Model Penal Code Article 213

Rape and Related Offenses

Prospectus for a Project of Revision*
May 14, 2012

When drafted in the 1950s, Article 213 of the Model Penal Code was a forward-looking document, well ahead of its time. Yet shortly after The American Law Institute approved it in 1962, dramatic social and cultural changes quickly overtook its once-progressive formulations, rendering them outmoded and in some instances even offensive to new sensibilities. A half-century has now passed since the adoption of Article 213. Much of it no longer reflects American law or the best thinking about the desirable shape of a penal code applicable to sexual offenses. As a result, Article 213 can no longer serve as a reliable guide for legislatures and courts confronting contemporary legal issues in this arena.

At a minimum, there is a pressing need to expunge from Article 213 its outdated vocabulary, its inaccurate assumptions about sexual behavior, and its most glaring disharmonies with contemporary American culture and prevailing American law. See Deborah W. Denno, "Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced," 1 Ohio St. L.J. 207 (2003).

Taking that step, however, will open the door to a long list of contentious issues on which current law is divided, ambiguous, or normatively problematic. If the Institute chooses to address issues of this sort, it will have the opportunity to bring more recent empirical research, analytic insight, and social norms to bear on an area of American law that is badly in need of clarity and modernization.

This Memorandum provides an introduction to this terrain and a prospectus for the proposed revision project. Section I presents an overview of Article 213 as it currently stands. Section II identifies some of Article 213's especially obvious anachronisms. Most of these, having long since disappeared from American law, have few significant defenders, but a revision effort will nonetheless have to revisit these provisions on their merits. Section III turns to the more complex questions that present the most difficult challenges in any attempt to revise Article

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213. Section IV offers a brief conclusion. An Appendix provides for ease of reference the complete text of Article 213, as approved by the Institute in 1962.

I. Article 213 of the Proposed Official Draft (1962)

Under §213.1(1), the crime of "rape" is committed (apart from the special circumstances identified in §213.1(1)(b)-(d)) only when "[a] male . . . has sexual intercourse with a female not his wife" by force or "by threat of imminent death, serious bodily harm, extreme pain or kidnapping." Even when committed under these aggravated circumstances, the offense is not a felony of the first degree when no serious bodily harm was actually inflicted and when the victim was "a voluntary social companion of the actor on the occasion of the crime and had . . . previously permitted him sexual liberties." Absent these circumstances, the offense is a felony of the second degree.

Section 213.1(2) defines an offense of "gross sexual imposition," a felony of the third degree, where "[a] male . . . has sexual intercourse with a female not his wife" when "he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution." The commentary to this provision states that the words "compels to submit" require more than "a token initial resistance." MPC, §213.1, comments at 306 (revised commentary 1980).

Cases involving sexual penetration of a male victim (as well as oral and anal sex between unmarried heterosexual couples) are labeled "deviate sexual intercourse" (§213.0(3)). Such conduct is criminal when compelled by the same means as rape and gross sexual imposition, and the grading of the "deviate" sexual offenses is comparable to that of rape/gross sexual imposition, except that the former are never classified as a felony of the first degree, even when they involve threats of "imminent death" and actual infliction of serious bodily harm.

Also worthy of note, in three specified varieties of statutory rape (intercourse with a minor under 16 when the perpetrator is at least 4 years older; intercourse when the perpetrator is the minor victim's guardian; and intercourse when the perpetrator has custodial authority over the victim, §213.3) a defense is permitted when "the alleged victim" had previously "engaged promiscuously in sexual relations with others." §213.6(3). And for one of the age-related offenses above, a mistake of age is a defense only if the defendant carries the burden of proving by a preponderance of the evidence that his belief about the victim's age was reasonable. §213.6(1).

All offenses under Article 213 are subject to three special procedural/evidentiary requirements: the alleged victim must file a *prompt complaint* (within three months), his or her testimony must have *corroboration*, and the jury must be instructed to evaluate his/her testimony "with *special care* in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private." §213.6(4) & (5).

