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).

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

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[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-

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

Section 213.0(4), defines nonconsent to include refusals in the form of either words or conduct and specifically provides that "a verbally expressed refusal establishes nonconsent in the absence of subsequent words or actions indicating positive agreement." There is widespread acceptance within both American law and American culture for this position. Nonetheless, this central tenet of the rape-reform movement—that "'no' means no"—has by no means won universal approval. The contrary view continues to find support in contemporary statutes[136] and case law.[137] Moreover, the scholarly literature includes thoughtful contemporary argument to the effect that, in actual social behavior, "no" *does not* always mean no[138] and that the law risks injustice if, for example, it punishes a man who acts on the basis of this more traditional convention, a convention that remains common among a significant number of both men and women.[139]

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

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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).

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

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

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

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

In many cases, the *absence* of express or implied force by the accused in response to a 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.").

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

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

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

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

Under Section 213.2(1)(a)(i), a jury could likewise find the defendant in *Bauer* guilty, but could do so simply on the basis of the complainant's expression of nonconsent, without needing to make any additional finding that the lack of further protest was due to fear. Indeed, if a jury did find such fear, and also found that the defendant was aware of a risk that his conduct 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.

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

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

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

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

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

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

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

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

For that reason, Section 213.1(1)(a), which includes implied threats of force or restraint, may in many cases be properly interpreted to cover these kinds of situations. But Section 213.2(1)(a)(ii) provides clarity by making explicit the appropriate presumption that sexual intimacy was unwanted. A dedicated subsection streamlines the need for possibly vexing factual findings about implied force and reduces the inquiry into one concerning whether the complainant's physical vulnerability was solely the consequence of having sought nonsexual professional services from the actor. Actors who initiate sexual intimacy in such circumstances should not benefit from reduced penalties simply because they cease the intrusion upon being 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 crime[154] 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).

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

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

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

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

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[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).

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

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

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

To resolve that issue, the first inquiry would be whether the principal had made a threat. On a conventional, widely accepted understanding of that concept (others, to be sure, are often suggested as well[166]), the student would face a *threat* only if the principal proposed to take away some right or privilege to which she was justly entitled (as in "your money or your life"), but she would merely be facing an *offer* if the principal proposed to give her some benefit to which she was not entitled (as in the 1962 Commentary's example of the case of the wealthy man's "threat" to withdraw financial support from his unemployed girlfriend). Thus as an initial matter, the answer to that question seems to turn—preposterously, to be sure—on the quality of the young woman's transcript. If she had the required number of passing grades, the principal's effort to block her graduation was a threat; if she lacked a sufficient number of credits, the principal's acts could be characterized (formalistically, at least) as an offer. In the latter event it would be 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).

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

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

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

One of the broadest formulas, that of the Pennsylvania code, seeks to escape limits like these by defining impermissible coercion as "[c]ompulsion by use of physical, intellectual, 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.

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

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

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

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[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).

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

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

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

In commercial disputes, the occasions for revisiting contract terms are so common and the need for fluidity so great that the law cannot permit one party to claim coercion every time the other party seeks to renegotiate existing contract "rights"; the party faced with the "threat" cannot be allowed to acquiesce and then refuse to be constrained by the new terms. Otherwise binding settlement of good-faith disagreements would become all but impossible. When reasonable alternatives are available, therefore, the law sensibly requires the party faced with a 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.

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

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

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

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

The specific inclusion of immigration-based threats (subsection (b)(i)) addresses a recent pattern of cases in which illegal immigrants are coerced into sexual activity through the threat of exposure.[183] Subsection (b)(ii) addresses situations in which the claimed threat is to impair any person's reputation in business or credit. The traditional definition of blackmail is broader, 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).

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

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

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

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

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

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

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

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

The 1962 Code defined a misdemeanor offense (labeled "Corruption of Minors and Seduction") applicable to cases in which the victim (including adult victims) "is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over [the victim]."[186] Nonetheless, that position remained for some time a minority view.[187] By the late 1990s, increasing numbers of women prisoners, a population especially vulnerable to this form of abuse by male guards, and increasing awareness of the prevalence of this problem[188] had prompted many states to criminalize nonviolent, ostensibly "consensual" 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

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[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.

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

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

The prevalent means of addressing this concern is to specify by statute or precedent that rape or sexual assault occurs when an actor has sexual intercourse with a person who "was so impaired as to be incapable of consenting"[198] or "was drunk enough to be unable to consent to sex."[199] This approach accordingly requires a test for determining when intoxication reaches a 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.

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[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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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[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.

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

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

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

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

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

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[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.

consent."[219] The New York provision states that a person "is deemed incapable of consent" when he or she is "incapable of appraising the nature of his or her conduct."[220] In Wisconsin the statutory test is whether a person "suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct."[221]

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

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

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

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

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[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).

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

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

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

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

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

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

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

D. 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.

Comment:

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

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

[*Commentary reserved*]

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

[*Commentary reserved*]

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

[*Commentary reserved*]

[232] 18 U.S.C. § 1591(a).

[233] N.Y. PENAL LAW § 230.34.