rennison, *supra* note 20, at 3.

1 especially pronounced in the case of non-stranger assaults.²³ Since the 1990s, however, reporting
2 rates may have leveled off or even declined.²⁴

3 In part because of these underreporting problems, the incidence and prevalence of sexual
4 assault remain difficult to measure. Most studies concur in finding that victimization rates for
5 sexual assault, like those for violent crime generally, have dropped significantly in recent
6 decades,²⁵ but the offense remains disturbingly common. In one careful survey, the Department
7 of Justice estimated that among American women aged 18 or older, there were approximately
8 876,000 rapes and attempted rapes annually; 15 percent of American adult women had
9 experienced one or more completed rapes in their lifetimes, and another three percent had been
10 victims of attempted rape.²⁶ A more recent survey by the Centers for Disease control estimates
11 that nearly 20 percent of adult women have been raped at some time in their lives.²⁷

12 In discrete settings where sexual assaults have been studied in greater depth, research has
13 found even higher rates of victimization. A Pentagon survey released in 2013 found that in the
14 previous year 6.1 percent of women on active duty in the military and 1.2 percent of men said
15 they had experienced some form of sexual assault,²⁸ victimization rates many times higher than
16 those found in the general population.²⁹ Those rates suggest that more than 12,000 women on
17 active duty and nearly 14,000 men had been sexually assaulted.³⁰ Yet in the same year offenses
18 were reported with regard to only 2949 of these male and female victims, a reporting rate of only
19 11 percent.³¹

²³ A study of reporting of rape from 1973-2000 found that reports to police of non-stranger sexual assaults increased significantly during the 1970s, 1980s, and 1990s. Eric P. Baumer, Temporal Variation in the Likelihood of Police Notification by Victims of Rape, 1973-2000, National Institute of Justice (April 12, 2004). The study used data from the National Crime Victimization Survey (1992-2000) and the National Crime Survey (1973-1991), and measured both reports by both victims and third parties.

²⁴ Lonsway & Archambault, *supra* note 19, at 148.

²⁵ See 2009 BJS study, *supra* note 19, at 1, 2; David A. Farenthold, Statistics Show Drop in U.S. Rape Cases, WASH. POST, June 19, 2006 (quoting president of the National Organization for Women as stating that “there has clearly been a decline [in the incidence of rape] over the last 10 to 20 years.”).

²⁶ U.S. Dep’t of Justice, National Violence Against Women Survey (1998).

²⁷ CDC study, *supra* note 19. Rape was defined as completed forced penetration, attempted penetration, and alcohol or drug-facilitated completed penetration. The 2009 crime victimization study by the Bureau of Justice Statistics found that 84.3 percent of sexual-assault victims were female. In terms of demographics, the sexual-assault victimization rate for Blacks was 1.2 in 1000, whereas for Whites it was 0.4 in 1000. Hispanic and non-Hispanic rates remain roughly equal at 0.5 in 1000. Rates of victimization hover around 0.6-0.9 in 1000 for ages 12 through 34, and then drop off sharply after that. 2009 BJS Study, *supra* note 19, at 1, Tbl 1. The data cited in these paragraphs refer to victims aged 12 or older. Young-child victims are discussed separately.

²⁸ U.S. Dep’t of Defense, Annual Report on Sexual Assault in the Military, Fiscal Year 2012, p. 2 (April 2013); Jennifer Steinhauer, Sexual Assaults in the Military Raise Alarm in Washington, N.Y. TIMES, May 7, 2013. The survey defined sexual assault as including rape as well as “unwanted sexual touching” of genitalia, breasts, buttocks, or inner thighs.

²⁹ See note 27, *supra*.

³⁰ Steinhauer, *supra* note 28.

³¹ Dep’t of Defense, *supra* note 28, at 3.

1 Among college women victimization rates appear to be especially high as well. One
2 Justice Department survey found that 2.8 percent of college women had experienced a completed
3 or attempted rape during the preceding six months alone, suggesting an annual victimization rate
4 of roughly 49 per 1000 college women. In a college career now lasting an average of five years,
5 the percentage of college women who suffer a completed or attempted rape could climb to
6 between 20-25 percent.³²

7 Contrary to the still-widespread popular perception, the majority of sexual assaults are
8 not committed by strangers, and a substantial proportion of acquaintance rapes are committed by
9 intimate partners.³³ Moreover, and again contrary to a widespread perception, the large majority
10 of sexual assaults (roughly 85 percent in one study) were committed without resort to a weapon;
11 in roughly 10 percent of the incidents, the assault was perpetrated with a firearm, and in eight
12 percent the offender used a knife.³⁴ Stranger assaults represent an especially small share of the
13 total on college campuses. Among college students, “sexual aggression is rare among strangers
14 and common among acquaintances.”³⁵

15 On the now-common understanding, rape can be committed against men as well as
16 women, and the data suggest that men, though in a minority among all victims, represent a
17 sizeable proportion of the total. The victimization rate may be five to ten times higher for
18 women, but surveys indicate that between 1.4 percent and three percent of adult men have been
19 victims of a completed or attempted rape in their lifetimes.³⁶ And in prisons, victimization rates
20 are dramatically higher. In one Justice Department survey, 4.5 percent of male inmates had
21 experienced a sexual assault during the prior year and 13 percent had been victimized (often
22 many times) during their incarceration.³⁷ Moreover, the underreporting problem, serious enough

³² Bonnie S. Fisher, et al., *The Sexual Victimization of College Students* (Nat'l Institute of Justice 2000).
See also SANFORD H. KADISH, ET AL., *CRIMINAL LAW AND ITS PROCESSES* 333-334 (9th ed. 2012) (collecting
studies).

³³ In one study, over half (52.5 percent) of female victims of forcible rape or attempted rape identified the
assailant as an intimate partner, 14.8 percent as a family member, 2.4 percent as a person of authority, 14.1 percent
as a stranger, and 33 percent as an acquaintance. CDC Study, *supra* note 19. Another reported that only 21 percent of
female victims described the assailant as a stranger, whereas 79 percent described the assailant as a non-stranger
(about equally split between intimate partners, and friends/acquaintances). 2009 BJS Study, *supra* note 19. Accord
Jennifer L. Truman, *Criminal Victimization, 2010*, Bureau of Justice Statistics (Sept. 2011) [hereinafter 2010 BJS
Study] (reporting 25 percent stranger and 73 percent non-stranger (17 percent intimate, eight percent other relative,
and 48 percent friend/acquaintance)).

³⁴ 2009 BJS Study, *supra* note 19, at Tbl. 9 (these percentages were based on 10 or fewer sample cases of
forcible rape and sexual assault, and due to rounding may not sum evenly).

³⁵ See MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR: THE SOCIAL COST OF RAPE* 26-28,
32-36 (1991).

³⁶ According to the CDC's 2010 survey, 1 in 71 men in the United States have been raped at some time in
their lives. CDC study, *supra* note 19. Rape was defined as completed forced penetration, attempted penetration, and
alcohol or drug-facilitated completed penetration. The 2009 crime victimization study by the Bureau of Justice
Statistics found that 15.7 percent were male. 2009 BJS study, *supra* note 19. A 2006 Justice Department survey
found that three percent of adult men had been victims of completed or attempted rape in their lifetimes. See Patricia
Tjaden & Nancy Theones, *Extent, Nature and Consequences of Rape Victimization: Findings from the National
Violence Against Women Survey* 7-8 (Nat'l. Institute of Justice 2006).

³⁷ Pat Kaufman, *Prison Rape Research Explores Prevalence, Prevention*, 259 NAT'L INSTITUTES OF JUSTICE
JOURNAL 24, 24 (March 2008).

1 in the case of women, is compounded many times over in the case of male victims.³⁸
2 Underreporting has made it especially difficult to obtain more detail concerning the relative
3 distribution of stranger and acquaintance rape and other important descriptive issues.³⁹

4 Sexual assaults of young children merit special attention. “[C]rimes against juvenile
5 victims are the large majority (67%) of sexual assaults handled by law enforcement agencies.”⁴⁰
6 The majority of victims are female, but child victims tend to include slightly more males than in
7 the adult context.⁴¹ Roughly 27 percent of offenders were family members of young victims,
8 with that percentage increasing as the victim’s age gets younger. Another 60 percent of offenders
9 were known, although not related, to the victim. Only 14 percent of offenders were strangers to
10 the victim; for victims under six, just three percent of offenders were strangers, and for victims
11 6-12, just five percent were strangers. Almost all offenders were male, and 23 percent of
12 offenders were under the age of 18.⁴²

13 Research also casts doubt on other conventional assumptions about rape victims. The
14 expectation that a great number of rape accusations are false does not appear empirically
15 supportable. To be sure, the range of proffered rates is broad,⁴³ but many of the figures at the
16 higher end are the result of manifestly flawed methodologies.⁴⁴ The more reliable quantitative
17 efforts suggest that false reports represent at most a small minority of the cases.⁴⁵

18 Legal and socio-cultural responses to changing insights into the prevalence and character
19 of sexual violence are complex. On the one hand, the feminist movement of the 1970s called
20 greater attention to the pervasiveness of rape and brought about a cascade of reforms that
21 extended better support to victims.⁴⁶ In the words of one scholar, “reforms in criminal law, gains

³⁸ See generally I. Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259 (2011).

³⁹ Compare, e.g., 2009 BJS study, *supra* note 19 (reporting 26 percent non-stranger, and 74 percent strangers) with 2010 BJS study, *supra* note 33 (reporting 78 percent non-stranger (all friend/acquaintance) and eight percent stranger, with 14 percent unknown). The CDC study found that, for male victims, over half (52.4 percent) identified the assailant as an acquaintance, and roughly 15.1 percent as a stranger; no estimates were given for categories including intimate partners, family members, or authority figures. CDC Study, *supra* note 19. The CDC study, which defined rape as attempted or forced penetration, also asked men about other forms of sexual violence, including being forced to penetrate another. For that offense, 44.8 percent were perpetrated by current or former intimate partners, 44.7 percent by acquaintances, and 8.2 percent by strangers. *Id.*

⁴⁰ Howard N. Snyder, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics*, National Center for Juvenile Justice/Bureau of Justice Statistics (July 2000).

⁴¹ Specifically, the proportion of female victims is: 69 percent of victims under six; 73 percent of victims under 12, and 82 percent of victims under 18. This study defined sexual assault to include rape, sodomy, assault with an object, and forcible fondling. *Id.*

⁴² *Id.*

⁴³ P.N.S. Rumney, *False allegations of rape*, 65 CAMBRIDGE L.J. 128 (2006). The Rumney study gathered 20 sources and reported findings ranging from 1.5 percent to 90 percent.

⁴⁴ See, e.g., Eugene J. Kanin, *False Rape Allegations*, 23(1) ARCHIVES OF SEXUAL BEHAVIOR (1994). This study counted recantations as false accusations, but recantations may simply signal a desire to disengage the judicial system rather than indicate that the initial complaint was false.

⁴⁵ See, e.g., David Lisak, Lori Gardinier, Sarah C. Nicksa & Ashley M. Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16(12) VIOLENCE AGAINST WOMEN 1318 (2010) (finding after independent investigation that 5.9 percent of sexual-assault allegations were false).

⁴⁶ See ROSE CORRIGAN, *UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS 2* (2013).

1 in funding for rape research and service providers, institutional reform on the local level [and]
 2 passage of the comprehensive Violence Against Women Act” all show that “the way we, as a
 3 culture, understand rape today mark[s] a radical break from the public consciousness of the late
 4 1960s.”⁴⁷ Convictions are no longer rare in situations where prosecution would have seemed
 5 almost unthinkable in the past—for example, cases in which a woman on a date agreed to sexual
 6 foreplay before making clear her desire to go no further. In a number of cases, prosecutors have
 7 even brought charges, juries have convicted, and appellate courts have sustained convictions
 8 when a defendant had disregarded the wishes of a victim who voluntarily agreed to sexual
 9 intercourse but then unsuccessfully told her partner to stop.⁴⁸

10 On the other hand, some scholars suggest that these strides overstate the effectiveness of
 11 reform efforts. For instance, one recent study of 167 rape care advocates across six states
 12 concluded that “victims are still likely to face overwhelming resistance, reluctance, and even
 13 outright contempt from legal and medical systems targeted by the feminist anti-rape movement
 14 of the 1970s.”⁴⁹ Further complicating this picture, others argue that the rape-reform movement
 15 has been misguided and that “addressing sexualized violence through increasing the
 16 prosecutorial power of the state is an endeavor in which, at this particular moment, feminists
 17 should no longer enlist.”⁵⁰

18 The present revision of Article 213 proceeds from this necessarily general and incomplete
 19 picture of the social and institutional problems posed in connection with sexual violence and
 20 other forms of sexual abuse in America today. More detailed explanation for the specific
 21 statutory solutions offered is presented in the Commentary to the pertinent Sections of the
 22 revised Article 213.

23 24 **E. DECISION TO STRIKE THE 1962 TEXT OF ARTICLE 213** 25

26 The social, cultural, and legal changes that have occurred since the Institute’s approval of
 27 the 1962 Code have rendered its provisions outdated, and they have been the subject of extensive
 28 scholarly criticism.⁵¹ Some of the most pertinent complaints include: its gendered language,⁵² its

⁴⁷ Id. (quoting MARIA BEVACQUA, RAPE ON THE PUBLIC AGENDA: FEMINISM AND THE POLITICS OF SEXUAL ASSAULT 195-196 (2000)).

⁴⁸ See, e.g., *People v. Roundtree*, 91 Cal. Rptr. 921 (Cal. App. 2000); *In re John Z.*, 2001 Cal. App. Lexis 2729 (2001); *McGill v. State*, 18 P.3d 77 (Alaska 2001).

⁴⁹ CORRIGAN, *supra* note 46, at 4.

⁵⁰ Aya Gruber, Rape, Feminism and the War on Crime, 84 WASH. L. REV. 581 (2009); see also Aya Gruber, The Feminist War on Crime, 92 IOWA L. REV. 741, 750 (2007) (“Unfortunately, feminist criminal law reform, which began laudably with the goal of vindicating the autonomy and rights of women, has increasingly mirrored the victims’ rights movement and its criminalization goals. Many of the widespread domestic violence reforms are more about increasing the likelihood of defendants going to jail than about supporting the individual desires, welfare, and interests of victims.”).

⁵¹ See, e.g., Deborah W. Denno, Why the Model Penal Code’s Sexual Offense Provisions Should Be Pulled and Replaced, 1 OHIO ST. J. CRIM. LAW 207, 211 (2003) (“I believe the Code’s reporters wrote a highly informative and sophisticated text given the cultural and societal constraints of the time.”).

1 tight restrictions on the scope of the highest degree of rape,⁵³ its designation of oral and anal
2 sexual activity as “deviate,”⁵⁴ its retention of a broad marital-rape exception relieving husbands
3 from liability for rape of their wives,⁵⁵ and its antiquated procedural provisions.⁵⁶ In addition,
4 much of the reasoning and phraseology of its commentaries are similarly dated and jarring to
5 modern sensibilities.⁵⁷ At present, few states if any follow the recommendations of Article 213
6 as adopted in 1962, although courts and casebooks still regularly refer to them.⁵⁸

7 As states struggle to adapt to changing times, the issue of legislative reform continues to
8 arise in numerous jurisdictions,⁵⁹ and a new effort to specify the structure and reach of a model
9 statute for the sexual-assault offenses accordingly can serve a valuable role in influencing future
10 reform in a positive direction. Yet in light of the scope of societal change on virtually every issue
11 addressed in the 1962 text of Article 213, piecemeal amendments are far more likely to be
12 confusing than helpful; the problem calls for an entirely fresh start. Accordingly, it was judged
13 best to strike the 1962 text and Commentary in their entirety. The remainder of the present
14 Commentary presents and explains the newly revised Article 213 that replaces them.

15 16 **F. THE ORGANIZATION OF ARTICLE 213**

17
18 Following Section 213.0, which defines the terms of general importance in Article 213,
19 Section 213.1 specifies the elements and grading of rape, the most serious of the sexual offenses,
20 a crime committed when the actor causes sexual submission by threats of violence, use of force,
21 or in similarly egregious circumstances.

22 Section 213.2 specifies the elements and grading of Sexual Intercourse by Coercion or
23 Imposition, a crime committed when the actor engages in intercourse when the victim has
24 expressly indicated his or her refusal to consent; when the victim lacks the capacity to express
25 nonconsent due to intoxication; or when the victim has given consent but that consent is tainted
26 by incapacity or involuntariness.

27 Section 213.3 specifies the elements and grading of Sexual Intercourse by Exploitation, a
28 crime committed when the actor engages in an act of sexual intercourse in the absence of consent
29 or when consent is tainted by certain professional relationships or forms of deception.

30 Section 213.4 specifies the elements of the misdemeanor offense of Sexual Intercourse
31 Without Consent.

⁵² See, e.g., MPC 1962 § 213.1(1) (defining rape largely as a crime committed by a man against a woman not his wife).

⁵³ MPC 1962 § 213.1(1).

⁵⁴ MPC 1962 § 213.2.

⁵⁵ MPC 1962 § 213.1-4.

⁵⁶ See Commentary to Section 213.7, *infra*.

⁵⁷ MPC 1980 § 213.4, Comment 2, at 401 n.11.

⁵⁸ See Denno, *supra* note 51, at 208 (citing examples).

⁵⁹ See, e.g., Maura Dolan, Legislators vow to change law on rape by impersonation, *L.A. TIMES*, Jan. 4, 2013; Stephanie Hughes, When the law won't call it rape, *SALON.COM*, Jan. 26, 2013.

1 Section 213.5 specifies the elements and grading of Criminal Sexual Contact, a crime
2 committed when [*reserved*].

3 Section 213.6 contains provisions addressed to the situation in which the parties to an
4 offense under Article 213 are married to each other or cohabiting in a sexually intimate
5 relationship. [*reserved*].

6 Section 213.7 contains four general provisions addressed to matters of procedure and
7 evidence that arise in a prosecution for an offense under Article 213. Subsections (1) and (2)
8 specify the rules of evidence applicable to the admissibility of testimony concerning the prior
9 sexual history of the complainant and the defendant respectively. Subsection (3) provides certain
10 special provisions applicable to the testimony of a child witness in a sexual-offense prosecution,
11 and subsection (4) deals with the admissibility of evidence concerning the timing of the victim's
12 complaint with regard to the alleged offense.

13 Section 213.8 addresses the collateral consequences authorized upon conviction of a
14 sexual offense..... [*reserved*].

15 It should be noted that the revised Article 213 omits the subject of indecent exposure,
16 which was defined as a misdemeanor under Section 213.5 of the 1962 Code. That behavior is in
17 any event an offense under Article 251 (Public Indecency), particularly Section 251.1 (Open
18 Lewdness). Treatment of the subject in Article 213 is redundant and in any case inappropriate in
19 an Article concerned with conduct involving more serious injury to individual victims.

III. STATUTORY COMMENTARY

A. SECTION 213.0. DEFINITIONS

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

(1) The definitions given in Section 210.0 apply;

(2) “Commercial sex act” means any act of sexual intercourse or sexual contact in exchange for which any money, property, or services are given to or received by any person.

(3) “Consent” means a person’s positive agreement, communicated by either words or actions, to engage in sexual intercourse or sexual contact.

(4) “Nonconsent” means a person’s refusal to consent to sexual intercourse or sexual contact, communicated by either words or actions; a verbally expressed refusal establishes nonconsent in the absence of subsequent words or actions indicating positive agreement.

(5) “Recklessly” shall carry only the meaning designated in Model Penal Code § 2.02(2)(c); the provisions of Model Penal Code § 2.08(2) shall not apply to this Article.

(6) “Sexual contact” means [*reserved*].

(7) “Sexual intercourse” means:

(a) any act involving penetration, however slight, of the anus or vagina by any object or body part, unless done for bona fide medical, hygienic, or law-enforcement purposes; or

(b) direct contact between the mouth or tongue of one person and the anus, penis, or vagina of another person.

Comment:

Section 213.0 prescribes the definitions for this Article.

As an initial matter, Section 213.0 applies to Article 213 the definitions stated in Section 210.0 of the 1962 Code. Most important among them is “serious bodily injury,” which Section 210.0(3) defines to mean “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.” The term “deadly weapon” is defined in 210.0(4) as “any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or intended to be used is known to be capable of producing death or serious bodily injury.” Sections 213.1 and 213.4 use these factors as aggravating factors; they raise the penalty for those sexual offenses when the actor causes serious bodily injury or uses a deadly weapon in the course of committing the crime.

With regard to the phrase “commercial sex act,” it should be noted that the present article does not address prostitution and similar offenses; it is concerned solely with sexual assault and related crimes in which direct proof of the defendant’s unwanted behavior is a formal element of the offense. Accordingly, for purposes of Article 213, the commercial character of the sexual activity serves only as an aggravating factor, raising the penalty for acts of victimization that violate Sections 213.1, 213.2, 213.3, and 213.5. Commercial sex trafficking is a distinctively serious problem, for which penalties above those otherwise applicable are clearly appropriate, as discussed in the commentary to Section 213.1(2)(c). Nearly all states now have a separate body of legislation applicable to sex trafficking, but the subject falls naturally within the scope of the Model Code and is readily addressed in Article 213. The definition of a “commercial sex act” in Section 213.0(3) closely tracks that typically used to specify the reach of sex-trafficking prohibitions in contemporary state and federal legislation.⁶⁰

“Consent” is the principal concept used to distinguish lawful conduct from sexual intercourse and sexual contact that is unlawful whether or not accomplished through use of force. For clarity, the concept of “consent,” as defined here, does not specify the extent to which the person giving consent must act freely and with capacity to consent. The circumstances under which affirmative consent will satisfy those additional prerequisites of effective consent are specified in Section 213.2 and 213.3 for sexual intercourse and in Section 213.5 for sexual contact.

The concept of “nonconsent” identifies the circumstance in which a refusal to consent to sexual intercourse or sexual contact is directly expressed; this circumstance thus marks a particularly serious instance in which affirmative consent is lacking. Under Article 213, sexual intercourse in the absence of consent is always an offense, for the reasons explained in the Comment to Section 213.4. But under Section 213.2(3)(a)(i), that conduct becomes an aggravated offense when the victim’s conduct, going beyond the silence, passivity or ambiguous behavior sufficient to trigger liability under Section 213.4, clearly communicates the unwanted character of the sexual intercourse or sexual contact.

The question whether “‘no’ means no” as a matter of law—that is, whether a verbal “no” should always be legally sufficient to establish nonconsent—remains a matter of some controversy, and jurisdictions continue to be divided on the point.⁶¹ Section 213.0(4) endorses the view that a verbally expressed refusal always establishes nonconsent. The basis for that judgment is most conveniently addressed in connection with the provisions identifying the elements of the specific Article 213 offenses and therefore is explained in the Commentary to Section 213.2.

⁶⁰ See, e.g., 18 U.S.C. § 1591(e) (3).

⁶¹ Compare CAL. PENAL CODE § 261.6 (defining consent to require “positive cooperation”); *Commonwealth v. Lefkowitz*, 481 N.E.2d 227, 232 (Mass. App. 1985) (holding that “when a woman says ‘no,’ . . . any implication other than a manifestation of non-consent that might arise in a person’s psyche is legally irrelevant, and thus no defense”), with N.Y. PENAL LAW § 130.05(2)(d) (defining lack of consent to require that “the victim clearly expressed that he or she did not consent . . . and a reasonable person in the actor’s situation would have understood such person’s words and acts as an expression of lack of consent to such act under all the circumstances” (emphasis added)); *State v. Gangahar*, 609 N.W.2d 690, 695 (Neb. App. 2000) (holding that “while [the victim] said ‘no,’ the statute allows Gangahar to argue that given all of her actions or inaction, ‘no did not really mean no’”).

1 Section 2.13.0(5) clarifies that recklessness, which sets the baseline level of culpability
2 for the offenses specified in Sections 213.1 through 213.6, always requires proof that the
3 defendant possessed subjective awareness of a risk. Most pertinently, it specifies that Section
4 2.08(2), which imputes reckless awareness to actors who are negligent due to self-induced
5 intoxication, does not apply. The justifications for exempting Article 213 from the terms of
6 section 2.08(2) are offered in the part F of this Commentary, following the discussion of Sections
7 213.1 through 213.6.

8 The definitions of “sexual intercourse” and “sexual contact” are of critical importance.
9 The former phrase identifies the act which may constitute exploitation sexual offense under the
10 circumstances specified in Sections 213.1 through 213.4. The latter phrase identifies the act
11 which may constitute criminal sexual contact under the circumstances specified in Section 213.5.

12 Section 213.0(6) defines “sexual contact” . . . [*reserved*].

13 Section 213.0(7) defines “sexual intercourse” expansively, in order to treat equally all
14 forms of sexual penetration, however slight, regardless of the sex of the victim or perpetrator,
15 and regardless of the particular intimate bodily cavity violated. The phrasing makes clear that
16 any instance involving sexual penetration qualifies, even in a situation in which the person
17 penetrated is an aggressor who causes the other party to engage in the act of penetration. The
18 sole exception (outside the context of bona fide medical or hygienic treatment and law
19 enforcement) is to exclude from the definition of sexual intercourse the penetration of the mouth
20 with an object or body part other than a sexual organ. Although serious, the nonconsensual
21 penetration of the mouth with something other than a sexual organ involves a lesser affront to
22 personal autonomy and dignity than violations committed with a sexual organ, and accordingly
23 the severe sanctions attached to nonconsensual intercourse are less appropriate. To the extent that
24 such penetration involves physical violence or threat thereof, or causes serious injury, it would
25 still be subject to severe penalties, either as sexual contact under Section 213.5 or as aggravated
26 battery and comparable offenses, such as Model Penal Code Section 211.1(2) (aggravated
27 assault).

28 The one exception to Section 213.0(7)’s refusal to consider motivation involves the area
29 of “bona fide medical, hygienic, or law-enforcement purposes.” A definition that brought a
30 doctor’s routine rectal examination or a correctional officer’s lawful cavity search within the
31 compass of “sexual intercourse” would be bizarre. Accordingly, the definition excludes acts
32 occurring for “bona fide medical, hygienic, or law-enforcement purposes.” This language
33 accords with the practice of 14 states in specifying such exclusions, which tend either to nestle
34 such clauses within the definition of covered behavior,⁶² or else separately provide that the
35 statute is inapplicable in such contexts.⁶³

36 The exclusion of Section 213.0(7) applies whenever the action occurs for a “bona fide”
37 purpose, even when the act may technically be unlawful. For instance, a law-enforcement
38 officer’s search might violate the civil rights of a person, or a doctor’s examination may
39 constitute ordinary malpractice, but the possible illegality of the actor’s conduct under some
40 provision of constitutional or statutory law does not alone transform it into a potential criminal

⁶² See, e.g., KAN. CRIM. CODE ANN. § 21-5501 (WEST 2010); FLA. STAT. ANN. § 794.011 (WEST 2011); PA. CONS. STAT. ANN. 18 § 3101 (WEST 2011).

⁶³ See, e.g., DEL. CODE ANN. TIT. 11, § 770 (2011).

1 sexual assault. Rather, a factfinder must determine a slightly different question: whether the act
2 was carried out in good-faith, for a legitimate medical or law-enforcement purpose.

3 To be clear, a search or other intrusion that violates constitutional or tort law could also
4 violate this Article if it is found not to have been done for a bona fide purpose. For instance, a
5 case alleging police brutality that involves sexual penetration may constitute a criminal offense
6 under this Section, as well as a civil-rights violation. Similarly, sexual penetration cannot, of
7 course, be considered a bona fide form of medical treatment except with the informed consent of
8 the patient and consistent with accepted medical ethics. Thus, a sexual relationship between a
9 psychotherapist and a current patient would be considered “sexual intercourse” within the
10 meaning of Section 213.0(7) even if the patient had consented to it; and accordingly the
11 sanctions contemplated by Sections 213.1 through 213.3 would apply, and the patient’s consent
12 would not be a defense. Special clauses also exist for cases in which a patient is deceived into
13 thinking that sexual intercourse will have beneficial health consequences⁶⁴ as well as for those in
14 which a patient in psychiatric treatment consents to having a sexual affair with his or her
15 therapist.⁶⁵

16 17 **B. SECTION 213.1. RAPE AND RELATED OFFENSES**

18 **(1) An actor is guilty of rape, a felony of the second degree, if he or she knowingly or**
19 **recklessly:**

20 **(a) uses physical force, physical restraint, or an implied or express threat of**
21 **physical force, bodily injury, or physical restraint to cause another person to engage**
22 **in an act of sexual intercourse with anyone; or**

23 **(b) causes another person to engage in an act of sexual intercourse by**
24 **threatening to inflict bodily injury on someone other than such person or by**
25 **threatening to commit any other crime of violence; or**

26 **(c) has, or enables another person to have, sexual intercourse with a person**
27 **who, at the time of such act of sexual intercourse:**

28 **(i) is less than 12 years old; or**

29 **(ii) is sleeping, unconscious, or physically unable to express**
30 **nonconsent to engage in such act of sexual intercourse; or**

31 **(iii) lacks the capacity to express nonconsent to engage in such act of**
32 **sexual intercourse, because of mental disorder or disability, whether**
33 **temporary or permanent; or**

34 **(iv) lacks substantial capacity to appraise or control his or her**
35 **conduct because of drugs, alcohol, or other intoxicating or consciousness-**

⁶⁴ See, e.g., *Boro v. Superior Court*, 163 Cal. App. 3d 1224, 210 Cal. Rptr. 122 (1985) (holding, however, that such conduct was not a crime under California law at the time).

⁶⁵ See, e.g., *State v. Leiding*, 812 P.2d 797 (N.M. App. 1991) (holding, however, that such conduct was not a crime). For discussion of many other such instances, see generally SUSAN BAUR, *THE INTIMATE HOUR: LOVE AND SEX IN PSYCHOTHERAPY* (1997); CAROLYN M. BATES & ANNETTE BRODSKY, *SEX IN THE THERAPY HOUR: A CASE OF PROFESSIONAL INCEST* (1989).

1 altering substances that the actor administered or caused to be administered,
2 without the knowledge of such other person, for the purpose of impairing
3 such other person's capacity to express nonconsent to such act of sexual
4 intercourse.

5 (2) An actor is guilty of aggravated rape, a felony of the first degree, if he or she
6 violates subsection (1) of this Section and:

7 (a) uses a deadly weapon to cause the other person to engage in such act of
8 sexual intercourse; or

9 (b) acts with the active participation or assistance of one or more other
10 persons who are present at the time of the act of sexual intercourse; or

11 (c) knowingly or recklessly causes serious bodily injury to the other person or
12 to anyone else for the purpose of causing such other person to engage in the act of
13 sexual intercourse; or

14 (d) the act of sexual intercourse in violation of subsection (2) of this Section is
15 a commercial sex act.

16
17 **Comment:**

18 Section 213.1 outlines the gravest of the sexual offenses, subdivided between second-
19 degree felonies in subsection (1) and first-degree felonies in subsection (2). Both grades of the
20 offense center on the presence of force or other exceptionally coercive circumstances. This
21 Comment to Section 213.1 addresses: (1) the scope of the core offense involving physical force
22 or threat of physical force; (2) age; (3) unconsciousness and related inability to express consent;
23 (4) purposefully induced intoxication; and (5) aggravating circumstances, in particular (a) use of
24 a deadly weapon; (b) multiple offenders; (c) serious physical injury; and (d) aggravated
25 commercial sex trafficking.

26 A preoccupation throughout Article 213 is to insure that its offenses discriminate on an
27 appropriate basis between more serious and less serious forms of sexual misconduct. Any sexual
28 offense is a grave matter deserving of significant penal sanctions, and the most aggravated
29 instances of the offense will warrant punishment at especially high levels. A just and workable
30 Code must, however, take care to limit those punishments to the most egregious crimes and to
31 make eligible for the most stringent penalties only those offenses that involve especially
32 reprehensible conduct. Moreover, a reality of the legislative process is that jurisdictions may
33 choose to be guided by the Model Code and adopt its grading scheme for the sexual offenses,
34 even when sentencing provisions appearing elsewhere in their penal codes attach more severe
35 sanctions to each grade of the offense than Article 213 itself contemplates. It is therefore doubly
36 important to restrict the highest grades of punishment under Article 213 to only those offenses
37 that deserve exceptionally severe punishment.

1 ***1. Physical force – Section 213.1(1)(a) and (b).***

2 *a. Current law – force, coercion, and resistance.* Most states retain a force requirement of
3 some kind for felonious sexual intercourse.⁶⁶ The definition of eligible force, however, varies
4 widely. In addition, a simple statutory survey can be misleading in multiple ways. Some states
5 appear to have no force requirement but then define nonconsent with reference to force and
6 resistance.⁶⁷ In many states, courts have construed seemingly clear statutory language in
7 unexpected ways;⁶⁸ elsewhere statutes lack authoritative reported case law. Any summary of the
8 current state of the law therefore is necessarily approximate. Subject to that caveat, a review of
9 statutes and cases reveals the following picture of the landscape.⁶⁹

10 With regard to definitions of physical force in felony sex offenses between adults, only
11 eight states define force as the use of significant physical force.⁷⁰ The remainder either eliminate
12 force altogether,⁷¹ define it broadly to include a range of circumstances that imply force but need

⁶⁶ See John F. Decker & Peter G. Baroni, “No” Still Means “Yes”: The Failure of the “Non-Consent” Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1102 (2011).

⁶⁷ See, e.g., Miss. Code Ann. § 97-3-95 (defining sexual battery as sexual penetration with “another person without his or her consent”); *Sanders v. State*, 586 So. 2d 792, 796 (Miss. 1991) (“force or violence are elements that a jury could consider in determining whether the victim consented to the act”).

⁶⁸ See, e.g., Ala. Code § 13A-6-60(8) (defining forcible compulsion as “[p]hysical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person”); *Ex parte Williford*, 931 So. 2d 10, 13-15 (Ala. 2005) (upholding conviction in case involving isolation and age differentials, noting that “[t]he force necessary to sustain a conviction for first-degree rape or first-degree sodomy is relative”).

In contrast, Arizona criminalizes sexual intercourse accomplished “without consent,” but defines “without consent” as including “[t]he victim is coerced by the immediate use or threatened use of force against a person or property.” *Ariz. Rev. Stat. Ann. § 13-1401*. Case law then clarifies that the definition of “nonconsent” is not exhaustive, and the word should have its ordinary meaning. *State v. Stoeckel*, 2012 WL 1248615 (Ariz. Ct. App. Apr. 11, 2012) (citing *State v. Witwer*, 856 P.2d 1183, 1185-1186 (Ariz. Ct. App. 1993)) (rejecting argument that “voluntary submission to economic or financial pressures” does not meet statutory nonconsent definition, noting that word has its “ordinary meaning” and that victim’s repeated statements that she did not want defendant to touch her met statute even without financial pressure). Thus, on its face, the statute first appears to be a non-consent only statute; then on closer inspection of “non-consent” looks like a force statute, and only with inspection of relevant precedent is Arizona a non-consent state.

⁶⁹ In addition to conducting their own independent research, the Reporters also consulted two particularly helpful recent compilations of statutory materials on this topic: an article by Professor John F. Decker and Peter G. Baroni, *supra* note 66, and documents compiled by AEQUITAS: The Prosecutors’ Resource on Violence Against Women, in June of 2011.

⁷⁰ These states include Maine, Montana, North Carolina, Iowa, South Carolina, Texas, Indiana, and Louisiana. See ME. REV. STAT. ANN. TIT. 17-A, § 251(E); MONT. CODE ANN. § 45-5-501; N.C. GEN. STAT. ANN. § 14-27.2 ET SEQ.; IOWA CODE ANN. § 709.1; S.C. CODE ANN. § 16-3-651; TEX. PENAL CODE ANN. § 22.011(B); IND. CODE ANN. § 35-42-4-1; LA. REV. STAT. ANN. § 14:42.1. Notably, even among these states, many have special provisions governing sexual assaults that occur in the context of unconscious victims, minors, deception, or those in custody.

⁷¹ The 15 states with no statutory force requirement are Arizona, New York, Nebraska, Oregon, Hawaii, Tennessee, Utah, Vermont, Wisconsin, Mississippi, New Hampshire, Pennsylvania, Washington, Missouri, and Nevada. See ARIZ. REV. STAT. ANN. § 13-1401; N.Y. PENAL LAW § 130.25 (McKINNEY 2011); NEB. REV. STAT. §§ 28-319 TO -320 (2008); OR. REV. STAT. §§ 163.415, .425 (2009); N.H. REV. STAT. ANN. § 632-A:2(I)(M) (2011); HAWAII REV. STAT. ANN. § 707-731; TENN. CODE ANN. § 39-13-503 (WEST); UTAH CODE ANN. § 76-5-402 (WEST); VT. STAT. ANN. TIT. 13, § 3252 (WEST); WIS. STAT. ANN. § 940.225(3) (WEST); MISS. CODE

1 not rise to express threats,⁷² or require only a slight showing of force,⁷³ including both pinning
 2 down hands or body parts as well as implied threats of physical restraint or force in light of
 3 surrounding circumstances.⁷⁴

ANN. § 97-3-95; 18 PA. CONS. STAT. ANN. § 3124.1 (WEST); WASH. REV. CODE ANN. § 9A.44.060 (WEST); MO. ANN. STAT. § 566.040 (WEST); NEV. REV. STAT. ANN. § 200.366 (WEST 2010). Three states have eliminated force requirements through judicial interpretation (New Jersey, Florida, and Virginia). See *In the Interest of M.T.S.*, 609 A.2d 1266 (N.J. 1992); *State v. Sedia*, 614 So. 2d 533, 535 (Fla. Dist. Ct. App. 1993) (“The state need not prove that the defendant used more physical force than merely the physical force necessary to accomplish sexual penetration in order to convict a defendant under section 749.011(5).”) and FLA. STAT. § 794.005 (legislative finding that “it was never intended that the sexual battery offense ... require any force or violence beyond the force and violence that is inherent in the accomplishment of ‘penetration’ or ‘union.’”); *Gonzalez v. Commonwealth*, 45 Va. App. 375 (2005) (citing *Minor v. Commonwealth*, 591 S.E.2d 61, 67 (Va. 2004)) (noting “the use of force is shown by the act of non-consensual intercourse itself”).

Some caveats are in order. Arizona’s statute requires close inspection to determine its classification. See *supra* note 68. Mississippi remains on this list because its statute has no express force requirement, although the statute may reintroduce some requirement of force through its definition of nonconsent. See *Sanders v. State*, 586 So. 2d 792, 796 (Miss. 1991). Nevada requires no force but retains a requirement that the victim resist as much as her “age, strength, and the surrounding facts and circumstances would reasonably dictate.” *McNair v. State*, 108 Nev. 53, 57 (1992). Utah also criminalizes “sexual intercourse [committed] with another person without the victim’s consent” as a first-degree felony, UTAH CODE ANN. § 76-5-402, and has held that “ignoring a victim’s ‘no,’ standing alone, may be sufficient for a conviction for rape, even without the use or threat of force.” *State v. Hammond*, 34 P.3d 773, 778 (Utah 2001). Vermont’s statute seems to require that the defendant “compel” the victim, but the courts have found “no actual force or compulsion is necessary.... The element of compulsion is satisfied by lack of consent alone.” *State v. Hazelton*, 915 A.2d 224, 233 (Vt. 2006).

⁷² See *infra* notes 75-84 and accompanying text.

⁷³ See, e.g., *People v. Griffin*, 94 P.3d 1089, 1097 (Cal. 2004) (“[T]he prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the victim.”); *State v. Borthwick*, 880 P.2d 1261 (Kan. 1994) (finding sufficient evidence of force where victim testified that accused pushed her legs apart); *People v. Le*, 346 Ill. App. 3d 41, 50 (2004) (there is “no definite standard setting the amount of force needed to show that the parties engaged in nonconsensual intercourse, and each case must be considered on its own facts”).

⁷⁴ See, e.g., *Way v. United States*, 982 A.2d 1135 (D.C. 2009) (upholding conviction under “reasonable fear” provision where police officer insisted prostitute provide free sexual services); *Yarnell v. Commonwealth*, 833 S.W.2d 834, 836 (Ky. 1992) (recognizing prior physical, emotional, or verbal abuse as relevant to the existence of an implied threat). A handful of jurisdictions follow this broader view as a matter of case law, see, e.g., *Dasher v. State*, 636 S.E.2d 83, 86 (Ga. App. 2006)); *Lewis v. State*, 137 P.3d 909, 912 (Wyo. 2006); *United States v. Holly*, 488 F.3d 1298, 1303 (10th Cir. 2007), or statutory law, see MINN. STAT. ANN. § 609.341 (West) (defining “coercion” as “the use by the actor of words or circumstances that cause the complainant reasonably to fear that the actor will inflict bodily harm upon the complainant or another, or the use by the actor of confinement, or superior size or strength, against the complainant that causes the complainant to submit to sexual penetration or contact against the complainant’s will. Proof of coercion does not require proof of a specific act or threat”).

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

1 Among the 21 states that recognize implied forms of force or coercion, the range of
 2 definitions is broad. Some states remain focused on physical aggression, most commonly by
 3 including threats to kidnap⁷⁵ or to damage property.⁷⁶ However, some states go further and
 4 recognize proxies for force such as size differentials between the accused and complainant,
 5 isolation, or other factors that would suggest physical domination.⁷⁷

6 A handful of states go beyond physical force or domination to penalize forms of coercion
 7 that are purely psychological or exploitative in nature.⁷⁸ Formulations along these lines include
 8 statutes that penalize intercourse obtained by:

- 9 • “extortion,” “intimidation,” or “coercion,”⁷⁹
- 10 • “threats of public humiliation or intimidation”⁸⁰
- 11 • threats to accuse the victim or any other person of a crime⁸¹
- 12 • threats to “expose a secret or publicize an asserted fact, whether true or false,
 13 tending to subject any person to hatred, contempt or ridicule.”⁸²
- 14 • “a threat, express or implied, that places a person in fear of public humiliation,
 15 property damage, or financial loss.”⁸³
- 16 • “use of physical, intellectual, moral, emotional, or psychological force, either
 17 express or implied.”⁸⁴

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

⁷⁵ See, e.g., ARK. CODE ANN. § 6-14-101(2); KY. REV. STAT. ANN. § 510.010(2); N.Y. PENAL LAW § 130.00.

⁷⁶ See, e.g., HAWAII REV. STAT. ANN. § 707-700; IDAHO CODE ANN. § 18-6101(8) (WEST 2011).

⁷⁷ *State v. Gilger*, 158 Wash. App. 1034 (2010), review denied, 171 Wash. 2d 1009, 249 P.3d 1028 (2011) (“[F]orcible compulsion may be found in the presence of other forms of non-physical resistance that are reasonable under the circumstances, given the physical size differences between the victim and perpetrator, the victim’s perception of the futility of a physical struggle, and the victim’s sense of intimidation and fear.”); MINN. STAT. ANN. § 609.341 (WEST) (“[U]se by the actor of confinement, or superior size or strength, against the complainant that causes the complainant to submit to sexual penetration or contact against the complainant’s will. Proof of coercion does not require proof of a specific act or threat.”).

⁷⁸ See, e.g., PA. CONS. STAT. ANN. 18 § 3101 (“Compulsion by use of physical, intellectual, moral, emotional, or psychological force, either express or implied.”)

⁷⁹ Decker & Baroni, *supra* note 66, at 1121 & n.265 (collecting statutes of roughly seven states) (“none of these ... states ... further define what constitutes ‘extortion’”). North Dakota defines coercion as imposing “fear or anxiety through intimidation, compulsion, domination, or control with the intent to compel conduct or compliance.” *Id.* at 1121 & n.268.

⁸⁰ Decker & Baroni, *supra* note 66, at 1121 (citing this language as followed by three states).

⁸¹ See, e.g., DEL CODE ANN. TIT. 11, § 774.

⁸² IDAHO CODE ANN. § 18-6101(8) (WEST 2011).

⁸³ HAWAII REV. STAT. ANN. § 707-700.

1 In contrast to force and coercion, the treatment of resistance appears far more
2 standardized across American law. Under the common law, a defendant could not be convicted
3 of sexual assault unless the victim resisted—often “to the utmost”—or unless the force was so
4 overwhelming that resistance would be futile.⁸⁵ Physical resistance was required; verbal refusals
5 were considered insufficient indicia of true nonconsent. To be sure, some victims’ advocates
6 have pointed out that legitimate reasons exist to encourage victims to resist physically when
7 circumstances permit; data suggest that such resistance “deters rape completion without
8 increasing the serious bodily injury women suffer”;⁸⁶ may decrease the degree of the victim’s
9 psychological harm;⁸⁷ and increases the chance that the assailant will be apprehended and
10 convicted.⁸⁸ Nonetheless, standards of resistance have historically undervalued a woman’s “no,”
11 at times treating verbal resistance as if it were an expected part of mutually desired sexual
12 foreplay.⁸⁹ Imposing strict resistance requirements as a matter of law—whether by statute or
13 judicial decision—tends to reinforce unrealistic “masculine” ideas of “fighting back”⁹⁰ and
14 presents unjustified barriers to effective prosecution of sexual assault.

15 In the wake of these criticisms and concerns, states gradually began to relax traditional
16 resistance requirements. At present, 15 states have explicit statutory provisions stating that
17 resistance is not required.⁹¹ One state court has even judicially eliminated what might have been
18 considered an implicit statutory resistance requirement.⁹² Many states without resistance
19 requirements nonetheless acknowledge that resistance may shed light on questions of

⁸⁴ PA. CONS. STAT. ANN. § 3101; *State v. Meyers*, 799 N.W.2d 132, 146 (Iowa 2011) (“[C]onsidering the legislative history of Iowa’s sexual abuse statute, the language and purpose of the statute, our prior cases interpreting the statute, and the persuasive authority from other jurisdictions and scholars on the topic, we conclude psychological force or inability to consent based on the relationship and circumstance of the participants may give rise to a conviction under the ‘against the will’ element....”).

⁸⁵ Anderson, *supra* note 10, at 962. Decker and Baroni observe that the statutory resistance states may employ their requirements to different effects. Decker & Baroni, *supra* note 66, at 1103-1104. For instance, three states use resistance to gauge the existence of nonconsent (Alabama, Virginia, and Nebraska); two states use it to gauge force (Missouri and Washington); two states also use resistance to ensure the defendant’s mental state about the victim’s nonconsent (Delaware and Nebraska). *Id.*

⁸⁶ *Id.* at 980-987 (collecting studies).

⁸⁷ *Id.* at 987-990.

⁸⁸ *Id.* at 990-991.

⁸⁹ *Id.* at 992-994.

⁹⁰ *Id.* at 1009-1011.

⁹¹ KY. REV. STAT. ANN. § 510.010(2); PA. CONS. STAT. ANN. § 3107 (WEST 2011); VA. CODE ANN. § 18.2-67.6 (WEST 2011); ALASKA STAT. § 11.41.470(8) (2010); D.C. CODE § 22-3001(2011); FLA. STAT. ANN. § 794.011 (WEST 2011); 720 ILL. COMP. STAT. ANN. 5/11-1.70 (WEST 2011); ME. REV. STAT. ANN. TIT. 17-A § 251 (2011); MICH. COMP. LAWS ANN. § 750.520i (WEST 2011); MINN. STAT. ANN. § 609.341 (WEST 2011); MONT. CODE ANN. § 45-5-511(5) (2011); N.J. STAT. ANN. § 2C:14-5(A) (WEST 2011); N.M. STAT. ANN. § 30-9-10 (WEST 2010); N.D. CENT. CODE § 12.1-20-04 (2009); OHIO REV. CODE ANN. § 2907.02 (WEST 2011). Of these, eight (Florida, Illinois, Iowa, Kentucky, New Mexico, Ohio, Oregon, and Virginia) specify expressly that physical resistance is not required, but do not reference verbal resistance.

⁹² KAN. STAT. ANN. § 21-5503 (WEST 2011) (requiring that the victim be “overcome by force or fear,” but not explicitly requiring proof of resistance).

1 nonconsent, force, and *mens rea*.⁹³ Only eight states still retain a formal resistance requirement,
 2 meaning that resistance is required unless it would be futile or incur some degree of injury.⁹⁴

3 Of states *with* a resistance requirement, only West Virginia provides a statutory definition
 4 of what constitutes resistance: “physical resistance or any clear communication of the victim’s
 5 lack of consent.”⁹⁵ Nonetheless, according to case law, every jurisdiction currently appears to
 6 accept verbal resistance as sufficient.⁹⁶

7 *b. The revised Model Code – Section 213.1(1)(a) and (b).* Section 213.1(1)(a) and
 8 (b) penalize sexual intercourse attained through physical force, physical restraint, or threats
 9 thereof, as well as through threats of serious bodily injury or to commit a criminal offense. The
 10 decision to grade these offenses more severely than other forms of nonconsensual sexual
 11 intercourse is not controversial. The use of physical force adds the experience of physical
 12 violence (actual or threatened) to the inevitable psychological injury of rape. In addition, to the
 13 extent that added penalties operate as an additional deterrent, grading these offenses more
 14 seriously discourages the use of physical force or threats in the commission of the offense.
 15 Finally, when actual or threatened force exceeds the physical actions normally inherent in
 16 intercourse and instead is used to cause submission, as Section 213.1 requires, the offender’s
 17 conduct is exceptionally wanton and dangerous.

18 Section 213.1(1) includes both “physical force” and “physical restraint” in order to make
 19 clear that the proscribed conduct includes any physical action that causes submission by
 20 restricting the other person’s ability to speak or move freely. Commonplace differences in size
 21 and power between sexually intimate parties do not in themselves amount to a physical restraint,
 22 but the language of Section 213.1(1) ensures that such differences are not actively used as a
 23 means to force submission.

⁹³ See, e.g., *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1163-1164 (Pa. 1994).

⁹⁴ Only one state retains the historical standard of resistance “to the utmost,” but it does so only for a special class of aggravated rape that had been subject to the death penalty. LA. REV. STAT. ANN. § 14:42(A)(1); see also *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (invalidating death penalty for rape of a child under this statute). Two states incorporate a requirement of “earnest resistance.” ALA. CODE § 13A-6-60(8) (LEXISNEXIS 2005); W. VA. CODE ANN. § 61-8B-1(1)(A) (LEXISNEXIS 2010). Three states require “reasonable” resistance. DEL. CODE ANN. TIT. 11, § 761(j)(1) (2007 & SUPP. 2010); MO. ANN. STAT. § 556.061(12)(A) (WEST 1999 & SUPP. 2011); NEB. REV. STAT. § 28-318(8)(B)-(C), (9)(A) (2008 & SUPP. 2010). But see *State v. Van*, 268 Neb. 814, 836 (Neb. 2004) (“[T]he mere fact that J.G.C. did not verbally or physically resist is not determinative of whether he consented to the acts. The record includes evidence that J.G.C. was subject to beatings for disobeying Van and that he revoked his consent to the BDSM relationship prior to the acts of sexual penetration.”). Finally, two states simply require “resistance.” IDAHO CODE ANN. §§ 18-6101(4), - 6108(4) (2011); WASH. REV. CODE ANN. § 9A.44.010(6) (WEST 2009). Massachusetts is not included in this count, as it eliminated a statutory resistance requirement. However, its narrowly worded jury instruction appears to reintroduce some idea of resistance as a requirement, not just a factual consideration. Instructions for Specific Crimes, CRMJII, MA-CLE 2-1 (“The complainant is not required to use physical force to resist. However, you may consider evidence of any attempt to restrain or confine the complainant, of violence by the defendant, or of struggle or outcry by the complainant on the issues of force and consent. However, lack of such evidence does not necessarily imply consent or the absence of force, because in certain circumstances physical resistance may not be possible. You may consider all of the circumstances and the entire sequence of events in determining whether the intercourse was without the complainant’s consent and (his/her) ability to resist.”).