II. Prominent anachronisms in Article 213

Some features of Article 213 that many commentators consider outdated nonetheless may still command some support in the legal community. Other widely criticized provisions are now rejected with virtual unanimity. Either way, anachronistic issues of this sort are on the whole less complex and will therefore be mentioned only briefly in this Memorandum. A revision of Article 213 presumably will have to revisit these issues and reevaluate them on their merits, but they do not seem to warrant extended discussion in a preliminary prospectus.

One of these more straightforward issues, for example, is the gendered character of the offense. A significant number of states still define rape in gender-specific terms.
Nonetheless, many (probably most) sexual offenses, including those denominated "rape," are now gender-neutral, and very few codes treat rape of a female adult victim as a more serious offense than comparable abuse of an adult male. Furthermore, it is safe to say that no informed legal commentator today would label as "deviate" the kind of conduct which the Supreme Court has now recognized (in Lawrence v. Texas, 539 U.S. 558 (2003)) as a constitutionally protected, central dimension of personal liberty and autonomy.

Similarly anachronistic is the broad marital exemption. Few states if any retain an unqualified exemption comparable to MPC §213.1, and some courts have long since held the unqualified exemption to be unconstitutional. E.g., People v. Liberta, 64 N.Y.2d 152 (1984). Other provisions that likewise are largely obsolete include the formal statutory mitigation for acquaintance rape ("voluntary social companion . . . sexual liberties"), the prompt complaint and corroboration requirements (abandoned in all jurisdictions, with a few limited exceptions applicable to allegations of spousal rape), and special-care jury instructions (also widely discarded). The treatment of a victim's previous "promiscuous" sexual experience as a complete defense to statutory rape is similarly far out of step with contemporary norms and is exceptionally egregious in its implications for vulnerable youth victimized by sex trafficking.

In contrast to Article 213's three special procedural rules for protecting against improper conviction (prompt complaint, corroboration, and special-care jury instructions), there is missing from the Code any mention of the need for limits on cross-examination of the complainant. Virtually every state now addresses this issue with some sort of rape-shield statute, though the structure and restrictiveness of these statutes vary widely across jurisdictions.

Certain other features of Article 213, though they strike a discordant note today, nonetheless reflect concerns that remain hotly contested. For example, although §213.1(1) defines the force required for aggravated rape in extremely limited terms, debate continues over whether or how to distinguish behavior that is sufficiently aberrant to warrant classification as an aggravated offense. Section 213.1(2), in requiring *more than* "a token initial resistance," is probably more demanding than current statutory law in close to half the states, but many jurisdictions still seem to require at least "reasonable resistance." See Michelle J. Anderson, Reviving Resistance in Rape Law, 1998 U. Ill. L. Rev. 953 (1999). Although virtually no American state retains a complete marital rape exemption, nearly half the states retain qualified versions of the exemption—for example, by prescribing lower punishment for marital rape, or by permitting prosecution only when the husband has used the most serious forms of force. See Michelle J. Anderson, Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates, 54 Hastings L.J. 1465 (2003). Issues like these, which remain difficult and controversial, will warrant more detailed consideration, as suggested in the next Section.

III. The Principal Challenges

Apart from the obsolete terms and doctrines identified above, Article 213 includes a number of provisions which, although likewise the subject of sharp criticism, nonetheless differ in that they still retain substantial support in legal commentary and in American law. Resolving disagreements in these areas and/or moving beyond them will pose the most substantial challenges for any effort to revise Article 213. Among these issues are the following:

(1) Should force be a required element of the basic offense of rape/sexual assault, or should all intercourse without consent be treated as a serious felony?

"[T]he vast majority of states . . . require *both* the defendant's force *and* the victim's nonconsent before an act of sexual penetration becomes a felony."[1] And for the majority of courts, the required force "does not mean the force inherent in all sexual penetration . . . but physical compulsion, or a threat of physical compulsion, that causes the victim to submit to the sexual penetration against his or her will." People v. Denbo, 868 N.E.2d 347, 355 (Ill. App. 2007). Accord, Commonwealth v. Lopez, 745 N.E.2d 961, 965 (Mass. 2001). Yet in contrast to that view, a substantial number of states, either by statute or judicial decision, now criminalize all instances of nonconsensual intercourse, often—in at least 14 states—as a felony. E.g., In re M.T.S., 129 N.J. 422, 609 A.2d 1266 (1992). And the European Court of Human Rights has ruled that the fundamental right to respect for private life and freedom from degrading treatment requires "penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim." M.C. v. Bulgaria, [2003] ECHR 39272/98.

On a different but related front, the FBI has recently changed the definition of rape used in compiling statistics on that offense for purposes of the Uniform Crime Reports (UCR). The original definition, in place since the inception of the UCR in the late 1920s, covered only vaginal penetration by physical force.[2] It had been widely criticized for excluding, among other things, all non-physical compulsion, the non-forcible exploitation of impaired victims, all rape of male victims, and all non-vaginal penetration of female victims. On January 6th of this year, Attorney General Holder announced the adoption of a new standard that extends the definition of rape to any sexual penetration without consent.[3] Although the new language officially serves only as a basis for FBI statistical reporting, a White House spokesperson stated, in connection with the change, that "[i]t's about more than a definition. . . . It's a change of our understanding of rape and how seriously we take it as a country."[4]

In light of these developments, a revision of Article 213 will need to consider whether the Institute should likewise endorse the position that absence of consent should be sufficient by

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[1] Michelle J. Anderson, Negotiating Sex, 78 S. Cal. L. Rev. 101, 103 (2005) (emphasis added).

[2] The formal definition, "'carnal knowledge of a female, forcibly and against her will,' . . . included only forcible male penile penetration of a female vagina." See http://www.fbi.gov/news/pressrel/press-releases/attorney-general-eric-holder-announces-revisions-to-the-uniform-crime-reports-definition-of-rape.

[3] The new language defines rape as "penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim." Id.

[4] Quoted in Charlie Savage, "U.S. to Expand Its Definition of Rape in Statistics," *N.Y. Times*, Jan. 6, 2012.

itself to render sexual intercourse a serious criminal offense. Alternatively, if force is still required, either as a precondition for any felony conviction or as an aggravating factor, the next question to arise will be:

(2) If force is required, how should the "force" concept be understood? Should it be limited to physical force? If not, what non-physical pressures should qualify as "force"? Will (and should) a force requirement imply some obligation of resistance on the part of the victim?

Where statutes require "force," many courts continue to interpret that language to mean physical force and decline to accept nonphysical threats as sufficient. E.g., State v. DiPetrillo, 922 A.2d 124 (R.I. 2007). In that respect, the penal prohibition in many states remains narrower than the "gross sexual imposition" offense (§213.1(2)) proposed by the Institute in 1962. Yet efforts to extend the prohibition to nonphysical threats run up against the problem of how to define *which* nonphysical pressures should be considered sufficient. The Article 213 solution (threats too strong for the "woman of ordinary resolution") has its own problems, because it leaves especially vulnerable women largely unprotected, reintroduces the problem of resistance, and at best remains dependent on cultural (and jury) preconceptions of how an ordinary woman (or in more contemporary terms, an ordinary person) should behave.[5]

(3) How should "consent" be defined?

Regardless of how the "force" issue is resolved, "nonconsent" will remain an element (perhaps *the only* element, other than intercourse itself) of the basic sexual offense.