⁹⁵ W. VA. CODE ANN. § 61-8B-1(1) (LexisNexis 2010).

⁹⁶ *Decker & Baroni*, *supra* note 66, at 1112.

1 Fully consensual sexual activity often includes some physical actions that inhibit the
2 other party's freedom of movement. Accordingly, "physical force or restraint" requires that the
3 restraint exceed that which is typically inherent in acts of consensual intercourse. Instead, the
4 proof must show that physical strength, body weight, or the like were used to *cause* submission.
5 Thus, for example, a defendant who locks the door of a room and stands in front of it, frustrating
6 the victim's expressed desire to leave, would satisfy the requirement of physical restraint,
7 whether or not he had physically touched the victim. There is no requirement, however, that the
8 force physically overwhelm the complainant. Former Section 213.1 of the Code and many
9 traditional statutes apply only when a defendant has "*compel[led]*" submission, a statutory
10 element often interpreted to imply an unjustifiable requirement of some resistance. An offender
11 who pins down the body or hands of a protesting and much smaller partner conveys an implicit
12 threat of much greater violence, even if the victim might, by extraordinary effort, have wrestled
13 out of his grasp.⁹⁷ Similarly, an assailant who covers the mouth of a victim and says "you better
14 not scream," exercises a form of "physical restraint" that carries an implicit threat of physical
15 force or bodily injury, even though the victim might be physically capable of pushing the hand
16 away. In short, Section 213.1 imposes no obligation of resistance when its requirement—the use
17 of physical force to cause submission—is met. Conversely, the simple act of a larger person
18 laying on top of a smaller person, without more, would not be enough by itself to constitute the
19 use of physical force or physical restraint to cause submission.

20 In addition, the threat of physical force, physical restraint, or bodily injury required in
21 Section 213.1(1)(a) includes not only situations in which the accused verbalizes such a threat, but
22 also those in which such a threat is implicit in the circumstances. Thus, in *Ritter v. State*,⁹⁸ the
23 court affirmed a conviction for forcible rape in the case of a massage therapist who digitally
24 penetrated four of his adult clients by taking advantage of the women's vulnerability as naked
25 massage patients to penetrate them by surprise. The defendant claimed that this behavior did not
26 amount to the required showing of "force," because, as the court acknowledged, he neither used
27 actual force nor expressed threats to accomplish the offense. Moreover, none of the women had
28 verbally rejected his advances.

29 Rejecting the defendant's arguments, the court found that the defendant's actions met the
30 statutory standard. The victims "were alone with him, they were undressed, and it was not
31 feasible to run outside into the cold"; these circumstances were sufficient, as the court noted, to
32 support the jury's finding that the "women were coerced by an *implicit* threat of imminent
33 physical injury or kidnapping," as required by the applicable statute.⁹⁹ If such a case arose under
34 the Model Code, it would likewise remain a felony. Most pertinently, such conduct is expressly
35 proscribed by Section 213.2(1)(a)(ii), which requires affirmative consent before initiating sexual
36 intercourse in the context of administering certain professional services. But such behavior also

⁹⁷ See, e.g., *People v. Griffin*, 94 P.3d 1089, 1097 (Cal. 2004) (pinning hands); *State v. Miller*, 2010 WL 3971761 (N.M. Ct. App. Jan. 8, 2010), cert. denied, 240 P.3d 14 (holding that restraining victim in the backseat of a car, informing her that he was going to rape her, and putting his hand on her mouth, "coupled with Victim's state of mind concerning Defendant's violent proclivity, produced the requisite force or coercion."); *People v. Carlson*, 278 Ill. App. 3d 515, 520 (1996) (getting on top of victim in the front seat of a car).

⁹⁸ 97 P.3d 73 (Alaska Ct. App. 2004).

⁹⁹ *Id.* at 77-78.

could, consistent with the court's interpretation in *Ritter*, qualify under Section 213.1(1)(a) as an implied threat of physical force, bodily injury, or restraint.

Similarly, in *Johnson v. State*,¹⁰⁰ the complainant was kidnapped at gunpoint and raped by a group of men. The defendant was not one of the men who had kidnapped her, and there was no evidence that he knew how she came to be in the house. However, the complainant testified that she was walking naked to the bathroom "hysterical and panicking," when she encountered the defendant, whom she did not know. He proceeded to follow her and impose himself on her while she repeatedly said to him "please don't." The jury convicted under a statute requiring "physical force or a threat, express or implied, of death or physical injury to or kidnapping of any person." Affirming the conviction, the court found sufficient force by treating the defendant's actions—cornering the visibly distraught complainant in the bathroom—as a form of restraint. In contrast, under Section 213.1(1)(a), a court would not have to stretch the facts to find force, because the circumstances of the encounter transmitted implied threats of both force and restraint.

Finally, Section 213.1(1)(b) reaches threats to inflict bodily injury on third parties, or to commit any other crime of violence. Prevailing law typically treats such threats as equivalent to threats to inflict violence directly on the victim, an approach that is not controversial. With respect to the use lesser threats to secure compliance, however, American criminal codes often do not impose criminal sanctions. Article 213, in contrast, extends the criminal prohibition to reach such conduct, under the circumstances specified in Section 213.2(1)(b).

2. Age of the victim – Section 213.1(1)(c)(i).

The judgment that all sexual intercourse with a young child should be treated as rape, even in the absence of force and in the presence of affirmative consent, was first given statutory expression during the reign of Elizabeth I.¹⁰¹ The offense has been known colloquially as "statutory" rape ever since.

Originally, the law equated this form of sexual intercourse with forcible rape only when the girl was less than ten years old;¹⁰² intercourse with an older child was not considered a crime unless the strict requirements of force and resistance had been met. By the mid-20th century, all American jurisdictions had raised the age of consent, though in many instances only by one or two years.¹⁰³ At the other extreme, some states raised the age of consent to 17 or even 18.¹⁰⁴

All states now punish intercourse with very young children, but in the case of intercourse with older victims (those above the age of puberty) few jurisdictions treat such conduct as equivalent in seriousness to intercourse with a very young child. Instead, most states follow one

¹⁰⁰ *Johnson v. State*, 94 S.W.3d 344 (Ark. App. 2002).

¹⁰¹ 18 Eliz. Ch. 7, § 4 (1576).

¹⁰² BLACKSTONE, *supra* note 1, at *212.

¹⁰³ MODEL PENAL CODE AND COMMENTARIES, PART II, §§ 210.0 to 213.6 (1980), § 213.1, COMMENT 6, AT 324-325.

¹⁰⁴ See, e.g., CAL. PENAL CODE § 261.5 (setting age of consent at 18); N.Y. PENAL LAW § 130.05(3)(a) (setting age of consent at 17).

1 of three intermediate approaches—either treating intercourse with an adolescent as a crime only
2 when the perpetrator is significantly older; treating all intercourse with an adolescent as a
3 prohibited but less serious offense; or combining the first two approaches by grading the
4 seriousness of intercourse with an adolescent on the basis of the age of both the victim and the
5 perpetrator.¹⁰⁵

6 The offense commonly known as statutory rape serves a variety of distinct purposes.
7 They include most prominently the prevention of pregnancy, the protection of minors from a
8 potentially intense emotional involvement for which they are not yet prepared, and the protection
9 of minors from unwanted intimacy, intimidation, or sexual exploitation. The degree to which
10 these purposes are implicated varies considerably on the basis of the age of victims and
11 perpetrators. Pre-pubescent children plainly cannot give meaningful consent to sexual
12 intercourse, and society, with good reason, considers sexual interest in them on the part of older
13 minors and adults as plainly unacceptable and dangerous. For this reason, Section 213.1(1)(c)(i)
14 endorses the prevailing view that such conduct constitutes a felony comparable in seriousness to
15 forcible rape of an adult woman.

16 In contrast, after the onset of puberty, children typically begin to experience intense
17 feelings of sexual attraction to other individuals, and they typically have at least an elementary
18 understanding of the physiological character of intercourse, even though they may lack an
19 adequate appreciation of its psychological, emotional, and biological risks. As a result, the
20 proper scope of the criminal prohibition with respect to this category of victims depends on more
21 nuanced judgments, and appropriate sanctions must be considerably less severe. The rigorous
22 penalties of Section 213.1 accordingly are restricted to cases involving very young victims.
23 Statutory sexual offenses involving older children are addressed in Section 213.2(1)(c) and
24 213.2(3)(b), and of course nonconsensual sexual offenses with children of any age remain
25 governed by the general provisions of Article 213.

26 Because the onset of puberty serves to identify the moment at which criminal abuse of a
27 child takes on a markedly less aberrant character, one could imagine using that circumstance as
28 the formal element that differentiates the offense of rape under Section 213.1 from the less
29 serious sexual offenses. A legal test of that nature, however, would pose difficult problems of
30 judicial administration and proof, with the necessary evidence often dependent on expert
31 testimony that may often prove intrusive, elusive, or contradictory. A formula that left an actor's
32 liability for an exceptionally serious felony dependent on such an unpredictable factual matter
33 would also present significant concerns about fairness and fair warning. Accordingly, Section
34 213.1(1)(c)(i) follows existing law in defining liability in terms of the victim's chronological
35 age.

36 That drafting judgment leaves for determination the issue of the appropriate age on which
37 liability for rape under Section 213.1(1)(c)(i) should turn. The 1962 Code proceeded on the
38 premise that the age of 12 represented the median age for onset of puberty but nonetheless

¹⁰⁵ See, e.g., CAL. PENAL CODE § 261.5 (one-year maximum when the victim is less than three years younger than the perpetrator; four-year maximum when the age difference is greater than three years); N.Y. PENAL LAW §§ 130.20-130.35 (treating the offense as first-degree rape (with a 25-year maximum prison sentence) when the victim is under 13; second-degree rape (seven-year maximum) when the victim is under 15 and the perpetrator is at least four years older); third-degree rape (four-year maximum) when the victim is under 17 and the perpetrator is at least 21; and a misdemeanor (one-year maximum) in all other instances involving a victim under the age of 17).

1 rejected that age as the dividing line because by definition half of the younger children *would*
 2 have reached puberty. The Institute therefore chose instead to set the dividing line at the age of
 3 10, explaining that “it would be illogical to set the age limit so high [i.e. at 12] that half the
 4 individuals in the class defined would fall outside the rationale for its definition.”¹⁰⁶ Sexual
 5 intercourse with a 10- or 11-year-old child was therefore treated as a criminal offense only at a
 6 lesser level of severity and even then only when the actor was at least 14 or 15 years old.¹⁰⁷

7 It now seems clear that this judgment—treating sexual intercourse with a minor as the
 8 most serious form of statutory rape only when the victim was no older than nine—gives
 9 inadequate weight to the gravity and frequency of sexual abuse of very young children. To be
 10 sure, the medical evidence suggests that the median age for onset of puberty is now lower than it
 11 was at the time of the 1962 Code.¹⁰⁸ And as a result, it seems safe to conclude that today many
 12 children aged 10 and 11 will have reached puberty. Nonetheless, the number of 10- and 11-year-
 13 olds who remain pre-pubescent is undoubtedly substantial,¹⁰⁹ and the extraordinary gravity of
 14 exposing such children to sexual experience must weigh heavily in any judgment about the age
 15 below which sexual intercourse should be treated as unequivocally unacceptable and dangerous.
 16 For these reasons, the Code now rejects the 1962 Code’s choice of age 10 as the critical
 17 demarcation and instead, in accord with current common approach in American law,¹¹⁰ sets at 12
 18 years the age below which sexual intercourse is always treated as a felony equivalent in
 19 seriousness to forcible rape.

20 21 **3. Inability to express nonconsent – Section 213.1(1)(c)(ii) and (iii).**

22 *a. Sleeping, unconscious, and physically impaired victims – Section 213.1(1)(c)(ii).*
 23 Intercourse with a sleeping or unconscious woman was a well-established form of rape at
 24 common law,¹¹¹ and it remains today a serious sexual offense in every jurisdiction.¹¹² Under the
 25 revised Code, such conduct would be punishable even in the absence of any provision directed
 26 specifically to the case of a sleeping or unconscious victim, because Section 213.4 criminalizes
 27 (as a felony of the fourth degree) all instances of sexual intercourse in the absence of affirmative

¹⁰⁶ Id. at 329.

¹⁰⁷ See 1962 Code, Section 213.3(1)(a).

¹⁰⁸ This question proves more complicated than it seems at first glance, but see Marcia E. Herman-Giddens et al., Secondary sexual characteristics and menses in young girls seen in office practice: a study from the Pediatric Research in office Settings Network, 99 PEDIATRICS 505, 508-509 (1997) (reporting mean age of onset of breast development as 8.87 for African American girls and 9.96 for white girls, and of menses as 12.16 and 12.88 in African American and white girls, respectively); P.A. Lee et al., Age of puberty: data from the United States of America, 109 APMIS 81 (2001). See also Elizabeth Weil, Puberty Before Age 10: A New “Normal”?, N.Y. TIMES, Mar. 30, 2012.

¹⁰⁹ Herman-Giddens, supra note 108, at 505.

¹¹⁰ See U.S. DEPT. OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, STATE LEGISLATORS’ HANDBOOK FOR STATUTORY RAPE ISSUES (2000).

¹¹¹ See 4 J. STEPHEN, COMMENTARIES ON THE LAWS OF ENGLAND 66 (21st ed. L. Warmington 1950); Commonwealth v. Burke, 105 Mass. 376 (1870).

¹¹² See, e.g., CAL. PENAL CODE § 261(a)(4); 720 ILL. COMP. STAT. ANN. § 5/11-1.20(a)(2) (West 2011); 18 PA. CONS. STAT. ANN. § 3121(a)(3) (West 2011); N.Y. PENAL LAW § 130.35(2) (McKinney 2011); WIS. STAT. § 940.225(2)d).

1 consent. Nonetheless, the decision to intrude sexually upon an unconscious person, who cannot
2 conceivably be regarded as a willing partner, is far more aberrant and egregious than the failure
3 to secure affirmative permission from a competent, fully conscious individual who has not
4 expressly manifested his or her opposition. Accordingly, the unconsciousness of the victim
5 presents a significant aggravating circumstance that warrants treating the actor's behavior as
6 equivalent in seriousness to forcible rape. The great majority of American jurisdictions are in
7 accord with this judgment with respect to both criminalization and grading.¹¹³

8 Section 213.1(1)(c)(ii) equates with unconsciousness and sleep the situation in which the
9 victim is conscious but physically unable to express unwillingness—for example, the relatively
10 rare situation in which a victim is both physically paralyzed and unable to speak or otherwise
11 signal his or her desires. It seems clear that an actor's decision to intrude sexually upon a
12 disabled person in this situation is equivalent in gravity to the misconduct involved in
13 perpetrating an act of sexual intercourse upon a person who is asleep.

14 Of course, in any of the situations covered by Section 213.1(1)(c)(ii), if the actor is
15 unaware of the victim's unconsciousness or disability, the situation is, from the actor's
16 perspective, identical to that addressed in Section 213.4—namely, one in which an actor
17 proceeds to sexual intercourse with a person who (he or she believes) *could*—but has not—
18 expressed either willingness or unwillingness. For that reason, the language of Section 213.1(1)
19 makes explicit the requirement that would in any event apply under the general principles of
20 Section 2.02—specifically that an actor can be held liable for the more severe penalties under
21 this provision only when he or she actually knows or recklessly disregards the risk that the
22 aggravating circumstances are present. In cases where the requisite *mens rea* is lacking, the actor
23 might still be punishable for knowingly or recklessly engaging in sexual intercourse without an
24 affirmative expression of consent, as provided pursuant to Section 213.4.

25 *b. Mental incapacity – Section 213.1(1)(c)(iii).* Section 213.1(1)(c)(iii) addresses the
26 situation in which the victim lacks the capacity to express unwillingness because of mental
27 disorder or disability. Its scope can be clarified by specifying the circumstances involving
28 mentally disabled victims that it *does not* address.

29 Section 213.1(1)(c)(iii) is *not* concerned with the situation in which a mentally disabled
30 person is subjected to sexual intercourse despite his or her express protests. Such conduct
31 constitutes the lesser offense of Sexual Intercourse by Coercion, a felony of the third degree
32 under Section 213.2(1), and the victim's protests are sufficient to establish the offense regardless
33 of whether the victim is mentally disabled. The fact that the victim suffers from some form of
34 mental incapacity might be a matter to be considered in sentencing for that offense, just as the
35 sentencing judge might impose a more severe sentence when a victim is elderly or otherwise
36 particularly vulnerable. But the critical consideration determining the gravity of the lesser
37 offense under Section 213.2(1)(a)(ii) is simply the actor's willingness to proceed to sexual
38 intercourse in the face of the victim's clearly expressed opposition.

39 Section 213.1(1)(c)(iii) likewise is *not* concerned with the situation in which a mentally
40 disabled person *has* expressed affirmative willingness to engage in sexual intercourse. This
41 situation also could qualify as an instance of Sexual Intercourse by Imposition (under subsection
42 (3)(c) or (d) of Section 213.2) if the victim is disabled to the extent specified in those provisions.

¹¹³ See, e.g., statutes cited at note 112, *supra*.

As in situations involving unconsciousness or sleep under Section 213.1, an actor can be held liable under these provisions of Section 213.2 only when he or she actually knows or recklessly disregards the risk that the requisite degree of mental impairment is present. And just as Sexual Intercourse by Coercion is established simply by the actor's willingness to ignore the victim's clearly expressed opposition, the offense described in Section 213.1(1)(c)(iii) is likewise established whenever the actor proceeds to sexual intercourse despite his or her awareness of the victim's pertinent degree of mental impairment.

Unlike these situations involving either expressed nonconsent or affirmative consent tainted by mental disability, Section 213.1(1)(c)(iii) addresses the distinctly more serious situation in which the actor knows (or recklessly disregards the risk) that the victim is so severely impaired that he or she *cannot* express willingness or unwillingness at all. This relatively rare degree of impairment is comparable to that of the unconscious or physically paralyzed victim, and as in those situations, the actor exhibits a particularly aberrant and egregious form of misconduct in choosing to intrude sexually upon another party despite his or her awareness that the other party cannot conceivably engage as a willing partner. The circumstances are sufficiently extreme, and sufficiently distinguishable from those addressed by Section 213.2, to warrant treating the actor's behavior as equivalent in seriousness to forcible rape.

4. Purposely induced intoxication – Section 213.1(1)(c)(iv).

Section 213.1(1)(c)(iv) penalizes the use of alcohol or other intoxicants for the purpose of surreptitiously impairing another person, in order to engage in sexual activity without the other party's consent. Although the actual frequency of such incidents is unknown, furtive administration of alcohol and certain other intoxicants—most notably GHB and Rohypnol (commonly called “roofies”)—as a means of sexual exploitation occurs sufficiently often that a special provision is warranted. Language applicable to such cases was included in the 1962 Code (Section 213.1(1)(b)), and such provisions find common expression in current law;¹¹⁴ statutory schemes typically either cover such behavior under their “mental incapacitation” provisions,¹¹⁵ or else set out a separate offense.¹¹⁶

¹¹⁴ Twenty-four states, Washington D.C., and the federal system all have provisions expressly addressing purposeful intoxication. See ARIZ. REV. STAT. ANN. § 13-1406 (2011); COLO. REV. STAT. ANN. §§ 18-3-402, 404 (WEST 2011); DEL. CODE ANN. TIT. 11, § 761 (2011); D.C. CODE §§ 22-3002, 2004 (2011); FLA. STAT. ANN. § 794.011 (WEST 2011); HAW. REV. STAT. § 707-730 (2011); IDAHO CODE ANN. § 18-6108 (2011); 720 ILL. COMP. STAT. ANN. §§ 5/11-1.30, 11-1.60 (WEST 2011); IND. CODE ANN. §§ 35-42-4-1, -2, -8 (WEST 2011); IOWA CODE ANN. § 709.4 (WEST 2011); LA. REV. STAT. ANN. § 14:42.1 (2010); ME. REV. STAT. ANN. TIT. 17-A, § 253(2)(A) (2013); MASS. GEN. LAWS ANN. CH. 272, § 3 (WEST 2011); MO. ANN. STAT. §§ 566.030, 566.060 (WEST 2011); N.H. REV. STAT. ANN. § 632-A:2 (2011); N.Y. PENAL LAW § 130.90 (McKINNEY 2011); N.D. CENT. CODE § 12.1-20-03, -07 (2009); OHIO REV. CODE ANN. §§ 2907.02, 2907.05 (WEST 2011); OKLA. STAT. ANN. TIT. 21, §§ 1111, 1114 (WEST 2011); PA. CONS. STAT. ANN. 18 §§ 3121, 3123, 3125, 3126 (WEST 2011); S.C. CODE ANN. § 16-3-652 (2010); TEX. PENAL CODE ANN. §§ 22.011, 22.021 (VERNON 2011); UTAH CODE ANN. § 76-5-406 (WEST 2010); VT. STAT. ANN. TIT. 13, § 3252 (2011); WYO. STAT. ANN. § 6-2-303 (2010); 18 U.S.C. § 2241 (WEST 2011). The majority of these provisions are limited to surreptitious or nonconsensual administration of intoxicants.

¹¹⁵ See, e.g., ALA. CODE § 13A-6-60(6) (2010) (“Mentally incapacitated. Such term means that a person is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent, or to any other incapacitating act committed upon him without his consent.”); CONN. GEN. STAT. ANN. § 53A-65(5) (WEST 2011) (“‘Mentally incapacitated’ means that a person is rendered temporarily incapable of appraising or controlling such person’s conduct owing to the

1 In the 1962 Code and many contemporary statutes, the restrictive terms of such
2 prohibitions—their requirements that the intoxicants be (1) administered by the defendant
3 (2) without the other party's knowledge (3) for the purpose of preventing his or her resistance—
4 set the boundaries of criminality.¹¹⁷ Absent any of these three conditions, the defendant's
5 conduct, however boorish or reprehensible, is not a crime under provisions of this sort. Of
6 course, sexual assault is now recognized as prevalent in certain commonly occurring situations
7 (on college campuses and elsewhere), such as, for example, when a young adult inexperienced in
8 the effects of excessive drinking becomes a sexual target after he or she loses the ability to stand
9 steadily or even speak coherently (much less resist physically).¹¹⁸

10 Section 213.1(1)(c)(iv) retains the same three requirements—administration (directly or
11 indirectly) *by the defendant*, without the other party's *knowledge*, and *for the purpose* of
12 affecting resistance—but their function is transformed; they now serve only to aggravate the
13 severity of what in any event could be a serious offense. The prerequisite that the defendant
14 “administer” the drugs or alcohol does not require that he or she administer the intoxicants
15 personally; it is sufficient if the actor puts the drug in a place where the victim will unknowingly
16 ingest it. Sexual intercourse with an intoxicated person rendered totally unconscious or
17 physically incapable of expressing nonconsent remain governed by Section 213.1(1)(c)(ii);
18 sexual intercourse with intoxicated persons who are physically capable of expressing
19 nonconsent, but lack the necessary mental coherence to do so, is covered under Section
20 213.2(3)(a). This trio of provisions reflects current understandings regarding the dynamics of

influence of a drug or intoxicating substance administered to such person without such person's consent, or owing to any other act committed upon such person without such person's consent.”).

¹¹⁶ See, e.g., COLO. REV. STAT. ANN. § 18-3-402(4)(d) (WEST 2011) (“The actor has substantially impaired the victim's power to appraise or control the victim's conduct by employing, without the victim's consent, any drug, intoxicant, or other means for the purpose of causing submission.”); DEL CODE ANN. TIT. 11, § 761(j)(5)(2011) (“The defendant had substantially impaired the victim's power to appraise or control the victim's own conduct by administering or employing without the other person's knowledge or against the other person's will, drugs, intoxicants or other means for the purpose of preventing resistance.”).

¹¹⁷ See Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131 (2002). Many of the state statutes apply to intoxicants administered without the victim's knowledge, but do not impose the additional requirement, present in the 1962 Code, that the defendant be the agent of the surreptitious administration. E.g., MINN. STAT. ANN. § 609.341 subd. 7 (WEST 2013) (“‘Mentally incapacitated’ means that a person under the influence of alcohol, a narcotic, anesthetic, or any other substance, administered to that person without the person's agreement, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration.”); N.J. STAT. ANN. § 2C:14-1(i) (WEST 2013) (“‘Mentally incapacitated’ means that condition in which a person is rendered temporarily incapable of understanding or controlling his conduct due to the influence of a narcotic, anesthetic, intoxicant, or other substance administered to that person without his prior knowledge or consent, or due to any other act committed upon that person which rendered that person incapable of appraising or controlling his conduct.”); N.Y. PENAL LAW § 130.00(6) (McKinney 2013) (“‘Mentally incapacitated’ means that a person is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent, or to any other act committed upon him without his consent.”).

¹¹⁸ See Karen M. Kramer, *Rule By Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115 (1994). See also Sharon Cowan, *The Trouble with Drink: Intoxication, (In)capacity, and the Evaporation of Consent to Sex*, 41 AKRON L. REV. 899, 904-905 (2008) (reporting that “in student populations, up to 81% of [sexual] incidents can involve drinking on the part of the victim.”).

intoxication-fueled situations, and responds to concerns that the limited reach of the 1962 Code and similar statutes was inadequate, if not inexcusable.¹¹⁹

As a grading matter, the decision whether to classify deliberate, surreptitious administration of intoxicants at the same level of severity as forcible rape calls for a discriminating judgment. The challenge is to distinguish such situations from two others that are far more common. In the first, a person provides intoxicants to a friend and perhaps even encourages him or her to use them, hoping that they will lower the other party's sexual inhibitions but not attempting to mislead the friend about the substances being consumed. In the second, a person furtively slips an intoxicating substance into the food or drink of another party, but without the purpose of gaining sexual advantage.

Both instances fall outside the scope of Section 213.1(1)(c)(iv) but nonetheless could involve a crime of some sort. Absent further conduct that qualified under one of the other Sections in this Article, the first normally would be an offense only if the intoxicant is a controlled substance or if one of the parties is under age. The second could involve a crime even in the absence of intercourse and even when only alcohol is involved, because the actor perpetrates a bodily intrusion without the informed consent of the other party. Although furtively administering intoxicants to another person is a serious offense, doing so without the goal of gaining sexual advantage is a crime different from those addressed in Article 213. Neither of the two situations inherently involves a form of sexual abuse, and accordingly they are not proscribed under Section 213.1(1)(c)(iv). Conversely, if the circumstances lead to sexual intercourse under any of the conditions proscribed by the provisions of Article 213, then the applicable provision will appropriately come into play for the reasons set out in the pertinent Commentary to these Sections.

5. Aggravating circumstances – Section 213.1(2).

Section 213.1(2) lists four aggravating factors that elevate offenses covered in Section 213.1(1) to the penalty for a first-degree felony: (a) the use of a deadly weapon; (b) multiple offenders; (c) serious bodily injury; and (d) commercial trafficking.

The provision for use of a deadly weapon finds longstanding and universal support in current law, and requires no further explanation. The decision in (b) to aggravate rapes committed by multiple offenders merits brief discussion. The provision, which finds significant support in existing law,¹²⁰ applies to rapes by force, threat, or exploitation which include “active

¹¹⁹ E.g., STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 7-9, 273 (1998); Kramer, *supra* note 118.

¹²⁰ Specially designated provisions for multiple-offender sexual assaults can be found in the District of Columbia and 16 states. See CAL. PENAL CODE §§ 264.1, 286, 288a (West 2011); COLO. REV. STAT. ANN. § 18-3-402 (West 2011); CONN. GEN. STAT. ANN. § 53a-70 (West 2011); FLA. STAT. ANN. § 794.023 (West 2011); IOWA CODE ANN. § 709.3 (West 2011); MD. CODE ANN., CRIM. LAW §§ 3-303, 3-305(a)(2)(iv) (West 2011); MICH. COMP. LAWS ANN. §§ 750.520b, 750.520c (West 2011); MINN. STAT. ANN. § 609.342 (West 2011); N.J. STAT. ANN. § 2c:14-2 (West 2011); N.M. STAT. ANN. §§ 30-9-11, -12 (West 2010); N.C. GEN. STAT. ANN. §§ 14-27.2, -27.4 (West 2011); TENN. CODE ANN. §§ 39-13-502, -504 (West 2011); TEX. PENAL CODE ANN. § 22.021 (Vernon 2011); UTAH CODE ANN. § 76-5-405 (West 2010); VT. STAT. ANN. Tit. 13, § 3253 (2011); WIS. STAT. ANN. § 940.225 (West 2011); D.C. CODE § 22-3020 (2011). Most simply define culpability in terms of conventional accomplice laws. Other formulations include application to instances in which “more than one person committed an act of

1 participation or assistance of one or more other persons who are present at the time of the act of
2 sexual intercourse.” By requiring both “active participation or assistance” and presence, this
3 language distinguishes between remote and immediate complicity. The classically covered
4 situation involves a “gang rape” in which multiple actors engage in sexual intercourse. Also
5 covered are scenarios in which the actor engages in sexual intercourse while other participants
6 restrain the complainant or serve as guards or intermediaries preventing interruption of the
7 attack. Thus, “presence” is not limited to physical presence in the same room as the assault, but
8 should be read to include, for instance, presence outside the door in the form of “standing
9 guard.”

10 The multiple-offender provision is *not* intended to cover all rapes in which an actor has
11 accomplices, however. Although punishable under conventional accomplice law, attacks
12 involving an aider and abettor who is not an active participant or present at the time of the attack
13 should not receive the aggravated penalty because the justification for the aggravated penalty
14 stems in part from the heightened threat posed by the presence of multiple aggressive actors.
15 Such an attack inherently communicates the futility and dangerousness of resistance. The other
16 rationale for enhancing the penalty when multiple actors are directly involved is the aggravated
17 harm to the victim. All rape is frightening and dehumanizing, but these characteristics are
18 particularly acute and the risk of injury is greater when multiple assailants act in concert.

19 Section 213.1(2)(c) applies to attacks resulting in serious bodily injury. Serious bodily
20 injury, like the use of a deadly weapon, is an aggravating circumstance that finds longstanding
21 and universal support in the law. Section 213.1(2)(c) does not treat pregnancy as a “serious
22 bodily injury,” however. Although pregnancy arguably does (to track the definitional language of
23 Section 210.0(3)) cause the “protracted impairment of the function of [a] bodily member or
24 organ,” pregnancy, unlike the other injuries that fall within the scope of Section 210.0(3), is
25 typically neither life-threatening nor an intended consequence of the assault. Moreover, the
26 increasing availability of emergency contraception somewhat diminishes the difficult medical
27 and moral choices that may attend unwanted pregnancies. Regardless, sanctions at the level of a
28 first-degree felony ought to be available only in cases of exceptional violence or other especially
29 egregious misconduct, and the fact of pregnancy does not, by itself, signal an offense of this
30 character. Absent other aggravating circumstances, the sanctions applicable to felonies of the
31 second degree will afford ample scope for deserved punishment. Although the question is not
32 free from difficulty, Section 213.1(2)(c), in accord with generally prevailing law,¹²¹ does not
33 treat pregnancy as a consequence sufficient by itself to place the offense in the most aggravated
34 category for grading purposes.

35 Section 213.1(2)(d) addresses the situation in which an actor violates Section 213.1(1) in
36 a commercial context. Violations of Section 213.1(1) are appropriately treated as felonies of the
37 second degree even in the absence of a commercial dimension. When the same circumstances
38 arise in connection with commercial sex trafficking, however, the offense is unquestionably

sexual battery on the same victim,” FLA. STAT. ANN. § 794.023(2); see also TEX. PENAL CODE ANN. § 39-13-504 (WEST 2011), or in which “two or more other persons [are] actually present,” CONN. GEN. STAT. ANN. § 53A-70.

¹²¹ Six states’ statutory schemes explicitly recognize pregnancy as a bodily harm or form of personal injury. See 720 ILL. COMP. STAT. ANN. 5/11-0.1, 5/11-1.30, 5/11-1.60 (WEST 2011); MICH. COMP. LAWS ANN. §§ 750.520A, 750.520B, 750.520C (WEST 2011); MINN. STAT. ANN. §§ 609.341, 609.342 (WEST 2011); NEB. REV. STAT. §§ 28-318, 28-319, 28-320 (2010); N.M. STAT. ANN. §§ 30-9-10, 30-9-11, 30-9-12 (WEST 2010); WIS. STAT. ANN. § 940.225 (WEST 2011).

more serious, and a penalty enhancement is appropriate. For similar reasons, Section 213.2 provides that the offenses of Sexual Intercourse by Coercion and Sexual Intercourse by Imposition, normally felonies of the third degree, are raised to felonies of the second degree when they occur in a commercial context. See Sections 213.2(2) and 213.2(4).

C. SECTION 213.2. SEXUAL INTERCOURSE BY COERCION OR IMPOSITION.

(1) An actor is guilty of sexual intercourse by coercion, a felony of the third degree, if he or she:

(a) knowingly or recklessly has, or enables another person to have, sexual intercourse with a person who at the time of the act of sexual intercourse:

(i) has by words or conduct expressly indicated nonconsent to such act of sexual intercourse; or

(ii) is undressed or is in the process of undressing for the purpose of receiving nonsexual professional services from the actor, and has not given consent to sexual activity; or

(b) obtains the other person's consent by threatening to:

(i) accuse anyone of a criminal offense or of a failure to comply with immigration regulations; or

(ii) expose any information tending to impair the credit or business repute of any person; or

(iii) take or withhold action in an official capacity, whether public or private, or cause another person to take or withhold action in an official capacity, whether public or private; or

(iv) inflict any substantial economic or financial harm that would not benefit the actor; or

(c) knows or recklessly disregards the risk that the other person:

(i) is less than 18 years old and the actor is a parent, foster parent, guardian, teacher, educational or religious counselor, school administrator, extracurricular instructor, or coach of such person; or

(ii) is on probation or parole and that the actor holds any position of authority or supervision with respect to such person's probation or parole; or

(iii) is detained in a hospital, prison, or other custodial institution, and that the actor holds any position of authority at such facility.

(2) An actor is guilty of aggravated sexual intercourse by coercion, a felony of the second degree, if he or she violates subsection (1)(b) or (1)(c) of this Section and in doing so causes a person to engage in a commercial sex act involving sexual intercourse.

(3) An actor is guilty of sexual intercourse by imposition, a felony of the third degree, if he or she knowingly or recklessly has, or enables another person to have, sexual intercourse with a person who, at the time of the act of sexual intercourse:

(a) lacks the capacity to express nonconsent to such act of sexual intercourse, because of intoxication, whether voluntary or involuntary, and regardless of the identity of the person who administered such intoxicants; or

(b) is less than 16 years old and the actor is more than four years older than such person; or

(c) is mentally disabled, developmentally disabled, or mentally incapacitated, whether temporarily or permanently, to the extent that such person is incapable of understanding the physiological nature of sexual intercourse, its potential for causing pregnancy, or its potential for transmitting disease; or

(d) is mentally or developmentally disabled to the extent that such person's social or intellectual capacities are no greater than that of a person who is less than 12 years old.

(4) An actor is guilty of aggravated sexual intercourse by imposition, a felony of the second degree, if he or she violates subsection (3) of this Section and in doing so causes a person to engage in a commercial sex act involving sexual intercourse.

Comment:

1. Nonconsent – Section 213.2(1)(a)(i)

Section 213.2(1)(a)(i) sets out a third-degree felony for sexual intercourse with a partner who has expressly indicated an unwillingness to consent. This position is in keeping with current law in approximately half of the states, though it is more precise than the formulations to be found in many of them. At present 17 states provide a felony punishment for sexual intercourse on the basis of lack of consent alone, without requiring added showings of coercion, force, deception, or other special situations and without defining “nonconsent” in such a way as to require force or high levels of resistance.¹²² Of those, six are states that define consent as positive cooperation: Vermont, Wisconsin, Florida, Hawaii, Iowa, and New Jersey. One, Maine, defines consent as express or implied acquiescence.¹²³ Ten define nonconsent as some expression of unwillingness or resistance: Arizona,¹²⁴ Missouri,¹²⁵ Mississippi,¹²⁶ Nebraska,¹²⁷ New

¹²² These qualifiers are necessary because there are some states that appear facially to punish sexual intercourse based on nonconsent alone, but closer examination reveals that lack of consent is defined as force or deception. See, e.g., Decker & Baroni, *supra* note 66, at 1085 (labeling as “contradictory states” those states in which “it may appear as though the element of a sex offense statute are met when a victim did not affirmatively consent,” but law requires that “the prosecution must show either the use of forcible compulsion or a victim’s incapacity”).

¹²³ ME. REV. STAT. ANN. TIT. 17-A, § 255-A(1)(B).

¹²⁴ Arizona lists a class five felony for “knowingly” engaging in sexual contact without consent, but the statute defines “without consent” in ways that look like it is limited to situations involving traditional coercion, deception, or incapacity, ARIZ. REV. STAT. ANN. § 13-1401(5). However, case law indicates that the statute prescribes an illustrative not exhaustive list, and so “without consent” can be construed as it would in ordinary usage, see *State v. Stoeckel*, 2012 WL 1248615 (Ariz. Ct. App. Apr. 11, 2012). These two features suggest that some indication of nonconsent is required for conviction, a reading bolstered by judicial recognition that the state has the burden of proving that the defendant knew that the conduct was without consent, *State v. Kemper*, 271 P.3d 484, 485-486 (Ariz. Ct. App. 2011).

- 1 Hampshire,¹²⁸ New York,¹²⁹ Pennsylvania,¹³⁰ Tennessee,¹³¹ Utah,¹³² and Washington.¹³³ An
 2 additional nine states punish nonconsensual sexual intercourse as a misdemeanor,¹³⁴ five of those
 3 states define nonconsent as the absence of positive cooperation.¹³⁵

¹²⁵ Missouri has a felony statute penalizing sexual intercourse when the defendant knows it is without consent. MO. ANN. STAT. § 566.040. The code's definitional section provides that "consent or lack of consent may be express or implied" and that consent is not freely given in situations of force or incapacity. MO. ANN. STAT. § 556.061. But case law suggests broader criminal liability. For instance, in one case, the court upheld a conviction for nonconsensual sexual assault in a case where an adult woman voluntarily met her longstanding abusive father for intercourse. *State v. Naasz*, 142 S.W.3d 869 (Mo. Ct. App. 2004).

¹²⁶ Mississippi has a felony statute that criminalizes sex "without . . . consent," MISS. CODE ANN. § 97-3-95(1)(a), but there is no statutory definition of consent. Case law indicates that force, violence, and resistance may be relevant to a showing of non-consent, but are not essential. *Sanders v. State*, 586 So. 2d 792, 796 (Miss. 1991) ("[Appellant] argues that force or violence are elements that a jury could consider in determining whether the victim consented to the act. Undoubtedly the latter is true but that doesn't mean that force or reasonable apprehension of force are necessary elements of the crime.").

¹²⁷ Nebraska's statute defines "without consent" to include "express[ing] lack of consent through words . . . or conduct" and requires that the victim "make known to the actor the victim's refusal to consent." NEB. REV. STAT. § 28-318(8). It then defines a felony offense for penetration without consent. NEB. REV. STAT. § 28-319(1).

¹²⁸ New Hampshire defines a felony for sexual penetration "when 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." N.H. REV. STAT. ANN. § 632-A:2(I)(m). Case law clarifies that a victim must objectively communicate lack of consent, but affords no defense if the defendant "subjectively fails to receive the message." *State v. Ayer*, 136 N.H. 191, 196 (1992).

¹²⁹ New York defines a felony of rape in the third degree for sexual intercourse without another's consent, "where such consent is by reason of some factor other than incapacity to consent." N.Y. PENAL LAW § 130.25(3); see also *id.* § 130.40 (similar language in context of oral or anal sexual acts). For purposes of these felony provisions, nonconsent requires that "the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such an act under all the circumstances." N.Y. PENAL LAW § 130.05(2)(d).

¹³⁰ Pennsylvania defines a second-degree felony for sexual intercourse "without the complainant's consent." PA. CONS. STAT. ANN. 18 § 3124. However, no statutory definition of consent is given. Case law places the burden of proving lack of consent on the government, but clarifies that there is no formal resistance requirement. *Commonwealth v. Prince*, 719 A.2d 1086 (Pa. Super. Ct. 1998) (upholding conviction where complainant's resistance was primarily verbal).

¹³¹ Tennessee defines a felony offense for "penetration accomplished without the consent of the victim [when] the defendant knows or has reason to know at the time. . ." TENN. CODE ANN. § 39-13-503(a)(2). Consent is undefined, but the statute and case law suggest that the complainant must communicate unwillingness.

¹³² UTAH CODE ANN. § 76-5-402(1) (West 2010) ("A person commits rape when the actor has sexual intercourse with another person without the victim's consent"); UTAH CODE ANN. § 76-5-406(1) (WEST 2010) (defining "without consent" for purposes of that provision as "the victim expresses lack of consent through words or conduct.").

¹³³ Washington's statute defines consent as "actual words or conduct indicating freely given agreement." WASH. REV. CODE ANN. § 9A.44.010(7). But the only substantive offense with a consent-only element proscribes as a felony intercourse where "the victim did not consent . . . and such lack of consent was clearly expressed by the victim's words or conduct." WASH. REV. CODE ANN. § 9A.44.060. This latter language suggests that, although the consent provision appears to require affirmative consent, the substantive provision requires an additional expression of unwillingness.

¹³⁴ Those jurisdictions are Colorado, Connecticut, D.C., Georgia, Kentucky, Minnesota, New Mexico, New York, Oregon, and South Dakota. See COLO. REV. STAT. ANN. § 18-3-404(1)(A); CONN. GEN. STAT. ANN. § 53A-

1 The approach followed in these jurisdictions and endorsed in Section 213.2 is consistent
2 with the trend to recognize sexual assault as an infringement on personal autonomy, rather than
3 solely the product of unjustified force or coercion. A person who seeks sexual intimacy with
4 another should heed that person's expressed preferences to engage in, refuse, or desist from
5 specific acts. Permitting persistence in the face of verbal or behavioral indicia of unwillingness
6 unjustly privileges the desires of the aggressor over those of his or her partner. Even in the
7 absence of force or coercion, there is no reason to assume that a verbal refusal alone should not
8 suffice to communicate rejection, and the law should encourage potential partners to take such
9 refusals seriously.

10 Section 213.0(4), defines nonconsent to include refusals in the form of either words or
11 conduct and specifically provides that "a verbally expressed refusal establishes nonconsent in the
12 absence of subsequent words or actions indicating positive agreement." There is widespread
13 acceptance within both American law and American culture for this position. Nonetheless, this
14 central tenet of the rape-reform movement—that "'no' means no"—has by no means won
15 universal approval. The contrary view continues to find support in contemporary statutes¹³⁶ and
16 case law.¹³⁷ Moreover, the scholarly literature includes thoughtful contemporary argument to the
17 effect that, in actual social behavior, "no" *does not* always mean no¹³⁸ and that the law risks
18 injustice if, for example, it punishes a man who acts on the basis of this more traditional
19 convention, a convention that remains common among a significant number of both men and
20 women.¹³⁹

21 Section 213.2(1)(a)(i), together with Section 213.0(4), nonetheless adopts a *per se* rule to
22 the effect that, as far as the criminal law is concerned, a verbal refusal without more always
23 establishes unwillingness. That judgment does not deny the ambiguities inherent in sexual
24 interaction and verbal communication. As a purely empirical matter, the word "no" can reflect
25 and convey a variety of attitudes. The very fact of that ambiguity, however, insures that error
26 will be inherent in *any* rule for assessing unwillingness for legal purposes. And as one team of

73A(A)(2); D.C. CODE § 22-3006; GA. CODE ANN. § 16-6-22.1(B); KY. REV. STAT. ANN. § 510.130(1) AND 510.140(1); MINN. STAT. ANN. § 609.3451(1); N.M. STAT. ANN. § 30-9-12; N.Y. PENAL LAW §§ 130.020, 130.55, 130.60; OR. REV. STAT. ANN. § 163.415; S.D. CODIFIED LAWS § 22-22-7.4.

¹³⁵ Those jurisdictions are Colorado, D.C., Kentucky, Minnesota, and New York. COLO. REV. STAT. ANN. § 18-3-401(1.5); D.C. CODE § 22-3001(4); KY. REV. STAT. ANN. § 510.020(2)(c); MINN. STAT. ANN. § 609.341(SUBD. 4); N.Y. PENAL LAW § 130.05(c). For purposes of the misdemeanor nonconsensual offenses cited in the previous footnote, New York defines nonconsent as any case in which "the victim does not expressly or impliedly acquiesce in the actor's conduct." N.Y. PENAL LAW § 130.05(2)(c).

¹³⁶ E.g., N.Y. PENAL LAW § 130.05(2)(d) (defining lack of consent to require that "the victim clearly expressed that he or she did not consent . . . and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances.") (emphasis added).

¹³⁷ E.g., *State v. Gangahar*, 609 N.W.2d 690, 695 (Neb. App. 2000) (holding that "while [the victim] said 'no,' the statute allows Gangahar to argue that given all of her actions or inaction, 'no' did not really mean no.").

¹³⁸ E.g., George C. Thomas III & David Edelman, Consent to Have Sex: Empirical Evidence About "No," 61 U. PITT. L. REV. 579 (2000).

¹³⁹ E.g., Douglas N. Husak & George C. Thomas III, Date Rape, Social Convention and Reasonable Mistakes, 11 LAW & PHIL. 95, 125 (1992).

1 researchers reported, the ambiguity itself can teach men to disregard women's verbal refusals
2 and thereby increase the incidence of sexual overreaching.¹⁴⁰

3 The law must choose, from among empirically imperfect standards, the one best able to
4 guide behavior and minimize the cost of inevitable over- or under-inclusiveness. The decisive
5 point is that, whatever may be the statistical frequency of verbal refusals that really do mean
6 "no," the harm resulting when an actor disregards a "no" that was intended literally is
7 incomparably greater than the harm resulting when an actor honors a "no" that was not meant
8 literally. In the first case, one of the parties suffers an unwanted sexual intrusion, while in the
9 second case, the principal harm is simply that mutually desired intimacy must be postponed
10 pending clarification of the parties' wishes. Section 213.2(1)(a)(i) requires all parties to seek
11 express clarification rather than run the risk of erroneously interpreting another person's
12 intentions in a matter of such importance.

13 The remaining concern, of course, is that the legitimate end of encouraging this
14 behavioral norm should not suffice to justify imposing felony sanctions on individuals who lack
15 personal culpability.¹⁴¹ Nonetheless, once the penal code endorses this norm as an important
16 social-protection safeguard, culpability is inherent in any knowing or reckless violation of it, just
17 as culpability is inherent in the conscious disregard of any other criminal-law standard that seeks
18 to minimize risky behavior. If an individual knowingly commits an act of dangerous driving
19 resulting in death, no one doubts that substantial sanctions should be available. The judgment
20 treating failure to heed a verbal "no" as dangerous misconduct calling for condemnation and
21 serious punishment stands on the same footing.

22 The greatest challenge with a standard of this kind is, to be sure, that early superficial
23 rejections to sexual advances persist as common behavior in consensual relationships, often
24 followed by positive conduct—rather than verbal agreements—that convey genuine accession to
25 sexual entreaties. In such cases, the factfinder will have to resolve whether the conduct indicated
26 a reversal of a prior expression of nonconsent, or whether it simply signaled defeat. Sexual
27 intimacy, whether consensual or nonconsensual, is often a product of evolving dynamics, and
28 thus several scenarios can be imagined. Where a complainant's expression of nonconsent is met
29 by the accused resorting explicitly to physical force, restraint, or threats thereof to secure
30 compliance, such cases will be properly handled under Section 213.1(1). Section 213.1(1) also
31 would apply in cases where a complainant's expressions of nonconsent are met by increased
32 aggression on the part of the accused which could serve to emphasize the complainant's
33 vulnerability, in a manner that transmits an implied threat of force, bodily injury, or restraint.

34 In many cases, the *absence* of express or implied force by the accused in response to a
35 complainant's initial expression of nonconsent will raise factual disputes concerning the

¹⁴⁰ Charlene L. Muelenhard & Lisa C. Hollabaugh, Do Women Sometimes Say No When They Mean Yes?,
54 J. PERSONALITY & SOC. PSYCH. 872 (1988).

¹⁴¹ Husak & Thomas, *supra* note 139, at 125 ("[O]ne might believe that it is more important to seek to
change the social convention . . . than to do justice in an individual case. But if one believes that the criminal law
should seek to apply the just result in particular cases, men whose belief in consent is consistent with the [existing]
social convention seem unlikely candidates for convictions of a serious felony.").

1 interpretation of subsequent conduct.¹⁴² If a jury views nothing in that conduct to constitute the
2 complainant's retraction from the initial expression of nonconsent, then it may properly convict
3 under this Section. If, on the other hand, a jury finds that the ensuing dynamics suggested a
4 possible reversal from an earlier expression of nonconsent, then two possibilities arise. The first
5 is that an accused might still be convicted under section 213.4, for sexual intercourse in the
6 absence of consent, because the jury finds that although the complainant did not quite say "no,"
7 the accused was at least recklessly aware that the complainant did not say "yes," either. A second
8 possibility of course, is that the accused is acquitted of all charges, a result that would be
9 appropriate only when words or actions subsequent to the earlier expression of nonconsent is
10 sufficiently clear to satisfy the requirements of an expression of actual consent.

11 State v. Bauer offers an example.¹⁴³ The complainant rented a farmhouse from the
12 defendant's parents, and had encountered the defendant casually on a number of social occasions
13 and when he came to make repairs. One night she left her children with a sitter and went out,
14 returning around midnight and falling asleep on the couch. At two in the morning the defendant
15 awakened her with a kiss on the lips; in the darkness, she did not know who he was. When she
16 asked, the defendant responded, "It is me. Who did you think it was?" but the complainant
17 testified that she still did not recognize the voice.