Few issues in the area of sexual offenses have received as much attention as the insistent claim that "no means no." Yet this long-standing goal of the rape-reform movement is still by no means universally accepted; the applicable standards on this subject are in disarray. Thus, to the great surprise of many lawyers, law students, and members of the general public, "no" does not always mean "no" as a matter of the law. In some jurisdictions, New York for example, a "clear" expression of unwillingness is not sufficient to establish nonconsent unless in addition "a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent." N.Y. Penal Law § 130.05(2)(d) (2011). Near the opposite pole, many jurisdictions hold that "no" or even silence are *always* equivalent to *nonconsent*; only

[5] For one discussion of the difficulties, see Stephen J. Schulhofer, Unwanted Sex 114-136 (1998).

an affirmative expression of willingness is sufficient to establish consent. E.g., Wis. Stat. § 940.225(4) (2011) ("Consent . . . means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse . . . ." And some commentators argue that even an affirmative expression should not be sufficient unless it takes the form of explicit words rather than just body language, since the latter is inevitably subject to misinterpretation.

(4) What circumstances should be sufficient to invalidate affirmative consent?

Even where valid consent must take the form of an affirmative expression of willingness, the law cannot escape difficult issues concerning the scope of the penal prohibition, because unacceptable forms of coercion obviously must render any apparent consent ineffective. Valid consent must be "voluntary" or "freely given." A revised Code therefore must seek to identify with some degree of precision the kinds of threats and coercive pressures that will invalidate consent. Similarly, certain physical, mental, or circumstantial incapacities clearly must be recognized by law as factors that will render apparent consent ineffective.

With the exception of its treatment of a few narrow circumstances, existing law on this subject is largely undeveloped. The 1962 Code identified several circumstances sufficient to invalidate consent: "mental disease or defect," §213.2(2)(b); custodial authority, §213.3(1)(c); and alcohol/drug intoxication §213.1(1), but in the last case only when both (1) the intoxicants were administered *by the defendant* and (2) he or she has done so "*for the purpose of preventing resistance*." In many jurisdictions current law goes much further in protecting potentially vulnerable victims. See, e.g., People v. Giardino, 82 Cal. App.4th 454, 462-463 (2000), holding that intoxication can invalidate consent even when it is not physically incapacitating and was not administered by the defendant, if it renders the victim "unable to make a reasonable judgment as to the nature or harmfulness of the conduct." Elsewhere, the law concerning intoxication defines the invalidating circumstances much more narrowly.[6] In another area of widely divergent judgments, many states impose criminal liability on mental-health professionals who have sexual

[6] See Stephen J. Schulhofer, Rape-Law Reform Circa June 2002: Has the Pendulum Swung Too Far?, 989 *Annals of the New York Academy of Sciences* 276 (June 2003).

relations with a current patient (E.g., N.Y. Penal Law § 130.05(3)(h) (2011)), but many others do not.[7]

(5) Assuming that the complete marital exemption is eliminated, should any special rules apply in case of married/cohabitating parties—especially if force and consent requirements are relaxed for sexual offenses generally?

As previously noted, many states consider it entirely irrelevant, at least as a matter of statutory law, that the perpetrator and victim are married or are cohabiting partners. But nearly half the states retain qualified versions of the exemption—for example, by prescribing lower punishment for marital rape, or by permitting prosecution only when the husband has used the most serious forms of force. Many commentators assert strongly, and as a matter of fundamental principle, that no distinctions of this sort can be acceptable, and that view carries particular force to the extent that the offense itself is narrowly defined to require aggravated physical force. On the other hand, to the extent that reforms extend the basic offense to nonphysical threats or to any intercourse without affirmative consent, the case for somewhat different treatment of cohabitant rape arguably becomes more plausible, especially in a Code that aspires to identify applicable limits in statutory terms rather than relying on prosecutorial discretion to make distinctions that are perceived to be relevant in practice.

(6) How should the grading and punishment of sexual offenses be handled?

Existing law displays wide variation, with some jurisdictions (e.g., New Jersey) defining the basic offense very broadly and with little or no statutory grading differentials, while others (e.g., New York) make use of four or more distinct categories, even for offenses involving completed intercourse.

A further issue concerns the actual penalty (or range of penalties) attached to any given grading category. The 1962 Code contemplated legislatively authorized sentences that extended over an exceedingly broad range, with reliance on the discretion of judges and parole boards to fix the actual sanction at an appropriate place along this continuum and to insure a sentence toward the more lenient end of the range when warranted by all the circumstances. Thus,

[7] See Schulhofer, supra note 5, at 206-226. For discussion of the issues that arise in connection with authority and trust in other settings, see id. at 168-205 (the workplace and education), 227-253 (medical and legal professionals).

suspended sentences and probation were assumed to be available for all felonies except murder (§6.02(3)), and even without those forms of mitigation, the sentence mandated by the Code did not have to exceed a year's incarceration, even in the case of murder and other felonies of the first degree (§§6.06(1), 210.6(1)).

A revision of Article 213 against this background, if it extended the penal prohibition to more common and less brutal forms of sexual abuse, would technically preserve the option of mitigated sentences for such cases.[8] But reliance on that background assumption would be unrealistic and perhaps irresponsible, given that a jurisdiction adopting the recommendations of a revised Code would very likely attach much harsher sentencing consequences than the Code itself does to an offense labeled as a felony of the first, second, or third degrees. Accordingly, a revision of Article 213 will have to choose whether to restrain the reach of the substantive prohibition in light of the authorized punishments that likely would be triggered outside the framework of the Model Penal Code, or instead whether to address directly within the boundaries of Article 213 the kinds of sentencing consequences that revised penal prohibitions in the distinctive area of sexual offenses should entail.

The sexual offenses also pose distinctive issues with respect to such collateral consequences as sex-offender registration. Although conceptually similar sentencing issues are handled elsewhere in the Code, sex-offender registration and related collateral consequences are driven by concerns and perceptions that are unique to the context of sexual offenses. To the extent that this is so, it could be opportune to address these collateral punishment issues directly in the specific context of a revision of Article 213. Indeed, it might be considered inappropriate, under these circumstances, *to fail to examine* these kinds of punishment issues. Again, the choices raise issues of some complexity, especially with respect to the optimal statutory framework within which charging discretion, plea bargaining, and sentencing discretion will operate.

(7) What should be the required elements of offenses not involving penetration?

All of the above issues arise not only for conduct involving sexual penetration but also for unwanted sexual touching short of actual or attempted intercourse. Section 213.5 imposes

[8] Subject, of course, to any changes resulting from the Institute's project to revise the MPC sentencing provisions.

criminal liability in the latter circumstance under conditions that largely mirror those applicable to cases of penetration, but all the former offenses are graded as misdemeanors. To the extent that the conditions triggering criminal liability are significantly extended and to the extent that more severe penalties are thought appropriate, it may become crucial to consider whether distinctions are appropriate in the case of conduct not involving actual or attempted intercourse. For example, it is arguable that a requirement of affirmative, freely given permission ought to be understood or applied differently to conduct involving a kiss than it is to conduct involving sexual penetration.

(8) What should be the required mens rea with respect to non-consent (adult offenses)

American jurisdictions currently vary widely in their approach to the required mens rea, with a few requiring proof of at least recklessness with respect to non-consent, many requiring only negligence (and typically not even criminal negligence), and some imposing strict liability. The strict-liability approach is to some extent a product of the era in which the required force and resistance were so pronounced that mistakes about consent were scarcely possible. Nonetheless, the strict-liability and negligence approaches continue to be accepted even where the basic offense has been extended to conduct that is potentially more ambiguous. See, e.g., In re M.T.S., 129 N.J. 422, 609 A.2d 1266 (1992) (imposing liability for a felony carrying a five-year mandatory minimum if sexual penetration occurs "when . . . all the surrounding circumstances

. . . would demonstrate to a reasonable person affirmative and freely given authorization . . . .") Apart from the obvious concern with respect to potentially disproportionate punishment, this combination of mens rea and grading provisions could potentially inhibit justified prosecutions or place excessive reliance on prosecutorial discretion to achieve appropriately proportionate punishments.

(9) What should be the required mens rea with respect to age (child offenses)?