18 The defendant then claimed that at that point they engaged in kissing and conversation
19 that eventually led to consensual sex. The complainant denied any further communication and
20 said that the defendant removed his pants, climbed on top of her, and started to remove her
21 clothes. Apart from saying "don't," the complainant conceded no additional verbal or physical
22 protest, noting that she feared for her safety in light of the home's remote location. The
23 defendant engaged in two acts of sexual intercourse, and at one point the complainant "actively
24 assisted him when he was having difficulty achieving penetration." Later, having asked
25 permission to get a cigarette and get dressed, she recognized the defendant by a light from the
26 kitchen. Assured that he was asleep, she fled to a friend's house.

27 The jury convicted the defendant of committing a sexual assault "by force or against the
28 will of the other participant." Finding that this provision embodied no resistance requirement, the
29 court affirmed the conviction. The court acknowledged that "[i]t is true defendant did not
30 threaten complainant and used no force except that which is necessary for the act of sexual
31 intercourse itself." However, it found that "the jury could—and obviously did—believe the
32 complainant when she testified to fear which rendered her incapable of protest or resistance. That
33 is all our statute demands."¹⁴⁴

34 Under Section 213.2(1)(a)(i), a jury could likewise find the defendant in *Bauer* guilty, but
35 could do so simply on the basis of the complainant's expression of nonconsent, without needing
36 to make any additional finding that the lack of further protest was due to fear. Indeed, if a jury
37 did find such fear, and also found that the defendant was aware of a risk that his conduct
38 threatened physical force, bodily injury, or restraint, then a more severe punishment under

¹⁴² For discussion of the risks of factual error and the potential inability of juries to resolve issues of this kind in the absence of evidence of physical force, see David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 376-387 (2000).

¹⁴³ 324 N.W.2d 320 (Iowa 1982).

¹⁴⁴ *Id.* at 322.

1 Section 213.1(1)(a) would be appropriate. Conversely, had a jury believed the defendant's
 2 account of conversation and kissing, and viewed the assistance during intercourse as further
 3 indicative of affirmative consent, then the defendant could be acquitted. Finally, had the
 4 complainant never rejected defendant at all, and the jury did not believe that the atmosphere rose
 5 to a level of implied threat, then the defendant could nonetheless be convicted of Section 213.4
 6 for engaging in sexual intercourse in the absence of expressed consent. Unlike many American
 7 statutes that would require an all-or-nothing verdict in a case like *Bauer* (either guilty of
 8 compelling intercourse "by force" or not guilty at all), Sections 213.1, 213.2, 213.3, and 213.4
 9 permit a nuanced judgment that sorts criminal behavior into well-defined grading categories,
 10 without insisting upon behaviorally artificial distinctions. To be sure, the decisive factual
 11 findings will often be sensitive and contested, but such is the case in many criminal matters;
 12 indeed in connection with many instances of alleged sexual abuse, this problem will be
 13 unavoidable, no matter how the offenses are defined.

14 A review of extant case law suggests that few cases currently are prosecuted on the basis
 15 of nonconsent alone (in the absence of implied or explicit threats of force). Empirical evidence as
 16 to why this is the case is lacking, but one explanation may be the lack of appropriately graded
 17 penalties that reflect degrees of culpability. It may also be that jurors resist, both as a matter of
 18 personal morality and in light of the high standard of proof in criminal cases, convicting
 19 defendants in situations where they consider the evidence of unwillingness ambiguous. Whatever
 20 the explanation, a legal obligation to respect expressions of nonconsent, on pain of criminal
 21 sanctions, is entirely appropriate in the context of sexual intimacy, even in the absence of other
 22 coercive circumstances.

23 *2. Professional services involving disrobing – Section 213.2(1)(a)(ii).*

24 Section 213.2(1)(a)(ii) imposes a burden to seek affirmative consent upon an actor who
 25 initiates sexual intercourse in a context in which the actor is providing professional services that
 26 require the other person to undress. By "professional," this subsection does not intend to hew
 27 formalistically to any requirement of licensing or certification, but simply provides a distinction
 28 between commercial or other formalized exchanges and social or intimate encounters.

29 Although written to cover any situation in which a person seeks services that require
 30 disrobing, this Section responds particularly to a surprisingly recurrent pattern in which massage
 31 therapists or masseurs take advantage of unclothed customers to perpetrate acts of sexual
 32 intercourse.¹⁴⁵ For instance, in *State v. Stevens*,¹⁴⁶ the defendant was convicted of assaulting six
 33 separate clients of his massage business. In each case, the defendant would begin the massage
 34 but then at some point penetrate the complainants. The complainants, in turn, would be enjoying
 35 the massage when they suddenly became aware of the penetration: one fell asleep and awoke to
 36 the sensation; one remained silent until the massage ended and she felt she could leave safely;
 37 and four others were in relaxed states until the assault occurred and momentarily "froze,"
 38 eventually vocalizing opposition that caused the defendant to desist.¹⁴⁷

¹⁴⁵ See, e.g., *Wright v. State*, 294 P.3d 1201 (Kan. App. 2013); *State v. Harrison*, 286 P.3d 1272 (Utah App. 2012); *State v. Cardell*, 970 P.2d 10 (Idaho 1998); *State v. Taylor*, 231 P.3d 79 (Mont. 2010).

¹⁴⁶ 53 P.3d 356 (Mont. 2002).

¹⁴⁷ *Id.* at 359-361.

1 Interpreting a state statute that required evidence that the complainant is “compelled to
2 submit by force,” or “incapable for consent because . . . physically helpless,”¹⁴⁸ the court
3 struggled to apply the law to each factual scenario. It affirmed the conviction related to the
4 sleeping complainant, finding sleep a condition of “physical[] helpless[ness].”¹⁴⁹ However, the
5 court overturned the convictions as to two other “frozen” complainants, noting that while they
6 each “were in a relaxed or dream state during their massages, there is simply no credible
7 evidence in the record demonstrating that they were unconscious or otherwise physically unable
8 to communicate unwillingness to act.”¹⁵⁰ The court did, however, enter convictions on a lesser
9 charge of sexual contact knowingly without consent, rejecting the defendant’s claim to have
10 misread the signals in a manner analogous to a “dating situation,” remarking that “[a]nalogizing
11 a professional massage by a licensed massage therapist with dating is ludicrous.”¹⁵¹

12 Under the proposed revision of Article 213, the defendant’s conduct would likewise
13 readily be captured by Section 213.4, which proscribes sexual intercourse in the absence of
14 consent. However, the low level of that penalty reflects ongoing cultural conflict about the extent
15 to which an actor in a “dating situation” is appropriately required to secure affirmative
16 permission before engaging in sexual intimacy.

17 In contrast, when a person disrobes solely to obtain services typically considered to have
18 no sexually intimate dimension of any kind, the strong presumption should be that sexual
19 intercourse is not desired. Consumers of massage, personal grooming, medical, holistic, or other
20 services that entail nakedness are often placed in a vulnerable position in light of the nature of
21 the treatments: they are often isolated in a closed room, reclined, unclothed, and without quick
22 access to shoes or their personal belongings in the event of a need for flight, and possibly even
23 lulled into deep rest or meditation. Consistent with the services sought, the actor may also be
24 tasked with applying physical pressure or using other immobilizing tools that are innocuous in
25 the context of the delivery of the service but which have the potential to underscore the physical
26 vulnerability of the customer. Initiating sexual intimacy in such an environment can easily create
27 an implied atmosphere of force or threat commensurate with those punished by Section
28 213.1(1)(a).¹⁵²

29 For that reason, Section 213.1(1)(a), which includes implied threats of force or restraint,
30 may in many cases be properly interpreted to cover these kinds of situations. But Section
31 213.2(1)(a)(ii) provides clarity by making explicit the appropriate presumption that sexual
32 intimacy was unwanted. A dedicated subsection streamlines the need for possibly vexing factual
33 findings about implied force and reduces the inquiry into one concerning whether the
34 complainant’s physical vulnerability was solely the consequence of having sought nonsexual
35 professional services from the actor. Actors who initiate sexual intimacy in such circumstances
36 should not benefit from reduced penalties simply because they cease the intrusion upon being
37 told to stop. Rather, the provider of such services should presume such advances are unwelcome;

¹⁴⁸ Id. at 361 (quoting MONT. CODE ANN. § 45-5-501).

¹⁴⁹ Id. at 363.

¹⁵⁰ Id. at 364. The court also found that there was no evidence of force, especially since the defendant stopped once the complainants objected. Id.

¹⁵¹ Id. at 365.

¹⁵² See, e.g., *Ritter v. State*, 97 P.3d 73 (Alaska Ct. App. 2004).

a provider who believes that the customer would welcome such advances is properly expected to take positive steps to elicit affirmative consent before engaging in any sexual intimacy.

3. *Tainted consent* – Sections 213.2(1)(b), (c) and 213.2(3).

Sections 213.2(1)(b), (c) and 213.2(3) provide that affirmatively expressed consent is ineffective if such consent has not been given freely or the person giving content is not competent to consent. The statement of that principle merely makes explicit the obvious and abstractly stated; it works no change in existing law. However, many jurisdictions that punish sexual intercourse in the absence of affirmative consent do not define the crucial concepts used to determine whether the party concerned has consented *freely* and is *competent* to do so.¹⁵³ Sections 213.2(1)(b), (c) and 213.2(3) address those two issues respectively.

4. *Coerced consent* – Section 213.2(1)(b) and (c)

Section 213.2(1)(b) and (c) outline three general categories for which affirmative consent is deemed not freely given—(a) when the actor obtains consent by deploying nonviolent threats; (b) when the person consenting is a minor with a certain status relationship to the actor; and (c) when the person consenting is subject to custodial confinement, probation, or parole and the actor holds a position of authority in the circumstances.

a. Nonviolent threats – Section 213.2(1)(b). Subsection (b) addresses four contexts in which an actor procures affirmative consent through nonviolent but impermissible means.

American law has long since moved beyond the early 20th-century view that physical harm and threats of violence were the only impermissible means by which to secure submission to a sexual demand. For reasons already discussed, rape is now understood as a violation of sexual autonomy. A sexual intrusion upon another person constitutes socially intolerable misconduct, even in the absence of violence, when consent to that intrusion has been coerced by impermissible pressures or threats.

The move to proscribe nonphysical coercion is no longer contestable, but the challenge for law has been to identify in a clear, predictable manner the pressures, proposals, and inducements that will be deemed impermissibly coercive. The range of potentially troublesome incentives and threats used to induce sexual submission is almost impossibly broad and varied: a police officer's threat to arrest or offer *not to make* a justifiable arrest; a job supervisor's intention to fire an employee, block a promotion, or expedite an *undeserved* promotion; a threat to expose another person's adultery, embezzlement, irregular immigration status, or sexual orientation; a wealthy person's threat to stop supporting a paramour; a person's threat to break off a dating relationship—the list is endless, and the criteria for distinguishing between legitimate exchange and impermissible compulsion are by no means uniformly agreed upon or even understood.

As already detailed, prevalent statutory formulas use a variety of terms to identify the boundaries of unacceptable coercion. Some of these, such as threats to accuse the victim of a crime¹⁵⁴ or to “expose a secret . . . tending to subject any person to hatred, contempt or ridicule”¹⁵⁵ have relatively clear content. Others are more elastic or, at best, undefined—for

¹⁵³ See, e.g., State in the Interest of M.T.S., 129 N.J. 422, 609 A.2d 1266 (1992).

¹⁵⁴ See, e.g., DEL CODE ANN. Tit. 11, § 774.

¹⁵⁵ IDAHO CODE ANN. § 18-6101(8) (WEST 2011).

1 example, threats of “intimidation”¹⁵⁶ or “public humiliation.”¹⁵⁷ A threat that “places a person in
2 fear of . . . financial loss”¹⁵⁸ could extend to anything from the freezing of one’s bank account to
3 the mere prospect of losing out in the effort to win a lucrative business contract.

4 Many of these terms, moreover, receive scant clarification from statutory elaboration or
5 case law. Many states require, as a matter of statute or case law, that consent must be “voluntary”
6 or “freely given,” without providing any criteria to determine which circumstances are sufficient
7 to impair voluntariness or freedom of choice.¹⁵⁹ Somewhat more helpfully, the New Hampshire
8 statute provides that impermissible coercion includes threats to “retaliate” against the victim.¹⁶⁰
9 Yet consider the application of this standard to threats to fire an employee, not hire an employee,
10 accuse someone of a crime, break off a dating relationship, evict a tenant, or close the door on a
11 potential business deal. Does the term “retaliate,” not further defined, apply to all of these, or
12 only to some? And if the latter, which ones?

13 The California statute deploys a similar concept—invoking the term “duress” rather than
14 “retaliation”—but defines duress to include “a direct or implied threat of . . . retribution
15 sufficient to coerce a reasonable person of ordinary susceptibilities to acquiesce”¹⁶¹ This
16 formula provides the beginnings of a metric of assessment, but still its contours remain vague.
17 When or under what circumstances would a “person of ordinary susceptibilities” submit to
18 unwanted sex rather than ignore a threat to be ticketed for speeding, arrested for drunk driving,
19 accused of cheating on an exam, fired from a job, not hired for a job, evicted from an apartment,
20 or not offered an apartment? The California statute seems to permit a jury to answer either way
21 in almost any of these cases—a possibility scarcely compatible with the concept of “law.”

22 The 1962 Model Code sharpened the focus to some degree in its offense of Gross Sexual
23 Imposition, which imposed punishment when an actor “compels [the victim] to submit by any
24 threat that would prevent resistance by a woman of ordinary resolution.”¹⁶² As the Commentary
25 makes clear, however, this approach imposes two independent limitations. Even when the
26 “prevent resistance” requirement is met, liability attaches only when “submission [results] from
27 coercion rather than bargain.”¹⁶³ Thus, the Commentary continues, “if a wealthy man were to
28 threaten to withdraw financial support from his unemployed girlfriend, it is at least arguable [that

¹⁵⁶ Decker & Baroni, *supra* note 66, at 1121 & n.265 (collecting statutes of roughly seven states) (“none of these . . . states . . . further define what constitutes ‘extortion’”). North Dakota defines coercion as imposing “fear or anxiety through intimidation, compulsion, domination, or control with the intent to compel conduct or compliance.” *Id.* at 1121 & n.268.

¹⁵⁷ *Id.* at 1121 (three states).

¹⁵⁸ HAWAII REV. STAT. ANN. § 707-700.

¹⁵⁹ E.g., M.T.S., 609 A.2d at 1277 (“[A]ny act of sexual penetration [without] freely given permission”); CAL PENAL CODE § 261.6 (“[T]he person [giving consent] must act freely and voluntarily”); Fla. Stat. § 794.011(4)(b), (5) (“‘Consent’ means intelligent, knowing, and voluntary consent and does not include coerced submission”); WIS. STAT. § 940.225(4) (“Consent . . . means . . . freely given agreement”).

¹⁶⁰ See *State v. Lovely*, 480 A.2d 847 (N.H. 1984).

¹⁶¹ CAL. PENAL CODE §§ 261(a)(2), 261(b).

¹⁶² MODEL PENAL CODE § 213.1(2)(a) (1962).

¹⁶³ MODEL PENAL CODE AND COMMENTARIES, PART II, §§ 210.0 to 213.6 (1980), § 213.1, COMMENT 4(b), AT 314 (emphasis added).

1 this] would prevent resistance by a woman of ordinary resolution.” Nonetheless, “this case is
2 excluded from liability [because it arises] as a part of a process of a bargain. He is not guilty of
3 compulsion . . . but only of offering her an unattractive choice to avoid some unwanted
4 alternative.”¹⁶⁴

5 The upshot is that the 1962 Code’s formula succeeds in broadening prior law by
6 permitting liability for some nonviolent pressures and inducements, without eliminating all prior
7 boundaries on the potential scope of criminality. But it achieves that elusive balance at three
8 substantial costs: First, at the very threshold, its formula turns on an elusive, arguably
9 indeterminate distinction between unattractive choices and impermissible threats. Next, it
10 reintroduces the old, problematic notion of resistance as the measure of *which* threats suffice to
11 establish the offense. And finally, it makes the required degree of resistance turn on a conception
12 of reasonableness (the “woman of ordinary resolution”) that invites blame-the-victim inquiries in
13 a context where the issue often will be unresolvable, culturally contingent or, at best, a matter of
14 a jury’s toss of the coin. Put another way, the 1962 Code’s formula, for all its virtues, permits
15 compelling pressures not characterized as “threats,” it permits a predatory actor to deploy
16 unequivocal threats against fragile or relatively insecure individuals, and it even allows the use
17 of blatantly impermissible threats more generally, so long as the threats are judged (by the actor
18 or perhaps by a subsequent trier of fact) as insufficient to prevent the ordinary person from
19 rejecting them.

20 We can test the merits of the 1962 Code’s approach by considering its application to a
21 1990 Montana case in which a high-school principal allegedly convinced one of his students to
22 submit to several acts of sexual intercourse by threatening to prevent her from graduating from
23 high school.¹⁶⁵ The principal’s alleged behavior was, by every measure, abusive and
24 inexcusable; any well-crafted modern statute should leave no doubt that, if proved, it constituted
25 a serious sexual offense. Yet this presumably uncontroversial result is by no means
26 straightforward or easy to reach under the 1962 Code. Because the student was over the age of
27 consent, criminal liability would attach only if the principal had “compelled her to submit by [a]
28 threat that would prevent resistance by a woman of ordinary resolution.”

29 To resolve that issue, the first inquiry would be whether the principal had made a threat.
30 On a conventional, widely accepted understanding of that concept (others, to be sure, are often
31 suggested as well¹⁶⁶), the student would face a *threat* only if the principal proposed to take away
32 some right or privilege to which she was justly entitled (as in “your money or your life”), but she
33 would merely be facing an *offer* if the principal proposed to give her some benefit to which she
34 was not entitled (as in the 1962 Commentary’s example of the case of the wealthy man’s “threat”
35 to withdraw financial support from his unemployed girlfriend). Thus as an initial matter, the
36 answer to that question seems to turn—preposterously, to be sure—on the quality of the young
37 woman’s transcript. If she had the required number of passing grades, the principal’s effort to
38 block her graduation was a threat; if she lacked a sufficient number of credits, the principal’s acts
39 could be characterized (formalistically, at least) as an offer. In the latter event it would be
40 plausible to say (in the words of the 1962 Commentary) that he, like the wealthy man threatening

¹⁶⁴ Id.

¹⁶⁵ State v. Thompson, 792 P.2d 1103 (Mont. 1990).

¹⁶⁶ For comprehensive discussion, see ALAN WERTHEIMER, COERCION 202-221 (1987).

1 to withdraw financial support, “is not guilty of compulsion . . . but only of offering her an
2 unattractive choice to avoid some unwanted alternative.”¹⁶⁷ But this entire framework of analysis
3 is surely beside the point and morally obtuse. To suggest that the criminality of the alleged
4 behavior turns on the student’s grades is bizarre in the extreme. The principal’s alleged conduct,
5 whether characterized as an offer or a threat, is equally offensive to fundamental community
6 norms.

7 The difficulties inherent in the 1962 formulation, moreover, do not stop with its
8 inappropriate threshold requirement. Even if the student is deemed to face a threat, the principal
9 still would not have violated the 1962 Code unless a jury found that the threat “would prevent
10 resistance by a woman of ordinary resolution.” One could easily support an affirmative answer
11 of course; any person of this student’s age, in her circumstances, might well feel that she had no
12 realistic choice. But that conclusion is by no means inevitable. Defense counsel surely would
13 argue that she could have sought help from her parents, complained to a guidance counselor or
14 school nurse, or even gone to the police. Counsel might add that even if the complainant was too
15 meek to seek such alternatives, a student of “ordinary resolution” would not have been. The
16 defense might even suggest that the student must, at some level, have felt a sexual attraction, or
17 she would not have acquiesced instead of seeking help. Such arguments, of course, will strike
18 many as offensive, and one might well think that a reasonable jury would find them repugnant or
19 implausible. But history and criminal-justice experience counsel against taking that outcome for
20 granted.¹⁶⁸ The important point, as on the issue of “threat,” is simply that the entire inquiry—
21 seeking to judge *the behavior of the victim*, and doing so against the standard of a person of
22 “ordinary resolution,” is utterly beside the point. If the principal secured the student’s submission
23 by means of the proposal as alleged, neither the quality of the student’s transcript nor her own
24 fortitude and resourcefulness should have any bearing on the obvious, incontestable
25 conclusion—that without any further information, the alleged facts, if true, establish an
26 unequivocal instance of criminal misconduct and victimization.

27 Shortcomings like these, moreover, are not unique to the 1962 Code. Nearly all
28 contemporary statutes proscribing nonviolent coercion require attention to similar issues.
29 Standards requiring that consent be “voluntary,” “freely given,” or not a response to
30 “intimidation” or threatened “retaliation”¹⁶⁹ might seem obviously to have been violated in the
31 case of the Montana high-school student. But such standards nonetheless turn, at least implicitly,
32 on an underlying and essentially subjective, indeterminate judgment. Presumably such standards
33 cannot be read to condemn genuine *offers*, even when they are irresistible. And such standards
34 almost inevitably invite juries to measure voluntariness or the existence of genuine intimidation
35 against some conception of how a “reasonable” but unwilling person would act.

36 One of the broadest formulas, that of the Pennsylvania code, seeks to escape limits like
37 these by defining impermissible coercion as “[c]ompulsion by use of physical, intellectual,
38 moral, emotional, or psychological force.”¹⁷⁰ But under that test, criminal sanctions could attach

¹⁶⁷ Id.

¹⁶⁸ See Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J. L. & GENDER 381, 405-406 (2005) (noting that contemporary juries continue to be guided by traditional expectations of victim resistance).

¹⁶⁹ See statutes cited at notes 78-84, *supra*.

¹⁷⁰ PA. CONS. STAT. ANN. 18 § 3101.

1 whenever intercourse results from powerful intellectual or emotional influence—for example,
 2 intense emotional appeals for intimacy or the expression of deeply moving feelings of hurt and
 3 rejection. To avoid that obviously unintended implication, the Pennsylvania Supreme Court
 4 added an important gloss, stating that the standard “requires much more than simply . . . moral,
 5 psychological or intellectual *persuasion* . . . [It] requires actual forcible *compulsion* . . . which is
 6 used to compel the victim to engage in sexual intercourse against that person’s will such that the
 7 act of sexual intercourse cannot be regarded as consensual.”¹⁷¹ Pennsylvania’s seemingly broad
 8 standard thus comes with a string of undefined, metaphysical limitations—allowing pressures to
 9 be classified as mere *persuasion* and proscribing even the more serious “forcible” pressures only
 10 when they *compel* submission, against the victim’s *will*, in a way that cannot be considered
 11 *consensual*. The 1962 Model Code’s test, for all its flaws, is considerably more concrete and
 12 precise than this standard and others now prevalent where jurisdictions have sought to move
 13 beyond the traditional physical-force requirement. And these open-ended criteria have had
 14 predictable results, generally affording an ineffective tool for prosecutions that are sorely needed
 15 while at the same time permitting occasional convictions on the basis of entirely legitimate
 16 economic and emotional give and take.¹⁷²

17 Although the problem of distinguishing between truly coercive pressures and those that
 18 are not seems intractable, we can shed light on the issue by considering the criminal law’s
 19 treatment of situations in which one party proposes an exchange involving money rather than
 20 sex. Suppose, for example, that the Montana high-school principal had demanded a payment of
 21 \$750 in return for allowing the student to graduate. Such conduct involves an unequivocal case
 22 of extortion, punishable as a serious felony under the 1962 Model Code and current law in every
 23 American jurisdiction.¹⁷³ No one would consider the student’s grades relevant or ask whether the
 24 proposed exchange (money for graduation) involved an offer rather than a threat; likewise no one
 25 would think to ask whether a reasonable person or a person of “ordinary resolution” would have
 26 sought help if the victim had simply paid up instead. The clear-cut illegitimacy of the principal’s
 27 effort to acquire the victim’s money in this way is enough in itself to justify criminal sanctions—
 28 a felony of the third degree under the 1962 Code.¹⁷⁴ There is no convincing reason to consider
 29 the case more complicated or less serious when the proposed exchange involves sex rather than
 30 property.¹⁷⁵

31 Section 213.2(1)(b) proceeds on this basis and adopts as the criteria for impermissible
 32 coercion the tests that have long been the measure of illegality in connection with monetary
 33 demands. The need to distinguish coercion from legitimate bargaining is just as fundamental in

¹⁷¹ *Commonwealth v. Rhodes*, 510 A.2d 1217, 1227 n.15 (1986) (emphasis added) (discussing standard subsequently codified at PA. CONS. STAT. ANN. 18 § 3101).

¹⁷² E.g., *Commonwealth v. Meadows*, 553 A.2d 1006, 1013 (Pa. Super. 1989) (finding forcible compulsion and upholding conviction based in part on the fact that “the victim had an adolescent crush on the Defendant” and the defendant exploited those feelings to obtain consent); *State v. Lovely*, 480 A.2d 847 (N.H. 1984) (finding a “retaliation” and upholding conviction based in part on the fact that the defendant pressured the victim to consent by threatening to stop paying the victim’s rent on the victim’s apartment).

¹⁷³ See MODEL PENAL CODE § 223.4(4) (1962).

¹⁷⁴ MODEL PENAL CODE § 223.1(2)(a) (1962).

¹⁷⁵ See ESTRICH, *supra* note 8; Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOKLYN L. REV. 39 (1998).

1 the area of monetary exchange as it is in connection with sexual interaction, and factual
2 judgments are of course inescapable. But the elements of extortion have a long-standing pedigree
3 and are given content in an extensive body of case law.¹⁷⁶ The four subsections of Section
4 213.2(1)(b) simply import into the law of the sexual offenses these well-settled, largely
5 uncontroversial criteria. This approach finds some support in existing sexual-offense
6 provisions,¹⁷⁷ but it represents a largely new direction for legislation in this area. For the reasons
7 already discussed, it is more precise and therefore both broader and narrower than the accordion-
8 like conceptions of sexual coercion that are currently prevalent in American law.

9 When considered against long-accepted definitions of extortion, the sexual-offense
10 requirements of “compulsion” and “reasonable resistance” are so anomalous that their origins
11 warrant a brief comment. It will be recalled that until recently, rape and related offenses
12 uniformly required proof of physical force. The need to extend that boundary into nonphysical
13 pressures naturally led courts and legislatures to draw on existing notions of coercion and duress
14 as the conceptual foundation for this development. And those notions—coercion and duress—
15 have (in other areas of the law) long been centered on requirements of both “threat” (rather than
16 offer) and the inability to resist or seek “reasonable” alternatives.¹⁷⁸ Thus, for example, the
17 criminal-law defense of duress turns on a two-pronged test requiring (1) a threat of unlawful
18 force (2) that “a person of reasonable firmness in his situation would have been unable to
19 resist.”¹⁷⁹ Similarly, a claim of duress or coercion sufficient to negate consent to a commercial
20 transaction requires both a threat *and* the absence of reasonable alternatives to submission.¹⁸⁰ In
21 these contexts, a wrongful threat is typically insufficient in itself to establish coercion or duress.

22 The requirement of resistance, though widely accepted in these contexts, nonetheless
23 might seem puzzling, because the party responsible for the coercive pressures has clearly put
24 himself or herself in the wrong by making a threat. Why should the threatened party, who is
25 entirely innocent, be required to prove that there were no alternatives to submission? Why do we
26 sometimes in effect blame the innocent victim for not resisting? The reason cannot be inherent in
27 the concept of coercion; rather the explanation rests on special social needs that arise in the
28 context of commercial interaction and criminal-law duress.

29 In commercial disputes, the occasions for revisiting contract terms are so common and
30 the need for fluidity so great that the law cannot permit one party to claim coercion every time
31 the other party seeks to renegotiate existing contract “rights”; the party faced with the “threat”
32 cannot be allowed to acquiesce and then refuse to be constrained by the new terms. Otherwise
33 binding settlement of good-faith disagreements would become all but impossible. When
34 reasonable alternatives are available, therefore, the law sensibly requires the party faced with a
35 renegotiation demand to either pursue those remedies or accept the new terms and be bound by

¹⁷⁶ For detailed discussion, see SCHULHOFER, *supra* note 119, at 114-167.

¹⁷⁷ See, e.g., DEL. CODE ANN. Tit. 11, § 774 (2011) (accuse of a crime, expose a secret, falsely testify, or withhold testimony); IDAHO CODE ANN. § 18-6101(8) (2011) (accuse of a criminal offense, expose a secret); N.H. REV. STAT. ANN. § 632-A:1 (2011) (defining “retaliate” as “to undertake action against the interest of the victim, including but not limited to . . . extortion . . . [or] public humiliation or disgrace”).

¹⁷⁸ See WERTHEIMER, *supra* note 169, at 172.

¹⁷⁹ MODEL PENAL CODE § 2.09(1).

¹⁸⁰ WERTHEIMER, *supra* note 169, at 172.

1 them. In the context of the criminal-law duress defense, the requirement of resistance makes
2 even more sense, because the threatened party seeks to rely on duress as an excuse for his or her
3 own criminal conduct. The two-step requirement of both threat and inability to resist reflects the
4 justifiably strong duty imposed on the threatened party to avoid, whenever possible, inflicting
5 harm on others.

6 In contrast, in a conventional extortion situation, there is no countervailing reason to
7 impose an obligation of resistance on the innocent party confronted with the extortionate
8 demand. The wrongfulness of the threat is sufficient in itself to establish illegal coercion.¹⁸¹
9 Once the law acknowledges that sexual offenses protect autonomy rather than just the interest in
10 avoiding physical violence, the right of individuals to control the boundaries of their sexuality
11 ranks at least equal in importance to their right to control their property, and there is no more
12 reason to require resistance in one case than in the other.

13 Subsections (b)(i) through (b)(iv) identify the nonviolent threats that will trigger liability
14 for Sexual Intercourse by Coercion, just as they conventionally do for extortion when used to
15 obtain money or property. The core case (“have sex with me or I will steal your car”) involves a
16 pure threat to inflict a clear-cut harm on the threatened individual. Subsection (b)(iv) covers this
17 unproblematic general category involving any substantial economic or financial harm that would
18 not benefit the actor.

19 The remaining subsections address situations in which the proposed exchange arguably
20 could be characterized as a mere “offer.” A person suspected of a criminal offense or an
21 immigration violation (subsection (b)(i)) has no right not to be accused. A person seeking to keep
22 information secret (subsection (b)(ii)) has no right to silence someone who wishes to share
23 knowledge of it. A person stopped for speeding (subsection (b)(iii)) has no right to prevent the
24 police officer from issuing a ticket. Nonetheless, the law has long punished as extortion (often
25 called blackmail) a person’s effort to extract money by offering to refrain from actions that he or
26 she would (absent the monetary demand) have a perfect right to take. Despite continuing
27 academic controversy over the logic of prohibiting blackmail,¹⁸² there is scant support for
28 overturning this longstanding prohibition; as a practical matter, the social harm of the practice
29 and the need to deter it are justifiably well-accepted.

30 The specific inclusion of immigration-based threats (subsection (b)(i)) addresses a recent
31 pattern of cases in which illegal immigrants are coerced into sexual activity through the threat of
32 exposure.¹⁸³ Subsection (b)(ii) addresses situations in which the claimed threat is to impair any
33 person’s reputation in business or credit. The traditional definition of blackmail is broader,
34 extending to any threat of public obloquy or humiliation, and a strong argument could be made

¹⁸¹ For discussion in greater depth, see SCHULHOFER, *supra* note 119, at 128-132.

¹⁸² See, e.g., Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795 (1998); Wendy J. Gordon, *Truth and Consequences: The Force of Blackmail’s Central Case*, 141 U. PA. L. REV. 1741 (1993); George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617 (1993).

¹⁸³ Michael Blanding, *Crimes Against Illegal Immigrants*, BOSTON MAGAZINE (Dec. 2010) (providing case of immigrant coerced into sex by threat of deportation, and noting study showing that “90% of migrant workers cite sexual harassment as a problem”); Nina Bernstein, *Immigration Officer Pleads Guilty to Coercing Sex From a Green Card Applicant*, N.Y. TIMES, Apr. 15, 2010, at A22 (reporting on the conviction of an immigration official for threatening an immigrant with adverse immigration consequences in exchange for sexual favors).

1 to treat threats of this nature as sufficient to trigger criminal liability for a sexual offense. In the
2 contemporary climate, social media and other means of rapid and diffuse dissemination of
3 information, which often can never be fully retracted or erased, present an increasingly profound
4 concern. These technologies greatly magnify the impact of any threat to ruin a person's
5 reputation, because they may in effect stain that person's identity for perpetuity on a national, if
6 not global, basis. In the context of sexual interaction, however, the range of behavior that could
7 arguably fall within this proscription seems far too broad and far too elastic to justify the
8 imposition of the severe sanctions that accompany a sexual offense. The decision to resist the
9 extension of criminal sanctions to this sort of social intimidation is by no means an easy one. But
10 concerns about vagueness and potentially disproportionate responses to the complex emotional
11 dynamics of sexual relationships suggest that criminality should be narrowly restricted in this
12 area. For that reason, subsection (b)(ii) is limited to a category of more specific threats that will
13 seldom if ever have any justifiable connection to the sexual relationship itself.

14 Subsection (b)(iii) applies to proposals to take some kind of official action affecting an
15 individual. Whether the official action grants a benefit or imposes a burden, it could in either
16 event be considered *an offer*—typically the individual affected has no right to the benefit and
17 likewise has no right to avoid the pertinent burden (such as a traffic ticket for speeding).
18 Nonetheless, the power of an official in these instances is so significant that proposals of this sort
19 are an uncontroversial form of extortion. One reason is that officials who propose to confer
20 benefits are typically in a position to inflict harm on citizens who refuse to “play ball.” Another
21 is that such officials typically have considerable discretion *whether* to inflict the relevant burden,
22 such as a legally justified traffic ticket.

23 As a result, even when the citizen has no right to avoid the ticket, the citizen does have a
24 right to the unbiased exercise of the official's discretion. The proposal to withhold the ticket (in
25 exchange for sex) therefore can accurately be described as *a threat*—namely, a proposal to take
26 away something (unbiased discretion) to which the citizen is undoubtedly entitled.¹⁸⁴ The same
27 analysis applies to any public- or private-sector actor proposing to inflict harm or confer benefits
28 in an official capacity—for example, the school principal in the Montana case, or a personnel
29 manager who proposes to fire (or not hire) an employee in exchange for sex. Such a proposal is
30 in effect a threat to take from the individual his or her right to the unbiased exercise of the
31 official's judgment, and it is therefore properly viewed as coercive and extortionate. Criminal
32 liability is uncontroversial if the official (whether in the public or private sector) demands money
33 in exchange for the action under discussion, and the same result should follow when the official
34 demands sex instead.

35 *b. Minors and authority figures – Section 213.2(1)(c)(i).* Subsection (c)(i) addresses the
36 situation in which the person consenting is a minor with a certain status relationship to the actor.
37 For purposes of general capacity to consent, Section 213.2(3)(b) sets the age of consent at 16;
38 absent special circumstances a minor aged 16 or 17 is deemed competent to consent. However,
39 special possibilities for coercion and exploitation are present in the case of a relationship
40 between a 16- or 17-year-old and an adult who wields influence or authority over the minor, such
41 as a parent, teacher, or athletic coach. A number of states set the general age of consent at 18 in
42 any event, and in such jurisdictions, a sexual relationship between a 16- or 17-year-old and an
43 adult would be a criminal offense regardless of the status relationship between the parties. As

¹⁸⁴ See SCHULHOFER, *supra* note 119, at 137-152.

1 explained above, that approach extends the scope of the criminal prohibition far too widely; 16-
2 year-old adolescents in contemporary society are—as a general matter—sufficiently mature and
3 sufficiently aware of the implications of sexual intercourse to be able to exercise autonomous, if
4 not always wise, judgment, absent special circumstances.

5 The situation is altogether different, however, when the older party in the relationship is
6 an adult who has special responsibilities for the care, well-being, education, or training of the
7 adolescent. In this situation, implicit coercion is an ever-present possibility. In addition, the older
8 party can claim little countervailing interest in his or her own autonomy to pursue an intimate
9 relationship that allegedly may be mutually desired. As against the interest in preventing
10 coercion and exploitation of minors in this situation, any competing interest the parties may have
11 in consummating a sexual relationship immediately, rather than waiting until the minor turns 18
12 or until the adult sheds the role of responsibility, is a consideration entitled to little weight.
13 Section 213.2(1)(c)(i) therefore in effect creates a limited form of statutory rape for minors under
14 the age of 18, regardless of consent, but only when the minor is at least 16 and the older party
15 holds one of the designated positions of status and authority.

16 *c. Custodial detention – Section 213.2(1)(c)(ii) and (iii).* Subsections (c)(ii) and (iii)
17 provide that consent is not freely given—and intercourse is therefore a criminal offense—when
18 the person consenting is subject to custodial confinement, parole release, or probation
19 supervision and the actor has some form of authority over the person giving consent. Of course,
20 when a guard obtains consent by expressly or implicitly threatening an inmate with physical
21 harm, the offense constitutes rape even in the absence of any provision specifically addressed to
22 the prison setting. The need for additional statutory coverage arises primarily because of the
23 pervasive ability of correctional officers or others in positions of power to deploy more subtle
24 threats and improper offers of special privileges in order to induce inmates to submit in the
25 context of confinement. The potential for overreaching and abuse in these situations is apparent,
26 and there is no legitimate countervailing interest in permitting the parties to pursue a
27 relationship; prison guards, probation officers, and others in like positions of custodial authority
28 are already subject to a clear prohibition on engaging in activity of this sort.¹⁸⁵

29 The 1962 Code defined a misdemeanor offense (labeled “Corruption of Minors and
30 Seduction”) applicable to cases in which the victim (including adult victims) “is in custody of
31 law or detained in a hospital or other institution and the actor has supervisory or disciplinary
32 authority over [the victim].”¹⁸⁶ Nonetheless, that position remained for some time a minority
33 view.¹⁸⁷ By the late 1990s, increasing numbers of women prisoners, a population especially
34 vulnerable to this form of abuse by male guards, and increasing awareness of the prevalence of
35 this problem¹⁸⁸ had prompted many states to criminalize nonviolent, ostensibly “consensual”
36 sexual submission in this setting, and by the late 1990s two-thirds of the states had done so,¹⁸⁹

¹⁸⁵ See Schulhofer, *supra* note 119, at 201-205.

¹⁸⁶ 1962 CODE § 213.3(1)(c).

¹⁸⁷ See MODEL PENAL CODE AND COMMENTARIES, PART II, §§ 210.0 to 213.6 (1980), § 213.3, COMMENT 4, AT 390 (citing 12 states that had adopted similar provisions as of 1980).

¹⁸⁸ See, e.g., Human Rights Watch Women’s Rights Project, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (1996).

¹⁸⁹ Schulhofer, *supra* note 119, at 203-204.

often at the felony level and subject to sentences running as high as 10 years' imprisonment.¹⁹⁰ Currently, every state except Vermont imposes criminal punishment on correctional officers and similar officials who have sex with inmates subject to their authority. At least 22 of the state statutes expressly foreclose the option of claiming consent as a defense, while nearly all the remaining statutes, though silent on the subject, implicitly treat sexual relationships between guards and inmates as illegal *per se*, regardless of consent.¹⁹¹

Many states extend the prohibition on inmate-guard sexual relationships to the context of probation and parole as well.¹⁹² The wording of the 1962 Code left some ambiguity on this point because it applied only to persons "in custody of law." Although the application of that criterion to persons on probation and parole is not addressed in the Commentary to the 1962 Code, probation and parole seem necessarily to fall within the phrase "in custody of law"; otherwise the provision's alternative basis for liability ("detained in a hospital or other institution") would render the former phrase redundant. Currently, many states extend the prohibition on guard-inmate sexual relations to the context of probation and parole as well,¹⁹³ a judgment that seems well justified in light of the similar potential for abuse and the similar absence of countervailing interests in unrestricted sexual freedom in that context.

Subsections (c)(ii) and (iii), in carrying forward the comparable provision of the 1962 Code, accordingly makes explicit that probation and parole are among the relationships covered. The language of subsections (c)(ii) and (c)(iii) is further meant to embrace not just those formally employed by the supervisory or custodial authority, but also those granted privileges or positions of authority within these institutions. Thus, for example, a person who provides programming for inmates or supervisees, or even a fellow inmate placed in a position of responsibility vis-à-vis other inmates, may qualify under this provision.

Finally, the seriousness of this form of misconduct and the difficulty of deterring it warrant sanctions more severe than the misdemeanor punishments available under Section 212.5 of the 1962 Code (Criminal Coercion). Therefore, Section 213.2(1)(c), in accord with the grading judgments now widely accepted in comparable state legislation,¹⁹⁴ classifies the offense as a felony of the third degree.

5. Competency to consent – Section 213.2(3).

Section 213.2(3) addresses three situations in which a person giving affirmative consent to sexual intercourse should not be considered competent to do so. Subsection (a) deals with the validity of consent in cases involving intoxication, subsection (b) deals with cases involving minors, and subsections (c) and (d) consider consent given by persons who suffer from severe mental disability.

a. Intoxication. Section 213.2(3)(a) imposes a penalty in cases in which the complainant

¹⁹⁰ MODEL PENAL CODE AND COMMENTARIES, PART II, §§ 210.0 to 213.6 (1980), § 213.3, COMMENT 4, AT 390 & n.47.

¹⁹¹ See Brenda V. Smith, Rethinking Prison Sex: Self-Expression and Safety, 15 COLUM. J. GENDER & LAW 185, 219-220 & n.161 (2006).

¹⁹² See Smith, *supra* note 191, at 219-220.

¹⁹³ See *id.* at 219-220.

¹⁹⁴ See Brenda V. Smith, 50 State Survey 2005, cited in Smith, *supra* note 191, at 219-220.

1 is incapable of expressing unwillingness due to intoxication. A high proportion of sexual assaults
2 occur while a complainant is under the influence of an intoxicant,¹⁹⁵ and this circumstance is
3 particularly common among college-aged victims assaulted by offenders known to them.¹⁹⁶
4 Typically, the victim has not been duped but rather has voluntarily chosen to drink. Nonetheless,
5 voluntary intoxication should not be treated as though it waives the right to bodily autonomy and
6 integrity. Stealing property is no less an offense when the victims were intoxicated and thus left
7 their items unguarded; so too, sexual assault is no less a crime because an individual was too
8 intoxicated to communicate an objection to another's advances. And that logic retains its force
9 even when *the perpetrator* of the offense is also intoxicated. The point has been well made that
10 holding an actor responsible for harms inflicted on others while the actor is intoxicated is far
11 more appropriate than holding *those persons* accountable for what the actor does *to them*.¹⁹⁷

12 The terms of Section 213.2(3)(a) aim to respond to two conflicting, and vexing, concerns.
13 On the one hand, a great deal of unwanted sexual activity, particularly among young people,
14 occurs between intoxicated parties. On the other hand, a great deal of *desired* sexual activity also
15 occurs between intoxicated parties. Even among adults, alcohol and other intoxicants are often
16 pleasurably employed as a welcome means of lowering sexual inhibitions. It is therefore
17 inappropriate to set a standard that precludes an intoxicated person from giving consent, or that
18 defines any sexual activity with an intoxicated individual as impermissible. Yet it is also
19 important not to *equate* voluntary intoxication with consent, or to leave willingly intoxicated
20 persons unprotected when their condition falls short of unconsciousness.

21 The prevalent means of addressing this concern is to specify by statute or precedent that
22 rape or sexual assault occurs when an actor has sexual intercourse with a person who "was so
23 impaired as to be incapable of consenting"¹⁹⁸ or "was drunk enough to be unable to consent to
24 sex."¹⁹⁹ This approach accordingly requires a test for determining when intoxication reaches a
25 level that should be considered incapacitating. Several jurisdictions, following the lead of the

¹⁹⁵ An estimated 35 percent to 55 percent of adult victims were under the influence of an intoxicant at the time of a sexual assault, most commonly alcohol. Leanne R. Brecklin & Sarah E. Ullman, *The Roles of Victim and Offender Substance Use in Sexual Assault Outcomes*, 25 J. INTERPERSONAL VIOLENCE 1503, 1504 (2010). But see David Light & Elizabeth Monk-Turner, *Circumstances Surrounding Male Sexual Assault and Rape: Findings from the National Violence Against Women Study*, 24 J. INTERPERSONAL VIOLENCE 1849 (2008) (indicating low rates (~16 percent) of intoxication in a study of non-penal male rape victims).

¹⁹⁶ The percentages rise dramatically among college-aged victims, particularly those who describe their assailant as an acquaintance. *Id.* at 1509 Tbl 1. By one count, "approximately half of all sexual assault incidents among college and youth aged populations involve the use of alcohol or drugs by the perpetrator, the victim, or both." Maria Testa, et al., *The Role of Victim and Perpetrator Intoxication on Sexual Assault Outcomes*, 65(3) J. STUDIES ON ALCOHOL 320, 321 (2004). In one study, moreover, in more than half the cases of sexual assault, the victim reported that the perpetrator "just did it before you had a chance to protest." Laurel Crown & Linda J. Roberts, *Against Their Will: Young Women's Nonagentic Sexual Experiences*, 24 J. Soc. & Pers. Relationships 385, 392, 396 (2007).

¹⁹⁷ ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* 244 (2003). The opposing view, though hard to defend, often surfaces nonetheless. See, e.g., *State v. Haddock*, 664 S.E.2d 339, 346 (N.C. App. 2008) (reversing rape conviction based on incapacity of heavily intoxicated complainant, on the ground that the statute was not "intended for the protection of . . . alleged victims who have voluntarily ingested intoxicating substances through their own actions.").

¹⁹⁸ E.g., *Commonwealth v. Blanche*, 880 N.E.2d 736, 743 n.14 (Mass. 2008).

¹⁹⁹ E.g., *State v. Smith*, 178 P.2d 672, 677 (Kan. App. 2008).

1962 Code, focus that inquiry on whether intoxication impairs or eliminates “the ability of [the victim] to appraise or control his or her conduct.”²⁰⁰ It is not entirely clear, however, what an ability to “appraise” one’s conduct means in this context. And many states give even less guidance. A typical formulation states, rather unhelpfully, “[m]entally incapacitated” means that a person under the influence of alcohol, a narcotic, anesthetic, or any other substance . . . lacks the judgment to give a reasoned consent to sexual contact or sexual penetration.”²⁰¹ Other statutes, even more vacuously, merely define incapacity as a condition in which alcohol or drugs render the victim “incapable of giving consent.”²⁰² Statutes and case law cast in such terms offer no coherent standard at all. One comprehensive survey concludes that among states prohibiting intercourse with an excessively intoxicated individual, “[none sets] forth clear guidelines or specific factors to determine whether a victim’s level of intoxication precludes consent.”²⁰³

Despite the vagueness of applicable law in this area, prosecutions are not rare. But judicial effort to apply the law in the context of specific cases has shed little light on the relevant criteria. The unhelpfulness of the case law is in itself revealing. In *People v. Giordano*,²⁰⁴ for example, a California appellate court held that incapacity sufficient to support conviction could be established on these facts by showing either that the victim was “unable to make a reasonable judgment as to the nature or harmfulness of the conduct” or “would not have engaged in intercourse with [the defendant] had she not been under the influence of the [intoxicants].”²⁰⁵ But the latter but-for test would transform many happy couples into regular sexual offenders; a test of this sort in effect gives juries license to convict either party almost any time alcohol has mixed with sex. In contrast, the former test is not absurd, but its “reasonable judgment” standard permits convictions under a benchmark with little content.

²⁰⁰ MODEL PENAL CODE § 213.1(1)(b) (defining rape to include cases in which intoxicants have “substantially impaired [the victim’s] power to appraise or control her conduct.”) For other formulations that require only impairment rather than complete elimination of the capacity to appraise or control, see, e.g., ME. REV. STAT. ANN. tit. 17-A, § 253(2)(A) (2013) (“The actor has substantially impaired the other person’s power to appraise or control the other person’s sexual acts.”); IOWA CODE ANN. § 709.4 (WEST 2011) (requiring only that the actor know that the “other person is under the influence of a controlled substance”); MASS. GEN. LAWS ANN. CH. 272, § 3 (“[A]pplies, administers to or causes to be taken by a person any drug, matter or thing with intent to stupefy or overpower such person so as to thereby enable any person to have sexual intercourse or unnatural sexual intercourse”).

For statutes that require not merely *impairment* but an *inability* to appraise, control, or resist, see, e.g., IDAHO CODE ANN. § 18-6108 (2011) (“[T]he victim is prevented from resistance by the use of any intoxicating, narcotic, or anaesthetic substance administered by or with the privity of the accused.”); OKLA. STAT. ANN. tit. 21 §§ 1111, 1114 (WEST 2011) (same).

²⁰¹ MINN. STAT. ANN. § 609.341 subdiv. 7 (WEST 2013).

²⁰² KAN. STAT. ANN. § 21-5503(a)(2) (WEST 2012); accord ARIZ. REV. STAT. ANN. § 13-1401.5(b) (“The victim is incapable of consent by reason of mental disorder, mental defect, drugs, [or] alcohol”); S.D. CODIFIED LAWS § 22-22-1(4) (2013) (“[T]he victim is incapable of giving consent because of any intoxicating, narcotic, or anesthetic agent or hypnosis.”); WIS. STAT. ANN. § 940.225(2)(cm) (WEST 2013) (the victim “is under the influence of an intoxicant to a degree which renders that person incapable of giving consent.”).

²⁰³ CAROL E. TRACEY, TERRY L. FROMSON, ET AL., RAPE AND SEXUAL ASSAULT IN THE LEGAL SYSTEM 27 (paper presented to the National Research Council, June 5, 2012).

²⁰⁴ 82 Cal. App. 4th 454 (2000).

²⁰⁵ *Id.* at 462-463.

1 Seeking to clarify the “reasonable judgment” test, the same court subsequently said that
2 “a poor judgment is [nonetheless] a reasonable judgment so long as the woman is able to weigh
3 and understand the physical nature of the act, its moral character and its probable
4 consequences.”²⁰⁶ Here the court succeeded in spotlighting something important—the
5 complainant’s understanding of the act’s physical nature, but by adding the two additional
6 requirements—that capacity requires understanding of the *moral* character and consequences
7 (perhaps including the *emotional* consequences) of intercourse—the court returned to a concept
8 of alcohol-induced incapacity that is preposterously broad. In other jurisdictions, courts have
9 upheld convictions on the basis of a similarly vague judgment that a complainant was too drunk
10 to “appreciate the consequences of [her] actions.”²⁰⁷ A Kansas court concluded that a trial judge
11 had not erred in refusing to give the jury any standard for determining whether the complainant
12 was “incapable of consent by reason of . . . alcohol,” and held that because jurors “are familiar
13 with the effects of alcohol,” the courts should simply “give great deference to [the jury’s]
14 finding.”²⁰⁸

15 The challenge of formulating a clear but not wildly overbroad test of alcohol-induced
16 incapacity seems almost insurmountable, but it is worth recalling the concerns that trigger this
17 dilemma. The prevalent requirement that incapacity result from *surreptitious administration* of
18 intoxicants eliminates at one stroke the potential for overly broad liability; indeed the
19 surreptitious-administration requirement owes much of its support to its ability to keep the legal
20 standard at a safe distance from any slippery slope.²⁰⁹ But it does so only by exposing blameless
21 victims to unacceptable risks of sexual violation. Some safeguard is imperative for victims who
22 are too sober to lose consciousness but too intoxicated to communicate their opposition to a
23 predator’s advances. And that need seemingly precipitates the impossible task of drawing an
24 identifiable line between intoxication that makes compliant behavior inauthentic and intoxication
25 that does not.

26 The law’s predicament in this area, however, is largely self-inflicted, not inescapable.
27 The difficulty of identifying nonconsent in cases of heavy drinking flows directly from one
28 fundamental but entirely unnecessary commitment—the law’s prevalent assumption that passive
29 or ambiguous behavior ordinarily can be treated as *consent* to have sex, until an individual has
30 taken clear steps to indicate the contrary. Because the passive behavior of a sober person
31 traditionally has been equated with consent and because the passive behavior of an extremely
32 intoxicated person cannot be, the law imposes upon itself the nearly impossible task of
33 determining the *genuine* meaning of a person’s behavior when docile or unresponsive actions
34 occur under the influence of alcohol or drugs. Yet, as discussed more fully in the Comment to
35 Section 213.4 below, unwillingness to accept sexual intercourse is *always* a significant
36 possibility when a person is silent, passive, or otherwise conveying ambiguous signals. Because
37 the harm of erroneously presuming willingness in such cases vastly outweighs the harm of
38 erroneously presuming unwillingness, the law should never treat ambiguous behavior as
39 equivalent to consent, whether the individual in question is intoxicated or not. Section 213.4

²⁰⁶ *People v. Smith*, 191 Cal. App. 4th 199, 205 (2010).

²⁰⁷ *State v. Al-Hamdani*, 2001 WL 1645773 (Wash. App. 2001).

²⁰⁸ *Smith*, 178 P.2d at 677.

²⁰⁹ See MODEL PENAL CODE AND COMMENTARIES, PART II, §§ 210.0 to 213.6 (1980), § 213.1, COMMENT 5, AT 315-318.

1 proceeds on this premise in imposing criminal liability for Sexual Intercourse Without Consent
2 whenever an actor has sexual intercourse with a person who has not given affirmative consent.

3 Once this principle is recognized, the difficulties of determining incapacity induced by
4 intoxication largely dissipate. When individuals who have consumed alcohol fail to protest
5 verbally or resist physically, there is no need to determine whether they are “incapable of giving
6 consent”²¹⁰ because, whatever their capacities, they clearly have not given *consent*. Under
7 Section 213.4, an actor who has sexual intercourse with such a person, without first obtaining
8 affirmative consent, therefore commits an offense regardless of how much alcohol, if any, the
9 victim has consumed.

10 This solution to the problem of alcohol-induced incapacity leaves open two further
11 issues. The first is a grading question. In situations where an actor imposes sexual intercourse
12 upon an individual who has expressed neither willingness nor unwillingness, should the severity
13 of the offense change when that individual is heavily intoxicated? Sexual intercourse in the
14 absence of consent is a misdemeanor under Section 213.4. The offense is a serious one, but the
15 actor’s culpability is nonetheless moderated to some degree by the possibility of the actor’s
16 believing that the other party, though silent or passive, may not be entirely unwilling. The degree
17 of culpability increases significantly when the actor is aware that the other party might be so
18 heavily intoxicated that he or she *cannot* express nonconsent. The focus of such an inquiry is not
19 on the question whether the other party has some difficult-to-define capacity *to appraise or*
20 *control* his or her conduct; rather the inquiry is concerned solely with the question whether the
21 degree of intoxication *precludes* the expression of unwillingness altogether. Of course, the actor
22 must *know* (or recklessly disregard the risk) that the other party is intoxicated to that degree. But
23 when this awareness is present, the actor’s culpability is significantly greater than that presented
24 in ordinary cases falling within Section 213.4 and is more nearly comparable to the culpability of
25 a defendant who proceeds to intercourse in the face of explicit indications of nonconsent—an
26 offense classified as a felony of the third degree under Section 213.2(1)(a)(i). A range of
27 penalties more severe than those provided in Section 213.4 accordingly should be available, and
28 Section 213.2(3)(a) therefore treats such conduct as Sexual Intercourse by Imposition, a felony
29 of the third degree.

30 The incapacity required under Section 213.2(3)(a) is the inability to communicate, via
31 words or conduct, a lack of desire to engage in the contemplated sexual activity. The
32 impairments covered by this Section are temporary in nature; developmental disabilities and
33 physical impediments are dealt with in Section 213.2(3)(c) and (d). Similarly, this Section is
34 applicable without regard to how the intoxication came about; if an actor purposefully and
35 surreptitiously uses intoxicants to impair a sexual partner, then Section 213.1(1)(c)(iv) applies. In
36 cases where intoxication renders a person unconscious or wholly incapable of speech or control
37 over that person’s body, Section 213.1(1)(c)(ii) applies.

38 The remaining question is to determine how the law should treat cases in which a heavily
39 intoxicated person *has* given consent, and yet the alcohol impairment arguably compromises the
40 quality or validity of that consent. Because consent is present, liability under Section 213.4 does
41 not attach, and yet there may be concern that intoxicants have rendered the individual’s
42 affirmative expressions of willingness inauthentic in some sense. Any effort to address this

²¹⁰ S.D. CODIFIED LAWS § 22-22-1(4) (2013).

1 concern—to distinguish between intoxication that makes a person's actions inauthentic and
 2 intoxication that does not—reintroduces the elusive inquiries just discussed.

3 One might expect that cases of this sort would seldom if ever warrant prosecution. But
 4 the problem is not purely theoretical, because the currently prevalent, highly elastic definitions of
 5 incapacity, formulated primarily to protect individuals who are too drunk to protest or resist,
 6 stand available to invalidate consent even when that consent has been expressed actively and
 7 unequivocally. Thus, in *People v. Giordano*,²¹¹ discussed above, the complainant knowingly
 8 drank several glasses of bourbon and became “tipsy” and “woozy” but was not too drunk to
 9 participate vigorously in numerous acts of oral sex and vaginal intercourse. The defendant was
 10 convicted of rape on the ground that the complainant lacked the capacity to give valid consent.
 11 Although the court reversed the conviction for improper jury instructions, it remanded the case
 12 and held that incapacity sufficient to support a conviction could be established if the jury on
 13 retrial found that the complainant, herself an active participant in every aspect of the sexual
 14 encounter, was “unable to make a reasonable judgment” or would have refrained “had she not
 15 been under the influence of the [intoxicants].”²¹²

16 Undoubtedly, there are cases in which intoxication, though voluntary, affects individuals
 17 so profoundly that they are too easily induced to engage in actions that would otherwise be
 18 repugnant to them. Nonetheless, for the reasons already discussed, it is not merely a difficult but
 19 rather a metaphysical and largely quixotic quest to attempt to distinguish such cases from the
 20 more numerous ones in which alcohol influences behavior in a manner that the intoxicated
 21 person readily accepts.²¹³ In principle, the law should require the other party in such a situation
 22 to clarify the nature of his partner's condition and determine whether it falls on the incapacity
 23 side of the line. But in this context it is hard to imagine what steps a person could take *ex ante* (or
 24 even *ex post*) to resolve an issue (the *authenticity* of another person's choices) that turns almost
 25 entirely on a subjective philosophical abstraction. In this narrow setting—that of a voluntarily
 26 intoxicated person who has clearly expressed affirmative consent to sexual activity—the
 27 judgment presented in the Commentary to the 1962 Code remains sound: “From the actor's
 28 perception, at least, this situation is exceedingly difficult to identify and perilously close to a
 29 common kind of social interaction.”²¹⁴ Accordingly, Article 213 does not impose criminal
 30 punishment in cases where affirmative consent is present and not otherwise tainted, regardless of
 31 whether voluntary intoxication could be seen as a factor contributing to that consent.

32 *b. Minors – Section 213.2(3)(b).* With respect to the appropriate age of consent, it should
 33 be noted at the outset that Section 213.1(2)(c)(i) defines Rape, a felony of the first degree, to
 34 include all instances of sexual intercourse with a person who is less than 12 years. The basis for
 35 this judgment and the reasons for drawing this crucial line at the age of 12, are discussed above
 36 in connection with Section 213.1(2)(c)(i). That provision leaves for consideration the appropriate
 37 treatment of sexual intercourse in the case of minors aged 12 or over.

²¹¹ 82 Cal. App. 4th 454 (2000).

²¹² *Id.* at 462-463.

²¹³ See Stephen J. Schulhofer, Rape Law-Reform Circa June 2002: Has the Pendulum Swung Too Far?, 989 ANNALS N.Y. ACAD. SCI. 276, 281-282 (2003).

²¹⁴ MODEL PENAL CODE AND COMMENTARIES, PART II, §§ 210.0 to 213.6 (1980), § 213.1, COMMENT 5(a), AT 318.

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

7 “[T]he spectre of imposition of felony sanctions on a boy of 17 who
8 engages in sexual intercourse with a willing and socially mature girl of
9 like age . . . reflects an extravagant use of the penal law to bolster
10 community norms about consensual behavior, and it ignores social reality
11 in assuming that sex among teenagers is necessarily a deviation from
12 prevailing standards of conduct.”²¹⁵

13 On the basis of this assessment, the Institute concluded that the principal concern with
14 respect to adolescents past the age of puberty was not to condemn sexual experimentation as
15 such but only to protect them from exploitation and victimization at the hands of significantly
16 more mature individuals. Accordingly, the 1962 Code set a general age of consent at 16,
17 specifying that adolescents over that age had the capacity to give valid consent, regardless of the
18 age of their partner, and that in the case of adolescents under the age of 16, consent was invalid
19 *per se* only when the other party was at least four years older.²¹⁶

20 The social facts underlying this 1962 assessment certainly are no less applicable today,
21 and jurisdictions have widely followed the Code’s recommendation to criminalize adolescent
22 sexual activity only when there is a substantial age difference between the parties.²¹⁷ Section
23 213.2(3)(b) endorses this judgment and in essence carries forward the provisions of the 1962
24 Code with respect to this problem.

25 *c. Mental disability – Section 213.2(3)(c) and (d).* Subsections (3)(c) and (d) address
26 capacity to consent in the case of individuals suffering from severe mental disability. The
27 principal challenge in this area is to identify the elusive degree of disability that should preclude
28 valid consent. The difficulties are compounded by an underlying tension: concern for protecting
29 these individuals from exploitation and abuse suggests tying valid consent to a relatively high
30 level of mental and social functioning, but the higher that standard is set, the more these
31 individuals will be precluded from ever experiencing sexual intimacy and sexually fulfilling
32 relationships, even with peers who may pose little danger to them.²¹⁸ Typical statutory language
33 is vague or conclusory, stating for example that intercourse constitutes rape when the victim “is
34 incapable, because of a mental disorder or developmental or physical disability, of giving legal

²¹⁵ MODEL PENAL CODE AND COMMENTARIES, PART II, §§ 210.0 to 213.6 (1980), § 213.1, COMMENT 6, AT 326.

²¹⁶ 1962 Code § 213.3(1)(a).

²¹⁷ See MODEL PENAL CODE AND COMMENTARIES, PART II, §§ 210.0 to 213.6 (1980), § 213.1, COMMENT 8(b), AT 341 & n.181. See also Catherine Carpenter, On Statutory Rape, Strict Liability, and the Public Welfare Offense Model, 53 AM. U. L. REV. 313 (2003) (collecting and analyzing contemporary state laws governing statutory rape); Annot., 46 A.L.R. 5th 499 (2005).

²¹⁸ See Deborah W. Denno, Sexuality, Rape, and Mental Retardation, 1997 U. ILL. L. REV. 315.

1 consent.”²¹⁹ The New York provision states that a person “is deemed incapable of consent” when
 2 he or she is “incapable of appraising the nature of his or her conduct.”²²⁰ In Wisconsin the
 3 statutory test is whether a person “suffers from a mental illness or deficiency which renders that
 4 person temporarily or permanently incapable of appraising the person’s conduct.”²²¹

5 As in the case of alcohol-induced incapacity, the jurisprudence has supplied few concrete
 6 tools for making these judgments. One court, acknowledging that the required degree of
 7 incapacity “cannot be determined in accordance with precise and inelastic standards,” explained
 8 that:

9 [C]apacity to give valid consent requires “the exercise of intelligence based upon
 10 knowledge of its significance and moral quality.” . . . An understanding of coitus
 11 encompasses more than a knowledge of its physiological nature. An appreciation
 12 of how it will be regarded in the framework of the societal environment and
 13 taboos to which a person will be exposed may be far more important. In that
 14 sense, the moral quality of the act is not to be ignored.²²²

15 Standards of this sort, avowedly elastic (to say the least), have obvious potential for
 16 injustice to the accused. In many states, that potential injustice is mitigated by requiring proof
 17 that the defendant had actual knowledge of the victim’s disability,²²³ but elsewhere the required
 18 *mens rea* is unspecified,²²⁴ or a negligent state of mind is sufficient.²²⁵

19 Subsections (3)(c) and (d) attempt a fresh approach by setting aside the largely vacuous
 20 criteria prevalent in current law and identifying instead two relatively manageable inquiries for
 21 determining the affected person’s capacity to consent. Under subsection (c) mental disability
 22 precludes valid consent when the affected person is so severely disabled that he or she is unable
 23 to understand the physiological nature of sexual intercourse, its potential for causing pregnancy,
 24 or its potential for transmitting disease.²²⁶ These are rudimentary prerequisites for any
 25 moderately intelligent or rational choice to engage in sexual activity. To establish incapacity, it is
 26 not sufficient to show simply that a victim did not in fact have a fully informed understanding of
 27 the specified facts; rather the prosecution must prove that the person affected *lacked the capacity*
 28 to understand. When that capacity is absent, there should be no room for doubt that a statement
 29 of willingness to engage in sexual intercourse has no meaningful content for the person
 30 expressing it, and its validity should be precluded *per se*. The provision makes explicit what

²¹⁹ CAL. PENAL CODE § 261(a)(1).

²²⁰ N.Y. PENAL LAW §§ 130.00(5), 130.05(3)(b).

²²¹ WIS. STAT. § 940.225(2)(c).

²²² *People v. Easley*, 42 N.Y.2d 50, 364 N.E.2d 1328 (1977).

²²³ E.g., WIS. STAT. § 940.225(2)(c) (second-degree sexual assault, punishable by imprisonment for a maximum of 40 years).

²²⁴ E.g., N.Y. PENAL LAW § 130.25 (rape in the third degree, punishable by imprisonment for a maximum of four years).

²²⁵ E.g., CAL. PENAL CODE § 261(a)(1) (rape, punishable by imprisonment for three, six, or eight years).

²²⁶ E.g., *People v. Cratsley*, 615 N.Y.S.2d 463 (App. Div. 1994), *aff’d*, 86 N.Y.2d 81, 653 N.E.2d 1162 (1995) (victim could not spell her name or correctly state her age, did not know where babies came from or what it meant to be pregnant, and had no knowledge of AIDS or venereal disease).

1 would in any event be required by general principle under the Code's culpability provisions,
2 namely that imposition of liability requires proof that the actor knew of the relevant condition or
3 recklessly disregarded the risk that it was present.²²⁷

4 A more difficult situation is presented when the person expressing consent, though
5 severely disabled, does have the capacity to understand the physiology of intercourse and its
6 potential for causing pregnancy or disease. In this situation, asking courts or juries to ascertain
7 whether the person affected lacks the ability "to appraise . . . his or her conduct,"²²⁸ or "lacks the
8 judgment to give a reasoned consent"²²⁹ asks them to undertake a philosophically abstract and
9 largely indeterminate inquiry. Section 213.2(3)(d) seeks to draw guidance instead from the
10 judgment that children under the chronological age of 12 typically lack the maturity to give
11 meaningful consent to sexual relations, regardless of the sophistication of their mechanical
12 understanding of sexual intercourse, and accordingly their consent is deemed ineffective *per se*.
13 If that judgment is sound with respect to minors generally, it should apply as well to older
14 individuals whose level of mental, social, and emotional development is no greater than that of a
15 minor whose chronological age is less than 12. No doubt there will be uncertainties, and in some
16 cases conflicts in expert testimony, concerning the developmental level of mentally disabled
17 individuals. But ambiguities of this sort are inescapable. The important point is that the inquiry
18 will have the potential to focus on a benchmark of some specificity and relevance, and that it will
19 be able to draw on relatively well-developed evaluation protocols.

20 As in the case of other Article 213 provisions that turn on incapacity of various sorts,
21 Section 213.2(3) draws explicit attention to the culpability requirement that is essential for
22 insuring just punishment when a defendant is charged with having nominally consensual
23 intercourse with a disabled individual, namely that the actor must know of the relevant condition
24 or recklessly disregard the risk that it is present.²³⁰

25 6. Sex trafficking – Section 213.2(2) and (4).

26 Section 213.2(2) and (4) address a type of sexual misconduct that ordinarily establishes a
27 third-degree felony under Section 213.2(1) and (3). However, when such abuse becomes the
28 means of securing the victim's participation in a commercial sex enterprise, the conduct is
29 considerably more serious. Commercial sex trafficking has become a particularly grave and
30 widespread form of sexual abuse. And because its victims often live in fear of deportation or
31 comparable retaliation against relatives initiated by those who exploit them, these victims are
32 especially hesitant to seek help from authorities, and law enforcement faces unusually difficult
33 obstacles.²³¹ Conduct of this sort is especially culpable and difficult to deter; severe sanctions

²²⁷ MODEL PENAL CODE § 2.02(3) (1962).

²²⁸ MODEL PENAL CODE § 213.1(2)(b) (1962) (defining rape to include cases in which "a mental disease or defect . . . renders [the victim] incapable of appraising the nature of her conduct."); COLO. REV. STAT. ANN. § 18-3-402(4)(d) (WEST 2013), amended by 2013 Colo. Legis. Serv. Ch. 353 (WEST); N.J. STAT. ANN. § 2C:14-1(i) (WEST 2013) ("incapable of understanding or controlling his conduct"); N.Y. PENAL LAW § 130.00(5) (McKinney 2013) ("incapable of appraising the nature of his or her conduct").

²²⁹ MINN. STAT. ANN. § 609.341 subdiv. 7 (WEST 2013).

²³⁰ MODEL PENAL CODE § 2.02(3) (1962).

²³¹ For discussion in the analogous context of coercive trafficking in migrant labor, see Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409 (2011).

1 accordingly are called for. Under federal law, for example, use of coercion to enforce submission
2 to commercial sex acts is punishable by a mandatory minimum of 15 years in prison, with a
3 maximum of life.²³² In New York, the offense is a class B felony punishable by up to 25 years'
4 imprisonment.²³³

5 Of course, when prosecutors can prove that sex traffickers have used force or threats of
6 violence to enforce compliance with their demands, Section 213.1 applies, and the offense
7 constitutes at least a second-degree felony in any event. But in the common situation in which
8 threats of deportation or other coercive pressures play a prominent role, Section 213.2(1) and (2)
9 insure that the severe sanctions of a second-degree felony will be available against those who use
10 such coercion in a commercial context.

11 12 **D. SECTION 213.3. SEXUAL INTERCOURSE BY EXPLOITATION**

13 An actor is guilty of sexual intercourse by exploitation, a felony of the fourth degree
14 if he or she has sexual intercourse with another person and:

15 (1) is engaged in providing professional treatment, assessment, or counseling for a
16 mental or emotional illness, symptom, or condition of such person over a period concurrent
17 with or substantially contemporaneous with the time when the act of sexual intercourse
18 occurs, regardless of the location where such act of sexual intercourse occurs and
19 regardless of whether the actor is formally licensed to provide such treatment; or

20 (2) represents that the act of sexual intercourse is for purposes of medical treatment
21 or that such person is in danger of physical injury or illness which the act of sexual
22 intercourse may serve to mitigate or prevent; or

23 (3) knowingly leads such person to believe falsely that he or she is someone with
24 whom such person has been sexually intimate.

25 26 **Comment:**

27 Section 213.3 defines the offense of Sexual Intercourse by Exploitation, a felony of the
28 fourth degree. It covers three situations—those involving sexual intercourse between a mental-
29 health professional and a current patient and two distinct sorts of deception.

30 ***1. Sexual Intercourse between a Mental-Health Professional and a Current Patient –*** 31 ***Section 213.3(1).***

32 [Commentary reserved]

33 ***2. Deception in the Context of Medical Treatment – Section 213.3(2).***

34 [Commentary reserved]

35 ***3. Deception with Regard to Identity – Section 213.3(3).***

36 [Commentary reserved]

²³² 18 U.S.C. § 1591(a).

²³³ N.Y. PENAL LAW § 230.34.

E. SECTION 213.4. SEXUAL INTERCOURSE WITHOUT CONSENT

An actor is guilty of sexual intercourse without consent, a misdemeanor, if the actor knowingly or recklessly has, or enables another person to have, sexual intercourse with a person who at the time of the act of sexual intercourse has not given consent to that act.

Comment:

Section 213.4 gives operational significance to the definition of consent provided by Section 213.0(3). The traditional premise in the law has been that individuals are presumed to be sexually available and willing to have intercourse—with anyone, at any time, at any place—in the absence of clear indications to the contrary, and indeed this still appears to be the current view in roughly half of American jurisdictions.²³⁴ Section 213.4 together with Section 213.0(3) posits, to the contrary, that in the absence of affirmative indications of a person's willingness to engage in sexual activity, such activity presumably is *not* desired.

Of the 25 jurisdictions that have clear statutory or judicial definitions of consent, a clear majority define consent as some form of express agreement or positive cooperation.²³⁵ Of the remaining 10 jurisdictions that define consent through their statutes or case law, seven define nonconsent as force or deception,²³⁶ and three define lack of consent as resistance.²³⁷ But 25

²³⁴ See *supra* notes 122-135 and accompanying text.

²³⁵ Thirteen jurisdictions have statutory provisions along these lines, and three have clear case law. Of these, six states have unambiguous statutory provisions: Colorado, Florida, Minnesota, Vermont, Wisconsin, and Washington, D.C. Examples of such language include: “words or actions by a person indicating a voluntary agreement to engage in a sexual act,” VT. STAT. ANN. TIT. 13, § 3251(3) (2011); “intelligent, knowing and voluntary consent,” FLA. STAT. ANN. § 794.011 (2011); and “words or overt actions by a person who is competent to give informed consent indicating freely given agreement,” WIS. STAT. ANN. § 940.225(4) (2011). See also COLO. REV. STAT. ANN. § 18-3-401(1.5) (West 2011); MINN. STAT. ANN. § 609.341, subd. 4 (West 2011); D.C. CODE § 22-3001(4) (2011).

Three additional states have seemingly clear statutory provisions, but the effect of those provisions is undermined by a statutory regime that defines all sexual-assault offenses as requiring some form of force or resistance: California, Illinois, and Washington. See CAL. PENAL CODE § 261.6 (West 2011); 720 ILL. COMP. STAT. 5/11-0.1, 1.70(a) (West 2011); WASH. REV. CODE ANN. § 9A.44.010(7) (West 2011). Finally, Kentucky, Maine, New York, and West Virginia all employ variations on language requiring that the victim “expressly or impliedly acquiesce,” which might be read as less clearly demanding positive cooperation, but the lack of case law makes the precise standard unclear. See KY. REV. STAT. ANN. § 510.020(2)(c) (West 2011); ME. REV. STAT. ANN., tit. 17-A, § 255-A(1), -260(1) (2011); N.Y. PENAL LAW § 130.95(2)(c) (McKinney 2011); W. VA. CODE ANN. § 61-8B-2(b)(3) (West 2011). The jurisdictions in which case law has adopted a clear requirement of affirmative consent are Hawaii, Iowa, and New Jersey. *State v. Adams*, 880 P.2d 226 (Haw. Ct. App. 1994), cert. denied, 884 P.2d 1149 (Haw. 1994); *State v. Meyers*, 799 N.W.2d 132 (Iowa 2011) (citing *State v. Bauer*, 324 N.W.2d 320, 322 (Iowa 1982)); *In re State in the Interest of M.T.S.*, 609 A.2d 1266 (1992).

²³⁶ Alabama, Alaska, Delaware, Georgia, Louisiana, Montana, and Texas. See ALA. CODE § 13A-2-7 (2014); ALASKA STAT. § 11.41.470(8) (2010); DEL. CODE ANN., tit. 11, § 761(j) (2011); *Greene v. State*, 295 Ga. App. 803, 805 (2009); LA. REV. STAT. ANN. § 14:42.1, :43 (2010); MONT. CODE ANN. § 45-5-501 (2011); TEX. PENAL CODE ANN. § 22.011 (Vernon 2011). For example, in Texas, “without consent” is defined as compelling the other person by means of force, violence, or threats; knowing that the other person is unconscious, unaware of the

American jurisdictions do not provide any express statutory or case-law definition of consent, and the structure of their offense provisions suggests that absence of consent is not in itself sufficient to establish an offense. In 12 jurisdictions, the statutory regime recognizes only offenses founded on traditional forms of force (such as use of a weapon or physical violence),²³⁸ and in at least 10 others case law suggests that proof of nonconsent requires some showing of resistance, whether verbal or physical.²³⁹

Section 213.4's embrace of an affirmative-consent requirement is grounded in the increasing recognition that sexual assault is an offense against the core value of individual autonomy, the individual's right to control the boundaries of his or her sexual experience, rather than a mere exercise of physical dominance. The decision to share sexual intimacy with another person, whether undertaken casually or with great deliberation, is a core feature of our humanity and personhood and thus should always be a matter of actual individual choice. Beyond this, evolving social standards around sexual behavior have increasingly favored more open and honest expressions of sexual needs and stressed the importance, in ambiguous circumstances, of discouraging sexual intimacy without first seeking greater clarity. In terms of prevalent behavior and perceived norms of social etiquette, of course, that aspiration remains disputed, and in practice no doubt it is frequently honored in the breach. But however this may be, given that the harm of unwanted sexual imposition greatly exceeds any harm entailed in having to make arguably awkward efforts to clarify the situation or (temporarily) missing an opportunity for a mutually desired encounter, the appropriate default position clearly is to err in the direction of protecting individuals against unwanted sexual imposition.

That position finds additional support in the prevalence of circumstances that make the expression of unwillingness much more difficult than intuition might suggest. One such circumstance is the well-documented phenomenon of "frozen fright": a person confronted by an unexpectedly aggressive partner or stranger succumbs to panic, becomes paralyzed by anxiety, or fears that resistance will engender even greater danger.²⁴⁰ To be sure, the individual's passivity *might* signal willingness, but it also could signal simply a terrorized inability to react to the situation. To permit an inference of consent in these circumstances, when that person's actual desires are relatively easy to clarify, is to expose individuals at risk to severe and readily

activity, or has a mental deficiency; intentional impairment; or certain status relationships. TEX. PENAL CODE ANN. § 22.011 (Vernon 2011).

²³⁷ See NEB. REV. STAT. § 28-318(8) (2010); UTAH CODE ANN. § 76-5-406(1) (West 2010). Oregon's law states that "[a] lack of verbal or physical resistance does not, by itself, constitute consent, but may be considered by the trier of fact along with all other relevant evidence," OR. REV. STAT. ANN. § 163.305(2) (West 2011), which suggests that evidence that the victim remained passive might suffice to establish non-consent.

²³⁸ Arkansas, Massachusetts, North Carolina, Rhode Island, South Carolina, South Dakota, Virginia, Wyoming, and the Federal system. Kansas, New Mexico, and North Dakota each have misdemeanor offenses founded on lack of consent, but do not define that term clearly.

²³⁹ Idaho, Indiana, Maryland, Mississippi, Missouri, Nevada, Oklahoma, Pennsylvania, Arizona, and Tennessee.

²⁴⁰ See, e.g., *People v. Barnes*, 721 P.2d 110, 117-120 (Cal. 1986) (noting studies that "have demonstrated that while some women respond to sexual assault with active resistance, others 'freeze.' . . . The 'frozen fright' response resembles cooperative behavior."); *M.C. v. Bulgaria*, [2003] ECHR 39272/98, ¶ 146 (noting that American courts have increasingly embraced "social-science data" that "some women become frozen with fear at the onset of a sexual attack and thus cannot resist.").

1 avoidable danger. A similar analysis applies with respect to the frequent intersection of heavy
2 drinking with sexual encounters. As previously discussed,²⁴¹ heavily intoxicated individuals
3 often become too disoriented or “tipsy” to express their wishes clearly. To permit an inference of
4 consent in this situation is, again, to expose individuals in a vulnerable position to entirely
5 unnecessary dangers of unwanted sexual intrusion.

6 The argument has been made—and no doubt will be repeated—that equating silence with
7 unwillingness, as Section 213.4 does, “patronizes” or “infantilizes” women, treating them as if
8 they were incapable of expressing their own desires.²⁴² The charge is highly misleading. The law
9 of sexual assault inevitably must address itself to behavior that potentially threatens extremely
10 serious violations of bodily integrity and autonomy, and it must choose standards that seek to
11 minimize the incidence of risky behavior, when that behavior can claim few countervailing
12 benefits. The uncontroversial requirement that a physician obtain informed affirmative consent
13 prior to performing surgery, no matter how objectively appropriate that medical procedure might
14 seem to be, is grounded in a similar analytic framework. Of course, a legal standard requiring the
15 affirmative expression of consent to sex will—inevitably—entail many false negatives, in the
16 form of findings of unwillingness when in fact passionate desire was present. But the contrary
17 standard now prevalent in American law will—just as inevitably—entail many false positives,
18 assumptions of willingness and subsequent sexual intrusion when such intimacy was entirely
19 *unwanted*. Section 213.3 reflects the judgment that the harms that arise under the latter standard
20 present far greater reason for concern.

21 Section 213.4 allows words *or conduct* to transmit willingness to engage in sexual
22 intimacy. Some scholars have urged a requirement of explicit *verbal* assent, noting that body
23 language is inevitably ambiguous and a potential source of many false positives.²⁴³ Yet that
24 standard finds no support in existing law and departs too far from current social practice. Section
25 213.4 recognizes the social reality that consensual sexual encounters quite frequently are not
26 preceded by an explicit verbal “yes.” Body language such as taking off the other party’s clothes
27 and aggressively touching him or her in an ever-more-intimate way may not *inevitably* signal
28 willingness to proceed to intercourse, but it can be sufficiently clear to leave little doubt about
29 the intentions of the person actively initiating these steps. Of course, this is particularly true
30 between persons who have previously been intimate, and a verbal “yes” requirement could
31 conceivably be limited to first-time relationships. But the symbolic and practical drawbacks of a
32 standard that formally differentiates between established and first-time relationships would far
33 outweigh its advantages.

34 Section 213.4 requires the factfinder to focus on the existence of consent regarding each
35 of the disputed sexual acts, but of course it does not impose on the parties any obligation—as
36 hyperbolic critics sometimes charge—to express their desires in any particular formal terms,
37 much less in writing. A person may consent to one form of sexual intimacy and yet decline
38 others, and engaging in one type of intimacy should not necessarily be treated as permission to
39 engage in others. Of course, once parties become sexually intimate, a certain fluidity often arises
40 that may make precision challenging. But by allowing either words or conduct to establish

²⁴¹ See *supra* Comment regarding Section 213.2(3)(a), *supra*.

²⁴² See, e.g., KATIE ROIPHE, *THE MORNING AFTER* 67 (1993).

²⁴³ E.g., PEGGY REEVES SANDAY, *A WOMAN SCORNE* 284 (1996); Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 101, 105 (2005).

1 consent, Section 213.4 does not demand verbal assent to each new act of intimacy. Instead, it
2 simply places the onus on the sexually more aggressive party to ensure that each new act is
3 welcome and desired. A factfinder may judge the existence of such assent on the basis of the
4 totality of the circumstances, even while considering each new level of intimacy separately.
5 Thus, for example, a jury might find that a person willingly engaged in oral sex, but also find
6 that this freely given permission did not extend to vaginal sex that followed.

7 Accordingly, when relevant, a prosecutor's burden is to prove beyond a reasonable doubt
8 that no affirmative words or conduct by the complainant constituted, in light of the totality of the
9 circumstances, positive agreement to engage in the specific conduct at issue. A defendant, in
10 turn, may defeat this evidence by raising a reasonable doubt about whether the complainant in
11 fact did demonstrate such willingness. While any standard invites both factual disputes about
12 what words or conduct occurred and interpretive disputes about how to understand such words
13 and conduct, those are the proper province of the jury to resolve.²⁴⁴ Section 213.4 nonetheless
14 makes clear that when a complainant's behavior has been passive—neither expressly inviting nor
15 rebuking the defendant's sexual advances, that behavior cannot be considered sufficient to show
16 affirmative permission. Passivity cannot be equated with willingness without depriving the
17 affirmative-consent requirement of all content.

18 Although Section 213.4 expresses a strong commitment to the importance of affirmative
19 consent as a prerequisite to the exceptional intimacy of sexual penetration, it does not endorse
20 the view, reflected for example in the *M.T.S.* decision,²⁴⁵ that absence of affirmative consent is
21 sufficient to place the misconduct at or near the highest available level for grading purposes.
22 However unjustifiable, intercourse without affirmative consent is distinctly less reprehensible
23 than intercourse imposed over an express statement of unwillingness or intercourse achieved by
24 force. Appropriate differentiation of severity requires the Section 213.4 offense to carry a
25 distinctly lower penalty, and accordingly it is classified as a misdemeanor.²⁴⁶

27 F. SECTION 213.5. CRIMINAL SEXUAL CONTACT

28
29 [Reserved]

31 G. SECTION 213.6. SEXUAL OFFENSES INVOLVING SPOUSES AND OTHER INTIMATE 32 PARTNERS

33 [Reserved]

²⁴⁴ This provision requires proof that the defendant acted with recklessness or knowledge as to the lack of affirmative consent.

²⁴⁵ State in the Interest of *M.T.S.*, 129 N.J. 422, 609 A.2d 1266 (1992).

²⁴⁶ See, e.g., Meredith J. Duncan, Sex Crimes and Sexual Miscues: The Need for a Clearer Line Between Forcible Rape and Nonconsensual Sex, 42 WAKE FOREST L. REV. 1087 (2007).

H. MENS REA FOR SECTIONS 213.1 TO 213.6**Comment:**

Sections 213.1 through 213.6 impose liability only when the actor is at least reckless—that is, consciously aware of the risk—with respect to each material element of the relevant offenses.²⁴⁷ That judgment, and in particular the decision not to authorize strict liability or liability on the basis of negligence for offenses under Article 213, presents a number of difficult questions.

The starting point for any discussion of *mens rea* must be the “basic norm” that runs throughout the 1962 Model Code, to the effect that criminal liability ordinarily requires at least recklessness.²⁴⁸ Under the 1962 Code, “negligence is an exceptional basis of liability.”²⁴⁹ And the 1962 Code “makes a frontal attack on absolute or strict liability in the penal law.”²⁵⁰ Indeed, the Commentary declares:²⁵¹

Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant’s act was culpable. This is too fundamental to be compromised.

Strong arguments are nonetheless made for departing from this commitment when the absence of consent or the age of the victim is a required element of a sexual offense, or when intoxication plays a role in the encounter. The relevant considerations with respect to consent, intoxication, and age are sufficiently different to warrant separate discussion of each.

Mistakes about consent. When the absence of consent is an element of a sexual offense, a requirement of knowledge or recklessness presents the considerable danger that a defendant who ignores a victim’s protests will nonetheless be able to argue that he honestly thought “no” did not necessarily mean no. This once-common assumption remains sufficiently widespread that such a defendant might well succeed in convincing a jury (or at least raise a reasonable doubt) that he was not consciously aware of the risk that the other party was unwilling. Concern that arguments of this sort can too readily lead to acquittal or nonprosecution underlie the insistence on the part of many rape law reformers that mistakes about consent should never be exculpatory unless they are *objectively reasonable*.²⁵² This is indeed the prevailing view in contemporary American case law.²⁵³ Some courts go even further, imposing strict liability for mistakes about consent.²⁵⁴ In

²⁴⁷ MODEL PENAL CODE § 2.02(2)(c).

²⁴⁸ MODEL PENAL CODE AND COMMENTARIES, PART I, §§ 1.01 to 2.13 (1985), § 2.02, COMMENTS 1-4, AT 229-241.

²⁴⁹ *Id.*, § 2.02, COMMENT 5, AT 244.

²⁵⁰ *Id.*, § 2.05, COMMENT 1, AT 282.

²⁵¹ *Id.* at 283.

²⁵² See, e.g., ESTRICH, *supra* note 8, at 97-98.

²⁵³ The negligence standard is common among jurisdictions that retain *force* or *express nonconsent* as an element of the offense. See, e.g., *State v. Smith*, 554 A.2d 713 (Conn. 1989).

1 contrast, the normal default position requiring at least recklessness is maintained in Britain²⁵⁵
 2 and in a few American states.²⁵⁶

3 Strict liability, of course, is a disfavored form of criminal liability even in connection
 4 with regulatory offenses not involving moral opprobrium; it is rarely if ever accepted as a
 5 predicate for conviction of a serious felony.²⁵⁷ No evident law-enforcement need justifies its use
 6 in connection with the element of consent in a rape case; indeed strict liability seems particularly
 7 inappropriate where, as here, the conduct under the circumstances as the defendant reasonably

Among jurisdictions that impose punishment for sexual intercourse without proof of force, merely on the basis of an *absence of affirmative consent*, two likewise require proof of negligence and therefore exculpate defendants who made reasonable mistakes of fact. See *State in the Interest of M.T.S.*, 129 N.J. 422, 609 A.2d 1266, 1278-1279 (1992) (“[T]he state must demonstrate either that defendant did not actually believe that affirmative permission had been freely given or that such belief was unreasonable under all the circumstances.”); *Davis v. United States*, 873 A.2d 1101, 1104 (D.C. 2005) (interpreting “reason to know” standard in statute as requiring that “the government need only establish that the defendant knew or should have known that the complainant did not give ‘permission’ to the sexual act or contact at issue”).

²⁵⁴ Under statutes that require proof of *physical force*, a *mens rea* requirement is sometimes considered superfluous, and strict liability accordingly has been defended (with some lack of precision) on that basis. See, e.g., *Commonwealth v. Lopez*, 745 N.E.2d 961 (Mass. 2001); *State v. Reed*, 479 A.2d 1291 (Me. 1984).

A few jurisdictions, however, have retained a strict-liability approach even after substantially relaxing their force requirement. E.g., *Commonwealth v. Fischer*, 721 A.2d 1111 (Pa. Super. 1998). And of the 12 jurisdictions that impose punishment for sexual intercourse, without proof of force, merely on the basis of an *absence of affirmative consent*, four appear to permit strict liability. *State v. McCredie*, 798 N.W.2d 320, *3 (Wis. App. 2011) (unpublished), review denied, 2011 WI 86, 335 Wis. 2d 149, 803 N.W.2d 851 (“[I]t is the consent of the victim and not the knowledge or intent of the defendant that is controlling.”); *Watson v. State*, 504 So. 2d 1267, 1269 (Fla. Dist. Ct. App. 1986) (“[W]hether a defendant knew or should have known that the victim was refusing sexual intercourse is not an element of the crime of sexual assault.”); *State v. Hernandez*, 2010 WL 3119379 (Minn. Ct. App. Aug. 10, 2010) (“the mens rea requirements for fifth-degree criminal sexual conduct do not include knowledge or understanding that the complainant does not consent ... Pursuant to the plain language of the statute, the state was required to prove only that R.L.E. did not consent. The state was not required to prove that Hernandez had knowledge or understood that R.L.E. did not consent.”); *State v. Mummau*, 834 N.W.2d 871 (Iowa App. 2013) (Table) (describing Iowa Supreme Court precedent as holding that “mistake of fact as to consent is no defense”).

²⁵⁵ See *Regina v. Morgan*, [1976] A.C. 182; Sexual Offenses (Amendment) Act § 1(1) (1976).

²⁵⁶ E.g., *Hess v. State*, 20 P.3d 1121, 1124 (Alaska 2001). Proof of knowledge or recklessness is also required in three of the 12 states that punish sexual intercourse in the absence of affirmative consent. See COLO. REV. STAT. ANN. § 18-3-404(1)(a) (“knows”); HAW. REV. STAT. § 707-731(1)(a) (“knowingly”). Maine’s language with respect to its offense based on the absence of affirmative consent is less clear; it requires that the actor “intentionally subjects” another to penetration in the absence of express or implied acquiescence, but it is not certain whether this *mens rea* applies only to the act or also to the circumstance of nonconsent. ME. REV. STAT. ANN. TIT. 17-A, § 255-A(1)(B).

In several states, the applicable *mens rea* requirement appears unsettled or unclear. See, e.g., *State v. Hammond*, 54 A.3d 151, 158-159 (Vt. 2012) (“[W]e need not address, in this case, the finer points of mens rea required for a violation of § 3252(1)(A).”).

²⁵⁷ Liability under the felony-murder and misdemeanor-manslaughter rules is of course strict with respect to the element of a killing, but these doctrines nonetheless presuppose culpability for the predicate offense. Felony liability is rare, and heavily disfavored, when the defendant’s conduct would have been entirely innocent, if the facts had been as he reasonably believed them to be. See, e.g., *Staples v. United States*, 511 U.S. 600 (1994); *Morissette v. United States*, 342 U.S. 246 (1952).

1 believed them to be (sexual relations between *consenting* adults) is constitutionally protected.²⁵⁸
2 Moreover, given the severe sentences of imprisonment and harsh collateral consequences that
3 invariably attach to conviction for a sexual offense, the imposition of strict liability for mistakes
4 about consent is unconscionable.

5 The arguments in favor of a negligence standard are worthy of serious consideration. It
6 has been plausibly argued that “male self-deception about whether a woman has consented . . . is
7 morally worse than ordinary forms of criminal negligence.”²⁵⁹ Susan Estrich has written:²⁶⁰

8 [T]he man who heard her refusal or saw her tears, but decided to ignore them . . .
9 has, through that failure, made a blameworthy choice for which he can justly be
10 punished. The law has long punished unreasonable action which leads to loss of
11 human life as manslaughter. . . . The injury of sexual violation is sufficiently
12 great, the need to provide that additional incentive pressing enough, to justify
13 negligence liability for rape as for killing.

14 Others, however, remain concerned that a negligence standard in this context will result
15 in penal liability greatly disproportionate to fault. And that concern is substantially more acute
16 today than it was in the 1980s, when reformers like Professor Estrich initially pressed for
17 adoption of that standard. Indeed today punishments for the sexual offenses are typically much
18 more severe and less discretionary than those authorized for involuntary manslaughter. The
19 serious, severely punished offenses defined in Article 213 presuppose grave moral culpability
20 and cannot justly be applied in the absence of proof of subjective awareness of the relevant
21 risks.²⁶¹

22 There is also a significant concern about negligence liability from the opposite
23 perspective—a concern that the negligence standard may not have enough bite to accomplish the
24 objectives of its proponents. To be sure, the possibility of convicting on the basis of negligence
25 insures that a claim of honest mistake will not automatically require an acquittal—for example,
26 in cases where the accused plausibly claims that he honestly thought the complainant’s “no” did
27 not actually mean no. But the negligence standard by no means guarantees that such a claim will
28 always be unavailing. Reformers who support a negligence standard typically assume that a jury
29 will readily dismiss claims of this sort as unreasonable, and the assumption will no doubt hold
30 when the jury’s sensibilities are in accord with those of the reformers themselves. But a jury that
31 shares this sensibility is also likely to doubt that the defendant’s alleged “mistake” was made in
32 good faith at all. And conversely, the cultural perspective that might make the defendant’s claim
33 of subjective good faith plausible (the assumption that in our society “no” does not necessarily
34 mean no) will also make plausible the defendant’s argument that his mistake was *not*

²⁵⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁵⁹ Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 *Harv. J.L. & Gender* 381, 387-388 (2005).

²⁶⁰ ESTRICH, *supra* note 8, at 97-98.

²⁶¹ That conclusion is reinforced by the reality that state legislatures may be persuaded to follow the Code’s recommendations with regard to the definition of the substantive sexual offenses but may nonetheless retain their own provisions applicable to grading, sentencing, and collateral consequences. In that event, any actor convicted of an Article 213 offense may well face severe mandatory-minimum penalties and harsh collateral consequences, even if the Model Code itself contemplates more moderate sanctions.

1 unreasonable.²⁶² Indeed, attitudes like those can even make plausible a conclusion that the
2 complainant, in spite of her verbal protests, actually did consent after all. In short, a negligence
3 standard gives a prosecutor more scope to overcome an argument of good-faith mistake, but it
4 does little to resolve the factual and cultural ambiguities that make the consent question so
5 fraught in the first place.²⁶³

6 Negligence standards are of course pervasive in the law; in the criminal law they are
7 particularly common in the jurisprudence of homicide and self-defense. Such standards can work
8 well when they call on social norms that are widely shared, stable, and substantively just. In
9 contrast, where even one of those prerequisites is missing, a negligence standard can become a
10 recipe for inconsistency, lack of fair warning, and substantive unfairness. And with regard to the
11 expression of consent in sexual encounters, *all three* of these prerequisites are lacking:
12 contemporary expectations regarding the appropriate expression of consent or nonconsent are far
13 from uniform across society, they remain in constant flux, and their fairness to victims and to the
14 accused is hotly contested. Under these circumstances, a negligence standard cannot suffice to
15 move legal outcomes or problematic patterns of behavior in a desired direction. And a
16 negligence standard may even produce the worst of both worlds, by undermining the chances for
17 conviction in cases deserving of punishment while at the same time exposing too many
18 defendants to the risk of conviction without fair warning.

19 The *mens rea* standard, in short, affords a clumsy and ineffective tool for achieving the
20 objectives of reform in the area of consent to sexual relations. The appropriate criteria for
21 determining consent or nonconsent cannot usefully be left for resolution on an *ad hoc*, low-
22 visibility basis through varying conceptions of “reasonableness” reached in the verdicts of
23 individual juries. Rather, the problem calls for legislative judgment, identifying in transparent,
24 consistently applicable terms the facts that will suffice to establish legally effective consent. This
25 is the approach taken in Article 213. In particular, Section 213.0(3) specifies that “[c]onsent”
26 means a person’s positive agreement, communicated by either words or actions, to engage in
27 sexual intercourse or sexual contact,” and Section 213.0(4) specifies that “a verbally expressed
28 refusal establishes nonconsent in the absence of subsequent words or actions indicating positive
29 agreement.” These provisions, in conjunction with the substantive-offense definitions of Sections
30 213.2(1)(a)(2) and 213.4, make nonconsent and absence of affirmative consent sufficient to
31 establish, respectively, the offenses of Sexual Intercourse by Coercion and Sexual Intercourse
32 Without Consent.

33 This framework largely obviates the perceived dangers of requiring proof of recklessness.
34 In the case posited by Professor Estrich (the “man who heard her refusal or saw her tears, but
35 decided to ignore them”), the defendant would *know* of the circumstances that the law defines as
36 sufficient to establish nonconsent. Likewise, a defendant who chose to assume that a woman’s
37 silence and passivity indicated willingness would *know* that he lacked her positive agreement. In
38 both cases, elusive judgments about the “reasonableness” of a defendant’s beliefs would not
39 undercut law-enforcement goals because the defendant would actually know that the decisive

²⁶² See, e.g., Husak & Thomas, *supra* note 142, at 123-125 (1992) (arguing that a belief in the presence of consent under these circumstances can be in accord with existing social conventions and can be considered reasonable).

²⁶³ See Stephen J. Schulhofer, *The Gender Question in Criminal Law*, 7 Soc. Phil. & Pol. 105, 132-133 (1994).

1 facts were present, and the jury would be instructed that those facts, if found beyond a reasonable
2 doubt, would be sufficient for conviction.

3 The principal remaining risk of unfairness lies in the residual possibility that a defendant
4 might in good faith believe, for example, that it was permissible to disregard a verbal “no” when
5 other circumstances led him to infer willingness. That this misconception—a mistake of law—
6 would afford no defense does not in itself completely answer the concern about unfairness to the
7 defendant. But the tension between the Model Code’s twin commitments to subjective
8 culpability and to the denial of mistake-of-law defenses pervades all of the criminal law; it
9 cannot in itself pose a barrier to changes in the law that are well-justified on their merits. It may
10 be assumed, moreover, that legislation addressing this subject will attract a considerable degree
11 of public attention, so that ignorance of the law in this regard may not be long lasting. As with
12 other mistake-of-law claims, prosecutorial charging discretion and judicial sentencing discretion
13 will afford an avenue (albeit an imperfect one) for mitigating potential injustice when
14 circumstances warrant.

15 *Intoxication.* Despite the 1962 Code’s general disapproval of penal liability on the basis
16 of negligence, Section 2.08(2) of the 1962 Code provides that “[w]hen recklessness establishes
17 an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of
18 which he would have been aware had he been sober, such unawareness is immaterial.”²⁶⁴ Section
19 2.08 thus partially displaces the ordinary recklessness requirement of the 1962 Code and permits
20 mere negligence to suffice when lack of awareness results from self-induced intoxication.
21 Proposed Section 213.0(5) specifies, however, that the terms of Model Penal Code Section
22 2.08(2) do not apply to the revised Article 213. Because Section 2.08 does not apply, liability for
23 any of the offenses detailed in Sections 213.1 through 213.6 always requires proof of the
24 accused’s actual subjective awareness of the material element. When an accused lacks such
25 subjective awareness, whether due to self-induced intoxication or any other reason, liability
26 under Sections 213.1 through 213.6 is therefore unavailable.

27 The rationale for rejecting the approach of Section 2.08 can be stated briefly. That
28 Section introduces an anomaly into the culpability and grading provisions of the Code, insofar as
29 it attributes subjective awareness and the corresponding degree of liability to a defendant who,
30 by definition, lacks that awareness. As the Commentaries to the 1962 Code acknowledged, “it is
31 precisely the awareness of the risk . . . that is the essence of [the actor’s] moral culpability,” and
32 thus “a special rule” positing awareness of a risk that proves “greater in degree than that which
33 the actor perceives at the time of getting drunk . . . is bound to [result in] a liability
34 disproportionate to culpability.”²⁶⁵ The 1962 Code nonetheless chose to accept this special rule,
35 primarily on the ground that “it is not unfair to postulate a general equivalence between the risks
36 created by the conduct of the drunken actor and the risks created by his conduct in becoming
37 drunk.”²⁶⁶

²⁶⁴ MODEL PENAL CODE § 2.08(2) (“When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.”).

²⁶⁵ MODEL PENAL CODE AND COMMENTARIES, PART I, §§ 1.01 to 2.13 (1985), § 2.08, COMMENT 1, AT 358-359.

²⁶⁶ *Id.* at 359.