Strict liability remains common in this area and only about 20 jurisdictions relax that rule even to the extent of permitting a negligent mistake to excuse. Again, the problem is aggravated by mandatory minimums and other harsh imprisonment possibilities, as well as mandatory sex-

offender registration and other collateral consequences that may be wholly inappropriate in the case of nominally consensual sex between willing partners, even though one (or both) may be underage. A further difficulty is arguably implicit in the Supreme Court's decision in Lawrence v. Texas, 539 U.S. 558 (2003), holding that unmarried adults have a constitutional right to engage in consensual sexual intimacy. The effect of strict liability for statutory rape, however, is to impose criminal penalties for conduct that the defendant reasonably believed to be constitutionally protected. An important challenge is to explore whether any departure from the Code's general insistence on subjective culpability is appropriate, to assess the realities of legislative politics in this area, and to determine whether compromise with a sound normative judgment is necessary to afford greater prospects for success to the revision project as a whole.

(10) Should the MPC undertake to identify guidelines or criteria appropriate to the exercise of prosecutorial charging and/or plea bargaining discretion in connection with sexual offenses?

Prosecutorial discretion is of course an issue of considerable importance throughout the criminal law. Yet it has not traditionally been viewed as a subject to be addressed in the penal code. Even if it is, moreover, one might think that it should be addressed across the entire code, rather than in a single-offense area only.

On the other hand, proper decisions about the substantive elements of the sexual offenses and the associated penalties are arguably embedded in an especially consequential way with assumptions about whether prosecutorial discretion will be available, in reliable ways, to mitigate potential overbreadth. An opposed set of concerns is also involved, to the extent that prosecutorial mitigation may be deployed not too little but too much. Indeed, in the area of sexual offenses there is perhaps a unique potential for insufficient attention to the victim and for prosecutorial nullification of reform efforts to expand the reach of the sexual offense prohibitions.

For these reasons, it seems worth considering whether it would be productive to extend the conventional scope of a revision effort, in order to address the framework within which prosecutorial discretion will be exercised in matters involving alleged sexual offenses. Such an inquiry might, for example, examine the relevant substantive criteria, aggravating and mitigating, that bear on prosecutorial decisionmaking. But even if that inquiry is judged to be overly open-ended or too lacking in practical consequences, it might nonetheless be found

productive to examine procedural and institutional issues affecting the exercise of prosecutorial discretion, such as matters pertaining to internal oversight and review, transparency of decisionmaking, and the role of the victim.

IV. Conclusion

Article 213, as it now stands, is far out of step with contemporary American law, and it presumably does not express the Institute's present views about the appropriate scope of penal prohibitions addressed to sexual misconduct. Unless this portion of the Model Penal Code is to be regarded merely as a historical relic, a quaint reminder of the condition of American society half a century ago, there is little choice but to revisit and thoroughly revise its provisions. Such a project will quickly be drawn into controversies that are emotionally freighted and not easily resolved. Nonetheless, the revision effort will offer the Institute the opportunity to help shape the next generation of thinking and practice in this area of the criminal law and in the valued but potentially dangerous social behaviors it affects.

APPENDIX

MODEL PENAL CODE ARTICLE 213

(Proposed Official Draft, 1962)

Article 213. Sexual Offenses

SECTION 213.0. DEFINITIONS

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

(1) the definitions given in Section 210.0 apply;

(2) "Sexual intercourse" includes intercourse per os or per anum, with some penetration however slight; emission is not required;

(3) "Deviate sexual intercourse" means sexual intercourse per os or per anum between human beings who are not husband and wife, and any form of sexual intercourse with an animal.

SECTION 213.1. RAPE AND RELATED OFFENSES

(1) *Rape.* A male who has sexual intercourse with a female not his wife is guilty of rape if:

(a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

(b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or

(c) the female is unconscious; or

(d) the female is less than 10 years old.

Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree. Sexual intercourse includes intercourse per os or per anum, with some penetration however slight; emission is not required.