1 The premise of Section 2.08, which in effect equates awareness of the risks entailed in
2 heavy drinking with awareness of a substantial and unjustifiable risk of causing a particular kind
3 of harm (such as death or, in the present instance, unwanted sexual intrusion), has been a target
4 of forceful criticism; one scholar considers this equation “often preposterous.”²⁶⁷ Moreover, a
5 law that permits conviction on this basis often has the effect of conferring on prosecutors and
6 juries the discretion to unfairly concentrate liability on one party even though the voluntary
7 intoxication of both contributed to a situation that turned abusive.²⁶⁸ Although a person’s
8 willingness to indulge in alcohol or other intoxicants should never be construed as waiving his or
9 her right to exercise sexual autonomy, it is also true that sexual intercourse often occurs when
10 both the accused and the complainant are intoxicated. In such situations, intoxication clouds not
11 only the complainant’s capacity and judgment in expressing consent or nonconsent, but also the
12 accused’s capacity to accurately understand the complainant’s condition. When a complainant is
13 physically able to express nonconsent but, as a result of intoxication, lacks sufficient mental
14 coherence to do so, and when, at the same time, the aggressor, as a result of intoxication, fails to
15 appreciate the degree to which the complainant’s mental state is compromised, the subsequent
16 activity is not fairly labeled criminal on the basis of those circumstances alone.

17 Accordingly, Sections 213.1-213.6 reflect a deliberate choice not to impose liability for
18 negligent acts, even when such negligence is the product of voluntary intoxication, and to insist
19 instead on proof that the defendant was at least aware of a risk that the other party was not
20 consenting.

21 Application of this *mens rea* standard will interact with the proof required to establish the
22 underlying factual element. Under statutes that leave consent undefined and ask whether a
23 defendant’s perception of consent is unreasonable, a defendant’s clouded perceptions due in part
24 to intoxication make the jury’s factfinding task elusive if not metaphysical. For the reasons just
25 explained, however, Article 213 eschews this framework in favor of one that defines in specific,
26 concrete terms the facts that will be sufficient to establish nonconsent or the absence of positive
27 consent. Thus, intoxication is much less likely to confound the inquiry. If, for example, an
28 accused claims lack of awareness due to intoxication, a jury confronted with persuasive evidence
29 of the complainant’s clear expressions of nonconsent may reject the accused’s self-serving
30 assertion, and find that even in his or her intoxicated state, the accused was, in fact, aware.
31 Moreover, even if a jury believes that the defendant perceived no risk that the other party’s
32 behavior signaled *non*consent, the jury might readily find in such circumstances that the
33 defendant was surely aware that the complainant had not affirmatively communicated *positive*
34 *consent*.

35 *Age.* Article 213 likewise rejects strict liability and negligence liability for mistakes as to
36 age. This position departs from the widely prevalent view in American law imposing strict

²⁶⁷ Stephen J. Morse, Fear of Danger, Flight from Culpability, 4 PSYCHOL., PUB. POL’Y & L. 250, 254 (1998).

²⁶⁸ “Alcohol is the most commonly used substance in sexual assaults, and victims who are drinking are usually assaulted by drinking offenders.” Brecklin & Ullman, *supra* note 195, at 1504; Antonia Abbey et al., The Relationship Between the Quantity of Alcohol Consumed and the Severity of Sexual Assaults Committed by College Men, 18 J. INTERPERSONAL VIOLENCE 813, 183 (2003) (“Research with convicted rapists, community samples of sexual assault perpetrators and victims, and college student perpetrators and victims consistently find that approximately half of sexual assaults are associated with alcohol use by the perpetrator, victim, or both.”).

1 liability with respect to mistake of age in sexual offenses.²⁶⁹ Section 213.6(1) of the 1962 Code
2 rejected that approach; it imposed strict liability only for sexual offenses against children under
3 the age of 10 and allowed a defense of reasonable mistake of age for offenses that hinged
4 liability on a child's age over 10.²⁷⁰ In contrast, the various age-based offenses under revised
5 Article 213 all limit criminal liability to actors who have at least a reckless awareness that the
6 complainant's age was below the prescribed level.

7 There are several justifications for this conclusion. First, regardless of the sweep of strict
8 liability in the criminal law more generally, there should be no room for punishment for a sexual
9 offense, with its inevitably significant exposure to imprisonment and harsh collateral
10 consequences, in the absence of proof of some degree of fault. The 1962 Code made limited
11 concessions to the opposing view, simply in deference to "political resistance."²⁷¹ But at this
12 stage of law-reform experience, it should be clear that strict liability of any sort in this context is
13 unconscionable and properly excluded as a basis for conviction.

14 Second, the 1962 Code set the age of consent at 10 years, whereas revised Section
15 213.1(1)(c)(i) extends to all minors below the age of 12 the rule of per se incapacity to consent to
16 sexual intercourse; any person who engages in (nominally consensual) sexual intercourse with a
17 child under 12 is guilty of a second-degree felony.²⁷² Section 213.2(3)(b) likewise punishes, as a
18 third-degree felony, consensual sexual intercourse with a child between 12 and 16, whenever the
19 defendant is four years older than the victim. Children under 10 will rarely be perceived as
20 sexually mature, and accordingly, strict liability with respect to a mistake about the relevant age
21 in that context (as permitted under the 1962 Code) posed far less risk of substantive injustice. In
22 contrast, children under 12—a significant percentage of whom will have entered into
23 puberty²⁷³—may more understandably be misperceived as above the age of legal consent.

24 A case could be made, nonetheless, for imposing criminal liability on those who
25 mistakenly and *unreasonably* assume that a consensual partner is over the age of 12. However,
26 such liability seems unnecessarily expansive, in light of the availability of punishment, under
27 Section 213.2(3)(b) whenever a victim is *under the age of 16* and the actor is at least four years
28 older. Most sexual relationships between pre-adolescent children and older persons are almost
29 certain to be captured by this provision, even if the defendant escapes liability under
30 213.1(2)(c)(i) by convincing a jury that he or she was unaware of the risk that the complainant
31 was under 12. Section 213.2(3)(b) requires only that the defendant know, or be aware of a risk,
32 that the consensual sexual partner is under 16 and that he or she is more than four years older.
33 Accordingly, any accused over the age of 20 who engages in sexual activity with a child will be
34 liable unless able to convince the jury that he or she was not even aware of a *risk* that the child

²⁶⁹ See, e.g., *State v. Jadowski*, 680 N.W.2d 810 (Wis. 2004); *Owens v. State*, 724 A.2d 43 (Md. 1999). See generally Catherine Carpenter, On Statutory Rape, Strict Liability, and the Public Welfare Offense Model, 53 Am. U. L. Rev. 313, 385-391 (2003) (surveying American jurisdictions).

²⁷⁰ MODEL PENAL CODE § 213.6(1) (1980).

²⁷¹ MODEL PENAL CODE AND COMMENTARIES, PART II, §§ 210.0 to 213.6 (1980), § 213.6, COMMENT 2, AT 416.

²⁷² When sexual intercourse with a child under 12 is *nonconsensual*, for any reason ranging from coercion by physical force to the mere absence of positive consent, it is of course punishable on that additional basis under the applicable provisions of Article 213.

²⁷³ See *supra*, text at notes 109-110.

1 was under 16, a nearly insurmountable hurdle when the child is actually less than 12 years old. In
2 this statutory framework, the refusal to countenance liability on the basis of negligence would
3 not risk the exoneration of a defendant who honestly but negligently failed to realize that his
4 sexual partner was under 12. Such a defendant could escape liability under Section 213.1(1)(c)(i)
5 but would nonetheless almost certainly be found liable under Section 213.2(3)(b), on the basis of
6 reckless awareness of a risk that this very young child was less than 16 years old.

7 The sole contexts in which a defendant's honest but unreasonable belief might, in
8 practice, afford a basis for exoneration under the age-based offenses of Article 213 would be
9 those involving defendants who are themselves close in age to their sexual partners. Such a case
10 would be presented, for example, if a 17-year-old engaged in nominally consensual sex with an
11 11-year-old, and then claimed that he or she thought that the younger child was 13 years old. If
12 the jury believed that claim but found the accused's belief unreasonable, the accused would not
13 be liable under Section 213.2(3)(b) (because the age gap between 13 and 17 is not more than four
14 years), and the accused might not be liable under Section 213.1(1)(c)(i) (because the accused
15 arguably was not subjectively aware of a risk that the partner was under 12). Under those
16 particular circumstances, the accused might possibly escape liability. Although that result may
17 strike some as undesirable, the need to deter or punish teenagers for consensual sexual
18 relationships with other children believed (even unreasonably) to be peers is insufficient reason
19 to depart from the general principle requiring moral culpability as a prerequisite to criminal
20 punishment, especially in light of the severe penalties and collateral consequences associated
21 with sex offenses and the increasing recognition of the ongoing cognitive development of
22 juvenile offenders.

MODEL PENAL CODE – ARTICLE 213

EVIDENTIARY MATERIAL

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Evidentiary Material

MODEL PENAL CODE
ARTICLE 213

I. PROPOSED SECTION 213.7
(DRAFT, MAY 19, 2014)

1 SECTION 213.7. PROCEDURAL AND EVIDENTIARY PRINCIPLES APPLICABLE TO
2 ARTICLE 213
3

4 (1) *Sexual Activity of the Complainant.*
5

6 (a) *General Rule*
7

8 (i) In a prosecution under this Article, notwithstanding any other provision of
9 law, reputation or opinion evidence about the sexual activity of the
10 complainant is not admissible, unless constitutionally required.

11 (ii) Evidence of specific instances of sexual activity of the complainant, other
12 than sexual activity with the accused, shall be inadmissible, except as
13 provided in subsection (b), or when its admissibility is constitutionally
14 required. If the proffered sexual activity alleges a prior instance of false
15 accusation of a sexual offense, such evidence is further inadmissible unless
16 the falsehood of the prior accusation is established by a preponderance of
17 evidence, with proof beyond mere evidence that the complaint was judged
18 unfounded or was otherwise not pursued.

19 (iii) Specialized rules under state or local law shall establish procedures for
20 determining, prior to trial whenever possible, the admissibility of evidence
21 covered by this Section.

22 (iv) For purposes of this Section, “sexual activity” shall mean any behavior,
23 condition, or expression related to human sexuality, or allegations thereof,
24 whether voluntary or involuntary, including but not limited to evidence and
25 allegations relating to sexual intimacy, contact, and orientation; use of
26 pornography; sexual fantasies and dreams; use of contraceptives; habits of
27 dress; and marital and partnership history or status.

28 (b) *Exceptions.* Evidence of specific instances of sexual activity, if otherwise
29 admissible according to generally applicable rules of evidence, shall not be
30 inadmissible under subsection (a):

31 (i) when offered to prove that the defendant was not the source of physical
32 evidence, pregnancy, infection, or injury in the present case;

33 (ii) when offered to impeach admitted evidence by specific contradiction or prior
34 inconsistency;

35 (iii) when offered to prove the complainant’s bias or motive to fabricate a
36 material fact;

(iv) when such evidence is a prior false accusation established in accordance with subsection (1)(a)(ii), and is offered to prove the complainant's character for untruthfulness;

(v) when other evidence or circumstances at a trial involving an alleged victim of tender years suggest that the accusation is more likely to be true because the alleged victim has a specific kind of precocious sexual knowledge pertinent to the accusation, or when the prosecutor makes such a suggestion or argument, regardless of the alleged victim's age; or

(vi) when such evidence has an especially strong tendency to prove a material claim, and exclusion of such evidence would substantially impede a party's ability to support that claim.

(2) Prior Sexual Conduct of the Defendant.

Evidence of other sexual conduct by the defendant is not admissible to prove the character of the defendant in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as for impeachment, bias, or as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(3) Testimony Outside of the Courtroom.

(a) Testimony of an alleged victim of the defendant may be taken outside the courtroom in accordance with the procedures specified in subsection (b) if, at the request of any party, the court finds on the record, after a hearing based on evidence that includes the testimony of a medical or psychological expert who has examined the alleged victim, that

(i) The alleged victim is less than 12 years of age at the time of trial, or has a documented developmental delay to the extent that his or her emotional or cognitive capacity is no greater than that of a child aged 12;

(ii) The alleged victim will suffer serious emotional distress if required to testify in the presence of the defendant;

(iii) Such distress will impair the alleged victim's ability to communicate, or will render the victim incapable of testifying; and

(iv) The procedure is necessary to, and will significantly, mitigate that distress.

(b) After making the findings required by subsection (a), the court may order that the testimony of an alleged victim be taken outside the courtroom and outside the physical presence of the judge, the defendant, and the jury, provided that all of the following conditions are met:

(i) The testimony is taken during the proceeding;

(ii) The testimony is taken via a method of communication that allows the defendant, judge, and jury to hear and see clearly the witness and counsel for prosecution and defense;

1 (iii) Counsel for the defense is present in the room in which the alleged victim
2 testifies and has the opportunity to cross-examine the alleged victim in the
3 usual way; or, in the event that the defendant elects to proceed *pro se*, then
4 the court has appointed standby counsel prior to the commencement of trial,
5 who shall be present;

6 (iv) The room in which the alleged victim testifies contains no person other than
7 the witness, counsel for the government, counsel or standby counsel for the
8 defense, the operators of the technical equipment, any essential court
9 personnel, and no more than one person who the court finds contributes to
10 the well-being of the alleged victim;

11 (v) During the testimony, the defendant, judge, and jury shall remain in the
12 courtroom;

13 (vi) The defendant shall be provided with a confidential and nondisruptive
14 means of instantaneous communication with defense counsel.

15
16 (4) *Official Complaint.*
17

18 (a) In a prosecution under this Article, and to the extent consistent with the
19 constitutional right of confrontation, the government may introduce in its case-in-chief
20 evidence that shows the time and place where the complaint was made to a person in
21 authority, along with evidence tending to establish the reasons for any delay, provided that
22 such evidence is not substantially more prejudicial than probative. The court shall take
23 care to circumscribe the admissible testimony to avoid reference to the details alleged in the
24 complaint, including by limiting the testimony of a witness and by limiting the number of
25 witnesses produced.
26

27 (b) Evidence of reports, or lack of reports, to persons other than those in
28 authority are inadmissible, unless deemed admissible by generally applicable rules of
29 evidence, or unless offered to rebut an express or implied argument concerning the
30 failure of the complainant to make a report.

MODEL PENAL CODE – REVISION OF ARTICLE 213**II. COMMENTARY****A. CONTEMPORARY CONCERNS RELATING TO PROCEDURE AND EVIDENCE.**

As noted earlier, data indicate that sexual offenses remain significantly under-reported and under-prosecuted.¹ Many victim advocates blame legal actors not just for failing to take seriously the allegations of accusers, but also for inflicting a secondary trauma upon victims in the form of the process itself.² Many jurisdictions have undertaken a range of reforms, including designating special sex-offense units in prosecution and police departments, funding advocates to help shepherd victims through a daunting and complicated process, and reforming evidentiary and procedural rules to better accommodate the needs of victims.³

No one can doubt the wisdom of overhauling many outdated and prejudicial criminal-justice rules. Traditional rules of evidence and procedure did not just discourage victims from coming forward and pursuing justice for their injuries; they also obscured or even blocked justice by placing inflammatory and misleading hurdles on the path. At the same time, however, too ready a willingness to dispense with conventional rules has resulted in miscarriages of justice in the other direction. For instance, a spate of convictions in daycare sexual-abuse cases in the 1980s, all later overturned,⁴ revealed grave problems with the procedures used to interview highly suggestible children, arguably exacerbated by the relaxation of rules of confrontation.

Moreover, race unfortunately continues to cloud accurate assessments of evidence. Between 1989 and 2012, 244 individuals condemned for rape or other sexual assault were officially exonerated after postconviction DNA testing made clear that they had no involvement in the crime.⁵ Yet although only about five percent of all rapes involved black perpetrators and white victims,⁶ 53 percent of the misidentifications in adult rape cases involved black defendants incorrectly identified by a white victim. Indeed, 34 percent of exonerations in adult rape cases—

¹ See Tentative Draft No. 1 (2014), Substantive Material, Part II.D.

² See generally ROSE CORRIGAN, *UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS* (2013).

³ See generally OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, *NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY* xii (1998).

⁴ DEBBIE NATHAN & MICHAEL R. SNEDEKER, *SATAN'S SILENCE: RITUAL ABUSE AND THE MAKING OF A MODERN AMERICAN WITCH HUNT* 2-4 (1995) (describing moral panic that led to McMartin preschool case, the conviction of Kelly Michaels, and others).

⁵ See Know the Cases, Innocence Project, <http://www.innocenceproject.org/know/> (last visited Mar. 21, 2014). Further details on the sexual-assault cases were provided by Innocence Project Research Director Emily West (Nov. 26, 2012). In a wider database that includes official exonerations resulting from evidence other than DNA, there were 305 exonerations of individuals convicted of sexual offenses (including crimes of child sexual abuse). Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989–2012*, at 20 (Univ. of Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, No. 277, June 2012), available at <http://ssrn.com/abstract=2092195>.

⁶ See Gross & Shaffer, *supra* note 5, at 49 n.71 (and accompanying text).

for any reason—were cases involving misidentification of a black defendant by a white victim.⁷ Evidentiary and procedural reform therefore must consider two conflicting realities: too few incidents of sexual assault are actually prosecuted, in part because of victims' concerns about the legal process itself, and yet sex offenses also remain an area of criminal law in which the danger of unjust conviction runs high.

With this contemporary picture in mind, this commentary addresses issues related to procedural and evidentiary rules that specially operate in the sexual-assault context.

B. RECOMMENDATIONS TO STRIKE THE CURRENT PROCEDURAL PROVISIONS.

Section 213.6 of the 1962 Code contained five provisions applicable to the entire Article 213. They provide for: (1) no defense of mistake in cases with a victim under age 10, and a reasonable-belief defense if the victim is over age 10; (2) a marital-rape exclusion; (3) a defense to corruption of minors and statutory sexual-contact offenses if the victim was sexually promiscuous; (4) a requirement of prompt complaint; and (5) a corroboration requirement paired with a cautionary jury instruction. Revised Section 213.7 strikes these five provisions in their entirety, and replaces them with provisions that address contemporary concerns and empirical findings relevant to generally applicable procedural and evidentiary issues for sexual offenses. The treatment of mistakes of fact that bear on the material elements of the Article 213 offenses is addressed in the commentary to the substantive sections, and the treatment of sexual offenses in which the victim and offender are married or otherwise involved in an ongoing intimate relationship is addressed in Section 213.5. Collateral consequences of conviction are addressed in Section 213.6. Section 213.7, as revised, addresses only (1) issues of evidentiary admissibility and (2) special considerations relating to the presentation of the testimony of child victims.

1. Victim Sexual History (§ 213.6(3)).

The common law historically considered any prior sexual experience of a sexual-assault complainant to be highly relevant evidence tending to disprove the complaint.⁸ Admissible evidence included not only any prior sexual relationship between the defendant and the complainant, but also proof of the complainant's prior sexual experiences with any other person.⁹ As a practical matter, therefore, traditional rape law in effect imposed hurdles such that women without pristine sexual histories could rarely succeed in prosecutions of their attackers.

MPC 213.6(3) as it now stands in essence codifies this approach, but seeks to cabin it to some extent by allowing a defense on the basis of the "sexual promiscuity" of the complainant. For reasons discussed more fully in Parts II.C.1–.2 below, which address the "rape shield" laws

⁷ Id. at 40 (Table 13), 49.

⁸ See generally Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 Geo. Wash. L. Rev. 51 (2002).

⁹ See, e.g., *State v. Johnson*, 133 N.W. 115, 116 (Iowa 1911) ("[I]t is also true that prosecutrix's general reputation for chastity, as well as her previous voluntary sexual relations with the defendant, may and should have been considered as substantive proof of the fact that whatever the act done it was with the consent of the prosecutrix.").

1 passed in the last quarter of the 20th century that sharply curtailed this practice, the draft strikes
2 this provision entirely.

3
4 **2. Prompt Complaint, Corroboration, and Cautionary Instructions (§ 213.6(4) and**
5 **§ 213.6(5)).**

6 The prompt-complaint, corroboration, and cautionary-instruction practices are
7 interrelated. This trio of requirements raised hurdles to the successful prosecution of rape claims
8 by imposing burdens on the sexual-assault complainant. They emerged from a cultural and legal
9 landscape in which the chief concern was the protection of chaste white women, and that sought
10 safeguards against the perceived likelihood that women would lodge a false complaint.¹⁰

11 [I]n many jurisdictions, if a woman failed to complain promptly, she would be forgiven if
12 she had evidence corroborating the rape. If a woman suffered a rape that produced no
13 corroborative evidence, a prompt complaint itself might serve as the necessary legal
14 corroboration. A judge was frequently required to issue cautionary instructions in a rape
15 case unless the complainant proffered corroborative evidence of the offense.¹¹

16 The commentaries to the MPC described the prompt-complaint requirement as “an innovation in
17 the law,” expressed an intention to “continue the traditional corroboration requirement, although
18 in a much-relaxed form,”¹² and felt continued need to warn the jury of “emotional involvement
19 of the witness and the difficulty of determining the truth with respect to alleged sexual activities
20 carried out in private.”¹³

21 *a. Prompt Complaint.*

22 The underlying logic of the prompt-complaint rule was that legitimate victims would
23 naturally tend to “hue and cry” immediately after the commission of the offense. Delay,
24 therefore, could only mean that a victim had opportunistically determined to raise a false
25 allegation as a result of some ill motive. Accordingly, the rule initially served as a severe statute
26 of limitations that barred prosecution entirely if a victim failed to promptly allege sexual assault.
27 In the 19th century, this hard rule softened somewhat to allow the prosecution to proceed, but to
28 admit evidence that the complainant failed to promptly report the offense as a legitimate attack
29 on the veracity of the rape claim.

30 Prompt-complaint rules slowly began to erode in the 1980s, as legislators awakened to
31 the reality that “rape’s uniqueness comes not in the disproportionate numbers of false
32 complaints, but in the disproportionate numbers of cases that are never reported at all.”¹⁴ A wide

¹⁰ Race served a critical and integral part of the story of rape law in the United States, both in that sexual assaults against women of color were historically ignored, and in that false accusations of sexual assault by white women against Black males legitimated white-male violence. See generally SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1993).

¹¹ See generally Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. Rev. 945, 954 (2004) (internal citations omitted).

¹² MODEL PENAL CODE Article 213, Introductory Note, at 273.

¹³ MODEL PENAL CODE § 213.6(5).

¹⁴ Susan Estrich, *Rape*, 95 Yale L.J. 1087, 1140 (1986).

variety of circumstances may delay a complainant in filing a report—for example, victims may feel shame or embarrassment about the incident, may worry that they will not be believed, may fear reprisal from the offender, may doubt that the offender will be apprehended or punished, or (particularly in the case of intimate assaults) may initially wish to protect the offender.

Today, South Carolina is the only jurisdiction that maintains a true prompt-complaint requirement, in that prosecution is barred if the period elapses, but its rule applies only in cases alleging assaults in the marital context.¹⁵ Texas also maintains a version of a prompt-complaint rule, but that provision operates in conjunction with the state's corroboration requirement. That is, Texas allows an allegation to be supported by uncorroborated testimony, so long as the complainant told any person other than the defendant within a year of the assault; otherwise, the state's corroboration requirement applies.¹⁶ The great weight of legislative and scholarly authority now disfavors these requirements, on thoroughly convincing grounds. The draft therefore strikes the MPC's prompt-complaint provision.

As a final note, it bears mention that rejection of the prompt-complaint rule occurred in tandem with increasing acceptance of an evidentiary exception for prompt complaints made by the complainant to private persons. This "fresh complaint" rule admits evidence that the complainant reported the sexual assault to another person, even where s/he did not report it promptly to the police. The fresh-complaint exception reflects a preconception similar to that which underlies the old prompt-complaint requirement—that a truthful sexual-assault victim will report the incident to another person promptly after the offense occurs, behavior that presumably is seen as less likely in the case of an untruthful complainant. The fresh-complaint exception is discussed in Part II.C.10 below.

b. Corroboration.

Contrary to the prompt-complaint rule, which originated in English common law, the corroboration rule first appeared in the United States.¹⁷ New York was the first jurisdiction to introduce the requirement by statute¹⁸ and Georgia was the first to do so judicially.¹⁹ The

¹⁵ S.C. CODE ANN. § 16-3-658 (2012) ("The offending spouse's conduct must be reported to appropriate law enforcement authorities within thirty days in order for a person to be prosecuted for these offenses."); S.C. CODE ANN. § 16-3-615(B) (2012) ("The offending spouse's conduct must be reported to appropriate law enforcement authorities within thirty days in order for that spouse to be prosecuted for this offense."). California and Illinois were longstanding holdouts as well, but both states ultimately eliminated their provisions. CAL. PENAL CODE § 264 (2012) as amended by 2006 Cal. Legis. Serv. Ch. 45 (S.B. 1402) (West); 720 ILL. L. COMP. STAT. 5/11-1.10 (2012) as amended by 2004 Ill. Legis. Serv. P.A. 93-958 (H.B. 4771) (West).

¹⁶ TEX. CODE CRIM. PROC. ANN. art. 38.07(a) (West 2012) ("A conviction . . . is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred."). The statute carves exceptions for victims under 17, over 65, or over 18 if the complainant "by reason of age or physical or mental disease, defect, or injury was substantially unable to satisfy the person's need for food, shelter, medical care, or protection from harm." Id. art. 38.07(b). The idea that a fresh complaint could substitute for corroboration was found in other jurisdictions as well.

¹⁷ MODEL PENAL CODE Commentaries 213.6, at 422 (citing 7 J. WIGMORE, EVIDENCE § 2061, at 342 (3d ed. 1940)).

¹⁸ An Act to amend the Penal Code, ch. 663, 1886 N.Y. Laws 109th Sess. 953 (1886).

¹⁹ Davis v. State, 48 S.E. 180, 181-182 (Ga. 1904) ("The law is well established, since the time of Lord Hale, that a man shall not be convicted of rape on the testimony of the woman alone, unless there are some

1 purpose of the requirement was “to protect the defendant from an ‘untruthful, dishonest, or
2 vicious complainant.’”²⁰ Accordingly, the law demanded corroborating evidence that attested to
3 the veracity of the complaint (such as torn clothes or physical injuries).

4 At present, 36 states and the federal government have eliminated their corroboration
5 requirements, either through statutory or judicial action. Thirteen states maintain limited
6 corroboration provisions,²¹ applicable for instance in the event of material inconsistencies in the
7 victim’s testimony,²² inherently incredible testimony,²³ or other special situations.²⁴

8 Although the corroboration requirement has more adherents than does prompt complaint,
9 closer inspection of those states that maintain the requirement reveal that most operate in a far
10 more limited fashion than may appear at first glance. In essence, contemporary corroboration
11 requirements seem to affirm only that a conviction cannot stand if the testimony of the
12 complaining witness is itself inherently contradictory or patently incredible, or where the
13 complaining witness has recanted.²⁵ Such a rule would seem, if fairly applied, to appropriately

concurrent circumstances which tend to corroborate her evidence.”).

²⁰ Anderson, *supra* note 11, at 957 (citing *People v. Yannucci*, 15 N.Y.S.2d 865, 866 (N.Y. App. Div. 1939),
rev’d on other grounds, 29 N.E.2d 185 (1940)).

²¹ Those states are: Alaska, Arizona, Kansas, Kentucky, Massachusetts, Mississippi, Missouri, New York,
Ohio, Oklahoma, Texas, West Virginia, and Wisconsin. See *infra* nn.22-25; see also *Henry v. State*, 861 P.2d 582,
586 (Alaska Ct. App. 1993); *Robinson v. Commonwealth*, 459 S.W.2d 147, 150 (Ky. Ct. App. 1970) *Commonwealth*
v. Sineiro, 432 Mass. 735, 741-742 (2000); *State v. Baldwin*, 571 S.W.2d 236, 239 (Mo. 1978) (en banc); *State v.*
Clark, 87 Wis. 2d 804, 816 (1979).

²² *Commonwealth v. Sineiro*, 740 N.E.2d 602, 607 (Mass. 2000) (“[W]hen the prior inconsistent grand jury
testimony concerns an essential element of the crime, the Commonwealth must offer at least some additional
evidence on that element....”); *Ben v. State*, 95 So. 3d 1236, 1253 (Miss. 2012) (“We have held that ‘[a]n individual
may be found guilty of rape on the uncorroborated testimony of the prosecuting witness, where the testimony is not
discredited or contradicted by other credible evidence.’”).

²³ *Remine v. State*, 759 P.2d 230, 232 (Okla. 1988) (“Corroboration is only necessary when the
prosecutrix’s testimony is too inherently improbable to support a conviction.”); *State v. McPherson*, 371 S.E.2d 333,
337, 338 (W. Va. 1988) (upholding conviction “on the uncorroborated testimony of the victim, unless such testimony
is inherently incredible,” as “when the testimony defies physical laws.”).

²⁴ New York requires corroboration when the victim’s incapacity to consent derives from the victim’s
mental defect or mental incapacity. N.Y. PENAL LAW § 130.16 (McKinney 2012) (“A person shall not be convicted
of [a sexual crime] of which lack of consent is an element but results solely from incapacity to consent because of
the victim’s mental defect, or mental incapacity, or an attempt to commit the same, solely on the testimony of the
victim, unsupported by other evidence....”). Ohio requires corroboration for the lesser crime of sexual imposition.
OHIO REV. CODE ANN. § 2907.06(B) (West 2012) (“No person shall be convicted of [sexual imposition] solely upon
the victim’s testimony unsupported by other evidence.”). Texas requires prompt report or corroboration, as
alternatives. TEX. CRIM. PROC. CODE ANN. § 38.07(a) (West 2012) (“A conviction . . . is supportable on the
uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the
defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred.”).

²⁵ E.g., *State v. Williams*, 526 P.2d 714, 716-717 (Ariz. 1974) (“A conviction may be had on the basis of the
uncorroborated testimony of the prosecutrix unless the story is physically impossible or so incredible that no
reasonable person could believe it.”); *State v. Borthwick*, 880 P.2d 1261, 1262 (Kan. 1994) (internal citations
omitted) (the “testimony of the prosecutrix alone can be sufficient to sustain a rape conviction without further
corroboration as long as the evidence is clear and convincing and is not so incredible and improbable as to defy
belief.”).

enforce the standard for judgment of acquittal in any criminal matter.²⁶ But calling special attention to the context of sexual assault by imposing an explicit rule of corroboration risks inviting a more stringent standard in only these cases. Given the potential for arbitrary technical distinctions to corroboration requirements raised by rules geared toward special circumstances,²⁷ and the lack of credible social-scientific evidence demonstrating that sexual-assault complainants falsify their allegations in notable numbers, the draft eliminates this provision.

c. Cautionary Instructions.

Distrust of rape complainants has long pervaded legal authorities, who in turn explicitly encouraged like skepticism among the jury. In the 17th century, English jurist Lord Hale cautioned that rape “is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.”²⁸ The cautionary instruction that often bears his name, or the “Lord Hale instruction,” warns the jury of the difficulty of defending against allegations of rape or instructs the jury to take special care to find guilt beyond a reasonable doubt based on the testimony of a complaining witness. Like the prompt report and corroboration requirements, cautionary instructions have been eliminated in most jurisdictions, by either judicial decision²⁹ or legislation.³⁰

Nine states and the federal system allow cautionary instructions,³¹ but many of those instructions apply only when the complainant’s testimony is uncorroborated,³² and there is some

²⁶ See, e.g., *Ben v. State*, 95 So. 3d 1236, 1253-1254 (Miss. 2012) (affirming rule that evidence not be discredited or contradicted, but rejecting appellant’s claim based on lack of conventional forms of corroboration such as injury or prompt complaint).

²⁷ *State v. Gardner*, 849 S.W.2d 602, 604 (Mo. Ct. App. 1993) (explaining that corroboration is not required for inconsistencies or contradictions that stem from differences between the victim and other witnesses, those that “bear[] on proof not essential to the case,” or those that stem from lack of memory as opposed to direct contradiction).

²⁸ 1 M. HALE, *PLEAS OF THE CROWN* 635 (1680). One student note in 1967 confidently begins, “[s]urely the simplest, and perhaps the most important, reason not to permit conviction for rape on the uncorroborated word of the prosecutrix is that that word is very often false. False accusations of sex crimes in general, and rape in particular, are generally believed to be much more frequent than untrue charges of other crimes.” Note, *Corroborating Charges of Rape*, 67 Colum. L. Rev. 1137, 1138 (1967) (citation omitted).

²⁹ In *Hardin v. State*, 840 A.2d 1217, 1222-1224 (Del. 2003), the Supreme Court of Delaware presents a historical account of the rise and fall of the cautionary-instruction requirement, and jurisdictions that have done away with the requirement through judicial opinion have followed these arguments.

³⁰ See, e.g., COLO. REV. STAT. ANN. § 18-3-408 (West 2012) (“[T]he jury shall not be instructed to examine with caution the testimony of the victim solely because of the nature of the charge, nor shall the jury be instructed that such a charge is easy to make but difficult to defend against, nor shall any similar instruction be given....”). See also IOWA CODE ANN. § 709.6 (West 2012); MD CODE, CRIM. LAW, § 3-320 (West 2012); MINN. STAT. ANN. § 609.347(5) (West 2012); NEV. REV. STAT. ANN. § 175.186(2) (West 2012); 18 PA. CONS. STAT. ANN. § 3106 (West 2012). South Dakota recently repealed its statutory ban on cautionary instructions, S.D. Codified Laws § 23A-22-15.1, apparently as a result of the decision by the South Dakota Supreme Court to adopt the federal rape shield rules, rather than as a statement intending to approve of cautionary instructions. Supreme Court of the State of South Dakota, *In the Matter of the Adoption of a New Rule Relating to Federal Rules of Evidence 412: Rule 10-13*, available at <http://www.sdjudicial.com/Uploads/sc/rules/Rule10-13.pdf> (Mar. 2011). The repeal included no expression of any intent to reintroduce cautionary instructions.

³¹ Arkansas, Hawaii, Kentucky, Nebraska, Oklahoma, West Virginia, and the federal courts grant the trial court discretion as to whether to give a cautionary instruction. See *State v. McPherson*, 31 S.E.2d 333, 338 (W. Va. 1988) (“The trial judge did not err when she denied the accused’s motion for acquittal and submitted the case, with

doubt about whether these requirements remain viable, as it seems no cases since 1988 support or reference the practice.

The draft eliminates the traditional cautionary instruction. In general, two rationales supported the practice. First, cautionary instructions are intended to offset concerns that assault complainants are particularly untrustworthy or likely to falsify their allegations. Specifically, authorities worried that a complainant would falsify charges “either because she feared the stigma of having consented to intercourse or because she was pregnant and needed an acceptable explanation for her condition.”³³ Yet social conditions have changed so dramatically that both intercourse outside of marriage as well as pregnancy out of wedlock no longer invoke the same level of societal opprobrium. At the same time, lodging a sexual-assault complaint exposes a complainant to scrutiny and skepticism, and so the express premise of the instruction, that rape is “an accusation easily to be made,”³⁴ is demonstrably false.³⁵

an instruction to scrutinize with care and caution the prosecutrix’s testimony, to the jury.”); *United States v. Merrival*, 600 F.2d 717, 719 (8th Cir. 1979) (“The form of credibility instruction given is within the discretion of the trial court. . . And, as we have held, this instruction is particularly argumentative and should not be given when there is corroboration of the complaining witness’s testimony.” (citations omitted)); *Beasley v. State*, 522 S.W.2d 365, 368 n.3 (Ark. 1975) (“You are instructed that the crime of rape, of which Gary Don Beasley is charged, is a serious one, and such a charge is easily made and hard to contradict or disprove; that it is a character of crime that tends to create a prejudice against the person charged; and, for these reasons, it is your duty to weigh the testimony carefully, and then determine the truth with deliberative judgment, uninfluenced by the nature of the charge.”); see also *State v. Jones*, 617 P.2d 1214, 1221 (Haw. 1980); *Reddell v. State*, 543 P.2d 574, 578 (Okla. Crim. 1975); *Clements v. Commonwealth*, 424 S.W.2d 825, 826 (Ky. App. 1968); *Fulton v. State*, 81 N.W.2d 177, 180 (Neb. 1957). Five states—Connecticut, Kansas, Mississippi, South Carolina, and Wisconsin—have early 20th-century cases expressing approval of cautionary instructions, see *State v. Brauneis*, 79 A. 70, 73 (Conn. 1911); *State v. Loomer*, 184 P. 723, 724 (Kan. 1919); *Watkins v. State*, 98 So. 537, 538 (Miss. 1923); *State v. Jennings*, 50 So.2d 352, 354 (Miss. 1951); *State v. Floyd*, 177 S.E. 375, 386-387 (S.C. 1934); *Cobb v. State*, 211 N.W. 785, 789-790 (Wis. 1927), but there are no contemporary decisions and it seems the practice has long since disappeared.

³² In Maine, New Hampshire, and New Mexico, the law seems to suggest that an instruction should be given in any case whenever the testimony is uncorroborated. *State v. McFarland*, 369 A.2d 227, 228, 230 (Me. 1977) (“In the absence of corroboration, the testimony of the prosecutrix must be scrutinized and analyzed with great care. If the testimony is contradictory, or unreasonable, or incredible, it does not form sufficient support for a verdict of guilty.”); *State v. Blake*, 1305 A.2d 300, 305-306 (N.H. 1973) (“We think this charge adequately apprised the jury of the weight to be given the uncorroborated complaining witness’ testimony.”); *State v. Dodson*, 353 P.2d 364, 365 (N.M. 1960) (“We have held that in a prosecution for rape, where the evidence is conflicting and uncorroborated as to resistance and force, the trial court should caution the jury, and failure to do so is reversible error. The ease with which the charge may be made and the comparative difficulty in defending against it makes the field of sexual crimes one in which the court, under our system of jurisprudence, must do its utmost to insure that the issue goes to the jury in proper context.”). See also *State v. McPherson*, 371 S.E.2d 333, 337-338 (W. Va. 1988) (finding no error in instruction that “if you believe from the evidence in this case that the crime charged against the defendant rests alone on the testimony of the prosecuting witness, . . . then you should scrutinize her testimony with care and caution; although a conviction of a sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible.”).

³³ STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 18 (1998).

³⁴ 1 MATTHEW HALE, *PLEAS OF THE CROWN* 635 (1680).

³⁵ The empirical evidence recited in the introductory materials to the substantive section, including high rates of underreporting, suggest that many sexual-assault complainants are already dissuaded from calling attention to their victimization.

Second, cautionary instructions arose in part out of concern for “the difficulty of determining the truth with respect to alleged sexual activities carried out in private.”³⁶ In other words, because the intimate nature of the conduct rendered third-party witnesses unlikely, added care was warranted. But sexual offenses are not uniquely likely to occur outside the presence of a third party. One recent study found that there were no third-party witnesses in 78.3 percent of rape cases, as compared to 51.9 percent of robbery cases or 95.3 percent of burglary cases.³⁷ Yet historically no special instructions have been given regarding the testimony of complainants in those cases; instead, jurors are entrusted with the task of assessing credibility according to general principles.

Given the strong disincentives to file a legitimate complaint, as well as the lack of substantial difference in the rate of witness observation of sexual versus other offenses, it cannot be considered justifiable to impose a cautionary instruction solely because the complaint alleges sexual assault.

C. SECTION 213.7. PROCEDURAL AND EVIDENTIARY PRINCIPLES APPLICABLE TO ARTICLE 213

1. Sexual Activity of the Complainant.

In the 1970s, victims’ advocates brought increasing awareness to the treatment of sexual-assault victims in the judicial process.³⁸ A wave of “rape shield” statutes focused on changing the rules of evidence to protect complainants from defense efforts to put forward a “loose woman” defense—i.e., exploit the complainant’s sexual history as a means of implying either consent or falsification of charges or seek a judgment that, regardless of the facts, such a woman did not deserve legal protection. Special concerns also arose regarding the testimony of child victims. Later, reform legislation, motivated in part by a perception that certain men were incorrigible predators, enabled what might be termed prosecutorial swords—provisions that permit or require the admission of otherwise impermissible character evidence pertaining to the defendant. Each issue is considered in turn.

a. Current Law. Contemporary rape shield laws are a response to critiques of the treatment of rape victims in the judicial system. First, the common law in effect distinguished degrees of sexual assault based on the chastity of the victim, a practice that critics contended unfairly diverted focus away from the acts of the assailant and onto the character and life of the victim.³⁹ Second, compelling descriptions of the treatment of rape victims in the judicial process fueled the perception that criminal prosecution of the assailant paradoxically resulted in further

³⁶ MODEL PENAL CODE § 213.6(5).

³⁷ Joseph Peterson, et al., *The Role and Impact of Forensic Evidence in the Criminal Justice Process* at 62, 92, & 109 (National Institute of Justice, 2010).

³⁸ SCHULHOFER, *supra* note 33, at 25-28 (describing writings of Susan Griffin, Vivian Berger, Catharine MacKinnon, and others); see also CORRIGAN, *supra* note 2.

³⁹ See generally Anderson, *supra* note 8 (providing historical analysis of the chastity requirement from biblical texts through present day).

1 victimization of the complainant.⁴⁰ As a result, “[l]egislatures began to impose rape shield laws
2 to restrict rape defendants from admitting evidence of complainants’ private sexual lives. By the
3 early 1980s, almost every jurisdiction in [the United States] had passed some form of rape shield
4 law.”⁴¹

5 Rape shield laws represent a policy choice to declare a class of volatile evidence—that
6 relating to the sexual history and behavior of the complainant—generally off limits at trial.
7 Conventionally, much of this evidence would be admissible under evidentiary rules that set a low
8 threshold for relevance, usually defined to require only that proffered evidence have “any
9 tendency to make a fact more or less probable than it would be without the evidence.”⁴² Even
10 though evidentiary codes typically provide for the exclusion of evidence that is substantially
11 more prejudicial than probative,⁴³ rape shield laws emerged in response to concern that judicial
12 rulings seeking to strike this balance often seemed to give inadequate weight to the tendency of
13 jurors to erroneously or even maliciously overvalue inflammatory facts related to the woman’s
14 prior sexual history, manner of dress, or personal sexual proclivities.

15 Yet, although legislators intended rape shield rules “to protect rape victims from the
16 degrading and embarrassing disclosure of intimate details about their private lives,’ to encourage
17 reporting of sexual assaults, and to prevent wasting time on distractive collateral and irrelevant
18 matters,”⁴⁴ only some of those aims can be viewed as legitimate reasons to exclude evidence
19 pertinent to a particular case. Absent a strongly grounded privilege, relevant evidence should
20 never be excluded when its probative value outweighs its prejudicial effect. Moreover, prejudice
21 in this context carries a narrower meaning than in common usage. It requires an impact harmful
22 to the accuracy or efficiency of the factfinding process;⁴⁵ evidence that embarrasses a witness or
23 discloses private information cannot, for those reasons alone, be considered prejudicial.⁴⁶ Indeed,

⁴⁰ See, e.g., Vivian Berger, *Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1, 12 (1977) (describing the experiences of the “victim on trial”); SUSAN GRIFFIN, *RAPE: THE ALL-AMERICAN CRIME*, 10 Ramparts Magazine 26-35 (Sept. 1971) (reporting iconic description of abusive experience of victim in San Francisco rape trial).

⁴¹ Anderson, *supra* note 8, at 80 (citations omitted).

⁴² FED. R. EVID. 401.

⁴³ See, e.g., FED. R. EVID. 403.

⁴⁴ *United States v. Torres*, 937 F.2d 1469, 1472 (9th Cir. 1991) (quoting 124 Cong. Rec. H. 11944 (daily ed. Oct. 10, 1978) (statement of Rep. Mann)). In *Torres*, the defendant was charged with assaulting a nine-year-old girl, and sought to introduce evidence that six months after the alleged incident, the girl’s sisters caught her in her bedroom with a 17-year-old boy and her panties down. The court upheld the exclusion of the evidence against the defendant’s claims that it was probative of an alternative source of traces of semen found on her underwear, as well as of a motive to misidentify him.

⁴⁵ Such prejudicial effects, as defined by the federal rules, are defined as “unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” FED. R. EVID. 403.

⁴⁶ See, e.g., *Davis v. Alaska*, 415 U.S. 308 (1974) (reversing due to trial court’s refusal to allow bias and impeachment cross based on juvenile witness’s criminal record); *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (“[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby ‘to expose to the jury the facts from which jurors... could appropriately draw inferences relating to the reliability of the witness.’”); *United States v. Abel*, 469 U.S. 45, 54-55 (1984) (affirming cross-examination for bias where “precautions did not prevent all prejudice to respondent from [the witness’s] testimony, but they did,

1 the Supreme Court has repeatedly held that the constitutional right to confrontation outweighs a
2 witness's interest to "testify free from embarrassment and with his [or her] reputation
3 unblemished."⁴⁷ Thus, to the extent that an obligation to testify causes a witness distress or even
4 thwarts a policy goal to encourage greater reporting of sexual assault, those concerns must be
5 considered secondary to the imperative to admit probative, even if uncomfortable, evidence.⁴⁸

6 This understanding is manifest in an opinion by the Supreme Court that addressed the
7 substantive scope of rape shield statutes. In *Olden v. Kentucky*, the Supreme Court held that rape
8 shield statutes must yield to questioning probative of bias.⁴⁹ The trial court prevented the
9 defendant from cross-examining the complainant about her co-habitation at the time of trial with
10 the state's chief other witness (who testified among other things that he saw the complainant
11 leave the vehicle of the accused immediately after the alleged incident). The defendant sought to
12 introduce the evidence: (1) to support his claim that she fabricated the rape in order to explain
13 her association with the accused and (2) to impeach her testimony during direct examination that
14 she lived with her mother.⁵⁰ Finding that exclusion of the evidence violated the Confrontation
15 Clause, the Court reversed.

16 In this light, rape shield statutes properly function to channel a court's analysis of the
17 probative and prejudicial worth of evidence with a goal of enhancing the accuracy of the
18 factfinding process. Statutes should endeavor to exclude evidence aimed at distracting jurors or
19 preying upon their unfounded stereotypes and presuppositions. But they should also ensure the
20 admission of evidence—even if personal or sensitive in nature—that fairly calls into question the
21 veracity of the complainant's claim. Ultimately, rape shield statutes may exclude only that which
22 —through prejudicial means—compromises the integrity of the factfinding process.

in our opinion, ensure that the admission of this highly probative evidence did not unduly prejudice respondent") (emphasis omitted). See also *Alford v. United States*, 282 U.S. 687, 694 (1931) ("But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked.").

⁴⁷ *Davis*, 415 U.S. at 320.

⁴⁸ See *id.* ("The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness."). See also *State v. Hudlow*, 659 P.2d 514, 521 (Wash. 1983) ("The issue is not whether evidence is prejudicial in the sense that it is detrimental to someone involved in the trial. Rather, the question is whether the evidence will arouse the jury's emotions of prejudice, hostility, or sympathy. Arguments that sexual history evidence is inadmissible because of its prejudicial impact on the rape victim miss the point. Adverse psychological effects suffered by crime victims, although regrettable, are not grounds for excluding probative evidence."); Anderson, *supra* note 8, at 159 (2002) (noting, in connection with proposal for a tightly restrictive rape shield law, that "[t]he governmental interest underlying the [proposed law] . . . is not protecting the sexual privacy of rape victims. It is, instead, furthering the truth-seeking process.")

⁴⁹ 488 U.S. 227 (1988) (*per curiam*). The Supreme Court has directly ruled on a rape shield statute only on one other occasion. In *Michigan v. Lucas*, 500 U.S. 145 (1991), the Court upheld a rape shield requirement that notice to introduce covered evidence must be filed within 10 days of arraignment (or risk exclusion of evidence), finding that the requirement did not *per se* violate the Constitution, but noting that it might be "overly restrictive." *Id.* at 151.

⁵⁰ *Olden*, 488 U.S. at 229-230. The Kentucky Court of Appeals upheld the exclusion, but on different grounds. That court found the evidence to be outside of the rape shield statute, but excluded it as prejudicial since the relationship was interracial. *Id.* at 232. The Supreme Court held that "[s]peculation as to the effect of jurors' racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of [the complainant's] testimony." *Id.*

Although the federal statute, embodied in Federal Rule of Evidence 412, followed rather than led the way, it was nonetheless copied by many jurisdictions. In general, rape shield statutes provide for (1) the general non-admissibility of evidence of a complaining witness's prior sexual activity, (2) subject to a list of exceptions that allow admission, (3) with judicial control of admissibility determinations after a hearing held *in camera*. All 50 states, plus the federal system and the District of Columbia, have a rape shield law with at least one of these three features; the majority have all three.

(1) General Inadmissibility of a Complainant's Prior Sexual Activity

The general-inadmissibility clause is the heart of the rape shield law. This clause makes evidence of the complainant's past sexual behavior generally inadmissible. The precise scope of covered past behavior varies state to state,⁵¹ but the core prohibition covers sexual activity with those other than the accused.⁵² Tracking the traditional distinction between character or reputation evidence ("victim sleeps around"), and evidence of specific past acts ("victim slept with Z"), the rape shield statutes likewise vary in their treatment of these two evidentiary forms. One helpful way to organize these variations is to distinguish between *unified* statutes (those that treat all evidence of past sexual behavior identically⁵³) and *bifurcated* statutes (those that treat opinion and reputation evidence differently from other evidence⁵⁴). Bifurcated statutes typically specify that opinion and reputation evidence is never admissible, but allow exceptions to admit "other evidence." At present, 31 states and the federal courts have unified statutes; 18 states and the District of Columbia have bifurcated statutes. New Hampshire follows its own distinct approach.⁵⁵

These general inadmissibility provisions are coupled with statutory exceptions, provision for admission by judicial discretion, or some blend of the two.

(2) Statutory Exceptions

The vast majority of jurisdictions have statutory exceptions to the general rule of inadmissibility, thereby allowing some evidence of prior sexual history. The following exceptions are nearly universal among states that use the statutory-exception mechanism:

1. Evidence of specific instances of sexual activity with other persons offered to prove that

⁵¹ See *infra* commentary to section 213.7(1)(a)(iv).

⁵² See *infra* note 57.

⁵³ See, e.g., COLO. REV. STAT. § 18-3-407(1) (2011) ("Evidence of specific instances of the victim's or a witness's prior or subsequent sexual conduct, opinion evidence of the victim's or a witness's sexual conduct, and reputation of the victim's or a witness's sexual conduct may be admissible only at trial and shall not be admitted in any other proceeding except at a proceeding pursuant to....").

⁵⁴ See, e.g., LA. CODE EVID. ANN. art. 412(A)-(B) (2010). Article 412(A) is "*Opinion and reputation evidence*" and does not admit of exceptions; article 412(B) is "*Other evidence; exceptions*" and does so admit.

⁵⁵ See *infra* note 71. Another helpful classification yields four models: "Legislated exceptions" laws that bar admission of any evidence subject to certain exceptions; "constitutional catch-all" laws that have limited exceptions, but include a constitutional exception; "evidentiary purpose" laws that assess the purpose of the evidence, rather than erect any general bar; and "judicial discretion" laws that simply leave the determination to the court. Michelle J. Anderson, *Time to Reform Rape Shield Laws: Kobe Bryant Case Highlights Holes in the Armor*, 19 Crim. Just. 14 (2004).

the accused was not the source of semen, pregnancy, infection, or injury in the present case.⁵⁶

2. Evidence of specific instances of prior sexual relations between the complaining witness and the defendant.⁵⁷
3. Evidence offered to impeach, if the prosecutor has put the complainant's prior sexual activity into issue.
4. Where exclusion of evidence would violate either state or federal constitutions.⁵⁸

The less universal exceptions include:

1. *Bias evidence*: Evidence that supports a claim that the complaining witness has a motive to falsely accuse the defendant of the crime.⁵⁹
2. *Prior false complaints*: Evidence of false allegations of sexual misconduct previously made by the complaining witness.⁶⁰
3. *Multiple Partners*: Evidence of sexual behavior with parties not the accused that occurred at the time of the event giving rise to the sex crime charged.⁶¹

⁵⁶ Louisiana limits this to evidence arising no more than 72 hours before the alleged criminal conduct occurred. LA. CODE EVID. ANN. art. 412(B)(1).

⁵⁷ Thirty-nine states, the federal system, and the District of Columbia distinguish between prior sexual activity of the complainant with the defendant and prior activity with any other person. Eight states do so by excluding the former entirely from the rape shield protections, 15 states do so by carving out a specific exception to the statute, and 18 states do so by carving out an exception but limiting it to evidence introduced as to the issue of consent. See, e.g., COLO. REV. STAT. § 18-3-407(1) (admitting prior or subsequent sexual conduct with the actor); ARIZ. REV. STAT. ANN. § 13-1421(A)(1) (2011) (admitting past conduct with the defendant so long as it is relevant and material to a fact at issue and the prejudicial nature does not outweigh the probative value); TEX. R. EVID. 412(b)(2)(B) (admitting prior behavior with accused as relevant for consent); N.J. STAT. ANN. 2C:14-7(d) (2013) ("Evidence of the victim's previous sexual conduct with the defendant shall be considered relevant if it is probative of whether a reasonable person, knowing what the defendant knew at the time of the alleged offense, would have believed that the alleged victim freely and affirmatively permitted the sexual behavior complained of.").

⁵⁸ No rape shield statute may validly violate the constitutional rights of a defendant. Some states include this as an explicit statutory exception, in part to insure that a single problematic application of the statute will not justify striking the statute in its entirety.

⁵⁹ ARIZ. REV. STAT. § 13-1421(A)(3); OR. REV. STAT. § 40.210(2)(b)(A) & (3)(b)(A) (2011); TEX. R. EVID. 412(b)(2)(C) (2010); VA. CODE ANN. § 18.2-67.7(B) (2010).

⁶⁰ ARIZ. REV. STAT. ANN. § 13-1421(A)(5) (2011); COLO. REV. STAT. ANN. § 18-3-407(2); IDAHO R. EVID. 412(b)(2)(C) (2010); MINN. STAT. § 609.347(3)(a)(i); MISS. R. EVID. 412(b)(2)(C); OKLA. STAT. ANN. § 2412(B)(2); VT. STAT. ANN. TIT. 13, § 3255(a)(3)(C) (2012); WIS. STAT. § 972.11(2)(b)(3) (2011). The standard of proof of the falsity of the accusation varies greatly. At one end of the spectrum, Arizona requires "clear and convincing evidence," *State v. Valenzuela*, 2008 WL 3878290 (Ariz. Ct. App. Aug. 21, 2008), while at the other Wisconsin requires only sufficient evidence, *State v. Ringer*, 785 N.W.2d 448, 452 (Wis. 2010). Minnesota's standard is "reasonable probability," *State v. Goldenstein*, 505 N.W.2d 332, 335 (Minn. Ct. App. 1993), while Colorado follows the preponderance rule, *People v. Weiss*, 133 P.3d 1180, 1182 (Colo. 2006). Idaho, Oklahoma, and Vermont's standards are not clearly defined.

⁶¹ IDAHO R. EVID. 412(b)(2)(D) (2010); OKLA. STAT. tit. 12, § 2412(B)(3) (2010) (Evidence of "similar sexual acts in the presence of the accused with persons other than the accused which occurs at the time of the event giving rise to the sexual offense alleged.").

- 1 4. *Manner of Dress*: Evidence of manner of dress offered by the accused, provided that such
2 evidence “(A) Relates to the motive or bias of the alleged victim; (B) Is necessary to
3 rebut or explain scientific, medical or testimonial evidence offered by the state; [or]
4 (C) Is necessary to establish the identity of the victim....”⁶²
- 5 5. *Pattern of behavior*: “[E]vidence of a pattern of sexual behavior so distinctive and so
6 closely resembling the defendant’s version of the alleged encounter with the complainant
7 as to tend to prove that such complainant consented to the act or . . . lead the defendant
8 reasonably to believe that the complainant consented.”⁶³
- 9 6. *Impeachment*: Evidence of a felony or other crime involving moral turpitude committed
10 by the complainant, when proffered by the defendant for the purpose of attacking
11 credibility.⁶⁴
- 12 7. *Chastity*: Evidence of lack of chastity where chaste character of the complainant is an
13 element of the alleged crime.⁶⁵
- 14 8. *Immediate circumstances*: Evidence of the immediate surrounding circumstances of the
15 alleged crime.⁶⁶
- 16 9. *Prior prostitution*: Evidence that the victim has been convicted of prostitution within
17 three years of the offense that is the subject of the prosecution.⁶⁷
- 18 10. *Psychological fantasy*: Evidence from an expert psychologist or psychiatrist that the
19 complainant fantasized or invented the acts charged.⁶⁸
- 20 11. *Adultery as to credibility*: Evidence of adultery to impeach the credibility of the
21 complaining witness if otherwise admissible.⁶⁹
- 22 12. *Psychotherapist-patient exceptions*: Creating a separate process for evidence relating to

⁶² OR. REV. STAT. § 40.210(3)(b) (2011); see also LA. CODE EVID. ANN. art. 412.1 (West 2013); N.J. REV. STAT. § 2C:14-7(e) (2011) (“Evidence of manner of dress where it is “relevant and admissible in the interest of justice; after [a hearing in camera], and a statement by the court of its findings of fact essential to its determination.”); WIS. STAT. § 972.11(2)(d) (West 2013).

⁶³ North Carolina and Tennessee use nearly identical statutory language. N.C. GEN. STAT. § 8C-1, RULE 412(b)(3) (2010); TENN. EVID. RULE 412(c)(4)(iii) (2010). Florida uses slightly different language. FLA. STAT. § 794.022(2) (2010) (“[...] such evidence tends to establish a pattern of conduct or behavior on the part of the victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent.”).

⁶⁴ IND. CODE § 35-37-4-4 Sec. 4(e); TEX. R. EVID. 412(b)(2)(D) (2010). Absent the statutory exception, such evidence could fall within the scope of the rape shield exclusion if the crime in question involved sexual conduct. In the case of a nonsexual crime, the rape shield exclusion would not apply, and the evidence could be admissible for impeachment purposes in accordance with ordinary rules of evidence.

⁶⁵ MO. REV. STAT. § 491.015(1)(4) (2010).

⁶⁶ MO. REV. STAT. § 491.015(1)(3) (2010); KY. R. EVID. 412(b)(1)(C) (2011).

⁶⁷ N.Y. CRIM. PROC. LAW § 60.42(2) (McKinney 2010).

⁶⁸ N.C. GEN. STAT. § 8C-1, RULE 412(b)(4) (2010).

⁶⁹ S.C. CODE ANN. § 16-3-659.1(1) (2010).

1 prior treatment when an allegation involves a psychotherapist and patient.⁷⁰

3 (3) *Judicial Balancing*

4 All jurisdictions have some measure of judicial control over the admission or exclusion
5 of evidence under the auspices of the rape shield statute. Four different models of control
6 emerge:⁷¹

- 7 • *Exception-only approach.* The rules applicable in 19 states and the federal system
8 provide for the admissibility of evidence that falls under an express statutory exception,
9 without explicitly requiring any further judicial assessment to assure that its probative
10 value outweigh potential prejudicial effects.⁷²
- 11 • *Exception-plus-balancing approach.* In 22 states and the District of Columbia, evidence
12 subject to the presumptive exclusion of the rape shield rule can be admitted only if it
13 (1) qualifies for an express statutory exception *and* (2) passes a judicial balancing test
14 (typically requiring, for example, that the evidence be more probative than prejudicial).⁷³

⁷⁰ MINN. STAT. § 609.347(6) (2011).

⁷¹ New Hampshire's rape shield law differs from all others, and thus merits special discussion. See N.H. EVID. RULE 412 (2010); N.H. REV. STAT. ANN. § 632-A:6 (2011). It blocks "evidence of prior consensual sexual activity between the victim and any person other than the defendant" except where the Constitution requires its admission. The law is silent on evidence of prior sexual activity between the complaining witness and the defendant—whether or not consensual—and on evidence of prior nonconsensual sexual activity between the complaining witness and someone not the defendant. It also blocks manner-of-dress evidence when offered to prove consent. New Hampshire also prescribes a hybrid standard of constitutional language and simple balancing. N.H. EVID. RULE 412(b)(2) (2010) ("[D]ue process requires the admission of the evidence . . . and the probative value in the context of the case in issue outweighs its prejudicial effect on the victim.").

⁷² See FED. R. EVID. 412; ALA. R. EVID. 412; DEL. CODE ANN. tit. 11, § 3509 (West 2014); FLA. STAT. ANN. § 794.022 (West 2014); GA. CODE ANN., § 24-4-412 (West 2014); KY. R. EVID. 412; ME. R. EVID. 412; MO. ANN. STAT. § 491.015 (West 2014); MONT. CODE ANN. § 45-5-511 (2013); NEB. REV. STAT. § 27-412 (2013); N.C. GEN. STAT. ANN. § 8C-1, RULE 412 (West 2013); N.D. R. EVID. 412; OKLA. STAT. tit. 12, § 2412 (2013); 18 PA. CONS. STAT. ANN. § 3104 (West 2014); S.D. CODIFIED LAWS § 19-12-15 (West 2014); UTAH R. EVID. 412; VA. CODE ANN. § 18.2-67.7 (West 2014); W. VA. CODE § 61-8B-11 (2014). Some of the rules use conditional language, such as noting that evidence "may" be admitted, which suggests that the court retains discretion to exclude evidence falling under an exception. See, e.g., FLA. STAT. ANN. § 794.022(2). Two states included here are somewhat difficult to classify: Wisconsin (which does not contain balancing language in most of its exceptions, but does for the manner-of-dress exception), WIS. STAT. ANN. § 972.11 (West 2013), Vermont (which does not contain balancing language for its credibility exception, but does for three other exceptions), VT. STAT. ANN. tit. 13, § 3255 (West 2014).

⁷³ See ARIZ. REV. STAT. ANN. § 13-1421 (2013); CONN. GEN. STAT. ANN. § 54-86F (West 2014); HAW. REV. STAT. § 626-1, RULE 412 (West 2014); IDAHO CODE ANN. § 18-6105 (West 2014) and IDAHO R. EVID. 412; 725 ILL. COMP. STAT. ANN. 5/115-7 (West 2014); IND. CODE ANN. § 35-37-4-4 (West 2014); IOWA CODE ANN. Rule 5.412 (West 2013); LA. CODE EVID. ANN. art. 412, 412.1 (West 2013); MD. CODE ANN., CRIM. LAW § 3-319 (West 2014); MASS. GEN. LAWS ANN. ch. 233, § 21B (West 2014); MICH. COMP. LAWS ANN. § 750.520J (West 2014); MINN. STAT. ANN. § 609.347 (West 2014); MISS. R. EVID. 412; NEV. REV. STAT. ANN. § 50.090 (West 2014); N.J. STAT. ANN. § 2C:14-7 (West 2014); OHIO REV. CODE ANN. § 2907.02 (West 2014); OR. REV. STAT. ANN. § 40.210, Rule 412 (West 2014); S.C. CODE ANN. § 16-3-659.1 (West 2013); TENN. R. EVID. 412; TEX. R. EVID. 412; WASH. REV. CODE ANN. § 9A.44.020 (West 2014); D.C. CODE § 22-3022 (2014). California could also be included here, although its structure is difficult to classify. Its statute generally admits covered evidence for credibility or propensity purposes, unless the proffered evidence is offered to prove consent in certain specified crimes; California also imposes a heightened standard for evidence of manner of dress. See CAL. EVID. CODE §§ 782, 1103 (West 2014).

- 1 • *Exception or balancing approach.* In two states, covered evidence can be admitted if it
2 *either* (1) qualifies for an express statutory exception *or* (2) qualifies under a more
3 general balancing or interests-of-justice test.⁷⁴
- 4 • *Balancing only.* In six states, the statute does not detail explicit exceptions, but simply
5 instructs the judge to exclude the evidence unless a specified balancing standard is met.⁷⁵

⁷⁴ See COLO. REV. STAT. ANN. § 18-3-407(2)(e) (West 2011) (requiring finding that proffered evidence is “relevant to a material issue to the case”). New York’s statute reads:

Evidence of a victim’s sexual conduct shall not be admissible in a prosecution for an offense or an attempt to commit an offense defined in article one hundred thirty of the penal law unless such evidence:

1. proves or tends to prove specific instances of the victim’s prior sexual conduct with the accused; or
2. proves or tends to prove that the victim has been convicted of a [prostitution] offense ... within three years prior to the sex offense which is the subject of the prosecution; or
3. rebuts evidence introduced by the people of the victim’s failure to engage in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact during a given period of time; or
4. rebuts evidence introduced by the people which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim; or
5. *is determined by the court after an offer of proof by the accused outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination, to be relevant and admissible in the interests of justice.*

N.Y. CRIM. PROC. LAW § 60.42 (McKinney 2014) (emphasis added).

⁷⁵ See ALASKA STAT. ANN. § 12.45.045 (West 2014); KAN. STAT. ANN. § 21-5502 (West 2013); N.M. STAT. ANN. § 30-9-16 (West 2013); R.I. R. Evid. 412; WYO. STAT. ANN. § 6-2-312 (West 2013). Arkansas’s scheme, included in the count here, is difficult to classify. ARK. CODE ANN. § 16-42-101 (West 2014). The rule first sets out a total ban on all evidence “of the victim’s prior sexual conduct with the defendant or any other person,” as well as prior allegations, *id.* § 16-42-101(b), but then provides a discretionary procedure for admitting “evidence directly pertaining to the act upon which the prosecution is based *or evidence of the victim’s prior sexual conduct with the defendant or any other person...*,” *id.* § 16-42-101(c) (emphasis added). South Dakota followed a discretionary model until its recent enactment of a parallel to the federal rule.

These standards are phrased in terms of relevance and probative value versus prejudice. See, e.g., N.M. STAT. ANN. § 30-9-16 (West 2013):

As a matter of substantive right, in prosecutions ... evidence of the victim’s past sexual conduct, opinion evidence of the victim’s past sexual conduct or of reputation for past sexual conduct, shall not be admitted unless, and only to the extent that the court finds that, the evidence is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

As a matter of substantive right, in prosecutions ... evidence of a patient’s psychological history, emotional condition or diagnosis obtained by an accused psychotherapist during the course of psychotherapy shall not be admitted unless, and only to the extent that, the court finds that the evidence is material and relevant to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

If the evidence referred to in Subsection A or B of this section is proposed to be offered, the defendant shall file a written motion prior to trial. The court shall hear the pretrial motion prior to trial at an in camera hearing to determine whether the evidence is admissible pursuant to the provisions of Subsection A or B of this section. If new information, which the defendant proposes to offer pursuant to the provisions of Subsection A or B of this section, is discovered prior to or during the trial, the judge shall order an in camera hearing to determine whether the proposed evidence is admissible. If the proposed evidence is deemed admissible, the court shall issue a written order stating what evidence may be introduced by the defendant and stating the specific questions to be permitted.

1 (4) *Procedural Prerequisites*

2 The prescribed format for proceedings tends to follow the path of the typical *in limine*
3 motion, with several key differences. Advance notice is a common, and critical, component.
4 Many jurisdictions give the complainant an explicit right to attend the hearing and be heard, and
5 provide that the transcript should be sealed.⁷⁶

6 **b. Section 213.7(1)(a).** Contemporary rape shield statutes have been subject to both
7 criticism and praise. Attacks come both from those who oppose any special protection for a
8 victim's sexual history, as well as those who think the law ought to protect a victim's sexual
9 history to a greater extent than it already does. The social stigma attached to sexual activity
10 outside of marriage has no doubt dissipated to a considerable degree since rape shield statutes
11 were first enacted in the 1970s. Yet continuing evidence of enduring stereotypes and biases,
12 along with pervasive underreporting and victims' continuing apprehensions about mistreatment
13 in the judicial process, all support the ongoing need for some rape shield protections.⁷⁷

14 Crafting a statute that strikes the proper balance between admission and exclusion of this
15 kind of evidence is an undeniably difficult task. As a preliminary matter, Section 213.7(1), unlike
16 most contemporary rape shield statutes, does not specify any particular pretrial procedures to be
17 used before admitting the evidence in question. This is not because such procedures are
18 undesirable; to the contrary, they form a critical component of an effective rape shield law.
19 However, the details of such procedural matters tend to be shaped by each jurisdiction's local-
20 practice rules and customs. Thus, Section 213.7(1)(a)(iii) expressly encourages the application of
21 specialized procedures for admitting this evidence, but leaves the question of which precise
22 procedures are adopted to resolution on a jurisdiction-by-jurisdiction basis.

23 For similar reasons, Section 213.7(1) does not affirmatively specify the conditions under
24 which evidence of this kind *is* admissible, because that conclusion depends on more than the
25 simple terms of the rape shield statute itself. Rather, as a threshold matter, admissibility hinges
26 upon application of all the other evidentiary rules of admissibility embedded in each
27 jurisdiction's laws of evidence, including most fundamentally ordinary rules concerning
28 relevancy and prejudice (such as the typical rule that evidence is inadmissible when its probative
29 value is substantially outweighed by its prejudicial effect).⁷⁸ Accordingly, Section 213.7(1)(a)
30 articulates an independent ground for excluding evidence that would otherwise be admissible,
31 and Section 213.7(1)(b) excepts certain uses of covered evidence from that rule of exclusion.
32 Thus, evidence that falls within the terms of such an exception is not necessarily admissible, as
33 Section 213.7(b) underscores with its clause referring to evidence that is "otherwise admissible."

⁷⁶ Alabama is the only jurisdiction that does not seal the hearing. ALA. CODE § 12-21-203(d)(1) (2010).

⁷⁷ For example, in a 2011 report investigating pervasive policing failures of the New Orleans Police Department ["NOPD"], the Justice Department concluded that "NOPD has systemically misclassified large numbers of possible sexual assaults, resulting in a sweeping failure to properly investigate many potential cases of rape, attempted rape, and other sex crimes." U.S. Department of Justice, Civil Rights Division, Investigation of the New Orleans Police Department xi (Mar. 16, 2011). Moreover, police paperwork "was replete with stereotypical assumptions and judgments about sex crimes and victims of sex crimes, including misguided commentary about the victims' perceived credibility, sexual history, or delay in contacting the police." *Id.*

⁷⁸ Thus, local law as to what constitutes "prejudice" governs. For instance, under the federal rules "unfair surprise" is not a legitimate basis of prejudice, whereas it is in some states. See Fed. R. Evid. 403 (excluding "unfair surprise" as a basis of prejudice).

1 Ordinary rules of evidence ultimately determine whether such evidence is affirmatively
2 admissible.

3 Section 213.7(1)(a) embodies the core, and least controversial, components of a rape
4 shield statute: namely, a general statement of exclusion of evidence of a complainant's prior
5 sexual activity. Section (a)(iv) defines "sexual activity" broadly to "mean any behavior,
6 condition, or expression related to human sexuality, or allegations thereof, whether voluntary or
7 involuntary, including but not limited to evidence and allegations relating to sexual intimacy,
8 contact, and orientation; use of pornography; sexual fantasies and dreams; use of contraceptives;
9 habits of dress; and marital and partnership history or status." The breadth of this illustrative list
10 makes clear that "sexual activity" for purposes of this provision encompasses a wide range of
11 sexual behavior and expression; it easily extends to such evidence as sexual infections, manner
12 of dress, intimate physical characteristics, and includes not just statements of fact but also
13 allegations (including false allegations) that pertain to human sexuality. In this respect, this
14 definition of "sexual activity" is akin to the federal standard, which likewise was expressly
15 amended to cover all past sexual behavior or conduct, evidence that implies sexual contact (such
16 as birth control or sexually transmitted infections), predispositions, and "sexual fantasies or
17 dreams," as well as "evidence that does not directly refer to sexual activity or thoughts but that
18 . . . may have a sexual connotation for the factfinder."⁷⁹

19 By defining this category broadly, the rule presumptively excludes any proffered
20 evidence conceivably relating to the sexual activity of the complainant.⁸⁰ Again, the breadth of
21 the definition is not intended as an independent statement that such evidence otherwise *would be*
22 relevant. Indeed, a wide swath of covered activity will rarely if ever constitute relevant
23 evidence.⁸¹ But when such evidence is relevant, the broad definition ensures that its admissibility
24 is circumscribed by the rule.

25 Subsection (a)(i) does not treat opinion and reputation evidence in the same manner as
26 evidence of specific prior acts; instead this subsection sets forth a general bar on all opinion and

⁷⁹ See Notes of the Advisory Committee to the 1994 Amendments ("Rule 412 has been revised . . . to expand the protection afforded alleged victims of sexual misconduct. Past sexual behavior connotes all activities that involve actual physical conduct, i.e. sexual intercourse or sexual contact. In addition, the word 'behavior' should be construed to include activities of the mind, such as fantasies or dreams. The rule has been amended to also exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. This amendment is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder." (citations omitted)).

⁸⁰ Cf. *United States v. Taylor*, 640 F.3d 255, 257-259 (7th Cir. 2011) (struggling to construe "sexual activity" in the context of federal trafficking statute and noting wide array of possibly included activity).

⁸¹ For instance, it is unlikely that evidence of "psychological fantasy" should ever be admitted, given the lack of empirical evidence in its support. Joseph W. Critelli & Jenny M. Bivona, *Women's Erotic Rape Fantasies: An Evaluation of Theory and Research*, 45 J. Sex Research 57, 62 (2008) (reviewing studies of rape fantasies over 30 years and concluding "[t]he empirical evidence does not support masochism as a general explanation of rape fantasies," including that over 99% of women in one assessment "clearly state[d] that they do not want to be raped in reality, and considerable evidence supports the demonstrated fact that they would be repulsed and traumatized by actual rape"). Similarly, it is only a rare case in which a complainant's manner of dress might be deemed relevant, as generally a complainant's clothing choices can no more constitute consent to assault than a "Shoot me now" t-shirt constitute permission to commit homicide. At the same time, in the rare case, clothing might become relevant to the factual dispute in the case—say, in a contest over whether the shirt worn by the complainant had buttons to tear as claimed.

1 reputation testimony related to prior sexual activity. The seriousness and intimate nature of the
2 harm involved in sexual-assault cases supports the conclusion that general opinion or reputation
3 is a poor basis upon which to encourage a defendant to make judgments about sexual
4 availability. Similarly, opinion or reputation evidence regarding sexual activity is a weak basis
5 upon which a jury might rest their assessments of veracity of a complaint. Consider, for example,
6 a case in which an employee alleges that her boss sexually assaulted her, but the boss claims that
7 the sex was consensual and that the employee fabricated the charge in order to win a civil
8 judgment for harassment. If other workers at the company had seen her engaging in consensual
9 sexual activity with the boss, such evidence would ordinarily have significant relevance to the
10 question whether she had consented on the occasion in question, and it would typically be
11 considered admissible under conventional exceptions to rape shield for prior sexual activity with
12 the accused. In contrast, if other workers had a hunch that she had engaged in such activity, or if
13 she had a reputation as a flirt, such evidence, though perhaps technically relevant, is too weakly
14 probative to justify admission. To the extent that opinion or reputation evidence might be
15 essential to the presentation of a defense under the unusual circumstances of a particular case, the
16 “constitutionally required” clause of subsection (1)(a)(i) and the safety-valve clause of
17 subsection (1)(b)(vi) ensure its admissibility.

18 Subsection (a)(ii) proscribes introduction of specific acts of sexual activity by the
19 complainant with persons other than the defendant subject to the specific exceptions of
20 subsection (b) or in the event that the admissibility of such evidence is constitutionally required.
21 This latter provision simply makes explicit that which is indisputable, and protects against the
22 invalidation of the whole statute in the context of an unforeseen case in which constitutionally
23 required evidence does not fall within the terms of one of the explicit exceptions to the rule of
24 exclusion. Sexual activity with the defendant is not covered by this Section, but rather is subject
25 to the ordinary rules of evidence, including the rule that admissibility requires that the proffered
26 evidence meet a threshold showing of relevance and not be unduly prejudicial.

27 The most salient risk of admitting evidence of sexual activity with the defendant is that
28 jurors will erroneously assume that consent to sexual activity with the defendant on an earlier
29 occasion presumptively establishes consent to future encounters. Another concern might be that
30 jurors will consider the complainant promiscuous, or less worthy of belief, because of evidence
31 of prior consensual activity with the defendant. As to the former concern, although prior consent
32 clearly does not prove future consent, it nonetheless will often be probative that a complainant
33 and defendant have previously been intimate. The existence of sexual history between the parties
34 may shed light on questions of identity, consent, and reasonableness of mistake. An encounter
35 between two people who have never engaged in any form of sexual intimacy is necessarily of a
36 different character than one between those who have been intimate in the past. In neither
37 situation is any material element conclusively proven—a person may immediately consent to a
38 one-night stand with a stranger but decline sexual relations with a longstanding intimate partner.
39 Yet a jury must have the opportunity, in judging the totality of the circumstances, to know which
40 kind of situation is arguably presented. To the extent that prior intimacy clouds any contested
41 issue, a court may exclude such evidence under general principles if it is substantially more
42 prejudicial than probative. In the context of currently prevailing mores with respect to sexually
43 active adults, however, such concerns normally will be more appropriately addressed by
44 argument of counsel and/or contextually specific jury instructions.

1 Finally, Section (a)(ii) further imposes a heightened evidentiary hurdle for one particular
2 class of “sexual activity” evidence: that pertaining to a prior instance in which the complainant
3 falsely alleged a sexual offense. Courts have diverged in their treatment of a complainant’s prior
4 charges of sexual assault when those accusations allegedly were false. The majority of the
5 decisions find that such allegedly false accusations fall outside of the protections of rape shield
6 laws.⁸² In such a case, evidence of false accusations is governed either by the ordinary rules of
7 evidence, which may impose a threshold as low as mere “relevance,” or by some heightened
8 admissibility standard which may apply to all prior false-accusation evidence (regardless of the
9 alleged offense).⁸³

10 Although only eight states explicitly place false-accusation evidence under the shelter of
11 their rape shield rules,⁸⁴ Section 213.7(1)(a)(ii) extends heightened protections to this class of
12 highly volatile evidence. The troubled history of sexual-offense policing and prosecution, along
13 with continuing misperceptions as to the frequency of false accusations, justify special care
14 before placing such evidence before the trier of fact. By including such evidence within the
15 scope of “sexual activity,” Section 213.7 ensures that specialized procedures, including pre-trial
16 notice, will apply before such evidence may be introduced. In addition, by raising the threshold
17 necessary to establish the factual basis for such evidence, Section 213.7(1)(a)(ii) endeavors to
18 ensure that such evidence is admitted only when the accusation was, in fact, demonstrably false
19 and not merely the product of any of the well-documented impediments to the reporting and
20 investigation of sexual offenses.⁸⁵

21 Accordingly, Section 213.7(1)(a)(ii) requires the proponent of the evidence to establish
22 by a preponderance of the evidence that the alleged accusation has, in fact, been made and that it
23 was false.⁸⁶ The rule further clarifies that the mere fact that a complaint was judged unfounded

⁸² See generally Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. Legis. 125, 138 (1998) (“A majority of jurisdictions have held that evidence of prior false accusations is admissible to impeach the credibility of the complaining witness.”). These states typically find that false accusations simply fall outside the purview of rape shield entirely. See, e.g., *People v. Jackson*, 726 N.W.2d 727 (Mich. 2007); *Commonwealth v. Bohannon*, 378 N.E.2d 987 (Mass. 1978). Courts have observed that this approach risks a clever lawyer seeking to introduce true prior behavior by simply claiming it was false, *Dennis v. Commonwealth*, 306 S.W.3d 466 (Ky. 2010) (noting issue), or raises the issue of how to treat prior false statements about sexual activity in which the complainant was the aggressor (i.e., confessions that the complainant at some point contended were false), *Perry v. Commonwealth*, 390 S.W.3d 122 (Ky. 2012). See also *United States v. Frederick*, 683 F.3d 913, 917 (8th Cir. 2012) (acknowledging that court had previously declined to rule on whether a prior false accusation falls within ambit of rape shield statute, and continuing to avoid deciding question).

⁸³ The precise language used to set the threshold varies widely, but the preponderance standard is the most common among states with articulated standards. See, e.g., Brett Erin Applegate, *Comment, Prior (False?) Accusations: Reforming Rape Shields to Reflect the Dynamics of Sexual Assault*, 17 Lewis & Clark L. Rev. 899, 907-909 (2013) (surveying standards).

⁸⁴ See *supra* note 60. Judicial opinions in some jurisdictions extend rape shield coverage, or its functional equivalent, to prior false accusations of sexual assault. See Applegate, *supra* note 83, at 915-916 (summarizing case law).

⁸⁵ See Tentative Draft No. 1 (2014), Substantive Material, Part II.D.

⁸⁶ Compare, e.g., *Quinn v. Haynes*, 234 F.3d 837 (4th Cir. 2000) (finding the refusal to allow cross-examination regarding complainant’s allegations of sexual abuse by others not to violate the Confrontation Clause), with *White v. Coplan*, 399 F.3d 18 (1st Cir. 2005) (granting habeas petition for exclusion of prior false accusations while also noting that “demonstrably false” standard may at times run afoul of constitutional guarantee). See also *Dennis v. Commonwealth*, 306 S.W.3d at 472 (giving examples of adequate proof and reviewing standards such as

1 by police or that it was not pursued by the complainant cannot, without more, meet the proposed
2 standard. A victim may choose not to press the matter or might recant the allegations,⁸⁷ or law
3 enforcement may find a complaint unfounded,⁸⁸ for many reasons unrelated to the complaint's
4 veracity. Even the fact that the accused was acquitted at trial does not, without more, necessarily
5 indicate falsehood, because a jury might believe the complainant and yet be unable to reach a
6 unanimous verdict of guilt beyond a reasonable doubt. Courts should look at the totality of the
7 circumstances to determine the preliminary question of admissibility: namely whether a
8 preponderance of the evidence supports a finding that the prior accusation was false. Evidence
9 that satisfies this standard may then be deemed admissible if in accord with the provisions of
10 Section 213.7(1)(b); evidence that fails this standard is simply inadmissible.

11 *c. Section 213.7(1)(b).* Section 213.7(1)(b) identifies instances of sexual activity with a
12 person other than the accused that, if otherwise admissible, are not blocked by the exclusionary
13 rule of Section 213.7(1)(a). The "otherwise admissible" clause underscores that subsection (1)(b)
14 does not enumerate independent grounds upon which evidence is admissible. Rather, this
15 subsection clarifies that evidence rendered presumptively inadmissible by subsection (a) can
16 become admissible if offered for an expressly authorized purpose. In other words, where a
17 proffered piece of evidence relates to "sexual activity" as defined by the rule, it must surmount
18 two sets of hurdles. It must be admissible under generally applicable rules of evidence including,
19 most fundamentally, the basic requirement of relevance. In addition, sexual activity evidence
20 must undergo scrutiny according to the rape shield provisions. Specifically, Section
21 213.7(1)(a)(i) erects an insurmountable ban on such evidence when offered in the form of
22 reputation or opinion, and Section 213.7(1)(a)(ii) presumptively blocks such evidence even when
23 offered in the form of specific acts. In addition, as discussed above,⁸⁹ Section 213.7(1)(a)(ii)
24 introduces a specific evidentiary hurdle for sexual-activity evidence that alleges a prior false
25 accusation.

26 The presumptive rule of exclusion under Section 213.7(1)(a)(ii) may, however, be
27 overcome by a showing that the specific instance of sexual activity meets the requirements of
28 one of the subsection (b) exceptions. Specifically, those exceptions are: (i) to prove an alternative
29 source of physical evidence, pregnancy, infection, or injury; (ii) to impeach admitted evidence by
30 specific contradiction or prior inconsistency; (iii) to prove bias or motive to fabricate a material
31 fact; (iv) to prove character for untruthfulness via qualifying prior instances of false accusation;
32 (v) to explain precocious sexual knowledge; and (vi) when such evidence is strongly probative of
33 a material claim. Thus, evidence of "sexual activity" is admissible only when it (1) meets the

preponderance, clear and convincing evidence, "reasonable probability of falsity," "strong and substantial proof of actual falsity," and "demonstrably false").

⁸⁷ See, e.g., *State v. MacDonald*, 956 P.2d 1314, 1317-1318 (Idaho App. 1998) (finding inadmissible evidence that victim recanted accusation of abuse against adoptive father when a teenager, noting that she recanted because she preferred living at home to abusive foster placement); see also Tentative Draft No. 1 (2014), Substantive Material, Part II.D.

⁸⁸ See CASSIA SPOHN & KATHARINE TELLIS, *POLICING & PROSECUTING SEXUAL ASSAULT* 15-49 (2014) (describing study of Los Angeles county practices, and detailing numerous ways a complaint may be unfounded, including if "there is no way of finding out who the suspect is," if "no DNA or no sexual assault kit is done," or any circumstance in which, for evidentiary reasons, the police "cannot confirm or deny that [the alleged assault] happened").

⁸⁹ See *supra* text accompanying notes 82-87.

requirements of general rules of evidence, (2) takes the form of specific acts, and (3) satisfies the terms of one of the provisions of subsection (b).⁹⁰

Subsections (i) and (iii) are straightforward. With respect to (i), the strong relevance of alternative explanations for physical evidence is apparent and acknowledged in all jurisdictions.⁹¹ An argument might be made to limit such evidence to cases in which identity is disputed, since evidence of this kind is most likely probative when the defendant denies sexual intimacy with the complainant. However, such evidence might be relevant even when the defendant raises a defense of consent. For instance, a defendant may admit sexual contact with the complainant, but deny causing the complainant's observed injuries. In such a case, it would be proper to admit relevant evidence of another explanation for the injury, to bolster the defendant's claim of consent.⁹² As to (iii), the Supreme Court has repeatedly held that "the exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination,"⁹³ and has expressly singled out the propriety of bias evidence in the rape shield context.⁹⁴

The exceptions for inconsistencies, false accusations, precocious sexual knowledge, and strongly probative evidence are more contestable. To be sure, the exclusion of such evidence may be constitutionally impermissible in many circumstances. But explicit exceptions are nonetheless warranted to underscore that evidence offered for such purposes need not overcome hurdles of constitutional stature and that trial judges need not reach constitutional issues in order to find such evidence admissible.

(1) *Impeachment by Contradiction or Inconsistency.* Exception (b)(ii) permits impeachment of admitted evidence by specific contradiction and by prior inconsistency. In order for evidence of a victim's sexual activity to qualify for this exception from the rule of presumptive inadmissibility, such evidence must, of course, be relevant to impeach admitted contrary evidence concerning that activity. In other words, the rule does not render evidence of prior sexual activity relevant in the first instance; such evidence can become relevant only as a response to previously admitted, inconsistent evidence.

⁹⁰ Of course, apart from these requirements, evidence of "sexual activity" is always admissible when constitutionally required.

⁹¹ See, e.g., *Neeley v. Commonwealth*, 437 S.E.2d 721 (Va. App. 1993).

⁹² See, e.g., *Fletcher v. People*, 179 P.3d 969, 975 (Colo. 2007) (en banc) (noting that "evidence of sexual activity immediately prior to an alleged assault may be relevant to establish that someone else may have been the source of an injury" even in a case in which the defense is consent). The court in *Fletcher* added that assessing the probative value of such evidence turns in part on determining "how much time it would take for such an injury to heal," because evidence too far removed is "too remote to be probative." *Id.*

⁹³ *Delaware v. Van Arsdall*, 475 U.S. 673, 678-679 (1986) (quoting *Davis*, 415 U.S. at 316-317).

⁹⁴ See, e.g., *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam) (reversing for error in excluding evidence of complainant's sexual relationship with man who observed her leaving defendant's car, offered as motive to fabricate sexual assault). Accord *State v. Stephen F.*, 188 P.3d 84 (N.M. 2008) (reversing for error in excluding evidence that juvenile complainant previously was punished for consensual sex with defendant, because such evidence was relevant to establishing motive to lie about nature of contested incident); *People v. Hackett*, 365 N.W.2d 120, 124-125 (Mich. 1984) ("[W]here the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge.") (citations omitted).

1 The terms of this exception thus give the prosecutor substantial control over the
2 introduction of evidence concerning the victim's prior sexual history, and accord with basic
3 precepts of adversarial fairness. To illustrate, in *State v. Martin*,⁹⁵ the complainant alleged that
4 she went to the grocery to pick up a last-minute dinner item while her child and sister waited for
5 her at home. She claimed that she was in the parking lot when the defendant ordered her into her
6 car at gunpoint, drove to a secluded location where he forced her to perform oral sex, returned
7 with her to the parking lot, and then ordered her into his own truck. After sexually assaulting her
8 again, he eventually allowed her to return to her own vehicle. The victim's sister corroborated
9 the victim's account by testifying that the complainant was dependable and reasonable, and that
10 she would never have voluntarily accepted a ride with a stranger. The defendant acknowledged
11 the encounter but claimed consent. In closing, the state argued that the victim's version "was
12 'reasonable' and comported with 'common sense,' while Martin's version ... was 'unreasonable,'
13 'difficult to swallow,' and 'leaking like crazy.'"⁹⁶

14 Prior to trial, the defendant offered evidence from an incident that had occurred months
15 earlier, in which the victim alleged that a different man, not previously known to her, had raped
16 her after she had accepted a ride in his car. The defendant sought only to introduce evidence that
17 the victim had voluntarily agreed to a ride from that stranger, seeking to show the complainant's
18 "casual attitude toward strangers," "impulsiveness," and "irresponsibility."⁹⁷ The trial court
19 excluded the evidence, both as inadmissible propensity and as a violation of the state's rape
20 shield law. The state supreme court reversed, finding the proffered evidence relevant and
21 admissible.

22 Section 213.7(1)(a) would ordinarily exclude evidence that the complainant had accepted
23 rides with strangers or had engaged in sexual intimacy with strangers. In *Martin*, however, the
24 government elicited evidence from both the complainant and her sister that the complainant
25 would never accept a ride from a stranger, in order to suggest that the defendant's version was
26 implausible. As a result, the complainant's prior behavior became acutely relevant, and the
27 defendant must be allowed to prove, through specific contradiction, that in fact the complainant
28 had engaged in behavior contrary to that suggested by the prosecution.⁹⁸ Thus, Section
29 213.7(1)(b)(ii), in accord with the result in *Martin*, would admit such evidence for impeachment
30 purposes.

31 Of course, even when an exception applies, ultimate admissibility is still governed—as
32 mentioned above—by the general rules of evidence, such as the court's obligation to balance
33 probative value against the risk of substantial prejudice. Thus a court must consider the totality
34 of the evidence in the case to determine the relative balance of probative value versus the
35 prejudicial effect of the impeaching evidence. *State v. Williams*⁹⁹ exemplifies the point. The

⁹⁵ 44 P.3d 805 (Utah 2002).

⁹⁶ *Id.* at 809.

⁹⁷ *Id.* at 814. Specifically, the proposed evidence involved the complainant having accepted a ride from a stranger while on her way to school, with whom she exchanged names and phone numbers, and then arranged to have him pick her up after school as well.

⁹⁸ Impeachment by contradiction "permits courts to admit extrinsic evidence that specific testimony is false, because [it is] contradicted by other evidence." *United States v. Castillo*, 181 F.3d 1129, 1132 (9th Cir. 1999) (noting that testimony must be elicited on direct examination for rule to apply).

⁹⁹ 773 P.2d 1368 (Utah 1989).

1 victim alleged that the defendant broke into her home, forced her to engage in sexual acts, fell
2 asleep, and then demanded \$100 from her in the morning. The defendant claimed that he had met
3 the victim at a convenience store and that they had then engaged in consensual sex. The
4 defendant sought to introduce evidence of her prior sexual activity in order to contradict her
5 earlier accounts of the incident: After the alleged attack, she had told a rape crisis counselor that
6 she had not had sex for a long time, even though she had in fact engaged in consensual sexual
7 activity with a neighbor earlier that evening. The trial court held that the evidence of this earlier
8 sexual encounter was highly prejudicial but only weakly probative of consent or credibility. The
9 court noted that some of the victim's lies stemmed from embarrassment over the relationship
10 with the neighbor and that significant evidence corroborated her version of the incident with the
11 defendant, including serious physical injuries, torn clothing, bloody sheets, a knife, and
12 incriminating materials in the defendant's gym bag. Accordingly, the court allowed inquiry into
13 several of her prior inconsistent statements that related to her nonsexual behavior, but precluded
14 evidence about her false statement regarding sex with the neighbor. Finding that "cross-
15 examination was granted a judicious tether, but was properly restrained to elicit that which was
16 relevant,"¹⁰⁰ the appellate court affirmed the conviction.

17 Section 213.7 would permit the same result. Although the exception for impeachment
18 would lift the exclusion otherwise applicable under Section 213.7(1)(a), such evidence would
19 nonetheless be subject to other rules of evidence, including the requirement to balance probative
20 value against the risk of substantial prejudice. If the complainant had testified on direct
21 examination that she had engaged in the earlier consensual activity, then the existence of a
22 previous contrary statement is of marginal utility. If her trial testimony makes no reference to
23 that activity at all, then the prior falsehood likewise possesses little probative value. Moreover, in
24 either case, its prejudicial impact is substantial, because it risks distracting and confusing the jury
25 with the details of an unrelated consensual encounter. In contrast, if the complainant denied the
26 earlier encounter during direct examination at trial, then her previous statement to the same
27 effect would no longer constitute a prior inconsistency. In that case, however, the rape shield rule
28 would not block evidence that a prior consensual encounter *had* occurred, when offered as
29 specific contradiction. Relatedly, if a defendant argued that the complainant's prior consensual
30 encounter created a bias or motive to fabricate the alleged sexual assault, then evidence of that
31 prior incident might be admissible under subsection (b)(iii). But if the sole probative value of the
32 prior encounter is to call into question a complainant's credibility, when the prior inconsistency
33 has low probative value in light of all the evidence in the case, then testimony concerning the
34 prior encounter is properly barred.

35 (2) *Prior False Accusations.* Subsection (b)(iv) lifts the exclusionary rule of Section
36 213.7(1)(a) for one limited category of sexual-activity evidence that might be offered to prove
37 character for untruthfulness—namely, evidence of a qualifying prior false accusation of a sexual
38 offense. To be sure, most efforts to impeach for untruthful character will not implicate the rape
39 shield exclusion at all, because the proffered evidence (for example, a prior conviction for
40 perjury) will not fall under the definition of "sexual activity." To the extent that evidence relating
41 to sexual activity is offered for this purpose, moreover, the rape shield exclusion ordinarily will
42 be appropriate, because a complainant's sexual history generally sheds little or no light on his or
43 her general trustworthiness. Suppose, for example, that a complainant has falsely described prior

¹⁰⁰ Id. at 1371.

1 *consensual* sexual encounters, has falsely denied having had an affair, or has even sought to brag
2 by falsely claiming to have had sex with a celebrity. Although such statements may sometimes
3 carry severe consequences, in most cases they are largely innocuous, and the reasons why a
4 person might exaggerate or even lie about consensual sexual encounters have little bearing on
5 that person's willingness to take the momentous step of falsely accusing someone of a sexual
6 offense. Accordingly, false statements relating to the existence or nonexistence of consensual
7 sexual encounters are deliberately excluded from the scope of the subsection (b)(iv) exception.
8 For the rare instance in which such a statement might shed crucial light on an issue in the case,
9 the safety-valve provision of subsection (b)(vi) and the constitutional savings clause of
10 subsection (a)(i) would offer a means of admitting essential evidence.

11 In contrast, when the false statement accuses another of a sexual offense, the gravity of
12 doing so and its concomitant probative value as regards the complainant's credibility in the
13 present instance justify a special exception to the general ban on sexual-activity evidence.
14 Nonetheless, the proper treatment of prior false accusations is problematic for three reasons.
15 First, there is the factual question of what constitutes a "false" versus "true" accusation. Second,
16 there is concern that if the law permits prior false accusations to be admissible, a complainant
17 shown to have made one prior false accusation will never again be believed. And third, there is
18 the question of how such evidence, if contested, may be proved.

19 As to the first concern, subsection (a)(ii), discussed above,¹⁰¹ requires that evidence of
20 prior false accusation first meet a heightened evidentiary standard establishing its factual basis
21 before any exception to the presumptive inadmissibility of such evidence can be considered
22 under any of the provisions of subsection (b). By specifically referencing subsection (1)(a)(ii),
23 subsection (b)(iv) makes clear that the exception for false accusations applies only when falsity
24 is established in accordance with this heightened standard.

25 As to the second concern, it is true that complainants who have made prior accusations
26 shown to be false will subsequently be at risk for underprotection. Yet that concern alone is not
27 sufficient reason to exclude probative evidence. The accusation of sexual assault is a serious one,
28 and the fact that a complainant has previously levied a demonstrably false charge is probative of
29 the complainant's credibility as to the instant offense.¹⁰² Accordingly, the draft follows the
30 general state-court practice of not categorically excluding such evidence, and relies on the
31 standard of preliminary proof to safeguard against unfair prejudice.¹⁰³

32 A final, and most difficult, question concerns the manner in which such evidence may be
33 received—specifically, whether it can be raised only on cross-examination of the complainant or
34 whether it can also be offered in the form of extrinsic evidence establishing the false accusation

¹⁰¹ See *supra* text accompanying notes 82-87.

¹⁰² As the New York District Attorney's Office recently wrote in its memorandum requesting dismissal of a high-profile indictment alleging a sexual assault in light of the information unearthed in subsequent interviews and investigation of the complainant, "[i]t is clear that, in a case where a complainant is accusing a defendant of a sexual assault, the fact that she has given a prior false account of a different sexual assault is highly relevant." Recommendation for Dismissal at 14, *People v. Strauss-Kahn*, Indictment No. 02526/2011 (N.Y. Sup. Ct. Aug. 22, 2011), at 14 (finding it further "highly significant" that the prior false allegation was recounted "to prosecutors ... in a completely persuasive manner—identical to the manner in which she recounted the encounter with the [present] defendant").

¹⁰³ See, e.g., *Perry v. Commonwealth*, 390 S.W.3d 122 (Ky. 2012).

1 in question. Resolution of this question requires close attention to the purpose for which
2 evidence of a prior false accusation is offered.

3 In the vast majority of cases involving such evidence, the false accusation will be
4 tendered to prove general character for untruthfulness and thus will fall under subsection (b)(iv).
5 In such cases, subsection (b)(iv) allows inquiry into the prior false accusation on cross-
6 examination of the complainant but takes no position on a second manner of raising the issue—
7 the use of *extrinsic* evidence of specific acts of untruthfulness to bolster such cross-examination.
8 American jurisdictions are split on this issue,¹⁰⁴ and the Supreme Court has declared that
9 forbidding proof by extrinsic evidence is constitutionally permissible.¹⁰⁵

10 In some cases, however, evidence of prior false accusation might be proffered for a
11 different purpose—for example to impeach by inconsistency or specific contradiction (as
12 permitted by subsection (b)(ii)) or to prove bias or motive to fabricate (as permitted by
13 subsection (b)(iii)).¹⁰⁶ These subsections, like subsection (b)(iv), permit the matter to be raised
14 on cross-examination but take no position on the admissibility of proof by extrinsic evidence.
15 Instead, they leave the question to be resolved under the jurisdiction's generally applicable rules
16 of evidence.¹⁰⁷

17 (3) *Precocious Sexual Knowledge*. Section 213.7(2)(b)(v) addresses cases involving
18 children, in which the alleged victim's graphic descriptions of abuse may suggest “precocious

¹⁰⁴ Compare FED. R. EVID. 608(b) (“Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness...”), with Applegate, *supra* note 83, at 916-918 (surveying debate over intrinsic versus extrinsic evidence, and noting courts that hold that, “in the context of sexual assault trials, exceptions must be made to rules prohibiting extrinsic evidence because of the high probative value of evidence of prior false accusations of sexual assault”). See also *id.* at 918 (reporting on states that take intermediate approach, and admit “admission of extrinsic evidence of prior false accusation if the victim denies having made a false accusation”); *State v. Long*, 140 S.W.3d 27, 30-31 (Mo. 2004) (en banc) (acknowledging a general ban on extrinsic evidence for credibility alone, but finding that where “a witness’ credibility is a key factor in determining guilt or acquittal, excluding extrinsic evidence of the witnesses’ prior false allegations deprives the fact-finder of evidence that is highly relevant to a crucial issue directly in controversy[,] the credibility of the witness.”); *id.* at 31 (citing to “several jurisdictions [that] allow defendants to introduce extrinsic evidence to prove that a victim has previously made false allegations”).

¹⁰⁵ *Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013) (reversing grant of postconviction relief to a defendant who claimed his constitutional rights were violated by trial court’s refusal to allow proof by extrinsic evidence of the complainant’s prior unsubstantiated accusations against him); *id.* at 1993-1994 (declaring that constitutionality of allowing cross-examination addressed to credibility while precluding the introduction of extrinsic evidence “cannot seriously be disputed”). Although the *habeas* context of the case might afford an argument for limiting the Court’s holding to that distinctive procedural posture, on balance the Court’s language in *Jackson* seems likely to preclude a federal constitutional mandate for admission of extrinsic evidence of false accusations.

¹⁰⁶ For instance, if a complainant testifies on direct examination that he or she would “never lie about something as serious as sexual assault,” then cross-examination as to a qualifying prior false accusation could be pursued not for purposes of putting character for truthfulness in issue, but rather for the purpose of showing specific contradiction or prior inconsistency.