(2) *Gross Sexual Imposition.* A male who has sexual intercourse with a female not his wife commits a felony of the third degree if:

(a) he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution; or

(b) he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct; or

(c) he knows that she is unaware that a sexual act is being committed upon her or that she submits because she mistakenly supposes that he is her husband.

SECTION 213.2. DEVIATE SEXUAL INTERCOURSE BY FORCE OR IMPOSITION

(1) *By Force or Its Equivalent.* A person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a felony of the second degree if:

(a) he compels the other person to participate by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

(b) he has substantially impaired the other person's power to appraise or control his conduct, by administering or employing without the knowledge of the other person drugs, intoxicants or other means for the purpose of preventing resistance; or

(c) the other person is unconscious; or

(d) the other person is less than 10 years old.

Deviate sexual intercourse means sexual intercourse per os or per anum between human beings who are not husband and wife, and any form of sexual intercourse with an animal.

(2) *By Other Imposition.* A person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a felony of the third degree if:

(a) he compels the other person to participate by any threat that would prevent resistance by a person of ordinary resolution; or

(b) he knows that the other person suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct; or

(c) he knows that the other person submits because he is unaware that a sexual act is being committed upon him.

SECTION 213.3. CORRUPTION OF MINORS AND SEDUCTION

(1) *Offense Defined.* A male who has sexual intercourse with a female not his wife, or any person who engages in deviate sexual intercourse or causes another to engage in deviate sexual intercourse, is guilty of an offense if:

(a) the other person is less than [16] years old and the actor is at least [4] years older than the other person; or

(b) the other person is less than 21 years old and the actor is his guardian or otherwise responsible for general supervision of his welfare; or

(c) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him; or

(d) the other person is a female who is induced to participate by a promise of marriage which the actor does not mean to perform.

(2) *Grading.* An offense under paragraph (a) of Subsection (1) is a felony of the third degree. Otherwise an offense under this section is a misdemeanor.

SECTION 213.4. SEXUAL ASSAULT

A person who has sexual contact with another not his spouse, or causes such other to have sexual conduct with him, is guilty of sexual assault, a misdemeanor, if:

(1) he knows that the contact is offensive to the other person; or

(2) he knows that the other person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct; or

(3) he knows that the other person is unaware that a sexual act is being committed; or

(4) the other person is less than 10 years old; or

(5) he has substantially impaired the other person's power to appraise or control his or her conduct, by administering or employing without the other's knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or

(6) the other person is less than [16] years old and the actor is at least [four] years older than the other person; or

(7) the other person is less than 21 years old and the actor is his guardian or otherwise responsible for general supervision of his welfare; or

(8) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him.

Sexual contact is any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire.

SECTION 213.5. INDECENT EXPOSURE

A person commits a misdemeanor if, for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm.

SECTION 213.6. PROVISIONS GENERALLY APPLICABLE TO ARTICLE 213

(1) *Mistake as to Age.* Whenever in this Article the criminality of conduct depends on a child's being below the age of 10, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than 10. When criminality depends on the child's being below a critical age other than 10, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age.

(2) *Spouse Relationships.* Whenever in this Article the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where the definition of an offense excludes conduct with a spouse or conduct by a woman, this shall not preclude conviction of a spouse or woman as accomplice in a sexual act in which he or she causes another person, not within the exclusion, to perform.

(3) *Sexually Promiscuous Complainants.* It is a defense to prosecution under Section 213.3 and paragraphs (6), (7) and (8) of Section 213.4 for the actor to prove by a preponderance of the evidence that the alleged victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others.

(4) *Prompt Complaint.* No prosecution may be instituted or maintained under this Article unless the alleged offense was brought to the notice of public authority within [3] months of its occurrence or, where the alleged victim was less than [16] years old or otherwise incompetent to make complaint, within [3] months after a parent, guardian or other competent person specially interested in the victim learns of the offense.

(5) *Testimony of Complainants.* No person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.