¹⁰⁷ THE NEW WIGMORE, A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION § 2.2 (Roger Park & Tom Lininger eds., 2014) (noting that evidence admitted to prove bias typically may be proved by extrinsic evidence, whereas extrinsic evidence offered to prove inconsistency or specific contradiction must satisfy the collateral-evidence rule).

sexual knowledge”¹⁰⁸ that would be unexpected in a child unless the allegations against the defendant were true. In such instances the defendant seeks to provide an alternative explanation for how the complainant acquired unexpectedly sophisticated knowledge, by introducing evidence of exposure to pornography or adult sexual materials¹⁰⁹ or evidence of prior sexual experiences (even if those experiences involved sexual abuse).¹¹⁰ Alternatively, a defendant may wish to introduce evidence that a young child has a sexually transmitted infection not carried by the defendant, as a means of indirect exculpation (indirect, because the prosecutor has not alleged that the infection was caused by the defendant).¹¹¹ Often the defense proffers such evidence not just to explain sexual knowledge, but also to attack credibility by suggesting that a child complainant is simply confused, covering for the true perpetrator, or otherwise unbelievable.

Conventional rape shield statutes appear to block such evidence, since past sexual experiences—whether consensual or not—are presumptively inadmissible, and the prior experience is not, strictly speaking, offered to prove an alternative perpetrator; rather, such evidence is simply offered to exculpate the defendant more generally. Some rape shield statutes explicitly permit the defendant to introduce evidence of prior sexual conduct in a case alleging sexual abuse of a juvenile. In other jurisdictions, courts have varied in their treatment of such defense requests,¹¹² but “[t]he majority ... agree that the prior sexual abuse of a youthful victim

¹⁰⁸ This concept has also been denominated the “sexual innocence inference theory.” See, e.g., *Grant v. Demskie*, 75 F. Supp. 2d 201, 213 (S.D.N.Y. 1999). See generally Christopher B. Reid, Note, *The Sexual Innocence Inference Theory as a Basis for the Admissibility of a Child Molestation Victim’s Prior Sexual Conduct*, 91 Mich. L. Rev. 827 (1993).

¹⁰⁹ See, e.g., *State v. Marks*, 262 P.3d 13 (Utah Ct. App. 2011) (finding that the confrontation clause was not violated by the exclusion of evidence that child had access to pornography, which had been offered to impeach the child’s statement to the contrary at preliminary hearing); *Howard v. Commonwealth*, 318 S.W.3d 607 (Ky. Ct. App. 2010) (finding no violation in exclusion on rape shield grounds of five-year-old’s exposure to sex toys and pornography); *Montgomery v. State*, 625 S.E.2d 529 (Ga. Ct. App. 2006) (holding viewing of pornographic movies to be irrelevant and possibly barred by state rape shield doctrine); *State v. Molen*, 231 P.3d 1047, 1062 (Idaho Ct. App. 2010) (discussing sexual innocence inference theory). But see *People v. Mann*, 41 A.D.3d 977 (N.Y. App. Div. 2007) (seeming to agree that pornography falls outside “sexual conduct” that was presumptively inadmissible under state’s rape shield law).

¹¹⁰ On the question whether rape shield laws cover prior *nonconsensual* sexual activity, see *People v. Parks*, 766 N.W.2d 650, 655-656 (Mich. 2009):

[N]early all states ruling on this question have read their rape shield protections as encompassing both voluntary sexual conduct and involuntary sexual conduct. Twenty other states specifically hold that sexual abuse falls under rape shield protections. Only three states concur with [the dissenter] in denying the applicability of rape shield provisions to involuntary sexual abuse. A fourth, New Hampshire, has enacted a statute expressly limiting exclusion to consensual sexual conduct.

¹¹¹ See, e.g., *State v. Garrett*, 1990 WL 98222 (Ohio Ct. App. 1990) (per curiam) (upholding exclusion of evidence of four-year-old complainant’s sexually transmitted disease, where the disease was curable within several weeks and allegation had been brought months later).

¹¹² Compare *LaJoie v. Thompson*, 217 F.3d 663, 671-672 (9th Cir. 2000) (finding prior abuse admissible to explain precocious knowledge) and *State v. Budis*, 593 A.2d 784 (N.J. 1991) (same), with *Pierson v. People*, 279 P.3d 1217, 1218, 1222 (Colo. 2012) (en banc) (upholding exclusion of eight-year-old’s consensual sexual activity with cousin at time of alleged fondling by accused, despite prosecutor’s argument that complainant could have falsified claims only if she had “the most incredible imagination of any child on the face of this earth”).

1 is relevant to rebut the inference that the complainant could not describe the details of sexual
 2 intercourse if the defendant had not committed the acts in question.”¹¹³ Indeed, “[a] number of
 3 states have held that the United States Constitution compels the admission of evidence to show
 4 an alternative basis for a child victim’s knowledge of sexual matters.”¹¹⁴ Moreover, some courts
 5 find that “the lack of sexual experience is automatically [implied] in the case without specific
 6 action by the prosecutor,” and the “defendant therefore must be permitted to rebut the inference a
 7 jury might otherwise draw that the victim was so naive sexually that she could not have
 8 fabricated the charge.”¹¹⁵ Other courts have found the evidence admissible so long as the two
 9 incidents are sufficiently similar in nature.¹¹⁶ The 1999 revisions to the Uniform Rules of
 10 Evidence incorporated in its rape shield provision an exception for evidence “that a person other
 11 than the accused was the source of the alleged victim’s knowledge of sexual behavior,” with no
 12 specific age restriction.¹¹⁷ A minority of jurisdictions, however, have categorically excluded such
 13 evidence, on the ground that it falls within the presumptive exclusion of the rape shield
 14 statute.¹¹⁸

15 Crafting an appropriate exception, as in the adult context, invokes competing concerns.
 16 On the one hand, it is essential that the factfinder hear relevant evidence tending to prove or
 17 disprove facts of consequence that are in issue. Moreover, child witnesses are more vulnerable to
 18 suggestion and confusion, and may not recognize the consequences of misidentifying an abuser.
 19 On the other hand, evidence of complainant’s sexual history can create confusion or trigger
 20 biases in the minds of jurors and thus may distort the accuracy of the factfinding process.

¹¹³ *State v. Budis*, 593 A.2d at 791. See also *Marks*, 262 P.3d at 27 (“Utah, like most other jurisdictions, recognizes the relevance of the complainant’s past sexual conduct to rebut the sexual innocence inference in appropriate cases.”); *State v. Molen*, 231 P.3d at 1052 (“[E]vidence of an alternate source for a child’s knowledge of sexual matters may be relevant in the trial of a sexual molestation charge[. . . . depending] upon the facts of each case.”).

¹¹⁴ *Hale v. State*, 140 S.W.3d 381, 396 (Tex. Ct. App. 2004) (citing cases).

¹¹⁵ *State v. Jacques*, 558 A.2d 706, 708 (Me. 1989); *State v. Howard*, 426 A.2d 457 (N.H. 1981) (finding the same in a statutory rape context); *People v. Osorio-Bahena*, 312 P.3d 247, 255 (Colo. App. 2013) (“[W]e are persuaded that a jury might infer guilt based on [the victim’s] presumed lack of sexual knowledge whether or not the prosecution specifically argued this inference.”).

¹¹⁶ See, e.g., *Commonwealth v. Ruffen*, 507 N.E.2d 684, 687-688 (Mass. 1987) (“If the victim had been sexually abused in the past in a manner *similar* to the abuse in the instant case, such evidence would be admissible at trial because it is relevant on the issue of the victim’s knowledge about sexual matters.”) (emphasis added); *Wisconsin v. Pulizzano*, 456 N.W.2d 325 (1990) (reversing conviction for exclusion of evidence, while laying out five-point test for offer of proof); *Molen*, 231 P.3d at 1052-1053 (noting that the victim’s age and the similarity of the complaints are relevant factors).

¹¹⁷ Uniform R. Evid. 412(c)(2) (1999).

¹¹⁸ In one of the most commonly cited cases, *People v. Arenda*, 330 N.W.2d 814 (Mich. 1982), the defendant was charged with molesting his eight-year-old son. He sought to question the child about sexual contact with third parties as a means of “explain[ing] the victim’s ability to describe the sexual acts that allegedly occurred and to dispel any inference that this ability resulted from experiences with defendant.” *Id.* at 817. The court upheld the exclusion, referencing the goals of privacy and protection from harassment embodied in the rape shield statute. The court’s analysis of the potential conflict with the defendant’s Sixth Amendment rights was inadequate, as it focused primarily on the rational basis of the law and the state’s interests in protecting rape victims. *Id.* at 816-817. See also *Commonwealth v. Appenzeller*, 565 A.2d 170 (Pa. Super. Ct. 1989) (en banc).

1 Prior sexual activity will simply be irrelevant in many cases. Yet where such evidence is
2 relevant, several factors distinguish its introduction in the juvenile context from its introduction
3 in the adult context, and thus make its admissibility less fraught. In the adult context, the primary
4 concerns are that a complainant's prior sexual history is often not probative (or weakly
5 probative) of facts at issue in the case. The fear is that such evidence will instead be used for a
6 prejudicial purpose: to judge a complainant as either less credible ("victim sleeps around and so
7 probably consented") or less deserving of protection ("victim sleeps around so got what she was
8 asking for").

9 But in the case of a young child, the probative value is heightened and the probability of
10 prejudice diminished. A jury confronted with evidence that a very young child has described
11 graphic sexual acts may infer—even without prosecutorial argument—that the only explanation
12 for such knowledge is that the child's allegations are true. Yet if an alternative explanation exists
13—for example, that the child learned this information from other sexual activity—then evidence
14 intended to defuse this inference is highly probative.

15 Moreover, the prejudicial uses of such evidence that complicate its introduction in adult
16 cases are less likely to occur in cases involving a young child complainant. A very young child
17 with a sexual history must, almost by definition, have gained that experience through abuse. In
18 that scenario, it does not seem likely that a jury will discount the child's credibility or worthiness
19 of protection on the basis of a prejudicial inference akin to that which can arise in the adult
20 context. A jury is unlikely to reason that, because a five- or 10-year-old was previously abused,
21 she deserved to be abused again. Similarly, where the evidence relates to childhood games
22 engaged in consensually, such evidence seems unlikely to evoke the kind of forbidden biases that
23 might arise with respect to an older child (for example, that the child is of unchaste character).

24 Instead, to the extent that the jury may consider such information in resolving credibility
25 questions, the inferences drawn are likely to be relevant ones. The jury may think that a young
26 child's previous abuse or precocious sexual behavior raises concerns about atypical sexual
27 development that may indicate a child prone to have confusion about appropriate sexual contact,
28 incentives to fabricate, or uncertainty or even a motive to lie about the identity of a perpetrator.
29 All of these inferences, however, are fair and highly relevant to the defendant's guilt. In contrast,
30 any adult complainant presumably has sexual knowledge, and therefore a jury is unlikely to infer
31 from graphic testimony alone that the adult complainant's account is true. And conversely, a jury
32 hearing accusations by an adult complainant is much more likely to use information about prior
33 sexual activity for impermissible purposes.

34 It is important to observe, however, that the logic of the foregoing analysis fits best with
35 very young juvenile complainants. They are the victims for whom evidence of prior exposure to
36 sexual activity is least likely to trigger an impermissible inference of promiscuity. They are also
37 the class of victims for whom precocious knowledge—not otherwise explained—carries the
38 strongest risk of improperly bolstering the complainant's veracity. In contrast, older juvenile
39 complainants are more likely to be and to be perceived to be sexually autonomous actors. As a
40 result, for this group of complainants, the probabilities are reversed as regards the probative
41 value and prejudicial effects of evidence relating to prior voluntary sexual behavior. Jurors are
42 likely less inclined to perceive that precocious knowledge necessarily translates into evidence of
43 abuse, and more likely to hold prior sexual experience against the complainant in an
44 impermissible manner. Indeed, the prejudice may be even greater for young adults who choose to

1 be sexually active, because social disapproval may be especially strong for promiscuity at a
2 young age.

3 To be sure, the precise line between the age at which a complainant's prior sexual
4 experience shifts from being least to most prejudicial is far from certain. However, lack of
5 certainty is not a reason to ignore the contrast in prejudicial impact or to risk admitting evidence
6 likely to adversely impact the accuracy of the factfinding process. Simply setting an age seems
7 too arbitrary given that the presumption for or against admissibility would so abruptly flip.
8 Allowing the evidence only when prosecutors explicitly raise the inference also seems unjust,
9 given that in many cases the age of the complainant may speak for itself. At the same time, some
10 standard is appropriate in order to provide guidance to courts.

11 For these reasons, Section 213.7(1)(b)(v) is limited to two situations: those in which the
12 "tender years" of the complainant raises an implicit inference; and those in which the prosecutor
13 expressly raises the issue, regardless of the victim's age. Thus, this subsection's exception to the
14 presumption of inadmissibility will apply to *implied* inferences only in the case of very young
15 children, because even pre-teenagers are typically assumed to have been exposed to some
16 measure of sexual knowledge through ordinary cultural channels. But if a prosecutor *expressly*
17 argues that a child gained such knowledge through the conduct alleged against the defendant,
18 then evidence of an alternative source of such knowledge is appropriate regardless of the child's
19 age.

20 The relevant time of inquiry is the time of the complaint and after, because that is the
21 moment when the child's expression of sexual knowledge occurs and when the inference might
22 first be drawn. The age of the child at the time of the assault is less important, since a witness
23 assaulted at a young age may make a complaint at an older age, but in such a case the jury will
24 have no reason to assume that the simple capacity to make such allegations (in light of tender
25 years) supports the complaint.

26 In addition, the language of this subsection affords the court flexibility to make its own
27 findings based on factors beyond chronological or cognitive age. In determining whether the
28 inference of precocious knowledge is likely to arise, the court should consider what other
29 evidence the jury will hear that might successfully rebut the inference, the nature of the alleged
30 conduct, the language in which the child described it, and the capacity of the proffered evidence
31 to rebut the inference.¹¹⁹ For instance, evidence of a prior incident involving fondling would not,
32 without more, be admissible to explain precocious knowledge in a child alleging more graphic
33 abuse. Courts should take care not to overlook the potential prejudice of such evidence and to
34 exclude or limit it accordingly. The court should also take appropriate measures to safeguard the
35 privacy and welfare of vulnerable juvenile witnesses as to these sensitive matters, including by
36 closing the court or sealing the record where appropriate.

¹¹⁹ See, e.g., *State v. Molen*, 231 P.3d 1047, 1052 (Idaho App. 2010) ("[T]he relevance of a child's prior exposure to sexual conduct (either as a victim or as an observer) will depend upon the facts of each case. One important factor is the age of the child when he or she reports and describes the sexual assault. That is, the probative value of evidence of a child's alternative source of sexual knowledge will ordinarily be inversely proportional to the child's age, for the younger the child, the stronger the likelihood of a jury inference that the child would be too sexually innocent to have fabricated the allegations against the defendant. As the victim's age rises, the risk of such an inference will diminish and may evaporate.").

(4) *Safety Valve*. Section 213.7(1)(b)(vi) provides an exception to the general rule of exclusion “when such evidence has an especially strong tendency to prove a material claim, and exclusion of such evidence would substantially impede a party’s ability to support that claim.” Although the other enumerated exceptions address the overwhelming majority of instances in which evidence of a complainant’s sexual activity should not be presumptively barred by the rape shield provision, occasions arise in which evidence that falls outside those five categories nonetheless ought to be admitted, because it substantially enhances the accuracy of the factfinding process or is crucial to a permissible claim or defense. Currently, jurisdictions tend to pursue one of several avenues to address such situations. In addition to the constitutional savings clause that is either explicitly or implicitly part of every statute, most American jurisdictions have available some statutory vehicle for admitting more evidence than that covered by the specific exceptions in the proposed Section 213.7(1)(b). Specifically:

° Both New York and California have broadly worded general exceptions to their rape shield laws;¹²⁰

° Seven states admit evidence based upon judicial discretion (typically phrased in terms of relevance and probative value versus prejudice);¹²¹

° Eight jurisdictions have one or more exceptions phrased in broad, potentially elastic terms, such as exceptions for evidence that someone other than the defendant committed the offense;¹²² that the victim consented;¹²³ or that the victim’s behavior fit a prior pattern of conduct;¹²⁴

° Seven states have exceptions for evidence of prior sexual conduct that casts doubt on the witness’s credibility;¹²⁵ and

¹²⁰ N.Y. CRIM. PROC. LAW § 60.42(5) (McKinney 2014) (“interests of justice”); CAL. EVID. CODE § 1103(a)(1) (West 2014) (“[O]ffered by the defendant to prove conduct of the victim in conformity with [a specific] character or trait”).

¹²¹ ALASKA STAT. ANN. § 12.45.045 (West 2014); ARK. CODE ANN. § 16-42-101 (West 2014); KAN. STAT. ANN. § 21-5502 (West 2013); N.M. STAT. ANN. § 30-9-16 (West 2013); R.I. R. Evid. 412; WYO. STAT. ANN. § 6-2-312 (West 2013). Colorado enumerates some explicit exceptions but also has a discretion-only safety valve. COLO. REV. STAT. ANN. § 18-3-407 (West 2011).

¹²² E.g., IND. CODE ANN. § 35-37-4-4, Sec. 4(b) (West 2014); (“[A] specific instance of sexual activity shows that some person other than the defendant committed the act upon which the prosecution is founded”); N.C. GEN. STAT. ANN. § 8C-1, RULE 412(b)(2) (West 2013) (“Is evidence ... offered for the purpose of showing that the act or acts charged were not committed by the defendant.”).

¹²³ IOWA CODE ANN. Rule 5.412(b)(2)(B) (West 2013) (“[O]ffered by the accused upon the issue of whether the alleged victim consented”); NEV. REV. STAT. ANN. §§ 48.069, 48.090 (West 2014) (outlining procedures to introduce “evidence to prove victim’s consent” as opposed to credibility restrictions); WASH. REV. CODE ANN. § 9A.44.020(2) (West 2014); D.C. CODE § 22-3022(a)(2)(B) (2014).

¹²⁴ E.g., FLA. STAT. ANN. § 794.022(2) (West 2014) (“[T]ends to establish a pattern of conduct or behavior on the part of the victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent”); N.C. GEN. STAT. ANN. § 8C-1, RULE 412(b)(3) (West 2013); TENN. R. EVID. 412(c)(4)(iii).

¹²⁵ See CONN. GEN. STAT. ANN. § 54-86f (West 2014); DEL. CODE ANN. tit. 11, § 3509(d) (West 2014); MD. CODE ANN., CRIM. LAW § 3-319(b)(4)(iv) (West 2014); TENN. R. EVID. 412(c)(2); VA. CODE ANN. § 18.2-67.7(B) (West 2014); WASH. REV. CODE ANN. § 9A.44.020(4) (West 2014); W. VA. CODE, § 61-8B-11(b) (2014).

1 ^o Six states permit exceptions for types of prior behavior that, though relatively specific,
2 raise more difficulties than they avoid, such as prior prostitution.¹²⁶

3 Section 213.7(1)(b)(vi) rejects each of these options, and instead pursues a different
4 course: namely, the adoption of a narrowly tailored exception that requires a tripartite showing
5 of: (1) special probative force, (2) materiality, and (3) significant detrimental effects from
6 excluding such evidence. Such findings are to be made in the specific factual context of the
7 particular case. Section 213.7(1)(b)(vi) elects this course for several reasons.

8 First, a broad “catch-all” or judicial-discretion clause, while it enables the admission of
9 evidence critical to the fairness of the trial, also risks permitting the admission of precisely the
10 kind of evidence that rape shield statutes rightly seek to exclude. Such statutes are designed to
11 channel and constrain the circumstances in which sexual-activity evidence, though arguably
12 “relevant” in the most generous sense of the term, is deemed admissible. Inserting a broadly
13 worded “interests-of-justice” exception, or relying entirely on judicial discretion, runs too great a
14 risk that *ad hoc* determinations will undermine the purpose and goals of this reform.

15 Second, adopting a long list of more specific exceptions also carries undesirable risks. To
16 be sure, a more detailed set of exceptions might have the laudable effect of accommodating
17 recurring scenarios that would otherwise need to be addressed on an *ad hoc* basis, such as highly
18 distinctive or unusual patterns of sexual behavior. But detailed exceptions might also suggest
19 that, by carving out targeted situations, all evidence falling within those categories should be
20 considered presumptively relevant, when in fact the opposite is more likely to be the case. More
21 detailed exceptions also needlessly add to the complexity of the statute.

22 Third, relying solely on detailed exceptions, without providing any more general
23 exception for unforeseen scenarios, fails to solve the fundamental problem of how to
24 accommodate atypical or unexpected situations where proffered evidence is nonetheless critical
25 to a claim in the case. For instance, in *State v. Cassidy*,¹²⁷ the complainant alleged that, after
26 going to the bedroom of the defendant to have consensual sex, the defendant (with whom she
27 had previously been intimate) turned aggressive and forced her to engage in sexual activity
28 against her will. The defendant alleged that the incident in question was consensual, but that the
29 complainant had suddenly started screaming, saying that her husband had been killed in Vietnam
30 and that she wanted to die.¹²⁸ The defendant sought to introduce evidence that a year earlier, the
31 complainant had had consensual sex with another man, who would testify that during the
32 encounter “she began ‘going crazy’ and screaming about her husband who was killed in
33 Vietnam.”¹²⁹ It is difficult to imagine how a targeted exception could anticipate such unusual
34 facts, at least without also imagining an impossibly long list of exceptions.

¹²⁶ E.g., IDAHO R. EVID. 412(b)(2)(D) (multiple partners); OKLA. STAT. tit. 12, § 2412(B)(3) (2013); OR. REV. STAT. ANN. § 40.210, Rule 412(3)(b) (West 2014) (manner of dress for limited purposes); N.J. STAT. ANN. § 2C:14-7(c) (WEST 2014) (same); WIS. STAT. ANN. § 972.11(d) (West 2013) (same); N.Y. CRIM. PROC. LAW § 60.42(2) (McKinney 2014) (prior prostitution).

¹²⁷ *State v. Cassidy*, 489 A.2d 386 (Conn. App. Ct. 1985).

¹²⁸ *Id.* at 388.

¹²⁹ *Id.* at 389.

1 The reported cases illustrate a considerable number of atypical scenarios. In many of
2 these cases, courts were able to admit the evidence only by invoking broad or vague statutory
3 terms that Section 213.7 deems unacceptable.¹³⁰ In cases where courts confronted such situations
4 but lacked any statutory escape hatch, judges have elected one of two routes. Some have simply
5 followed the terms of their rape shield exclusion as written, at the cost of permitting an
6 unreliable and potentially unjust conviction to stand.¹³¹ Others, in order to avoid potential
7 injustice, have been forced to declare their rape shield statute unconstitutional as applied.¹³²

¹³⁰ E.g., *People v. Jovanovic*, 263 A.D.2d 182, 193 (App. Div. 1999) (victim's email messages to the defendant, in which she expressed an interest in sadomasochism, did not constitute "evidence of prior sexual conduct (to which the statute expressly applies)" and therefore were not excluded by the rape shield rule) (emphasis in original); *State v. Shoffner*, 302 S.E.2d 830, 832-833 (N.C. Ct. App. 1983) (proffered "evidence indicating that the prosecuting witness's sexual behavior on past occasions conformed to [defendants'] version of what happened" on the night in question was not excluded because the state's rape shield law provided an exception for past sexual behavior of the complainant that "[i]s . . . so distinctive and so closely resembling the defendant's version of the alleged encounter . . . as to tend to prove that such complainant consented") (internal quotations omitted).

¹³¹ See, e.g., *State v. Cassidy*, 489 A.2d 386 (Conn. App. Ct. 1985), discussed in text accompanying *supra* notes 127-129. Similarly, *Gagne v. Booker*, 680 F.3d 493 (6th Cir. 2012) (en banc), involved an allegation that the defendant and several others had forced the complainant to engage in group sex. The defendant was not allowed to introduce evidence that the complainant had previously engaged in consensual sex with a group including himself and others. For more detailed discussion of *Gagne*, see note 142 *infra*. In *Moore v. Duckworth*, 687 F.2d 1063 (7th Cir. 1982), the teenaged victim of an alleged assault was sixth months pregnant at the time of trial. The government acknowledged that the prospective father was the complainant's boyfriend, not the defendant, and thus made no explicit argument that the pregnancy was the result of defendant's offense. But if jurors noticed her pregnancy and were given no explanation, then the defendant would be severely prejudiced because his only defense was that the assault had not occurred. At the time, Indiana's rape shield law contained no exception that would have made evidence explaining the pregnancy admissible, just as no such exception would clearly admit the evidence under proposed sections 213.7(1)(b)(i) through (v). The trial judge sought to conceal the complainant's pregnancy from the jury by having her sit with her coat in her lap and by excusing the jury before she moved about the courtroom; state courts made the dangerous assumption that the jury was unaware of the pregnancy, and on *habeas corpus* review, the U.S. court of appeals reluctantly denied relief. In *Richmond v. Embry*, 122 F.3d 866 (10th Cir. 1997), the prosecution relied on evidence of hymenal injury to the 12-year-old victim; the defendant was not allowed to introduce evidence that she owned condoms—evidence he had proffered for the purpose of arguing that someone else could have been responsible for the injury. See also *Ex parte Dennis*, 730 So. 2d 138, 143 (Ala. 1999) (precluding introduction of defense witness's testimony that another man attempted to have sex with the victim, which was proffered to support defense argument that someone else could have been responsible for the hymenal injury that the prosecution attributed to the defendant).

¹³² In several of these cases, the proposed terms of subsection (b) would have obviated the constitutional problem, because they provide an express exception applicable to the situation. See, e.g., *United States v. Begay*, 937 F.2d 515, 520 (10th Cir. 1991) (alternative explanation for physical injuries observed during medical examination); *State v. Bass*, 465 S.E.2d 334, 336-337 (N.C. Ct. App. 1996) (alternative explanation for precocious sexual knowledge of child victim); *Neely v. Commonwealth*, 437 S.E.2d 721, 723 (Va. Ct. App. 1993) (alternative explanation for hair fragment found during medical examination); *State v. Lampley*, 859 S.W.2d 909, 912 (Mo. Ct. App. 1993) (motive to lie).

Many other cases, however, have presented unusual, hard-to-anticipate scenarios not covered by any of the specific exceptions in subsection (b). See, e.g., *Obiazor v. United States*, 964 A.2d 147, 151 (D.C. 2009) ("striking resemblance between [prior alleged incident and the present accusation] leans in favor of admissibility to challenge T.D.'s credibility," without regard to whether the prior allegation was false); *United States v. Kelly*, 33 M.J. 878, 883 (A.C.M.R. 1991) (evidence of complainant's distinctive pattern of sexually aggressive behavior toward males when she was drunk paralleled defendant's account of the alleged incident; evidence did not fit within an established exception to the rape shield statute but nonetheless its admission was constitutionally required); *State v. Colbath*, 540 A.2d 1212, 1216 (N.H. 1988) (Souter, J.) (evidence of complainant's "openly sexually provocative behavior"

Neither alternative should be acceptable in a well-crafted rule of evidence. In particular, relying on the constitutional exception is unsatisfying for two reasons. First, courts properly mindful of the limits of constitutional intervention have too often construed the constitutional standard very restrictively, and have refused to admit factually critical evidence that fell outside the specific statutory exceptions.¹³³ Thus, in the *Cassidy* case above, the appellate court found that exclusion of the evidence did not violate the defendant's constitutional rights.¹³⁴ Yet surely such evidence was essential to the accused's defense, which otherwise was facially implausible.¹³⁵

Second, reliance on a constitutional safeguard alone would leave the prosecution without any recourse where sexual-activity evidence forms a critical component of *its* case. Although such scenarios are uncommon, they nonetheless arise. For instance, in *State v. Wayne*,¹³⁶ the prosecution introduced evidence that the complainant was a lesbian—in order to call into question the male defendant's claim that she had sought out and consented to sex with him, a near-stranger. On appeal, the defendant challenged the admission of that evidence as a violation of the state's rape shield law. Although the appellate court rejected the claim by noting that the state's rape shield statute did not cover sexual orientation, the more generous terms of Rule 213.7(1)(a)(iv) clearly and appropriately encompass such evidence in ordinary cases. Because the evidence would not fall under any of the other Rule 213.7(1)(b) exceptions, and because its admission would not be constitutionally required when it is offered by the government, it would have to be ruled inadmissible, absent the availability of an exception such as that embodied in Section 213.7(1)(b)(vi).¹³⁷

Nevertheless, the exception as drafted still must contend with two opposing concerns. The first is that courts will construe its scope too expansively, with the effect of undermining the

toward a group of men in a public bar had strong relevance to the issue of consent; evidence did not fit within an established exception to the rape shield statute but nonetheless its admission was constitutionally required). The court's analysis in *Colbath* unjustifiably implies that the complainant's prior sexual activity called for a less stringent rule of exclusion because it had occurred in public. See Anderson, *supra* note 8, at 140-141 (criticizing *Colbath* on this ground). On its facts, however, the appropriately decisive circumstance in *Colbath* was that the prior conduct involved behavior with the defendant himself, and that the evidence therefore had strong relevance on the issue of consent.

¹³³ See, e.g., *Gagne v. Booker*, 680 F.3d 493, 517 (6th Cir. 2012) (en banc) (finding that exclusion of evidence that complainant had engaged in consensual group sex with the defendant, who at the time was her boyfriend, was not an unreasonable application of constitutional law meriting *habeas* relief). See also cases cited *supra* note 131.

¹³⁴ *Cassidy*, 489 A.2d at 392.

¹³⁵ Moreover, in contemporary times, the mere fact that an adult woman engaged in consensual sexual activity with another man a year before the alleged incident is less likely to lead the jury to draw prejudicial inferences (such as that the complainant is promiscuous). Given the probative value, which bolsters the defendant's otherwise facially improbable claims, and the limited prejudice, the evidence should have been admitted.

¹³⁶ *State v. Wayne*, 2013 WL 6055004 (Ohio Ct. App. Nov. 15, 2013) (slip op.).

¹³⁷ To reiterate, evidence of sexual orientation will, in most cases, have little probative value and thus will not meet the requirements of distinctiveness, materiality, and substantial impediment. But where (1) consent is the decisive factual issue in the case, (2) strong evidence establishes the complainant's sexual orientation, (3) that fact casts doubt on a claim of consent, and (4) there is little other evidence available to dispute consent, evidence of sexual orientation would be critical to effective presentation of the government's case and should not be excluded.

goals of rape shield exclusion; the second is that courts will construe its terms too narrowly and thus undermine the purpose of this safety-valve relief from the usual rule of inadmissibility.

The first concern is to some degree speculative. The reported decisions provide few clear-cut examples of overly permissive use of flexible “catch-all” or discretionary exceptions.¹³⁸ It is possible, to be sure, that loose administration of a rape shield law could escape appellate notice—for example, if broad interpretations of a discretionary provision at the trial level permit the introduction of prejudicial evidence resulting in unjustified acquittals.¹³⁹ In the absence of systematic surveys from this perspective, it is difficult to assess this danger, but it is reassuring that in New York, which has a generously worded “interests-of-justice” exception, the supervisor of the sex-crimes unit in one of the state’s largest counties reports that the rape shield statute “works fairly well in NY. Judges are good about enforcing the offer of proof in the catch-all sub 5, and have not used that subsection to eviscerate the statute.”¹⁴⁰

The risk of unduly permissive administration of a catch-all exception is nonetheless sufficiently substantial to counsel against adoption of the kind of unbounded language found in the statutes of New York and California. Instead, the terms of subsection (b)(vi) include three important requirements that circumscribe the scope of admissible evidence: (1) the proffered evidence must be *strongly* probative, (2) it must address a *material* claim, and (3) its exclusion must *substantially impede* the proponent’s ability to support that claim. As to the latter two requirements, the proponent must therefore show that the proffered evidence is probative of a central claim or question in dispute, and that the inability to introduce the evidence will not merely prejudice, but *substantially impede*, the party’s ability to support that claim. Regarding the first requirement that the evidence be *strongly* probative, this language limits the exception to circumstances in which the evidence makes a clear contribution to accurate factfinding. Evidence that merely has some relevance to a material claim offers no distinct or unique benefit to that goal; conversely, exclusion of such evidence works no special harm. In contrast, evidence that is distinctively valuable, as a result of either its substantive content or its persuasive force (in terms of incontestability) falls within the province of the subsection (b)(vi) exception. Considering the three parts together, the rule essentially states that, if especially probative of a material claim, evidence should be admitted when its exclusion would substantially inhibit a proponent’s ability to support that claim.

In keeping with these restrictions, the exception should be applied with special care to avoid reinforcing outdated or unjust assumptions about sexual behavior, or unfairly shifting the focus of the inquiry to the chastity of the complainant. For instance, a complainant’s prior acts of prostitution should not generally be admissible to prove consent—because knowing that a complainant has exchanged sex for money sheds little if any light on whether a complainant engaged in consensual sexual behavior with a specific person. The same principle applies to evidence that a complainant has previously engaged in “one night stands” or unconventional

¹³⁸ Reasonable minds can differ, of course, on the question whether there was appropriate justification for any given ruling in favor of admissibility. For a careful analysis of decisions to admit evidence on grounds arguably at odds with the principles of rape shield exclusion, see Anderson, *supra* note 8, at 97-141.

¹³⁹ *Id.* at 95.

¹⁴⁰ Telephone interview, March 4, 2014, and e-mail correspondence, March 10, 2014 (cited without attribution because the impressions reported should not be taken to represent the official position of the District Attorney in question).

1 sexual acts, both of which may offer little if any probative value in determining whether a
2 complainant engaged in a particular “one night stand”¹⁴¹ or in a sex act with a specific person.¹⁴²
3 In short, in most cases such evidence is not particularly probative of whether consent occurred in
4 the disputed case, and exclusion of such evidence does not substantially impede the defendant’s
5 ability to support a claim of consent.

6 Nevertheless, subsection (b)(vi) recognizes that such evidence might, given the facts of a
7 particular case, be admissible in limited circumstances. For example, suppose the defendant
8 argues that he arranged to pay for sex with the complainant, but that she accused him of rape
9 when he failed to pay her a sufficient amount. In such a case, the defendant is entitled to ask the
10 witness whether he or she agreed to the exchange of money for sex with the defendant. If the
11 witness *admits* the agreement, then evidence of prior prostitution should remain inadmissible.
12 This is true as a matter of ordinary relevance, in that the prior acts of prostitution would have
13 little bearing on whether the complainant consented or not in the disputed case. But it is also true
14 as a matter of applying the exception: The complainant’s acknowledgment of the prostitution
15 agreement with the defendant reduces the material dispute in the case to whether the complainant
16 is retaliating for breach of that agreement, and evidence of prior prostitution offers little if any
17 probative value for resolving that question. Moreover its exclusion in no way impedes (much
18 less substantially) the defendant’s ability to support his claim.

19 However, if the complainant *denied* such an agreement, then the defendant should be
20 permitted to introduce evidence of prior prostitution as critical to proving the material fact of
21 whether the incident could have occurred as the defendant claims. The evidence is distinctly

¹⁴¹ See *State v. Sheline*, 955 S.W.2d 42, 46 (Tenn. 1997) (observing, in the context of defendant’s claim for admission, under “distinctive behavior” exception, of complainant’s two prior instances of sexual activity with men she met in a bar, that such behavior is hardly “so outside the normal, that it [could be considered] the complainant’s modus operandi”). See generally Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763 (1986) (discussing cases).

¹⁴² This is not to say that such evidence can never be relevant and admissible. In a case in which reasonable jurors would find a claim of consent to an unconventional sexual act intrinsically implausible, evidence that the complainant has previously consented to just such an act should be admissible under this subsection. For instance, in *People v. Swathwood*, the complainant alleged that after beginning consensual sexual relations with the accused, her former boyfriend, he invited two others to join in against her will. 2003 WL 1880143 (Mich. Ct. App. Apr. 15, 2003), appeal denied sub nom. *People v. Gagne*, 673 N.W.2d 755 (Mich. 2003). One of the accused, Gagne, sought to introduce evidence that on three prior occasions the victim had consented to engage in group sexual activity with him. He argued that without the evidence of the complainant’s prior consent to group sexual encounters, “the jury likely would reject a consent defense because the [alleged] incident involved more than one partner.” *Id.* at *2; see also *Gagne v. Booker*, 680 F.3d 493, 517 (6th Cir. 2012) (en banc). The state’s rape shield law allowed evidence of past sexual conduct with the accused, but the state court ruled that this exception did not extend to past activity involving both the accused *and* others. *Swathwood*, 2003 WL 1880142, at *2 (citing Mich. Comp. Laws Ann. § 750.520j (2013)). The state court therefore upheld the exclusion of the evidence, and the Sixth Circuit *en banc* denied *habeas* relief, acknowledging that although “the state courts [might have been] wrong to exclude” the evidence, doing so was not an unreasonable application of law. *Gagne*, 680 F.3d at 517. In contrast, under Section 213.7(1)(b)(vi), such evidence clearly should be ruled admissible, because the precise nature of the contested incident rendered the specific proffered evidence strongly probative of a material claim that would be substantially impeded in its absence. As defendant Gagne argued, a jury unaware of the prior episodes was unlikely to believe his testimony that a “threesome” was consensual. Indeed, the government itself acknowledged as much in its closing argument at trial, when it “repeatedly stressed the unlikelihood of Gagne’s story” and claimed that his defense was “much more consistent with the pornographic movie than real life.” *Gagne v. Booker*, 596 F.3d 335, 344 (6th Cir. 2010), rev’d en banc, 680 F.3d 493 (6th Cir. 2012).

1 probative—indeed it may be the only way for the defendant to support the claim that such an
2 agreement was made in the instant case, given that such transactions are not routinely recorded
3 or witnessed by other parties. It is also material, in that without such evidence the jury would
4 likely find incredible the defendant's assertion that the complainant had agreed to exchange sex
5 for money in the present case. And in light of both of these facts, exclusion of the evidence
6 would substantially impede the defendant's ability to present his defense—since the “broken
7 agreement” constitutes the linchpin of defendant's claim. Finally, note also that such evidence
8 would not fall under any of the other enumerated exceptions; most pertinently, it would be
9 unlikely to constitute impeachment, since it does not directly contradict the complainant's claim
10 that such an arrangement was not made *in the instant case*.

11 In this respect, the exception requires sharp attention to the disputed claims in each case
12 and the precise inferences supported by the proffered evidence. For example, in *State v. Hudlow*
13 the court recognized the value of evidence of prior acts of unusual behavior pertinent to the
14 instant complaint, but rightly held that the defendants' evidence failed to qualify as such.¹⁴³ In
15 that case, two victims alleged that the two defendants had picked them up while the complainants
16 were hitchhiking and then sexually assaulted them. The proffered evidence related to the prior
17 sexual behavior of the two women with a group of sailors whom they knew, who had referred to
18 the women as “the whores.” In upholding the exclusion of the evidence, the court observed that
19 “no testimony was offered showing that the two women had ever engaged in sex with men other
20 than sailors whom they knew,” and that “[w]ithout such particularized factors...the evidence was
21 limited at best.” In other words, the evidence at most indicated that the women enjoyed sex with
22 groups of men known to them, but that was not the factual context at issue in the case.
23 Accordingly, the proffered evidence was relevant only to suggest that the women were
24 promiscuous, which is precisely the kind of inference that rape shield statutes properly exclude.
25 Section 213.7(1)(b)(vi) would likewise exclude such evidence; it is not strongly probative, in that
26 the general promiscuity of a complainant offers no special value in answering the question
27 whether he or she engaged in sexual activity on a specific occasion, and the evidence is not
28 necessary to the defense, as its exclusion in no way impedes the defendant's ability to establish
29 consent.

30 The second, converse concern is that the exception as drafted will not be afforded
31 sufficient scope and thus will fail to prevent the inappropriate exclusion of evidence that is
32 crucial to a fair trial. Indeed, such fears have materialized even when an available statutory
33 safety valve was much broader than that proposed in Section 213.7(1)(b)(vi).¹⁴⁴ Cases of that

¹⁴³ 659 P.2d 514, 518-523 (Wash. 1983) (en banc).

¹⁴⁴ See, e.g., *People v. Halter*, 979 N.E.2d 1135 (N.Y. Ct. App. 2012). In *Halter*, a father accused of sexually molesting his daughter sought to elicit testimony concerning (1) her possibly sexual relationship with her 16-year-old boyfriend, (2) her sexually inappropriate clothing, and (3) her sexually provocative MySpace postings. Such evidence, the defendant argued, would tend to establish several motives for fabrication of her accusation, including a desire to protect the boyfriend from charges of statutory rape and a desire to protect herself from the father's expressed intention to send her to an institution for adolescents with behavior problems. The trial court's ruling excluding such evidence was upheld by the Court of Appeals over dissents arguing that the trial court gave insufficient consideration to New York's broad “interests-of-justice” safety valve and that there were substantial “[d]oubts about the evidence of [defendant's] guilt” including that “the defendant may be innocent.” 979 N.E.2d at 1140-1141 (Pigott, J. dissenting); 979 N.E.2d at 1142-1143 (Smith, J. dissenting). As one dissenter observed, the record suggested that the “County Court was under the misconception that the Rape Shield Law contains only the specific enumerated exceptions of section 60.42 (1) through (4), and that it was powerless to admit any evidence...unless it matched one of these four exceptions. In other words, the trial court believed that it had no

sort underscore the point that no statutory safety valve, no matter how flexible, can escape this danger, which is inherent in any process relying on human judgment. The standard embodied in Section 213.7(1)(b)(vi) expresses what can be said, in legislative terms, to preserve the principle of treating sexual-history evidence as generally inadmissible while steering judicial inquiry in an appropriately constrained yet flexible direction. Such flexibility is imperative but cannot be attained with a tightly circumscribed list of specific exceptions, backstopped only by the narrow exception for evidence that meets the high constitutional threshold. The inclusion of a safety valve framed in the narrow terms of subsection (b)(vi) is thus essential to fair, accurate adjudication in cases of this sort.¹⁴⁵

2. Sexual Conduct of the Defendant

a. Current Law. In 1994, Congress amended the Federal Rules of Evidence to permit prosecutors to introduce evidence of the defendant's prior acts of a similar nature in sexual-assault cases. The new rules, Federal Rules of Evidence 413 and 414, displaced—for sexual-assault cases involving adult and child victims, respectively—the general rules on character evidence.¹⁴⁶ These rules allow prosecutors to introduce in cases of sexual assault, “evidence that the defendant committed any other [sex offense, which] may be considered on any matter to which it is relevant.”¹⁴⁷ They do not distinguish among prior misconduct evidence that resulted in conviction, that resulted in acquittal, or that was never charged or previously brought to light; misconduct in all these categories is admissible.¹⁴⁸ Rules 413 and 414 therefore depart dramatically from the general rule that character evidence is inadmissible to prove propensity (behavior in conformity therewith).¹⁴⁹

discretionary authority to allow in evidence of the elder sister's sexual conduct even if relevant to a defense.” *Id.* at 1141 (Pigott, J., dissenting); see also *People v. Osorio-Bahena*, 312 P.3d 247 (Colo. Ct. App. 2013) (applying broad gloss on explicit statutory exceptions rather than resort to broad discretionary provision).

¹⁴⁵ Under this analysis, the availability of the Section 213.7(1)(b)(vi) exception—that is, the question whether prior-act evidence “has an especially strong tendency to prove a material claim, and exclusion of such evidence would substantially impede a party's ability to support that claim”—could easily turn on trial events occurring subsequent to the judge's ruling during (or normally before) trial on the admissibility of such evidence. Absent special attention to this timing problem, events at trial (such as the tenor of the prosecutor's closing argument) could render the earlier Section 213.7(1)(b)(vi) determination erroneous in retrospect, a situation that would then require either futile cautionary instructions or a mistrial. Normally, however, this timing problem can be averted by appropriate cautionary directives to opposing counsel that the judge would issue when making the initial Section 213.7(1)(b)(vi) determination.

¹⁴⁶ See *United States v. Mound*, 149 F.3d 799, 802 (8th Cir. 1998) (“[T]here is no inherent error in admitting under Rule 413 evidence that would be inadmissible under Rule 404(b): that is the rule's intended effect.”).

¹⁴⁷ FED. R. EVID. 413, 414 (2012).

¹⁴⁸ Jason L. McCandless, *Prior Bad Acts and Two Bad Rules: The Fundamental Unfairness of Federal Rules of Evidence 413 and 414*, 5 Wm. & Mary Bill Rts. J 689, 699 (1997). However, Rules 413 and 414 do not displace the usual requirement (Rule 403) that evidence is inadmissible when its probative value is substantially outweighed by its prejudicial effect. *United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998) (“The legislative history ... indicates that the district court must apply Rule 403 balancing and may exclude such evidence in an appropriate case.”).

¹⁴⁹ *Michelson v. U.S.*, 355 U.S. 469, 475-476 (1948); Fed. R. Evid. 404.

1 The provisions permitting admissibility for prior sexual acts of the defendant have been
2 much more controversial than those related to the complainant's history. The animating principle
3 behind the rules is that in cases of sexual assault, "evidence of other sexual assaults is highly
4 relevant to prove propensity to commit like crimes, and often justifies the risk of unfair
5 prejudice."¹⁵⁰ Yet in its report to Congress opposing the proposed rule, the Judicial Conference's
6 Advisory Committee on Evidence Rules echoed the traditional concerns about character
7 evidence and voted against the rule, noting "the highly unusual unanimity of the members of the
8 Standing and Advisory Committees, composed of over 40 judges, practicing lawyers, and
9 academicians, in taking the view that [Rules 413 and 414 are] undesirable. Indeed, the only
10 supporters . . . were representatives of the Department of Justice."¹⁵¹ Nevertheless, Congress
11 enacted the provisions as drafted.

12 Only a minority of jurisdictions follow the federal approach, either as a matter of
13 common law¹⁵² or statute, in cases involving adult victims.¹⁵³ However, state practice with
14 regard to evidence of prior sexual misconduct in sexual-assault cases involving children is both
15 more varied and more ambiguous.¹⁵⁴

16 *b. Section 213.7(2).* The standard for determining the admissibility of a defendant's
17 sexual history under Section 213.7(2) differs from the standard for determining the admissibility

¹⁵⁰ *Enjady*, 134 F.3d at 1431 (citing 140 Cong. Rec. H8968-01, H8992 (S. Molinari, Aug. 21, 1994)). A tripartite rationale behind the rule has also been reported as: "first, the need to detect a propensity to commit sexual assault; second, the improbability that a rape defendant would be mistakenly accused; and third, the importance of additional evidence given the difficulty with credibility determinations in rape cases." Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 Harv. L. Rev. 563, 568 (1997) (emphasis added).

¹⁵¹ 159 F.R.D. 51, 53 (Feb. 9, 1995).

¹⁵² Rule 413 is a codification of the "depraved sexual instinct" rule known to several States' common law.

¹⁵³ ARK. CODE ANN. § 16-42-103(a) (West 2012) ("[E]vidence of the defendant's commission of another sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant, subject to the circuit court's consideration of the admissibility of any such evidence under Rule 403 of the Arkansas Rules of Evidence."); LA. CODE EVID. ANN., art. 412.2(A) (2012) ("[E]vidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403."); NEB. REV. STAT. § 27-414(1) (2012) ("[E]vidence of the accused's commission of another offense or offenses of sexual assault is admissible if there is clear and convincing evidence otherwise admissible under the Nebraska Evidence Rules that the accused committed the other offense or offenses. If admissible, such evidence may be considered for its bearing on any matter to which it is relevant."); 12 OKLA. STAT. ANN., tit. 12, § 2413(A) (2012) ("[E]vidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.").

¹⁵⁴ Two states allow such evidence only in cases of child molestation: IND. CODE ANN. § 35-37-4-15 (West 2012) ("[E]vidence that the defendant has committed another crime or act of child molesting... (1) against the same victim; or (2) that involves a similar crime or act of child molesting or incest against a different victim; is admissible."); MO. ANN. STAT. § 566.025 (West 2012) ("[E]vidence that the defendant has committed other charged or uncharged crimes of a sexual nature involving victims under fourteen years of age shall be admissible for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he or she is charged unless the trial court finds that the probative value of such evidence is outweighed by the prejudicial effect."). Numerous other jurisdictions have "adopted some basis in which evidence of a defendant's prior sexual abuse of a child can be admissible as propensity evidence." Basyle J. Tchividjian, *Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions*, 39 Am. J. Crim. L. 327, 343 (2012).

1 of a complainant's sexual history under Section 213.7(1). In the latter case, the evidence is
2 subject to stringent rules of exclusion, with only narrow exceptions, for reasons discussed
3 above.¹⁵⁵ In the former case, admissibility is determined by ordinary rules of evidence, which
4 typically impose less rigorous rules of exclusion. In general, the ordinary rules of evidence will
5 exclude evidence of a defendant's prior sexual misconduct when offered to prove propensity but
6 not when offered for a wide range of other purposes—for example, when offered to impeach the
7 credibility of a defendant who testifies at trial or to show motive, opportunity, absence of
8 mistake, identity, or common scheme or plan.

9 Advocates of Rules 413 and 414 nonetheless argue that the pertinent rules of evidence
10 should afford even wider opportunity for admissibility in the case of evidence concerning the
11 prior sexual history of the defendant. They note that cases of sexual assault are often credibility
12 contests, and argue that evidence bolstering the victim's claims is especially important and
13 should be allowed.¹⁵⁶ Critics, however, make a far stronger case. First, it is notable that the
14 federal rules have garnered little support either in the states or in the professional and academic
15 community. In addition to the near-unanimity of the Judicial Conference in rejecting the rule, the
16 American Bar Association likewise voted against these provisions.¹⁵⁷ The 1999 revisions to the
17 Uniform Evidence Rules also rejected similar proposals.¹⁵⁸

18 In the specific context of child sexual assault, there appears to be broader receptiveness to
19 evidence of this nature both within state evidentiary codes¹⁵⁹ and in retention of common-law
20 ideas of "lustful disposition." In many states, such evidence may be admitted via judicial
21 relaxation of the 404(b) standard for prior bad acts.¹⁶⁰

22 Nonetheless, the core cases warranting admission of prior assaults are already covered by
23 traditional evidence rules, which permit introduction of evidence of prior acts for purposes other
24 than proving propensity.¹⁶¹ To the extent that federal Rules 413 and 414 exceed even a generous
25 interpretation of this principle, they admit evidence with insufficient safeguards for reliability,
26 invite "mini trials" on collateral issues, and prejudice defendants who already may be vulnerable
27 to false accusation or mistaken identification. The federal rules also presuppose that sex
28 offenders are uniquely inclined to high rates of recidivism, even though the empirical evidence

¹⁵⁵ See *supra* Part II.C.1.b.

¹⁵⁶ 140 CONG. REC. H8968-01, at H8991 (Aug. 21, 1994) (Statement of Rep. Molinari) (stating that newly admissible evidence is "frequently critical in ... accurately deciding cases that would otherwise become unresolvable swearing matches").

¹⁵⁷ American Bar Association Criminal Justice Section Report to the House of Delegates, Perspectives on Proposed Federal Rules of Evidence 413-15, 22 Fordham Urb. L.J. 343 (1995).

¹⁵⁸ Uniform Rules of Evidence (1999), introductory note.

¹⁵⁹ See generally Tchividjian, *supra* note 154, at 343-344 ("All in all, approximately thirty-three states and the District of Columbia have adopted some basis in which evidence of a defendant's prior sexual abuse of a child can be admissible as propensity evidence.").

¹⁶⁰ David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 Minn. L. Rev. 529, 540-549 (1994) (describing use of 404(b) exceptions to admit such testimony).

¹⁶¹ These exceptions are exemplified by Federal Rule of Evidence 404. See generally Tchividjian, *supra* note 154, at 343-344.

1 suggests otherwise.¹⁶² As the Judicial Conference of the United States noted in its report
2 opposing Rules 413 and 414:

3 [T]he new rules, which are not supported by empirical evidence, could diminish
4 significantly the protections that have safeguarded persons accused in criminal cases and
5 parties in civil cases against undue prejudice. These protections form a fundamental part
6 of American jurisprudence and have evolved under long-standing rules and case law. A
7 significant concern identified by the committee was the danger of convicting a criminal
8 defendant for past, as opposed to charged, behavior or for being a bad person.¹⁶³

9 Moreover, the federal rules arguably reinforce a stereotype that typical sexual offenders
10 are “deviant,” and this stereotype in turn runs the risk of diminishing the likelihood of
11 prosecution of suspects who do not meet that image. As Katharine Baker has argued with respect
12 to federal Rule 413, the rule (a) unjustly treats as indistinguishable the many distinct kinds of
13 rape; (b) singles out rapists for special treatment, thereby wrongly suggesting that rapists are a
14 small, distinctly depraved group of offenders rather than, more accurately, a broad and diffuse
15 group of otherwise ordinary men; and (c) perpetuates empirically contested assumptions that
16 rape offenders are distinctively more prone to recidivism.¹⁶⁴ In short, she argues, the premises on
17 which the rule rests cannot be convincingly supported.¹⁶⁵

18 Section 213.7(2) reflects the judgment that special rules of admissibility should be
19 strongly supported by empirical or other evidence and that this standard has not been met in the
20 case of Rule 413 or 414. In accord with the assessment of the Judicial Conference, the American
21 Bar Association, most states, and scholarly commentary, Section 213.7(2) endorses the view that
22 the special rules of admissibility reflected in Rules 413 and 414 are unsound and should not be
23 endorsed in the Model Code.

25 3. Testimony Outside of the Courtroom

26 *a. Current Law.* Although the judicial process is likely difficult and unpleasant for every
27 sexual-assault complainant, special concerns arise with regard to juvenile victims. Historically,
28 courts considered children incompetent to testify, and as a result few cases involved juvenile
29 complainants.¹⁶⁶ Today, child victims and witnesses receive special care and attention in many

¹⁶² See generally James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95 (1994) (exhaustively cataloging and critiquing proffered reasons for rule).

¹⁶³ 159 F.R.D. at 53.

¹⁶⁴ Id. Patrick A. Langan et al., *Recidivism of Sex Offenders Released from Prison in 1994*, Bureau of Justice Statistics, at 2 (Nov. 2003) (tracking 9691 sex offenders released from prison in 1994 for three years, and reporting that “[c]ompared to non-sex offenders released from state prison, sex offenders had a lower overall rearrest rate” of 43 percent versus 68 percent); see also Baker, *supra* note 150, at 578 (citing older Bureau of Justice Statistics study and noting that “[o]nly homicide had a lower recidivism rate than rape”).

¹⁶⁵ Baker, *supra* note 150, at 564-565.

¹⁶⁶ See, e.g., Myrna S. Raeder, *Enhancing the Legal Profession’s Response to Victims of Child Abuse*, 24 Crim. Just. 12, 13 (2009) (noting that, before the 1974 passage of the Child Abuse Prevention and Treatment Act, “very few child sexual abuse cases were investigated, let alone prosecuted” and yet by 1997, “child victims made up ... 71 percent of all sex crime victims” reported to police).

jurisdictions, both to protect them from the harshness of the judicial process and to attend to their particular susceptibility to improper suggestion or influence.¹⁶⁷

A federal statute passed in 1990 provides special protection to juvenile complainants, who are considered a particularly vulnerable class of witness. The law illustrates some of the procedural and evidentiary mechanisms employed to lessen the harshness of the judicial experience for child victims. For example, the law allows for alternatives to live testimony, including two-way closed-circuit testimony¹⁶⁸ or videotaped depositions.¹⁶⁹ It also provides a right for a child to have the presence of an “adult attendant” in “close physical proximity” or even in contact with the child at the time of testimony.¹⁷⁰ Among other things, the statute also outlines procedures for the determination of competency, protection of privacy, the closing of the courtroom during a child’s testimony, the preparation of victim-impact statements, the appointment of guardians ad litem, and provisions for speedy trial and the stay of civil actions.

The in-court testimony experience is especially stressful for children.¹⁷¹ “Often children are incompetent to testify or [are] easily confused during cross-examination. As a result, the child is often unable to recall crucial details or unable to relate those details to the jury.”¹⁷² Children also may be unable to overcome the intimidation of the judicial process and face-to-face confrontation with the defendant. To alleviate some of the pressures of criminal processes, legislatures have enacted laws that soften the experience for child victims. These provisions take two forms: one allows for closed-circuit testimony at the time of trial or for video depositions, and the other provides for consolidation of complaint intake via interviews at Child Advocacy Centers (CACs).

¹⁶⁷ Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 *Am. Crim. L. Rev.* 1271, 1283-1285 (2005) (recounting recent high-profile cases of false accusation of child abuse, along with “body of research” showing that “young children are more susceptible to suggestion”).

¹⁶⁸ 18 U.S.C. § 3509(b). This procedure is authorized if a court finds that the child is unable to testify because of fear, that the child will suffer emotional trauma from testifying, that the child suffers from mental or other illness, or that the defendant or defense counsel caused the child to stop testifying. Findings must be made on the record. The government, defense attorney (other than a pro se defendant) shall be present; the child’s attorney or guardian, technical personnel, a judicial officer, and anyone else for the welfare of the child may also be present. The judge is to remain in the courtroom with the jury, and the defendant must have a means of contemporaneous communication with counsel. See also *Closed-Circuit Television & Recording Technology for Use in Child Abuse Cases*, American Bar Ass’n, available at http://www.americanbar.org/groups/child_law/what_we_do/projects/cctv.html (last visited April 18, 2014).

¹⁶⁹ 18 U.S.C. § 3509(c) (2012). Depositions are available if a court finds that the child is “likely to be unable to testify” at trial substantially for the reasons given in the footnote above. The defendant is entitled to all trial rights at the deposition, although a two-way closed-circuit proceeding is available if the inability to testify is due to the defendant’s presence. If at any time during trial the child is unavailable to testify, the statute provides for the admission of the videotape.

¹⁷⁰ 18 U.S.C. § 3509(i).

¹⁷¹ For general background on these issues, including issues of child development, memory, and suggestibility, see John E.B. Myers, *MYERS ON EVIDENCE OF INTERPERSONAL VIOLENCE: CHILD MALTREATMENT, INTIMATE PARTNER VIOLENCE, RAPE, STALKING, AND ELDER ABUSE* § 1 (5th ed. 2011).

¹⁷² Todd H. Neuman, *Student Work, A Child’s Well Being v. A Defendant’s Right to Confrontation*, 93 *W. Va. L. Rev.* 1061, 1062 (1991) (internal footnotes omitted).

1 Virtually all jurisdictions (49 states and the federal courts) now have legislation regarding
2 the use of closed-circuit television when supported by strong public-policy concerns.¹⁷³ The
3 Illinois Constitution previously guaranteed the right to face-to-face confrontation of witnesses at
4 trial,¹⁷⁴ but it was subsequently amended to permit closed-circuit television in these types of
5 cases.¹⁷⁵ In closed-circuit situations, defense counsel and the prosecutor are typically in another
6 room with the witness, where the direct and cross-examination are conducted. The judge may
7 remain in the courtroom, or join counsel in the remote location. The jury and the defendant stay
8 in the courtroom and are able to watch the proceedings live; the defendant may communicate
9 contemporaneously with counsel. However, unlike a two-way closed-circuit situation, the child's
10 testimony is taken one-way—that is, blocked from face-to-face confrontation with the defendant.
11 The deposition procedure is similar, except that the deposition typically takes place prior to and
12 outside of the courtroom trial.

13 CAC interviews are different in crucial respects.¹⁷⁶ Child Advocacy Centers are places in
14 which multidisciplinary teams of social workers, medical officials, and child psychologists may
15 interview a child extensively as first responders in order to ascertain what happened in a
16 streamlined and child-friendly space.¹⁷⁷ CACs not only begin a process of treatment and healing
17 for an abused child, but also often serve a critical forensic role in establishing the account of the
18 offense that will serve as a basis for prosecution. Most pertinently, neither defense counsel, the
19 defendant, nor the judge is present, but the prosecutor or law-enforcement personnel may
20 participate either actively or passively. Typically, CACs conduct a videotaped forensic interview
21 of a child that later may play an evidentiary role at trial.

22 Some states have carved out special hearsay exceptions applicable to child testimony, or
23 for complainants in abuse or sexual-offense cases, in order to allow for admission of evidence
24 such as a CAC tape if a child is later incapable of testifying because of fear or intimidation. The
25 provision from Washington, the first state to enact such a statute, offers a good illustration:

26 A statement made by a child when under the age of ten describing [sexual or physical
27 abuse], not otherwise admissible by statute or court rule, is admissible in...criminal
28 proceedings...if...[t]he court finds, in a hearing conducted outside the presence of the
29 jury, that the time, content, and circumstances of the statement provide sufficient indicia

¹⁷³ The District of Columbia does not have a statute authorizing its use, but the highest court has accepted it in practice. *Hicks-Bey v. United States*, 649 A.2d 569, 575 (D.C. Ct. App. 1994) (“In sum, there is no hint in *Craig* that, to satisfy the Confrontation Clause, a court cannot permit a closed circuit television procedure for a child witness in the absence of an authorizing statute. All that is required is trial court findings reflecting compliance with the three ‘necessity’ criteria specified in *Craig*....”). Research failed to produce either a case or a statute from Maine authorizing testimony by closed-circuit television.

¹⁷⁴ *People v. Fitzpatrick*, 633 N.E.2d 685 (Ill. 1994).

¹⁷⁵ *People v. Dean*, 677 N.E.2d 947, 953 (Ill. 1997) (holding that the constitutional amendment deleting “face to face” language did not apply retroactively).

¹⁷⁶ Some states provide both for a deposition-style interview, at which defense counsel would be present, as well as for more traditional CAC procedures. See, e.g., IND. CODE ANN. § 35-37-4-6(f) (West 2010) (“If a protected person is unavailable to testify at the trial...a statement or videotape may be admitted in evidence under this section only if the protected person was available for cross-examination: (1) at [a hearing out of the presence of the jury]; or (2) when the statement or videotape was made.”).

¹⁷⁷ See generally Nancy Chandler, *Children’s Advocacy Centers: Making a Difference One Child at a Time*, 28 Hamline J. Pub. L. Pol’y 315 (2006).

of reliability; and (2) The child either: (a) Testifies at the proceedings; or (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.¹⁷⁸

Other states rely upon traditional hearsay doctrines, such as the excited utterance exception, the medical diagnosis or treatment exception, or general “catch-all” provisions to admit child hearsay statements without bringing the child victim into court.

A majority of jurisdictions (39 states and the federal courts) allow for the admission of such videotaped interviews with juvenile witnesses, at the discretion of the court, with statutory guidance.¹⁷⁹ Factors that courts may be required to consider before admitting videotaped interviews include:

- Age of the child witness¹⁸⁰
- Maturity of the child witness
- Nature of the offense
- Nature of the testimony expected
- Possible effect that in-person testimony will have on the child witness
- Whether the child is available to testify at trial

Tapes may also be used to bolster the testimony of a child whose credibility is attacked, or to provide substantive evidence in the event that the child recants.

The Confrontation Clause. The Sixth Amendment confrontation right is in tension with both the use of videotaped testimony and the introduction of interviews (whether through testimonial, documentary, or videotaped evidence) conducted by psychologists and social workers, especially those specially designated or trained as liaisons to the judicial process. However, the Supreme Court has yet to definitely resolve these issues.

In *Crawford v. Washington*,¹⁸¹ the Court upended Confrontation Clause doctrine and overturned *Ohio v. Roberts*,¹⁸² which had previously endorsed an *ad hoc* standard of reliability as the test of the Sixth Amendment right, thereby effectively embracing the standard hearsay exceptions. *Crawford*, in contrast, held that the admission of any testimonial statement of a non-testifying witness violated the Confrontation Clause and declared that by “replacing categorical

¹⁷⁸ WASH. REV. CODE ANN. § 9A.44.120.

¹⁷⁹ See, e.g., 725 ILL. COMP. STAT. ANN. 5/115-10 (West 2013) (describing exception to the hearsay rule admitting statements as substantive evidence, after hearing on reliability, if allegations of a certain nature and victim under the age of 13 at the time of the offense and the taping).

¹⁸⁰ Jurisdictions vary as to the ceiling set for use of alternative procedures, whether videotaped or closed-circuit testimony. The youngest ceiling for videotaped evidence is 12 years old (Delaware, Minnesota, South Carolina, Wisconsin, and Wyoming). Washington’s ceiling is 10 years old and Georgia’s ceiling is 11 years old, but these ceilings apply only to closed-circuit television because those states do not have statutes authorizing videotaped interviews. The oldest ceiling is under 18 years old (Alaska, Rhode Island, and Federal). Nebraska does not set a ceiling, but leaves an assessment of the maturity of the witness up to the discretion of the court. Iowa sets its ceiling at under 18 years old or marriage, whichever is sooner.

¹⁸¹ 541 U.S. 36 (2004).

¹⁸² 448 U.S. 56 (1980).

1 constitutional guarantees with open-ended balancing tests, we do violence to [the Founders']
2 design."¹⁸³

3 Although the full contours of the doctrine remain unclear, *Crawford* and subsequent
4 rulings¹⁸⁴ suggest that a "testimonial" statement is one made to "state actors involved in a
5 formal, out-of-court interrogation of a witness to obtain evidence for trial."¹⁸⁵ *Crawford*
6 therefore calls into question a number of the doctrines presently used to ease the burden on child
7 witnesses or to introduce statements of non-testifying children. In addition, because teachers and
8 social workers usually are obliged to report allegations of child abuse, it may be that out-of-court
9 statements to these officials could be considered "testimonial" for *Crawford* purposes and thus
10 inadmissible.

11 With regard to closed-circuit television, although the Supreme Court in *Maryland v.*
12 *Craig*¹⁸⁶ held that the Sixth Amendment does not invariably guarantee face-to-face confrontation
13 with witnesses at trial, *Crawford* may undermine that decision. *Craig* found that the
14 constitutional right to confrontation may be denied "where ... necessary to further an important
15 public policy and ... where the reliability of the testimony is otherwise assured."¹⁸⁷ But
16 *Crawford* clearly rejected such *ad hoc* balancing of Sixth Amendment interests, as well as the
17 idea that "in certain narrow circumstances, 'competing interests, if closely examined, may
18 warrant dispensing with confrontation at trial.'"¹⁸⁸

19 Nevertheless, although "*Craig* appears anathema to *Crawford*,"¹⁸⁹ some scholars have
20 predicted that *Craig* may be saved. For example, Professor Richard Friedman argues that "the
21 two cases can coexist peacefully," since "*Crawford* addresses the question of *when* confrontation
22 is required; *Craig* addresses the question of *what* procedures confrontation requires."¹⁹⁰
23 Moreover, the Court's apparent focus in *Crawford* is on the absence of cross-examination under
24 oath, conditions that are both present in the case of closed-circuit or deposition testimony.¹⁹¹

¹⁸³ 541 U.S. at 67-68.

¹⁸⁴ *Michigan v. Bryant*, 131 S. Ct. 1143 (2011); *Giles v. California*, 554 U.S. 353 (2008); *Davis v. Washington*, 547 U.S. 813 (2006).

¹⁸⁵ *Michigan v. Bryant*, 131 S. Ct. at 1155.

¹⁸⁶ 497 U.S. 836 (1990). Justice Scalia, a leading architect of the *Crawford* doctrine, dissented in *Maryland v. Craig*. In *Coy v. Iowa*, 487 U.S. 1012 (1988), the Court (Justice Scalia writing) held that a screen that shielded the witnesses from seeing the defendant, but allowed the defendant and jurors to see the witnesses, violated the Confrontation Clause. 487 U.S. at 1021-1022.

¹⁸⁷ *Craig*, 497 U.S. at 850.

¹⁸⁸ *Id.* at 848 (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (internal quotation marks omitted)).

¹⁸⁹ Myrna S. Raeder, Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation, 82 Indiana L.J. 1009 (2007) (arguing *Craig* may be distinguishable); Marc C. McAllister, The Disguised Witness and *Crawford*'s Uneasy Tension with *Craig*: Bringing Uniformity to the Supreme Court's Confrontation Jurisprudence, 58 Drake L. Rev. 481, 532 (2010) (positing that *Craig* is overturned).

¹⁹⁰ Richard D. Friedman, The Confrontation Clause Re-Rooted and Transformed, 2004 Cato Sup. Ct. Rev. 439, 454 (2004) (emphasis in original).

¹⁹¹ As the Court remarked in *Bryant*, describing the holding of *Crawford*, "We therefore limited the Confrontation Clause's reach to testimonial statements and held that in order for testimonial evidence to be admissible, the Sixth Amendment 'demands what the common law required: unavailability and a prior opportunity for cross-examination.'" *Michigan v. Bryant*, 131 S. Ct. 1143, 1153 (2011) (quoting *Crawford*, 541 U.S. at 68).

1 Even if *Craig* survives, the constitutional fate of CAC interviews seems more doubtful,
 2 as is the admissibility of an array of other statements of child victims that historically have been
 3 allowed under established exceptions.¹⁹² To illustrate, consider that many statements by child
 4 victims are admitted under the medical-treatment-and-diagnosis exception to the hearsay rule.
 5 Yet, pursuant to *Crawford*, if a hospital sets up a special intake process for child victims that is
 6 intended to preserve and transmit evidence for a prosecutor at trial, then statements made by the
 7 child in that context may be just the kind of formal, proof-of-past-facts declarations that qualify
 8 as “testimonial.”¹⁹³

9 As one commentator concluded, “*Crawford* appears to doom the use of multidisciplinary
 10 teams in child abuse as a way of introducing statements of children who do not testify.”¹⁹⁴
 11 Although a few outlying cases treat some videotaped statements as given primarily for
 12 nonprosecutorial purposes,¹⁹⁵ most agree that “because the statements may also have ‘a medical
 13 purpose does not change the fact that they were testimonial, because *Crawford* does not indicate,
 14 and logic does not dictate, that multipurpose statements cannot be testimonial.”¹⁹⁶

15 Finally, as a result of a series of high-profile cases of false accusations of child abuse,
 16 some courts have agreed to conduct pre-trial “taint hearings” intended to assess the reliability of
 17 the child’s complaint.¹⁹⁷ Critics complain that such hearings usurp the jury’s role to weigh the

¹⁹² By way of another example, *Crawford* and its progeny call into question the scope of the excited-utterance exception; indeed *Crawford* specifically questioned the continued validity of *White v. Illinois*, 502 U.S. 346 (1992), which used the exception as a basis for admitting statements of a nontestifying child made to a police officer. *Crawford*, 541 U.S. at 58 n.8 (questioning *White*). *Crawford* also raises a question regarding the continued vitality of *Idaho v. Wright*, 497 U.S. 805 (1990), in which the Court held that statements by a child victim to a doctor while in protective custody failed the *Ohio v. Roberts* test for reliability. Professor Raeder has argued that it “most likely is that *Wright* will be cabined by recharacterizing it as a case involving a police proxy or agent who engages in the ‘functional equivalent’ of police questioning, since the doctor was chosen by the police after the child had been taken into protective custody.” Raeder, *supra* note 189, at 1012.

¹⁹³ Raeder, *supra* note 189; accord Deborah Paruch, *Silencing the Victims in Child Sexual Abuse Prosecutions: The Confrontation Clause and Children’s Hearsay Statements Before and After Michigan v. Bryant*, 28 Touro L. Rev. 85, 114-115 (2012) (“The most significant issue on which courts have disagreed is whether children’s statements, made in connection with a physical examination in which they identified their perpetrator, are admissible under the medical diagnosis and treatment exception to the hearsay rule. These types of identifying statements can be particularly damaging to defendants because they may be the only statement identifying the defendant....”).

¹⁹⁴ Raeder, *supra* note 189, at 1023.

¹⁹⁵ Some lower courts have held that CAC interviews fall under the “ongoing emergency” exception, or are found to be nontestimonial because their primary purpose is to attend to the health of the child. See, e.g., *State v. Muttart*, 875 N.E.2d 944 (Ohio 2007) (finding CAC statements to social worker nontestimonial, because they were followed by treatment by a doctor and hence were made for medical diagnosis). But see *State v. Arnold*, 933 N.E.2d 775 (Ohio 2010) (holding statements at CAC to be testimonial, collecting cases).

¹⁹⁶ Raeder, *supra* note 189, at 1023-1024. But see *Commonwealth v. Allshouse*, 36 A.3d 163, 182 (Pa. 2012) (finding child’s statements to county caseworker nontestimonial), cert. denied sub nom. *Allshouse v. Pennsylvania*, 133 S. Ct. 2336 (2013).

¹⁹⁷ See, e.g., *State v. Michaels*, 642 A.2d 1372 (N.J. 1994) (requiring a pretrial taint hearing); see generally Dana D. Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. Cal. L. Rev. 2117 (1996). Taint hearings typically occur in two stages: the defendant bears the initial burden to trigger a hearing by producing some evidence of suggestive or coercive techniques, and then the prosecution must prove the reliability of proffered statements and testimony by clear and convincing evidence.

credibility of witnesses and place unfair constraints on government evidence, whereas advocates point to the demonstrated susceptibility of child witnesses to improper suggestion.

b. Section 213.7(3). Face-to-face confrontation is a cornerstone of our adversarial process, and should remain the presumed form in which all testimony is taken. For example, since the *Craig* decision in 1990, research has underscored the special vulnerability of children to suggestibility, and confrontation may serve a critical role in safeguarding the reliability of the testimony.¹⁹⁸ Nevertheless, empirical evidence strongly affirms that children forced to give testimony directly before their abusers may suffer serious emotional harm, and the purposes of the judicial process as a whole are also compromised if children routinely shut down or refuse to testify.¹⁹⁹ Accordingly, a limited exception to the presumption of face-to-face confrontation is warranted, and use of closed-circuit testimony may be appropriate in certain circumscribed situations.

The regime endorsed by Section 213.7(3) remains mindful of the constitutional standard.²⁰⁰ Closed-circuit testimony is allowed only for alleged victims under the age of 12 or those with developmental delays that impair emotional or cognitive capacity. Requests must be supported by the testimony of the proponent's expert, who has examined the child and finds that the child either will suffer serious distress from having to testify in the presence of the defendant or will be incapable of testifying due to fear. Although the defendant should be afforded the opportunity to cross-examine that expert in the hearing or present contrary evidence, Section 213.7(3) gives no presumptive right to the defendant to conduct his or her own psychological examination of the child. Having received all the evidence, the trial court must find on the record that the child will experience serious distress as a result of having to testify before the defendant; that this distress will impede the child's ability to testify; and that out-of-court procedures are necessary to, and will in fact significantly mitigate, that distress.

Section 213.7(3) further states that the judge shall remain in the courtroom with the defendant and the jury. The prosecuting and defense attorneys will be present in another room with the child witness, along with technical personnel, court reporters, and a guardian or support person for the child. The method of communication must permit all the remote observers to see and hear clearly the witness and both defense and prosecuting attorneys. In addition, the

¹⁹⁸ See generally Amye R. Warren & Dorothy F. Marsil, Why Children's Susceptibility Remains a Serious Concern, 65 Law & Contemp. Probs. 127 (2002) (highlighting six areas in which research contradicts conventional wisdom, including that suggestiveness (1) occurs in older children and not just preschoolers; (2) is not just correlated to leading questions; (3) occurs outside formal interview settings; (4) is effective in children that might otherwise seem resistant to suggestion; (5) is difficult to train against or prevent; and (6) is difficult to purge from interviewers, even with education).

¹⁹⁹ Dorothy F. Marsil, et al., Child Witness Policy: Law Interfacing With Social Science, 65 Law & Contemp. Probs. 209, 211 (2002) ("[T]he phenomenon of confrontational stress experienced by children is amply supported by social science evidence.") (citing studies).

²⁰⁰ *Craig*, 497 U.S. at 855 ("The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. ... Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, i.e., more than 'mere nervousness or excitement or some reluctance to testify....'" (citations omitted)).

1 defendant must have a means of contemporaneous, private communication with counsel that is
2 effective and not disruptive, such as through instant message or private microphone.

3 The determination that the judge ought to stay in the courtroom with the defendant and
4 jurors was made after weighing several competing concerns. On the one hand, there is a strong
5 need for the judge to be personally present in the place where the testimony is actually given in
6 order to oversee the flow of the proceedings, to rule promptly on motions, and to observe
7 firsthand any alleged improprieties. On the other hand, there are compelling reasons to require
8 the judge to remain in the courtroom, including that he or she must ensure that the technology
9 operates smoothly in order to fully safeguard the rights of the defendant and the integrity of the
10 factfinding process. Moreover, placing the judge in the satellite location may also be
11 unintentionally viewed as an endorsement of the complainant's credibility, by suggesting that the
12 judge is in effect vouching for the concerns that prevented the complainant from confronting the
13 defendant directly. Given that other observers, including opposing counsel, will be in the room
14 with the witness and thus will be able to raise any concerns or improprieties, Section 213.7(3)
15 requires the judge to remain in the courtroom in order to minimize the isolation of the defendant
16 and jury from what is likely to be the most crucial portion of the proceeding.

17 Finally, the language of Section 213.7(3) also indicates that it may apply not just to
18 juvenile complainants, but also to a juvenile witness who is an alleged victim of the defendant.
19 Thus, for instance, if a court admits prior-bad-acts evidence under Rule 404(b) or a state
20 equivalent, the prosecution may avail itself of these procedures if necessary to enable a juvenile
21 witness-victim to present such evidence.

22 As regards the admissibility of videotaped interviews and other prior statements made
23 by children in the course of the investigation, the *Crawford* doctrine properly bars the admission
24 of such statements.

25 26 4. Initial Complaints

27 *a. Current Law.* As explained in Part II.B.2, the fresh-complaint doctrine arose in
28 response to concern that jurors mistrust the testimony of the complaining witness when they do
29 not hear evidence that he or she reported the incident shortly after its occurrence. Indeed, the
30 common-law "prompt complaint" doctrine cultivated such expectations, in that "testimony
31 reporting statements made by the victim shortly after the attack [were] universally admitted to
32 corroborate the victim's testimony."²⁰¹ Similarly, corroboration requirements necessitated an
33 evidentiary route for admission of corroborating reports by victims, resulting in the development
34 of fresh-complaint rules in some jurisdictions.²⁰²

35 But beginning in the late-1980s and early-1990s, in response to objections by victim
36 advocates, courts began rejecting the "timing myth as false and the product of gender stereotypes

²⁰¹ *Commonwealth v. Bailey*, 348 N.E.2d 746, 749 (Mass. 1976), overruled by *Commonwealth v. King*, 834 N.E.2d 1175 (Mass. 2005); see also *People v. Brown*, 883 P.2d 949, 954 (Cal. 1994) ("While such evidence would ordinarily be hearsay, its admission in [rape] cases is justified upon the ground that in such cases, when restricted to the *fact of complaint*, it is in the strictest sense original evidence." (quotation omitted) (emphasis in original)).

²⁰² See, e.g., *Burnett v. State*, 225 S.E.2d 28, 29-30 (Ga. 1976) (finding that fresh complaints made by victim met state's corroboration requirement).

1 and rape myths”²⁰³ and started eliminating prompt-complaint rules as a prerequisite to
2 conviction.²⁰⁴ Theoretically, then, evidence of a report of rape should be excluded, since
3 typically “an out-of-court statement that is merely repetitive of a victim’s trial testimony is not
4 admissible as part of the case-in-chief.”²⁰⁵

5 Tension thus arose between juror expectations and the general principles of evidence.
6 The latter hold that “[t]he testimony of a witness may never be corroborated by proof that the
7 witness made the same statement of facts on another occasion when not under oath.”²⁰⁶ Yet
8 jurors arguably expect such testimony; even absent explicit argument by the defense, they may
9 assume “in the absence of evidence of complaint ... that none was made” and as a result may
10 unjustifiably disbelieve the complainant’s claim.²⁰⁷ Accordingly, some jurisdictions crafted
11 exceptions to their ordinary rules of evidence to permit the government in its case-in-chief to
12 introduce testimony regarding the out-of-court statements of a complainant alleging that a sexual
13 assault was committed, whether through the testimony of the complainant or from witnesses to
14 those statements.²⁰⁸ Such exceptions appear unique to the context of sexual assault,²⁰⁹ even
15 though the case for such exceptions presumably could be made in other contexts as well.

16 The rules that states have adopted to address this concern have been cast as either “first”
17 complaint or “fresh” complaint provisions. The difference in terminology points to an important
18 substantive difference in scope: some courts focus on the “fresh” aspect (i.e., admitting only
19 reports made shortly after the incident — usually hours or a couple days at most) while others
20 emphasize the “first” aspect (i.e., admitting any initial report, regardless of timing). Fourteen
21 states and the federal courts recognize no special exception and thus exclude both kinds of
22 complaint testimony.²¹⁰ But most jurisdictions (36 states plus the District of Columbia) allow

²⁰³ Kathryn M. Stanchi, *The Paradox of the Fresh Complaint Rule*, 37 B.C. L. Rev. 441, 448 (1996); see also *State v. Hill*, 578 A.2d 370, 378 (N.J. 1990) (explaining rationales underlying the rule, and noting that “[i]f we limit the fresh-complaint rule to the *res gestae* exception to the hearsay rule, allowing the admission of spontaneous or excited utterances, then women who had not complained very shortly after the crime would not be able to have their complaints admitted into evidence”).

²⁰⁴ See Part II.B.2.a.

²⁰⁵ *Bailey*, 348 N.E.2d at 748.

²⁰⁶ Lt. Thomas J. Hilligan, *The Fresh Complaint Rule*, 18 JAG J. 265, 265 (1964).

²⁰⁷ *Bailey*, 348 N.E.2d at 749.

²⁰⁸ See, e.g., *People v. Brown*, 883 P.2d 949, 950 (Cal. 1994) (revising the state’s prompt-complaint doctrine to allow “proof of an extrajudicial complaint, made by the victim of a sexual offense, ... for a limited, nonhearsay purpose—namely, to establish the fact of, and the circumstances surrounding, the victim’s disclosure of the assault to others....” Courts differ on whether to consider the testimony admissible as an exception to the hearsay doctrine (such as an excited utterance) or as relevant nonhearsay (such as a prior consistent statement, admissible to rebut an express or implied inferences of a motive to fabricate). See generally Michael H. Graham, *Admissibility of Initial Complaint of Sexual Assault or Child Molestation*, 48 No. 5 Crim. L. Bull. ART 9 (2012). The *Brown* court considered the fact-of-complaint-only testimony to be nonhearsay, but noted that facts-and-details testimony would be indisputably hearsay. 883 P.2d at 950-951.

²⁰⁹ See *People v. Anthony C.*, 6 Misc.3d 616, 618 (N.Y. Sup. Ct. 2004) (rejecting defendant’s request for a “prompt outcry” instruction in a robbery case, noting that “the doctrine surely has standing vis-à-vis crimes of a sexual nature, where visceral rather than reasoned reflection is evident” but ducking decision whether to apply the doctrine in a robbery case on ground that testimony would not qualify under the doctrine in any event).

²¹⁰ In addition to the federal government, the states are: Arizona, Delaware, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Minnesota, Nevada, New Hampshire, Ohio, Oklahoma, Utah, and Wisconsin. However, these

one or the other. Where recognized, the exception comes in two basic varieties: one that allows witnesses to testify both to the fact of the complaint and to its details (“fact-and-details”), and another that allows witnesses to testify only to the fact of the complaint (“facts-only”).²¹¹ The fact-only jurisdictions are in the majority (22 States plus the District of Columbia), while 14 states follow the facts-and-details approach.²¹²

The Massachusetts Supreme Judicial Court has played an active role in shaping the doctrinal evolution of these rules, and thus its opinions over time are illustrative. Under the fresh-complaint doctrine at the time of *Commonwealth v. Licata*,²¹³ “an out-of-court complaint seasonably made by the victim after a sexual assault [was] admissible . . . only to corroborate the complainant’s testimony [and] a witness [could] testify to the fact of a complaint and also to the details of the complaint.”²¹⁴ In *Licata*, however, the court reexamined this rule and was torn about its future application. On the one hand, it understood that “many rape victims choose not to complain at all”²¹⁵ and “lack of a fresh complaint in no way implies lack of rape.”²¹⁶ On the other hand, it “recogniz[ed] the unfortunate skepticism that exists [among jurors] as to the truth

jurisdictions have at times allowed in evidence of a similar nature under ordinary rules of evidence. See, e.g., *Winn v. State*, 829 A.2d 142 (Del. 2003); *State v. Parker*, 730 P.2d 921, 924 (Idaho 1986); *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997); *State v. Randolph*, 408 P.2d 397, 398 (Ariz. 1965); *Lindsey v. State*, 209 S.W.2d 462, 463 (Ark. 1948).

²¹¹ Some states counted in the “facts-and-details” category forbid general testimony about the incident, but allow details relating to identity or the nature of the complaint. See, e.g., *Borchgrevink v. State*, 239 P.3d 410, 422 (Alaska Ct. App. 2010) (“We conclude that ‘first complaint’ evidence may include a victim’s identification of the perpetrator, but we also conclude that a trial judge has the authority, under Evidence Rule 403, to exclude this facet of the victim’s first complaint if it appears likely that the jury will use this information for an improper purpose—i.e., treat it as substantive evidence of the defendant’s guilt.”); *State v. Haworth*, 21 P.2d 1091, 1092 (Or. 1933) (“[T]he witness should not be permitted to tell the particulars of the complaint, still enough may be given in evidence to show the nature of the complaint, even though it involves to some extent the particulars thereof, and . . . the rule is not violated by evidence showing the time and place where the complaint was made, the circumstances under which it was made, [and] the condition of the victim when making the complaint.”); *State v. Harrison*, 113 S.E.2d 783, 785 (S.C. 1960) (“The particulars or details are not admissible but so much of the complaint as identifies the time and place with that of the one charged may be shown.”) (internal quotation marks omitted). Some states permit introduction of the evidence as rebuttal to a charge of fabrication, using an exception apparently broader than the prior-consistent-statement exception typically would be. See, e.g., *State v. Golden*, 336 S.E.2d 198, 203 (W. Va. 1985) (“[T]he rule is intended to allow corroboration of an alleged victim’s testimony, since the unexplained failure to make a prompt complaint of rape may discredit her testimony. Even though evidence of prompt complaint is particularly probative where there is an allegation that the charge was fabricated, to be admissible, such testimony must be introduced in rebuttal.”) (internal citations omitted); *State v. Smith*, 540 S.W.2d 189, 191 (Mo. Ct. App. 1976) (internal citations omitted) (“It is also the general principle that the details of the statements made by the victim in the complaint are not admissible in the first instance. The details are only admissible in rebuttal to rehabilitate the credibility of the witness after testimony establishing extrajudicial statements has been introduced for impeachment purposes.”) (internal citations, quotation marks, and parentheticals omitted).

²¹² A ruling in the UK took the principles animating fresh-complaint doctrines one step farther. In *R. v. John Doody* [2008] EWCA Crim 2394, a UK court of appeals held that a judge may instruct the jury that a victim might delay a report of rape due to feelings of shame or embarrassment.

²¹³ 591 N.E.2d 672 (Mass. 1992), overruled by *Commonwealth v. King*, 834 N.E.2d 1175 (Mass. 2005).

²¹⁴ *Licata*, 591 N.E.2d at 673-674.

²¹⁵ *Id.* at 674.

²¹⁶ *Id.*

1 of allegations of rape where the victim is perceived as having remained silent.”²¹⁷ Despite
2 describing the origins of the rule as “sexist,” “outmoded,” and “invalid,” the court nonetheless
3 adhered to it. The court settled on a rule that fresh-complaint evidence is “admissible on the
4 ground that a victim’s [perceived] failure to make prompt complaint might be viewed by the jury
5 as inconsistent with the charge of sexual assault and in the absence of evidence of complaint the
6 jury might assume that none was made.”²¹⁸

7 Just over 10 years later, *Commonwealth v. King*²¹⁹ overruled *Licata* and replaced the
8 “fresh complaint” rule with a “first complaint” rule. Dismissing the relevance of the
9 “freshness,”²²⁰ the court focused on the “first” aspect, noting that first complaint focuses “on the
10 evidence pertaining to the facts and circumstances surrounding the complainant’s *initial* report of
11 the alleged crime....”²²¹ Further, its new “first complaint” rule limited such testimony to one
12 witness—the first person told of the assault. The court reasoned that “the testimony of multiple
13 complaint witnesses likely serves no additional corroborative purpose, and may unfairly enhance
14 a complainant’s credibility as well as prejudice the defendant by repeating for the jury the often
15 horrific details of an alleged crime.”²²² The intention, although not a strict requirement, of the
16 first-complaint rule was that the witness be *the* first person told of the assault.²²³ Under *King*, the
17 witness may testify both to the fact of the assault and to its details.

18 *Commonwealth v. Aviles*²²⁴ further modified *King*. Rather than hold the first-complaint
19 doctrine an ironclad rule of admissibility, the court found that the doctrine instead reflects “a
20 body of governing principles to guide a trial judge on the admissibility of first complaint
21 evidence.”²²⁵ In light of the concerns surrounding a first-complaint rule, especially the
22 statements in *King* regarding corroborative purpose, the dangers of unfair enhancement of the
23 complainant’s credibility, and the risk of prejudice to the defense, the court found that judges
24 retain discretion “to determine the scope of admissible evidence....”²²⁶

25 Further complicating fresh- and first-complaint doctrine is the existence of ordinary
26 hearsay doctrines that may be stretched to admit much of the same testimony. Courts have
27 relaxed the strictness of excited utterance or *res gestae* rules to embrace complaints of an attack
28 made with less temporal proximity to the incident,²²⁷ and have admitted (as a prior consistent

²¹⁷ *Id.*

²¹⁸ *Id.* (internal citations omitted).

²¹⁹ 834 N.E.2d 1175 (Mass. 2005).

²²⁰ *Id.* at 1190.

²²¹ *Id.* (emphasis added).

²²² *Id.* at 1197 (“A victim who is not fabricating an assault may tell only one other person of the assault, while a liar may spread the tale widely.”).

²²³ *Id.* at 1198 (“In limited circumstances, a judge may permit the testimony of a complaint witness other than, and in lieu of, the very ‘first’ complaint witness. For example, where the first person told of the alleged assault is unavailable, incompetent, or too young to testify meaningfully....”).

²²⁴ 958 N.E.2d 37 (Mass. 2011).

²²⁵ *Id.* at 49.

²²⁶ *Id.*

²²⁷ See, e.g., *State v. Parker*, 730 P.2d 921, 924 (Idaho 1986) (“In sex crime cases, the excited utterance

statement) testimony concerning an alleged victim's complaints of an attack made *after* an alleged motive to fabricate had arisen.²²⁸ In contrast, some jurisdictions with fresh- or first-complaint rules construe them so strictly as to exclude evidence that would be admitted even in jurisdictions that have no fresh-complaint provisions.²²⁹

b. Section 213.7(4). Criticism of the first- and fresh-complaint doctrines comes from both victims' supporters and defendant-rights' advocates. From the former perspective, both doctrines arguably legitimate the indefensible belief that "true" sexual-assault victims will want to tell others of their attacks, either immediately (fresh complaint) or eventually (first complaint). Although in any single case the purpose of the doctrines is to offset this misconception, the law's willingness to admit such evidence to bolster the complainant's credibility may, by negative inference, tend to undermine the credibility of victims who did not immediately report an assault.

From the defense perspective, both doctrines are criticized for allowing unnecessary and arguably prejudicial repetition of the fact, and at times even the details, of the alleged assault. Such repetition risks unfairly bolstering the complainant's account, especially since the witnesses to the first- or fresh-complaint have no special insight into its veracity. Rather than use the first- or fresh-complaint evidence to offset inaccurate expectations about a "real" victim's likely behavior, the jury could infer from such evidence that the complainant's account is more likely to be true.

Nevertheless, sexual-assault victims continue to endure special scrutiny about their claims. Jurors may still carry biases that lead them to expect to hear that the complainant promptly reported the offense to *someone*, especially if the complainant delayed reporting the offense to law-enforcement officials (or did not personally report the offense to officials at all).²³⁰ Jurors may assume from the absence of testimony about an initial report that no prompt report was made and that the complainant is therefore less credible.

Section 213.7(4) attempts to strike the balance between these competing concerns by crafting a limited provision of special admissibility for out-of-court statements alleging sexual assault when made to persons in authority (subsection (a)), while nonetheless rejecting an approach that accords special treatment to such statements when made to non-authority figures

exception often receives broader application than in other cases."); *State v. Noble*, 342 So. 2d 170, 172-173 (La. 1977) (admitting report made two days after incident); *State v. Randolph*, 408 P.2d 397, 399 (Ariz. 1965) (approving admission of excited utterance made 55 minutes after alleged attack).

²²⁸ See, e.g., *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. Ct. App. 2000) (state rule admitting (as nonhearsay) prior consistent statements of a witness when helpful to credibility applies after a challenge to the witness's credibility, without regard to timing of motive to fabricate). It is not always clear in such cases whether such evidence is received as substantive evidence under an exception to the hearsay rules, such as Federal Rule of Evidence 801(d)(1)(B), or as nonhearsay offered solely to prove consistency, see, e.g., *United States v. Simonelli*, 237 F.3d 19, 25-28 (1st Cir. 2001). Compare *State v. McSheehan*, 624 A.2d 560, 562-563 (N.H. 1993) (finding victim has motive to fabricate as soon as incident allegedly occurs, thus excluding statements made afterward, under a strict interpretation of the temporal requirement of this rule).

²²⁹ See, e.g., *Seagrave v. State*, 768 So. 2d 1121, 1122 (Fla. Dist. Ct. App. 2000) (per curiam) (concluding that, because state's first-complaint doctrine applies only when victim complained at the first opportunity, the 12-year-old victim's report made 10 hours after alleged incident—despite multiple opportunities to raise accusation earlier—did not qualify for admission).

²³⁰ Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 Suffolk U. L. Rev. 467, 472 (2005) (discussing continued adherence to old views).

1 (subsection (b)). By a “person of authority,” Section 213.7(4)(a) focuses on individuals who are
2 in a position to initiate formal inquiry into the incident. This category covers law enforcement
3 and government personnel, as well as teachers and others empowered to make a formal
4 complaint. Thus, the language also includes, in the case of a juvenile complainant, a report to a
5 parent or other person in authority, on the premise that children are less likely than adults to seek
6 law-enforcement assistance directly themselves.

7 The distinction between reports to persons in authority and reports to others, although not
8 always unambiguous, is nonetheless a principled one. Jurors have a strong interest in learning
9 how an accusation came before the judicial system in the form of a formal complaint, and may
10 legitimately expect to hear about the conditions that prompted an investigation by prosecutors or
11 police. The pertinent evidence in that regard is the fact of the official complaint.

12 In addition, when the official report was for some reason delayed, jurors have a legitimate
13 interest in knowing the circumstances or reasons for that delay. Although delay may indicate
14 lack of truthfulness, many truthful rape victims have understandable reasons for not immediately
15 reporting an incident to authorities. To the extent that, in the past, such explanations might have
16 been deemed facially incredible, because of inaccurate ideas about how “real” rape victims
17 respond, admitting evidence of the reason for failure to make a prompt *official* report permits
18 jurors to fairly weigh and assess such evidence.²³¹ Providing greater context and explanation
19 may also help dislodge jurors from the erroneous assumption that “delay indicates falsity.”
20 Section 213.7(4)(a) therefore allows the admissibility of statements regarding the reason for any
21 delay.

22 Section 213.7(4)(a) permits evidence concerning the fact of the report and the
23 explanation for delay or failure to report, but does not permit evidence concerning the details
24 conveyed by the complainant. Recitation of the details of the complaint by witnesses with no
25 special knowledge of the incident is hearsay, and renders the defendant unable to challenge the
26 repetition of the complainant’s account, except by underscoring the complaint witness’s lack of
27 firsthand observation. The hearsay rule and the confrontation clause both rightly reject this
28 palliative as intrinsically insufficient. The practice of admitting third-party testimony concerning
29 both facts and details is therefore indefensible.

30 In contrast to jurors’ legitimate interest in the conditions under which the incident came
31 to the attention of the authorities, jurors generally should *not* judge the veracity of a complaint on
32 the basis of the presence or absence of a report to persons not in authority. Admitting testimony
33 about *repetition* of the complaint to parties other than law enforcement at best has minimal added
34 value, while at the same time it presents considerable risk of confusion and prejudice. Jurors who
35 hear such evidence may speculate as to why one person was told and not another, even though
36 there is no indication that the number of persons told of a sexual offense reflects either favorably
37 or unfavorably on whether the incident in fact took place. Rather than reinforce outdated ideas
38 about how “real” victims behave, the law should underscore that reporting or failing to report to
39 those other than official authorities has no bearing on whether the complainant’s accusation is
40 true. Section 213.7(4)(b) thus rejects a general rule of special admissibility for reports to non-

²³¹ Many of the reasons commonly cited by complainants in empirical studies of this question—fear of not being believed, shame, desire to protect an offender who is also an intimate, a belief that law enforcement will not help—are reasons that a contemporary jury can weigh fairly.

1 authority figures, while carving a narrow exception for admitting such reports when offered to
2 rebut an express or implied argument concerning the failure of the complainant to make a report.

3 In rejecting a general rule of special admissibility for “fresh” or “first” complaints,
4 Section 213.7(4)(b) does not intend to upset the ordinary application of the rules of evidence.
5 Indeed, by declaring such reports inadmissible “unless deemed admissible by generally
6 applicable rules of evidence,” the rule leaves undisturbed the admissibility of such evidence
7 under ordinary principles. For example, reports of assault may be admissible under the excited-
8 utterances or state-of-mind exceptions, or may be admissible as prior consistent statements.
9 Section 213.7(4)(b) simply rejects the *special* treatment for initial complaint evidence that has
10 developed in some jurisdictions for cases of sexual assault.

11 The sole exception to this general rejection of special treatment rests in the second clause
12 of subsection (4)(b). Specifically, that subsection allows for admission of reporting or lack of
13 reporting evidence where “offered to rebut an express or implied argument concerning the failure
14 of the complainant to make a report.” This language should be construed broadly, in order to
15 afford a means to address any implication at trial, by either party, regarding the lack of a report.
16 In its most straightforward application, the provision clearly comes into play in the event of a
17 defense claim that the complainant should not be believed because he or she failed to report the
18 assault to a logical confidante; it would then allow the prosecution to meet such a claim not just
19 with evidence that the complainant *did* in fact report to that person, but also with evidence of any
20 *other* relevant report or of any pertinent explanation for its absence. The rule also extends to
21 defense arguments that imply or assert that the complainant’s *behavior* after the incident did not
22 comport with common intuitions about how a victimized party would behave; it thus allows the
23 prosecution to rebut such attacks with evidence that the complainant either reported the incident
24 to others at that time or had specific reasons for failing to do so.

25 This clause of Section 213.7(4)(b) thus expands the conventional scope of permissible
26 rehabilitation doctrine to address the understandable concern that without first- or fresh-
27 complaint evidence, the prosecution may find it difficult to counter the ingrained biases and
28 expectations of jurors, especially when those biases are being exploited by the defense. To
29 illustrate, consider the case of a student sexually assaulted by her teacher, who tells a friend
30 immediately but delays official reporting for a year, out of a desire to graduate and gain
31 acceptance to graduate school unencumbered by the difficulties that an official accusation would
32 present. In addition to testifying about the assault, the student should be permitted to testify
33 about the decision to come forward to authorities only a year later—testimony that is highly
34 relevant and minimally prejudicial to the accused. Consistent with this view, Section 213.7(4)(a)
35 would permit such testimony.

36 In contrast, with respect to reports to parties other than law enforcement, such as the
37 contemporaneous report to the friend, the balance between probative value and prejudicial effect
38 shifts. Corroborating testimony by the friend unfairly bolsters the government’s case-in-chief
39 through repetition of the allegations by a witness with no special insight into their veracity.
40 Moreover, to the extent that juries might expect to hear evidence that the complainant
41 contemporaneously reported the assault to someone other than a person in authority, the law
42 should disabuse them of this expectation, rather than reinforce it in the form of counsel’s
43 arguments either way. Accordingly, Section 213.7(4)(b) forecloses admission of the report to the
44 friend, except under two circumstances—when a generally applicable rule of evidence is satisfied

1 or when such evidence is offered to rebut an express or implied argument by either party
2 concerning the failure of the complainant to make a report.

3 The first of these circumstances allowing testimony about a complaint to someone other
4 than an official can be illustrated by a simple example. Suppose that the accused claims that the
5 complainant fabricated the charge of assault because he had given her a poor grade on a final
6 exam. In such a case, conventional rules of evidence permit admission of testimony to the effect
7 that she had complained about the assault before receiving the grade. In order to rebut the
8 defendant's attack on her credibility, both the student's own testimony about telling her friend
9 and her friend's corroborating testimony to the same effect would be admissible as prior
10 consistent statements made before the alleged motive to fabricate arose.

11 In addition to acknowledging the operation of the ordinary rules of evidence, Section
12 213.7(4)(b) also slightly expands the scope of these rules, by recognizing a second circumstance
13 in which testimony about a complaint to someone other than an official can become admissible.
14 A variation on the previous example illustrates this second circumstance. Suppose that the
15 accused teacher attacked the complaining student's credibility by pointing to her *behavior*—for
16 example, by presenting evidence that she continued to attend and participate in the class. Such
17 evidence does not in itself suggest a "motive to fabricate" the assault charge, and it therefore
18 would not render the prior-consistent-statement doctrine applicable as a vehicle for admission of
19 the corroborating report to the friend. The defense argument does, however, imply that a "real"
20 victim would have stopped attending class, and it therefore opens the door to evidence that tends
21 to undermine that claim. Accordingly, in such a case, Section 213.7(4)(b) would permit the
22 introduction of a report made to a non-authority figure, such as that made to the friend, as a way
23 of rebutting the defense argument. Although allowing such evidence arguably perpetuates many
24 misconceptions about how a "real" complainant behaves, this limited rebuttal is justified by the
25 need to accommodate present social realities that inevitably shade jurors' perspectives when
26 weighing witness credibility.